

# COMMENT

## The Hidden Second Amendment Framework within *District of Columbia v. Heller*

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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.

- U.S. CONST. amend. II

## I. INTRODUCTION

The Second Amendment has always been shrouded in constitutional mystery. For most of our history, this mystery has centered on whether the Second Amendment protects an individual or collective right to keep and bear arms.<sup>1</sup> The Supreme Court had not addressed the issue in any meaningful fashion,<sup>2</sup> and lower courts continuously struggled with it,<sup>3</sup> leading legal commentators to produce countless books,<sup>4</sup> articles,<sup>5</sup> and symposia<sup>6</sup> on the topic.

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1. Under the individual-rights view, the Second Amendment protects an individual right to bear arms unconnected with service in a militia. Under the collective-rights view, the Second Amendment protects the right to bear arms only in connection with service in a militia. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008) (briefly summarizing the positions).

2. As will be shown in Part II.A, although the Supreme Court has addressed the Second Amendment in a few other cases, it cannot reasonably be argued that those cases offered an in-depth analysis of the amendment.

3. *Compare, e.g.*, *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001) (holding that the Second Amendment protects an individual right), *with* *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (holding that the Second Amendment protects a collective right).

4. *Compare, e.g.*, STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008) (arguing for the individual-rights view), *with* H. RICHARD

The Court resolved this central Second Amendment question in June 2008 when it decided *District of Columbia v. Heller*.<sup>7</sup> In *Heller*, the Court squarely confronted the meaning of the Second Amendment and held that it protected an individual right to keep and bear a firearm for lawful purposes, such as self-defense in the home.<sup>8</sup> Yet, in the same breath, the Court was careful to limit explicitly its ruling by holding that the individual right was not absolute.<sup>9</sup> Although the *Heller* Court provided a non-exhaustive list of certain “longstanding” firearms regulations that did not run afoul of the Second Amendment,<sup>10</sup> it left the issue of how to review Second Amendment claims for another day.<sup>11</sup> Thus, in resolving the question of whether the Second Amendment protects an individual right, the Court created a new mystery: How should courts review claims under the Second Amendment?

The answer to this question is vital. In the year following *Heller*, lower federal courts have been deluged with Second Amendment claims, yet they have little explicit guidance from the opinion as to how to rule on these challenges.<sup>12</sup> Over time, the Court may provide further guidance on the applicable analytical framework. If the past is precedent in the Second Amendment context, lower courts may wait a long time for a decisive Supreme Court ruling. Meanwhile, the cases will come faster than ever, leading Judge J. Harvie Wilkinson of the U.S. Court of Appeals for the Fourth Circuit to state that the post-*Heller* federal docket “threaten[s] to suck the courts into a quagmire.”<sup>13</sup> Indeed, confusion already reigns in the lower courts as to how to review Second Amendment claims. In the

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UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO BEAR ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002) (arguing for the collective-rights view).

5. Compare, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989) (arguing for the individual-rights view), with Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 *N. KY. L. REV.* 705 (2002) (arguing for the collective-rights view).

6. See, e.g., *Symposium on the Second Amendment: Fresh Looks*, 76 *CHI.-KENT L. REV.* 1 (2000).

7. 128 S. Ct. 2783 (2008).

8. *Id.* at 2817–18.

9. *Id.* at 2816.

10. *Id.* at 2816–17.

11. *Id.* at 2821.

12. A LexisNexis Shepard’s search of the *Heller* decision run on September 23, 2009 reveals more than 170 lower court decisions—most of them firearms cases—referencing *Heller*.

13. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *VA. L. REV.* 253, 280 (2009); see also Richard A. Posner, *In Defense of Looseness*, *NEW REPUBLIC*, Aug. 8, 2008, at 32 (“It may take many years for the dust to settle [surrounding the Second Amendment]—many years that our litigious society does not need.”).

wake of *Heller*, lower courts have applied strict scrutiny,<sup>14</sup> intermediate scrutiny,<sup>15</sup> and rational basis review<sup>16</sup> in analyzing Second Amendment challenges. Perhaps the quagmire feared by Judge Wilkinson already exists.

This Comment argues that courts have more guidance than they may believe. Although Justice Scalia, the author of the majority opinion in *Heller*, refused to set a standard of review, his opinion nevertheless yields numerous clues hinting at the applicable analytical framework.<sup>17</sup> Accordingly, this Comment articulates the Second Amendment framework based on a careful analysis of the *Heller* opinion itself. In essence, it offers a prediction for the standard of review that the Court has in mind or will embrace.<sup>18</sup> It does not offer a critique—positive or negative—of *Heller*,<sup>19</sup> nor does it argue, as a matter of policy, which particular standard of review should be applied to claims under the Second Amendment.<sup>20</sup> Rather, this

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14. See, e.g., *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 U.S. Dist. LEXIS 78148, at \*5–6 (N.D.N.Y. Oct. 6, 2008) (upholding under strict scrutiny 18 U.S.C. § 922(g)(8), criminalizing possession of a firearm by those individuals suspected of domestic violence).

15. See, e.g., *United States v. Bledsoe*, No. SA-08-CR-13(2)XR, 2008 U.S. Dist. LEXIS 60522, at \*11 (W.D. Tex. Aug. 8, 2008) (upholding under intermediate scrutiny 18 U.S.C. § 922(a)(6), criminalizing lying about one's age in obtaining a firearm).

16. See, e.g., *Welsch v. Twp. of Upper Darby*, No. 07-4578, 2008 U.S. Dist. LEXIS 65500, at \*22 (E.D. Pa. Aug. 26, 2008) (rejecting under rational-basis review an Equal Protection claim to a local police policy seizing weapons at a crime scene and only returning them after court order). Notably, the District Court did not rule on whether the policy itself violated the Second Amendment; however, its language tends to suggest that the court may have used rational basis review under this claim as well.

17. See 128 S. Ct. at 2821 (“But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .”).

18. The scope of this Comment is confined to the majority of laws directly regulating firearms that are bound to be challenged under the recently recognized Second Amendment right and how they will be reviewed. By direct regulations, I refer to those laws that facially regulate the use, transfer, possession, etc. of firearms. *Heller* itself provided examples of direct regulations that do not run afoul of the Second Amendment: “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 2816–17. Although there may be laws that do not directly regulate but rather have a secondary effect on firearms, how such laws will be reviewed is beyond the scope of this Comment.

19. For those interested in the early reactions to *Heller* as a matter of constitutional jurisprudence, see, for example, Wilkinson, *supra* note 13, at 254 (negative); David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 236 (2008) [hereinafter Kopel, *The Natural Right*] (positive).

20. Professor Eugene Volokh provides, in my opinion, the most in-depth proposal of a constitutional framework for analyzing Second Amendment challenges in the post-*Heller* world, in which he generally argues that such challenges should be analyzed according to the level of burden presented. 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, 1446–47 (2009).

Comment contends that lower courts should adopt this framework, grounded in the language of the opinion, in order to avoid being sucked into the Second Amendment quagmire.

As a preliminary matter, this Comment assumes three preliminary, but no less important, issues: first, that the Second Amendment will be incorporated as against the states;<sup>21</sup> second, that the *Heller* majority will remain constant; and third, and most significantly, that the Supreme Court will rely upon its decision in *Heller*—and the specific language it used in that opinion—when it eventually addresses the issue of a Second Amendment standard of review.

Part II provides a background of Second Amendment jurisprudence. It discusses those pre-*Heller* cases implicating the Second Amendment and then reviews the *Heller* decision. Part III explains why, only one year following the *Heller* decision, the appropriate Second Amendment framework needs to be clearly articulated. Part IV constructs the Second Amendment framework from language in the *Heller* opinion. After examining the analytical puzzle pieces left behind in the *Heller* decision, this Part assembles the puzzle and reveals a two-pronged test: whether the challenged regulation (1) falls within the scope of the right protected by the Second Amendment, and (2) satisfies a deferential form of strict scrutiny. Finally, Part V argues that lower courts need not wait for

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21. To be sure, two federal circuit courts of appeals have refused to incorporate the Second Amendment as against the states. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), cert. granted, *McDonald v. City of Chicago*, 78 U.S.L.W. 3013 (U.S. Sept. 30, 2009) (No. 08-1521); *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). However, their refusal is based not on the fundamentality of the protected right but rather on Supreme Court precedent stating that circuit courts, regardless of their belief that a Supreme Court decision is outdated given changes in the law, must leave the job of overruling direct precedent to the Supreme Court. *Nat'l Rifle Ass'n of Am.*, 567 F.3d at 857–58; *Maloney*, 554 F.3d at 58–59. A panel of the Ninth Circuit had incorporated the Second Amendment as against the states, arguing that Supreme Court precedent does not foreclose selective incorporation of the amendment. *Nordyke v. King*, 563 F.3d 439, 448–49 (9th Cir. 2009). However, the Ninth Circuit subsequently agreed to rehear the case *en banc* and accordingly vacated the opinion. *Nordyke v. King*, No. 07-15763, 2009 U.S. App. LEXIS 16908 (9th Cir. July 29, 2009). Undoubtedly observing this rift among the circuit courts, on September 30, 2009, the Supreme Court granted certiorari to decide the issue of Second Amendment incorporation. *Nat'l Rifle Ass'n of Am.*, 567 F.3d 856, cert. granted, *McDonald*, 78 U.S.L.W. 3013.

These circuit opinions notwithstanding, the immediate reaction among many commentators is that the Second Amendment will indeed be incorporated by the Supreme Court. See, e.g., Nelson Lund, *Anticipating the Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 196 (2008) [hereinafter Lund, *Anticipating*]. David Kopel, meanwhile, makes the argument that the Obama Administration could be instrumental in pushing a future Court in the direction of non-incorporation. David Kopel, *Slope Still Slippery*, CATO UNBOUND, July 22, 2008, <http://www.cato-unbound.org/2008/07/22/david-kopel/slope-still-slippery/>.

the Supreme Court to set a standard of review but can instead apply this two-pronged test.

## II. THE SECOND AMENDMENT AT THE SUPREME COURT

Before *Heller*, there was a stunning dearth of Supreme Court jurisprudence on the Second Amendment. An attorney for lead plaintiff Dick Heller colorfully described the Second Amendment as “a sort of constitutional Loch Ness Monster: Despite occasional reported sightings, many people—and certainly most judges—were inclined to believe it did not really exist.”<sup>22</sup> *Heller* served as proof that the Second Amendment Loch Ness Monster was no myth—at the very least, the amendment squarely protects an individual’s right to possess a handgun in the home for purposes of self-defense. At the same time, beyond the *Heller* Court’s recognition of this core right, the precise scope of the Second Amendment right remains ambiguous. In order to ascertain a fuller meaning of the Second Amendment, a searching analysis of the language in *Heller* is in order. This Part will begin by outlining the few cases where the Supreme Court has specifically considered the Second Amendment. Next, it will analyze the *Heller* decision with a fine-tooth textual comb. This textual analysis will assist in the search for the hidden Second Amendment framework.

### A. Pre-*Heller* Supreme Court Cases on the Second Amendment

Prior to *Heller*, the Supreme Court’s Second Amendment jurisprudence was especially sparse. The Court’s limited discussion in the few cases directly implicating the Second Amendment ensured that the amendment’s true meaning would remain a mystery for over two centuries.

#### 1. *Houston v. Moore*

Although *Houston v. Moore* was the first Supreme Court case discussing the Second Amendment (albeit through a concurring opinion),<sup>23</sup> it provides minimal guidance as to the meaning of the amendment. The *Houston* Court rejected a constitutional challenge to a Pennsylvania statute authorizing a state court martial for those militia members who did not report for duty—either intentionally or

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22. Clark Neily, District of Columbia v. Heller: *The Second Amendment Is Back, Baby*, 2007-08 CATO SUP. CT. REV. 127, 127 (2008).

23. 18 U.S. (5 Wheat.) 1 (1820).

unintentionally—when called upon, thereby violating federal law.<sup>24</sup> However, Justice Washington's majority opinion altogether ignored discussion of the Second Amendment. Justice Story introduced the Second Amendment into discussion in his separate opinion, but only to conclude that it “may not, perhaps, be thought to have any important bearing on this point [at issue in the case].”<sup>25</sup> Even if it could be assumed to have significance in this matter, Justice Story continued, “[the Second Amendment] confirms and illustrates, rather than impugns the reasoning already suggested”<sup>26</sup>—namely that the federal government did not have exclusive jurisdiction over all matters affecting the militia.<sup>27</sup> However, this statement is of little value. It is merely an afterthought in a concurring opinion, as Justice Story said only that the Second Amendment supported his theory of his case, not *why* it did so. Thus, *Houston* provides little direction in understanding the right protected by the Second Amendment, especially outside of the context of the militia.

## 2. The Incorporation Cases

During the Reconstruction Era, the Supreme Court heard three cases directly implicating the Second Amendment. The first and most prominent of these cases was *United States v. Cruikshank*.<sup>28</sup> *Cruikshank* is notable today for the now-defunct proposition that the Bill of Rights amendments are not incorporated as against the states; they rather serve as restrictions upon the federal government.<sup>29</sup> In affirming a conspiracy indictment against the defendants, the *Cruikshank* Court held that the Second Amendment only protected against infringement of the right to bear arms by the federal government, not by the states or individuals.<sup>30</sup> Subsequent

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24. *Id.* at 32.

25. *Id.* at 52–53 (Story, J., concurring).

26. *Id.* at 53.

27. *Id.* at 50.

28. 92 U.S. 542 (1876).

29. See 92 U.S. at 552 (“[The First Amendment], like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.”). While *Cruikshank* has not been overruled, its functional invalidity today is illustrated by the seminal case of *Duncan v. Louisiana*, which discusses the doctrine of selective incorporation of the Bill of Rights amendments. 391 U.S. 145, 148–58 (1968).

30. *Cruikshank*, 92 U.S. at 553 (“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 . . .”).

nineteenth-century cases—*Presser v. Illinois*<sup>31</sup> and *Miller v. Texas*<sup>32</sup>—affirmed the *Cruikshank* holding that the Fourteenth Amendment did not incorporate the Second Amendment. *Presser* involved a constitutional challenge to an Illinois law banning unauthorized groups of men from organizing militarily and from drilling or parading with arms.<sup>33</sup> Though the Court rejected the challenge on grounds of nonincorporation, it nonetheless stated that the prohibitions “do not infringe the right of the people to keep and bear arms.”<sup>34</sup> Therefore, *Presser* arguably foreshadows the individual-rights interpretation of the Second Amendment definitively stated in *Heller* while simultaneously holding that such an individual right is not unrestricted.

### 3. *United States v. Miller*

*United States v. Miller* stands as the only pre-*Heller* Supreme Court case that directly addresses the Second Amendment.<sup>35</sup> *Miller* involved a constitutional challenge to the National Firearms Act of 1934,<sup>36</sup> which “taxed the manufacture, sale, and transfer of short-barreled rifles and shotguns, machine guns, and silencers; required registration of covered firearms; and prohibited interstate transportation of unregistered covered firearms.”<sup>37</sup>

Justice McReynolds, writing for the Court, rejected the defendants’ Second Amendment claim in nine pages of brief analysis.<sup>38</sup> In *Miller*, Jack Miller and Frank Layton were charged with violating the Act by transporting a sawed-off shotgun in interstate commerce.<sup>39</sup> The men argued successfully before a federal district court that the Act violated the Second Amendment.<sup>40</sup> Rather than interpreting the

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31. 116 U.S. 252, 265 (1886).

32. 153 U.S. 535, 538 (1894).

33. 116 U.S. at 260.

34. *Id.* at 265.

35. 307 U.S. 174 (1939). For an insightful analysis of the *Miller* decision and its background, see generally Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48 (2008). Indeed, the *Heller* Court relied on this article in giving short shrift to the *Miller* decision. 128 S. Ct. 2783, 2814 (2008).

36. 307 U.S. at 176.

37. Frye, *supra* note 35, at 60–61. Frye instructs that “the NFA was really a ban disguised as a tax, intended to discourage the possession and use of covered firearms.” *Id.* at 61.

38. *Miller*, 307 U.S. at 178. Additionally, Justice McReynolds began his opinion by immediately writing off the defendants’ Tenth Amendment challenge, holding that the National Firearms Act—as a revenue measure—did not “usurp[] police power reserved to the States.” *Id.*

39. *Id.*

40. *Id.* at 176–77.

Second Amendment generally, Justice McReynolds focused on the specific facts of the case.<sup>41</sup> He stated:

In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable regulation 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.<sup>42</sup>

Although *Miller* appeared to suggest that the Second Amendment guarantees the right to possess and use weapons suitable for militia service, it failed to rule specifically whether this right was individual or collective. More broadly, *Miller* did not read the Second Amendment as foreclosing the regulation of firearms.<sup>43</sup> Nonetheless, the opinion's precise meaning—and the meaning of the Second Amendment generally—would be debated by theorists<sup>44</sup> and lower federal courts<sup>45</sup> for the decades to come.

### B. District of Columbia v. Heller

The Supreme Court effectively ended this debate regarding the meaning of *Miller* when it decided *District of Columbia v. Heller* on June 26, 2008.<sup>46</sup>

#### 1. Background

The case involved a Second Amendment challenge to the District of Columbia's wholesale ban on the possession of handguns.<sup>47</sup>

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41. *Id.* at 175.

42. *Id.* at 178.

43. See Frye, *supra* note 35, at 82 (“At a minimum, [*Miller*] held the Second Amendment permits Congress to tax firearms used by criminals. At the maximum, dicta suggest the Second Amendment protects an individual right to possess and use a weapon suitable for militia service. And in general, it implies the Second Amendment permits reasonable regulation of firearms.”). Notably, however, Professor Nelson Lund has argued that *Miller* stands for the mere proposition that it is not within judicial notice that the Second Amendment protects possession or use of a sawed-off shotgun—no more and no less. Nelson Lund, *Heller and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335, 338 (2009).

44. Compare, e.g., Michael C. Dorf, *What Does the Second Amendment Mean Today?*, in THE SECOND AMENDMENT IN LAW AND HISTORY 247, 250–51 (Carl T. Bogus, ed., 2000) (arguing that *Miller* supports the collectivist rights view of the Second Amendment), with Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 616–17 (1995) (suggesting that *Miller* supports the individual rights view of the Second Amendment).

45. Compare, e.g., *United States v. Emerson*, 270 F.3d 203, 226–27 (5th Cir. 2001) (arguing that *Miller* does not support a collectivist rights view of the Second Amendment), with *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (arguing that *Miller* supports the collectivist rights view of the Second Amendment).

46. 128 S. Ct. 2783, 2814 (2008).

The District not only banned the carrying of unregistered firearms but also prohibited individuals from registering handguns.<sup>48</sup> Plaintiff Dick Heller challenged the prohibition in federal court following the District's denial of a registration certificate for Heller's possession of a handgun in his District home.<sup>49</sup> The U.S. District Court for the District of Columbia dismissed the suit, holding that the Second Amendment does not guarantee an individual right to possess a firearm "not in conjunction with service in the Militia."<sup>50</sup> A divided panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed, holding that the Second Amendment "protects an individual right to keep and bear arms" unrelated to membership in a militia.<sup>51</sup> The District appealed the decision to the Supreme Court, and the Court granted certiorari.

## 2. The Textual Analysis

In *Heller*, the Court—in an opinion authored by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito—held generally that the Second Amendment guarantees an individual, albeit limited, right to keep and bear arms.<sup>52</sup> More specifically, Justice Scalia wrote that the core right of the Second Amendment encompasses an individual's right to possess a lawful firearm in the home for purposes of self-defense.<sup>53</sup> In Part II.A of the decision, Justice Scalia analyzed the text of the amendment as it would have been commonly understood at the time of its ratification.<sup>54</sup> He divided the amendment into two clauses: the prefatory clause ("A well regulated militia, being necessary to the security of a free State"<sup>55</sup>) and the operative clause ("the right of the people to keep and

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47. *Id.* at 2788. The Supreme Court granted the District of Columbia's petition for a writ of certiorari, heard oral arguments on March 18, 2008, and issued its opinion on June 26, 2008.

48. *Id.* There are minor exceptions to this blanket ban; however, they are not pertinent to the issue at hand. *Id.* at 2788 n.1.

49. *Id.* Because of his background as "a D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center," Dick Heller presented the perfect test case. *Id.*

50. *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 110 (D.D.C. 2004). Notably, five other District of Columbia residents joined Dick Heller at the District and Circuit levels before dropping out at the Supreme Court level, thereby leaving Heller—the only one of the six plaintiffs who filed for a registration certificate prior to the suit—as the sole plaintiff at the Supreme Court. *Id.* at 103.

51. *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007).

52. 128 S. Ct. at 2799.

53. *Id.* at 2821–22.

54. *Id.* at 2788.

55. U.S. CONST. amend. II.

bear Arms, shall not be infringed”<sup>56</sup>). Discussing why he analyzed the operative clause first, Justice Scalia explained that “apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”<sup>57</sup>

Justice Scalia stated that the operative clause “guarantee[s] the individual right to possess and carry weapons in case of confrontation” for three main reasons.<sup>58</sup> First, comparing the phrase “right of the people” to other parts of the Constitution and Bill of Rights where similar terminology is used, the phrase signifies an individual right belonging to all and “not an unspecified subset.”<sup>59</sup> Second, based on eighteenth-century linguistic sources, “to keep and bear Arms” holds the same meaning today: to possess and carry weapons.<sup>60</sup> Additionally, individuals in the eighteenth century used the phrase “to keep and bear Arms” outside of the military context, thereby dispelling any notion that “the right of the people to keep and bear Arms” confers the right only upon militia members.<sup>61</sup> Third, the historical background of the Second Amendment confirms the individual-rights interpretation. “We look to this,” Justice Scalia explained, “because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right,” as demonstrated by the amendment’s specific statement that the right “shall not be infringed.”<sup>62</sup> And, at the time of the amendment’s ratification, the people held the right to possess arms for self-defense.<sup>63</sup> Thus, for these three reasons, the operative clause of the Second Amendment guarantees an individual right to possess and carry firearms.

Justice Scalia next analyzed the prefatory clause of the Second Amendment and concluded that the historical backdrop of the amendment’s ratification substantiates the interpretation of the operative clause.<sup>64</sup> The preface to the Second Amendment, according to Justice Scalia, shows that members of the founding generation were greatly concerned with elimination of the militia through the government’s confiscation of the people’s individual arms.<sup>65</sup> Thus, the

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56. *Id.*

57. *Heller*, 128 S. Ct. at 2789.

58. *Id.* at 2797.

59. *Id.* at 2790–91.

60. *Id.* at 2792–93.

61. *Id.* at 2792–97.

62. *Id.* at 2797.

63. *Id.* at 2798–99.

64. *Id.* at 2801.

65. *Id.* at 2801.

prefatory clause does not stand in opposition to the operative clause; rather, it confirms the individual-rights interpretation of the Second Amendment.

In the first of two dissenting opinions in *Heller*,<sup>66</sup> Justice Stevens—joined by Justices Souter, Ginsburg, and Breyer—analyzed the text of the Second Amendment and arrived at quite different conclusions.<sup>67</sup> According to Justice Stevens, the prefatory clause “both sets forth the object of the Amendment and informs the meaning of the remainder of the text.”<sup>68</sup> By discussing the militia in the preamble, the Framers intended to limit the right to keep and bear arms to individuals in a militia.<sup>69</sup> He chastised the majority for dismissing the prefatory clause in blind deference to the operative clause, as such analysis runs counter both to the Court’s usual method of textual analysis as well as how the Framers would have read the amendment.<sup>70</sup> Justice Stevens next argued that the phrase “the right of the people,” when referenced with other Bill of Rights provisions, in no way guarantees an individual right.<sup>71</sup> Finally, he rejected the majority’s interpretation of the phrase “to keep and bear Arms” as meaning “to possess and carry weapons in case of confrontation,” arguing that the historical interpretation of the phrase clearly supports a militaristic meaning.<sup>72</sup> In sum, according to the dissent’s textual analysis of the amendment, the collective-rights view is the correct one.<sup>73</sup>

### 3. The Historical Analysis

Justice Scalia argued in Parts II.B-E of his opinion that historical sources confirm his textual analysis of the Second Amendment. To begin, state constitutional analogues to the Second Amendment, ratified both before and after the amendment, demonstrate that founding-generation Americans read the Second Amendment as securing an individual right to possess firearms.<sup>74</sup> Next, the amendment’s drafting history illustrates that the Second

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66. The second dissent in *Heller*, penned by Justice Breyer, will be discussed *infra* Part II.B.4.

67. *Heller*, 128 S. Ct. at 2824–31 (Stevens, J., dissenting).

68. *Id.* at 2826.

69. *Id.*

70. *Id.*

71. *Id.* at 2826–27.

72. *Id.* at 2828.

73. *Id.* at 2831.

74. *Id.* at 2802–03 (majority opinion).

Amendment, like other Bill of Rights amendments, guarantees an individual right, as opposed to a right held only by members of a militia.<sup>75</sup> Additionally, numerous nineteenth-century sources substantiate the individual-rights view.<sup>76</sup> Justice Scalia cited a litany of founding-era sources that interpreted the Second Amendment as a guarantee of an individual right, including St. George Tucker and Joseph Story;<sup>77</sup> the *Houston* Court and state supreme courts;<sup>78</sup> Congress during the Reconstruction era;<sup>79</sup> and late nineteenth-century scholars, such as Thomas Cooley.<sup>80</sup>

Finally, Justice Scalia concluded that the Court's precedent on the Second Amendment—consisting only of *Cruikshank*, *Presser*, and *Miller*—supports the individual-rights interpretation of the Second Amendment.<sup>81</sup> Here, Justice Scalia predominantly focused on *Miller*, arriving at two conclusions. First, the *Miller* Court's focus on the type of firearm at issue, rather than whether the *Miller* defendants were members of a militia, lends strong support to the individual-rights view.<sup>82</sup> Second, the previous conclusion notwithstanding, *Miller* cannot be strongly relied upon because the *Miller* Court heard only from one party (the government) and did not rest any of its decision upon historical analysis.<sup>83</sup>

Justice Stevens, in dissent, offered evidence rebutting each section of Justice Scalia's historical analysis.<sup>84</sup> Investigating various historical and linguistic sources, he concluded that the original meaning of the phrase “to keep and bear arms” “describe[s] a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities.”<sup>85</sup> Next, after studying the pre-enactment history, he argued that the drafters of the amendment focused on protecting a collective, not individual, right to bear arms.<sup>86</sup>

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75. *Id.* at 2804.

76. *Id.* at 2804–05.

77. *Id.* at 2805–07.

78. *Id.* at 2807–09.

79. *Id.* at 2809–11.

80. *Id.* at 2811–12.

81. *Id.* at 2812–16.

82. *Id.* at 2814.

83. *Id.* at 2814–15.

84. *Id.* at 2831–46 (Stevens, J., dissenting). Justice Stevens's dissent led Judge Wilkinson to argue that, textually and historically, “both sides fought into overtime to a draw.” Wilkinson, *supra* note 13, at 267.

85. *Heller*, 128 S. Ct. at 2827 (Stevens, J., dissenting).

86. *See id.* at 2831–36 (“The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger.”).

Finally, Justice Stevens dismissed the majority's use of nineteenth-century sources to confirm its individual-rights interpretation, concluding that such sources were largely equivalent to "postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intention of any provision's drafters."<sup>87</sup> Finally, he lamented the Supreme Court's ignorance of *stare decisis*, arguing that the *Miller* Court had long ago resolved the Second Amendment debate unanimously in favor of the collective-rights view.<sup>88</sup>

#### 4. Limiting the Right and the Standard of Review

Although Justice Scalia addressed the need for a Second Amendment standard of review, he refused to specify one, stating that setting a standard of review would be premature.<sup>89</sup> To begin, Justice Scalia quickly clarified, "Like most rights, the right secured by the Second Amendment is not unlimited."<sup>90</sup> To this end, he listed examples of certain "longstanding" firearms regulations that did not violate the Second Amendment, such as the federal felon-in-possession prohibition; however, he did not explain *why* such regulations were constitutional.<sup>91</sup> Additionally, he accepted *Miller's* conclusion that the Second Amendment only protects those firearms that are "in common use at the time."<sup>92</sup>

These limitations on the Second Amendment notwithstanding, Justice Scalia largely sidestepped the issue of the Second Amendment standard of review. He rejected Justice Breyer's proposed interest-balancing test outright,<sup>93</sup> arguing that "no other enumerated constitutional right has been subjected to a freestanding 'interest-balancing' approach."<sup>94</sup> However, Justice Scalia declined to set the applicable framework, explaining instead that the District's handgun ban violated the Second Amendment under *any* standard of scrutiny<sup>95</sup> and that, just like other constitutional rights, the precise contours of

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87. *Id.* at 2837 n.28.

88. *Id.* at 2845–46.

89. *See id.* at 2816–22 (majority opinion).

90. *Id.* at 2816.

91. *Id.* at 2816–17.

92. *Id.* at 2817 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

93. *See infra* notes 95–99 and accompanying text.

94. *Heller*, 128 S. Ct. at 2821.

95. *Id.* at 2817–18 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster.") (internal citations omitted).

the amendment will be clarified by future Supreme Court jurisprudence.<sup>96</sup>

Justice Breyer's dissent initiated the standard of review discussion. In the second dissenting opinion in *Heller*, Justice Breyer—joined by Justices Stevens, Souter, and Ginsburg—criticized the *Heller* majority's refusal to set a Second Amendment standard of review.<sup>97</sup> Justice Breyer argued that, in order to provide guidance to reviewing courts, the Supreme Court should adopt an interest-balancing test in which the government's concern for public safety is weighed against the burden on the individual Second Amendment right.<sup>98</sup> Anticipating that lower courts would read *Heller* as requiring the application of heightened scrutiny to Second Amendment claims, Justice Breyer asserted that “any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry . . . .”<sup>99</sup> Applying this interest-balancing standard, Justice Breyer explained that the District's ban passed constitutional muster by achieving its legitimate objective of improving gun safety without disproportionately burdening the protected right.<sup>100</sup> He concluded by arguing that the Framers would have intended for the Second Amendment's adaptation to the modern context.<sup>101</sup>

### III. THE NEED FOR AN ANALYTICAL FRAMEWORK

*Heller* has simultaneously clarified and clouded the constitutional mystery surrounding the Second Amendment. On the one hand, it is clear that the Second Amendment guarantees an individual right to possess a firearm, and the core right encompasses possession of a handgun in one's home for self-defense.<sup>102</sup> On the other

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96. *Id.* at 2821.

97. *See id.* at 2850–51 (Breyer, J., dissenting) (“How is a court to determine whether a particular firearms regulation (here, the District's restriction on handguns) is consistent with the Second Amendment? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?”). Before turning to the specific issue of standard of review, Justice Breyer first provided examples of firearms regulations implemented in colonial American cities. According to Justice Breyer, these examples demonstrated how the founding generation allowed the Second Amendment to be burdened in a constitutionally permissible manner. *Id.* at 2848–50.

98. *Id.* at 2852.

99. *Id.* at 2852.

100. *Id.* at 2853–68.

101. *See id.* at 2870 (“Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated?”).

102. *Id.* at 2822 (majority opinion).

hand, this individual right is not absolute.<sup>103</sup> Yet, at the same time, the *Heller* Court did not divulge the proper analytical framework for Second Amendment claims.<sup>104</sup> Even if Justice Scalia is correct that the public “should not expect” the Supreme Court’s first decision directly and deeply analyzing the Second Amendment “to clarify the entire field,” the *Heller* Court nonetheless created as many questions as it answered about the Second Amendment.<sup>105</sup>

These open questions have quickly generated uncertainty and confusion among the lower courts.<sup>106</sup> To be sure, federal courts can easily dispose of challenges to those regulations that Justice Scalia expressly identified as safe under the Second Amendment,<sup>107</sup> such as the federal felon-in-possession statute<sup>108</sup> and the federal prohibition on carrying firearms in “sensitive places.”<sup>109</sup> But when the factual scenarios stray from those listed in *Heller*, the lower federal courts fall into disarray. Already, federal district courts have applied strict scrutiny, intermediate scrutiny, and rational basis review to Second Amendment claims in the wake of *Heller*.<sup>110</sup>

A few examples highlight the disorder in the lower courts. Two federal district courts have held that some form of heightened scrutiny is required under the Second Amendment—but refuse to say what that level of scrutiny is.<sup>111</sup> Other district courts simply have held without explanation that the Second Amendment challenge fails under *Heller*.<sup>112</sup> And one federal district judge, rather than setting a standard of review, instead asked if the statute prohibiting

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103. *Id.* at 2816.

104. *Id.* at 2821.

105. *Id.*

106. *See supra* notes 12–13 and accompanying text.

107. *Id.* at 2816–17.

108. Challenges by criminal defendants to the federal felon-in-possession statute currently predominate the Second Amendment docket. *See, e.g.*, *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Stuckey*, 317 F. Appx. 48, 50 (2d Cir. 2009); *United States v. Brye*, 318 F. Appx. 878, 880 (11th Cir. 2009); *United States v. Frazier*, 314 F. Appx. 801, 806 (6th Cir. 2008); *United States v. Brunson*, 292 F. Appx. 259, 261 (4th Cir. 2008) (per curiam); *United States v. Irish*, 285 F. Appx. 326, 327 (8th Cir. 2008) (per curiam); *United States v. Gilbert*, 286 F. Appx. 383, 386 (9th Cir. 2008) (mem.). *See also* *United States v. Yancey*, No. 08-cr-103-bbc, 2008 U.S. Dist. LEXIS 77878, at \*2–3 (W.D. Wis. Oct. 3, 2008) (listing post-*Heller* cases in which lower federal courts have affirmed the constitutionality of the federal felon-in-possession statute).

109. *See, e.g.*, *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009).

110. *See supra* notes 14–16 and accompanying text.

111. *See* *United States v. Chester*, No. 2:08-00105, 2008 U.S. Dist. LEXIS 80138, at \*5 (S.D. W. Va. Oct. 7, 2008); *United States v. Kitsch*, No. 03-594-01, 2008 U.S. Dist. LEXIS 58904, at \*21–22 (E.D. Pa. Aug. 1, 2008).

112. *See, e.g.*, *United States v. Hall*, No. 2:08-00006, 2008 U.S. Dist. LEXIS 59641, at \*3 (S.D. W. Va. Aug. 4, 2008).

misdeameanants convicted of domestic violence from possessing firearms “is similar enough” to the statute prohibiting felons from possessing firearms.<sup>113</sup> As Judge Wilkinson has predicted,<sup>114</sup> this Second Amendment jurisprudential jumble in the lower courts is sure to worsen as the factual scenarios diversify over time.

Legal scholars are no more certain about the constitutional framework that the Supreme Court is likely to intend or apply.<sup>115</sup> Robert Levy, senior fellow in constitutional studies at the Cato Institute and one of the attorneys for plaintiff Heller, argues that Second Amendment claims should be subject to heightened review of some sort but is unsure what standard will be employed. In one article, he writes that the Court will probably adopt intermediate or strict scrutiny;<sup>116</sup> however, in a subsequent article, he appears to suggest that the Court might adopt a standard approaching rational-basis review with bite.<sup>117</sup> Surely lower federal courts cannot be expected to set the correct framework when one of Heller’s attorneys, a scholar well versed in the Second Amendment, is unsure of how courts should resolve this thorny issue. Meanwhile, other scholars stray from the traditional tiers of scrutiny, instead suggesting application of a burden-type analysis in determining whether a challenged regulation violates the Second Amendment.<sup>118</sup> With the

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113. *United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008); *see also* *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1024–25 (E.D. Wis. 2008) (refusing to apply strict scrutiny to a Second Amendment challenge but rather holding that the Second Amendment “is best analyzed . . . by comparing the challenged regulation to those deemed permissible under the [*Heller*] Court’s historical analysis”).

114. *See* Wilkinson, *supra* note 13, at 280 (arguing that the *Heller* Court’s failure to specify the standard of review, in addition to setting certain exceptions to the individual right, “threaten[s] to suck the courts into a quagmire”); *see also* Erwin Chemerinsky, *The Heller Decision: Conservative Activism and its Aftermath*, CATO Unbound, July 25, 2008, <http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/the-heller-decision-conservative-activism-and-its-aftermath/> (“[Justice Scalia’s] failure to set a standard of review is an open invitation to challenge every gun law.”).

115. *See, e.g., After Heller: The New American Debate About Guns*, CATO Unbound, July 2008, <http://www.cato-unbound.org/archives/july-2008-after-heller-the-new-american-debate-about-guns/>.

116. Robert A. Levy, *District of Columbia v. Heller: What’s Next?*, CATO Unbound, July 14, 2008, <http://www.cato-unbound.org/2008/07/14/robert-a-levy/district-of-columbia-v-heller-whats-next/> [hereinafter Levy, *What’s Next?*].

117. *See* Robert A. Levy, *Standards of Review: A Review*, CATO Unbound, July 25, 2008, <http://www.cato-unbound.org/2008/07/25/robert-a-levy/standards-of-review-a-review/> (“Courts can rigorously review gun restrictions for reasonableness without being deferential to the legislature.”).

118. *See* Volokh, *supra* note 20, at 1461 (“The best way to protect self-defense rights, I think, is to acknowledge that courts are likely to find slight burdens to be constitutional, to focus on defining the threshold at which the burden becomes substantial enough to be presumptively unconstitutional, and to concretely evaluate the burdens imposed by various gun restrictions.”);

lower federal courts and commentators in disagreement, the need for a clear doctrinal framework for analyzing Second Amendment claims becomes readily apparent.

#### IV. THE SECOND AMENDMENT FRAMEWORK PUZZLE IN *HELLER*

One solution to prevent the federal courts from further sinking into a Second Amendment quagmire is for the Supreme Court to set a clear Second Amendment analytical framework.<sup>119</sup> Unfortunately, lower courts do not have the luxury of waiting; they must determine the law as it presently stands. But, as this Part will demonstrate, they have more of a tether than they might think: hidden within *Heller* is a workable framework for jurisprudentially faithful adjudication of Second Amendment claims. This Part suggests that the *Heller* opinion contains important clues about the appropriate framework for analyzing Second Amendment claims. It begins by laying out the different puzzle pieces—some large, some small—that the *Heller* Court provided.<sup>120</sup> Specifically, it will point out the textual hints in the opinion that, when coupled with the Court's constitutional jurisprudence, suggest the analytical framework the Court would likely apply.<sup>121</sup> Next, assembling these textual puzzle pieces, it argues that if the *Heller* opinion is to be taken at face value, a general two-pronged test emerges: Does the challenged regulation (1) fall within the scope of the Second Amendment right, and (2) satisfy a deferential version of strict scrutiny? Finally, this Part explains why the text of *Heller*, when viewed through the jurisprudence of its author, Justice Scalia, does not support application of a burden test to claims concerning direct regulations of firearms.

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Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs* 83 (Chapman Univ. Sch. of Law Legal Studies Research Paper Series, No. 08-3042), available at <http://ssrn.com/abstract=1245402> (implying that application of the undue burden test used in the abortion context would protect the "core right" of the Second Amendment while still permitting heavy regulation of that right).

119. Wilkinson, *supra* note 13, at 280.

120. The puzzle metaphor is invoked with respect to Professor Nelson Lund, who has argued that "the Second Amendment poses some genuine puzzles." Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1347 (2009) [hereinafter Lund, *Originalist Jurisprudence*].

121. To be sure, many of the textual clues in *Heller*—such as the list of "presumptively lawful regulatory measures," 128 S. Ct. 2783, 2817 n.26 (2008)—are unnecessary to the opinion's essential holding and are thus dicta. However, as discussed *supra* Part III, lower courts are already following the dicta of *Heller*, leading Professor Adam Winkler to rightly advise, "In the upside down universe of *Heller* . . . the dicta are what really matter." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1567 (2009).

A. *Searching for Second Amendment Puzzle Pieces in Heller*

Although the *Heller* Court expressly declined to set a standard of review, it did provide some clues as to a possible framework. Within the Court's vast opinion, two categories of puzzle pieces emerge. The first category sheds light into the scope of the right protected by the Second Amendment. The second category, perhaps more importantly, includes the clues hinting at the level of scrutiny the Court will apply to a Second Amendment challenge.<sup>122</sup> Together, these categories outline a framework for assessing Second Amendment claims that is faithful to the *Heller* opinion.

1. The First Category of Puzzle Pieces: Scope of the Right

The *Heller* Court left behind four important puzzle pieces regarding the scope of the Second Amendment right. First and foremost, the *Heller* Court held that the Second Amendment established an individual right to bear arms, yet it quickly clarified that the right is not absolute. Second, individual self-defense, rather than service in a militia, comprises the core of the Second Amendment right. Third, the *Heller* Court suggested that the Second Amendment right does not extend to all purposes. Fourth, the Court also intimated that the Second Amendment only applies to a specific subset of arms, rather than to all weapons.

a. *The Individual, but Limited, Right to Keep and Bear Arms*

The *Heller* Court put an end to the longstanding debate over the meaning of the Second Amendment by holding definitively that the Second Amendment protects an individual right to keep and bear arms.<sup>123</sup> This holding, the most significant part of *Heller*, establishes the general existence of the individual right guaranteed by the Second Amendment.

Nonetheless, after establishing that the Second Amendment protects an individual right, the *Heller* Court did not hesitate to limit its scope. Justice Scalia explicitly stated, "Like most rights, the right secured by the Second Amendment is not unlimited."<sup>124</sup> He then

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122. This Comment will not review the three traditional levels of scrutiny (strict scrutiny, intermediate scrutiny, and rational basis) in-depth. For a synopsis of the levels, see, for example, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5 (3d ed. 2006).

123. 128 S. Ct. at 2799. For more information on this portion of the holding, see *supra* Part II.B.2 and accompanying notes.

124. *Id.* at 2816.

outlined certain “longstanding” firearms regulations that do not run afoul of the Second Amendment<sup>125</sup> but quickly footnoted that this list of constitutional prohibitions is not “exhaustive” but rather one of examples.<sup>126</sup> Thus, although an individual right to keep and bear arms exists, it is a limited—yet greatly ambiguous—right.<sup>127</sup>

*b. The Core of the Right*

As *Heller* at the very least makes clear, the Second Amendment confers an individual right to keep and bear a handgun in the home for the use of self-defense. This holding is significant in its own right, but the *Heller* Court went one step further: it identified the right to bear a common arm for “individual self-defense” as “the central component of the right itself.”<sup>128</sup> Given that the core of the Second Amendment right is self-defense, the scope of the Second Amendment right must necessarily be far broader than if, for instance, the core of the right were based on militia service.<sup>129</sup> To wit, if the core of the right includes self-defense in the home,<sup>130</sup> the right arguably also includes the right of a felon to possess a handgun in the home for purposes of self-defense. But if the core of the right were based on service in the militia, then that same felon might not have the same right, as she is presumably not a member of the militia. Moreover, because self-defense may be unconnected to militia service, she may not have the right even absent her felony status. In sum, because the core of the right is defined in terms of self-defense, rather than service in a militia, the scope of the Second Amendment right is quite broad.

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125. *Id.* at 2816–17 (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places and government buildings, or laws imposing conditions and qualifications on the commercial sale or arms.”) (internal citations omitted).

126. *Id.* at 2817 n.26. As will be discussed *infra* Part IV.A.2.c, this list should be viewed as hinting at the level of scrutiny, not the scope of the right.

127. *See, e.g.,* Wilkinson, *supra* note 13, at 280 (“Because the District of Columbia laws at issue were some of the strictest in the country, and in the Court’s mind clearly unconstitutional, the actual holding of the opinion does not provide much guidance for future cases.”).

128. 128 S. Ct. at 2801.

129. *Cf.* Philip J. Cook, et al., *Gun Control after Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1060 (2009) (“Th[e] more personal self-defense function, not the prerequisites of a robust citizen militia, defines the scope of the right in *Heller*.”).

130. Professor Michael O’Shea argues that the Second Amendment right to self-defense must also extend outside the home. Michael P. O’Shea, *The Right to Defensive Arms after District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 378–79 (2009).

*c. The Right Does Not Extend to All Purposes*

Implicit in the *Heller* Court's opinion is that the scope of the Second Amendment right only extends to lawful purposes, rather than to any purpose whatsoever.<sup>131</sup> Throughout the opinion, the *Heller* Court frequently discussed the Second Amendment right as one that protected "lawful purposes."<sup>132</sup> Although the holding only explicitly established a general individual right to keep and bear a firearm,<sup>133</sup> the constant references to the right protecting only "lawful purposes" signal that the individual right protected by the Second Amendment is specific, not general.<sup>134</sup>

*d. The Right Does Not Extend to All Weapons*

Finally, in defining the scope of the right, the *Heller* Court determined that the Second Amendment only protects the keeping and bearing of those weapons that are "in common use at the time" by the

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131. This point arguably belabors the obvious. From a practical standpoint, it is obvious that the Second Amendment does not protect all purposes. After all, if this were the case, then a person could use a firearm to kill another person and, upon prosecution, claim the Second Amendment as an affirmative defense. But, from a constitutional standpoint, although the *Heller* Court did not include this notion—i.e., that the Second Amendment individual right to bear and keep arms only extends to, among other things, lawful purposes—in its explicit holding, the point must be made clear.

132. See *Heller*, 128 S. Ct. at 2789 ("Respondent argues that [the Second Amendment] protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."); *id.* at 2813 ("We described the right protected by the Second Amendment as 'bearing arms for a lawful purpose.'"); *id.* at 2815 ("The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense."); *id.* at 2815–16 ("We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right."); *id.* at 2817 ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."); *id.* at 2818 ("[T]he District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.")

133. *Id.* at 2800.

134. Chief Judge Easterbrook of the Seventh Circuit has identified this key piece in the context of a drug dealer's challenge to his right to possess a firearm for purposes of self-defense, explaining, "The Court said in *Heller* that the Constitution entitles citizens to keep and bear arms for the purpose of *lawful* self-protection, not for *all* self-protection." *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009).

At this point, a key question arises: What if a state responded by passing a statute explicitly defining possession of a handgun for purposes of self-defense in the home as an *unlawful* purpose? As discussed in greater detail *infra* Part IV.B.1, a state cannot sidestep the requirements of the Second Amendment by redefining a traditionally lawful purpose as an unlawful purpose.

American people, regardless of the weapon's connection to military use.<sup>135</sup> In support of this proposition, the *Heller* Court once again harkened back to America at its infancy, focusing on "the historical tradition of prohibiting the 'carrying of dangerous and unusual weapons.'" <sup>136</sup> This explicit holding provides insight into the contours of the protected right, leading some courts to identify the historical-tradition inquiry as going to the scope of the right.<sup>137</sup> In sum, because the Second Amendment only encompasses a specified subset of firearms, a key element of any Second Amendment claim is the type of firearm at issue.

## 2. The Second Category of Puzzle Pieces: Standard of Review

The second, and arguably more important, category of puzzle pieces embedded in the *Heller* opinion reveals what level of scrutiny the Court will apply in analyzing Second Amendment challenges. First, *Heller* expressly ruled out the use of two tests—rational basis and interest-balancing review—in scrutinizing Second Amendment challenges. Second, the *Heller* Court strongly hinted that the right guaranteed by the Second Amendment is fundamental, which has major implications for defining the Second Amendment standard of scrutiny. Third, *Heller* provided a list of certain long-existing firearms regulations that do not run afoul of the Second Amendment as examples of laws that would pass Second Amendment scrutiny.

### *a. Ruling Out Certain Tests*

By rejecting certain levels of scrutiny, the *Heller* Court provided some guidance on the applicable Second Amendment level of scrutiny.<sup>138</sup> As an overarching point, *Heller* made clear that the Second Amendment, under any constitutional test, prohibits an

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135. *Heller*, 128 S. Ct. at 2817 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

136. *Id.* (quoting numerous treatises).

137. *See, e.g.*, *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes . . ."). Note, however, that the Eighth Circuit, like many other courts, conflates the common-use and lawful-purpose inquiries. These are two separate, although greatly overlapping, questions. Surprisingly, this inquiry has been largely overlooked by commentators. *See, e.g.*, Ilya Somin, *Locked Liberties*, LEGAL TIMES, July 30, 2008 (also conflating common-use and lawful-purpose inquiries when examining the scope of the right).

138. Justice Scalia is able to largely sidestep the issue of standard of review due in part to the extremeness of the District of Columbia's firearms regulation. *See Wilkinson, supra* note 13, at 280 ("Because the District of Columbia laws at issue were some of the strictest in the country, and in the Court's mind clearly unconstitutional, the actual holding of the opinion does not provide much guidance for future cases.").

overall ban on the use “of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”<sup>139</sup> Thus, blanket prohibitions of a class of firearms “in common use at the time” will likely fail any level of scrutiny that the Court applies.<sup>140</sup>

More significant, however, is the *Heller* majority’s explicit rejection of Justice Breyer’s suggested interest-balancing approach.<sup>141</sup> Through this rejection, the *Heller* Court signaled that Second Amendment claims will face scrutiny at one “of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis),” just like “other enumerated constitutional right[s].”<sup>142</sup>

By strongly hinting that Second Amendment claims will be subject to some form of heightened scrutiny, footnote twenty-seven—buried in the text of the opinion—stands as the critical piece of the puzzle. First, Justice Scalia rejected rational-basis review as the level of scrutiny for Second Amendment claims, arguing that it “could not be used to evaluate the extent to which a legislature may regulate a specific, *enumerated* right.”<sup>143</sup> Second, he quoted the following passage from *Carolene Products* footnote four: “There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, *such as those of the first ten amendments.*”<sup>144</sup> The implication of this passage is not only that rational basis review is not the test, but also that “gun control regulations will be rigorously reviewed—perhaps even strictly scrutinized.”<sup>145</sup> This argument grows stronger when one studies the rigorous scrutiny level for rights that the *Heller* Court compared the Second Amendment to: “the freedom of speech [First

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139. *Heller*, 128 S. Ct. at 2817.

140. *United States v. Miller*, 307 U.S. 174, 179 (1939).

141. *See supra* notes 95–99 and accompanying text.

142. *Heller*, 128 S. Ct. at 2821.

143. *Id.* at 2818 n.27 (emphasis added). To be clear, Justice Scalia is talking about the traditional version of rational basis review, that is, toothless rationality review. *See, e.g.*, *U.S. R.R. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting).

144. *Heller*, 128 S. Ct. at 2818 n.27 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (brackets in original) (emphasis added).

145. Robert A. Levy, *Looking Ahead to Heller's New Paradigm*, CATO Unbound, July 22, 2008, <http://www.cato-unbound.org/2008/07/22/robert-a-levy/looking-ahead-to-hellers-new-paradigm/> [hereinafter Levy, *New Paradigm*]. Dennis Henigan disagrees on this point with Levy, arguing that if the *Heller* Court truly believed that Second Amendment claims would be subject to heightened scrutiny, such as First Amendment claims, it would have come out and explicitly said so. Dennis A. Henigan, *Does Heller Point the Way to Victory for Reasonable Gun Laws?*, CATO Unbound, July 23, 2008, <http://www.cato-unbound.org/2008/07/23/dennis-henigan/does-heller-point-the-way-to-victory-for-reasonable-gun-laws/>.

Amendment], the guarantee against double jeopardy [Fifth Amendment], the right to counsel [Sixth Amendment].”<sup>146</sup> Thus, footnote twenty-seven strongly suggests that any Second Amendment analytical framework must include a heightened scrutiny prong.

*b. The Right Is Fundamental*

A close reading of *Heller* suggests that the right protected by the Second Amendment is fundamental, which has significant ramifications for determining the level of scrutiny. The Supreme Court has previously defined a right to be fundamental if it is (1) “deeply rooted in this Nation’s history and tradition”<sup>147</sup> or (2) “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [it] w[ere] sacrificed.”<sup>148</sup>

Under *Heller*, the Second Amendment guarantee appears to fit either definition. First, the *Heller* Court signaled that the Second Amendment right is deeply rooted in American history and tradition. As Justice Scalia explained, “[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”<sup>149</sup> Indeed, the individual right to keep and bear arms, according to the *Heller* Court, was already deeply rooted at the time of the nation’s founding, as its origin dated back to the English Bill of Rights.<sup>150</sup>

The liberty interest protected by the Second Amendment also seems to fit the second definition of a fundamental right. Professor Nelson Lund argues that “the Supreme Court’s reference to those rights that are ‘of the very essence of a scheme of ordered liberty’ is nothing but a slightly reworded version of the Second Amendment’s reference to what is ‘necessary to the security of a free State.’”<sup>151</sup> After all, if the right to bear arms is “necessary to the security of a free State,” as the drafters of the Bill of Rights believed, it is difficult to imagine the nation’s scheme of liberty and justice existing without it.<sup>152</sup> Indeed, the *Heller* Court seemingly signals that the colonists who founded the nation and ratified the Constitution and Bill of Rights

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146. *Heller*, 128 S. Ct. at 2818 n.27.

147. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

148. *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

149. *Heller*, 128 S. Ct. at 2797.

150. *Id.* at 2798 (explaining how a provision in the English Bill of Rights “has long been understood to be the predecessor to our Second Amendment”).

151. Lund, *Anticipating*, *supra* note 21, at 194 (citations omitted).

152. U.S. CONST. amend. II.

would not have dared to imagine their new nation without such a right.<sup>153</sup>

Regardless of these definitions of a fundamental right, the *Heller* Court itself came very close to recognizing explicitly the Second Amendment right as fundamental. The *Heller* Court found that “[b]y the time of the founding, the right to have arms had become *fundamental* for English subjects.”<sup>154</sup> It is hard to argue that Justice Scalia, “the wordsmith par excellence of the Court,”<sup>155</sup> selected the word “fundamental” in this context unintentionally. This word choice suggests the *Heller* Court’s belief that a right that was fundamental for English subjects prior to the nation’s founding must necessarily be fundamental as well for those same subjects who would comprise the founding generation of the United States.

The federal circuit courts of appeals have so far provided little guidance into the fundamentality of the right. Two circuit courts—the Second and Seventh Circuits—have refused to incorporate the Second Amendment as against the states.<sup>156</sup> However, their holdings rested not on the issue of fundamentality but rather on the ground that circuit courts are not to overrule Supreme Court precedent directly on point even where such precedent is weakened by more recent cases.<sup>157</sup> On the other hand, a panel of the Ninth Circuit, relying on *Heller* as well as historical documents, held that the right protected by the Second Amendment is fundamental.<sup>158</sup> However, the Ninth Circuit as a whole subsequently agreed to rehear the case en banc and accordingly vacated the original opinion.<sup>159</sup> Thus, although these three circuit courts have addressed the issue of incorporation, none are instructive as to whether the Second Amendment right is fundamental. Fortunately, the Supreme Court will likely clarify this when it rules on the question of Second Amendment incorporation during the October 2009 Term.<sup>160</sup>

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153. *See Heller*, 128 S. Ct. at 2797–99.

154. *Id.* at 2798 (emphasis added).

155. Stephen Yagman, *Scalia’s Word-Twisting Is What Makes Him So Dangerous*, 554 PRAC. L. INST. LITIG. & ADMIN. PRAC. HANDBOOK SERIES: LITIG. 951, 959 (1996), available at 554 PLI/Lit 951 (Westlaw).

156. *Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 858 (7th Cir. 2009), cert. granted, *McDonald v. City of Chicago*, 78 U.S.L.W. 3013 (U.S. Sep. 30, 2009) (08-1521); *Maloney v. Cuomo*, 554 F.3d 56, 58–59 (2d Cir. 2009).

157. *Nat’l Rifle Ass’n of Am., Inc.*, 567 F.3d at 857–58; *Maloney*, 554 F.3d at 59. However, in dicta, Chief Judge Easterbrook provided arguments why the Second Amendment right may not be fundamental. *Nat’l Rifle Ass’n of Am., Inc.*, 567 F.3d at 859.

158. *Nordyke v. King*, 563 F.3d 439, 456–57 (9th Cir. 2009).

159. *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009).

160. *Nat’l Rifle Ass’n of Am.*, 567 F.3d 856, cert. granted, *McDonald*, 78 U.S.L.W. 3013.

Therefore, in determining the fundamentality of the right, one must return to the original opinion in *Heller*. Whether one chooses to define fundamentality through the traditional definitions or *Heller*'s use of the word "fundamental," the Second Amendment—as seen through the lens of the *Heller* opinion—strongly appears to fit the mold of a fundamental right.<sup>161</sup> And recognizing the right as fundamental uncovers a significant clue regarding the applicable standard of scrutiny.

*c. The List of "Presumptively Lawful Regulatory Measures"*

The *Heller* Court's list of "presumptively lawful regulatory measures" reveals the final piece of the puzzle.<sup>162</sup> In qualifying the reach of *Heller*, the Court wrote:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>163</sup>

While this significant dicta could possibly be read as describing the scope of the Second Amendment right, it more accurately hints at the applicable level of scrutiny for two main reasons.<sup>164</sup> First, as discussed previously, by placing the right to possess a firearm for purposes of self-defense in the home at the core rather than the periphery of the Second Amendment right, the *Heller* Court necessarily implied that the scope of the right is very broad.<sup>165</sup> Given the breadth of this right, the right seemingly encompasses these "presumptively lawful regulatory measures"; the measures, however,

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161. Post-*Heller* commentators are in consensus. See Kopel, *The Natural Right*, *supra* note 19, at 243 ("Although personal self-defense is not specifically mentioned in the Declaration of Independence, that natural right is the intellectual foundation, in Western philosophy, of the right of the people to defend all their natural rights by using force to overthrow a tyrant."); Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause*, 39 N.M. L. REV. (forthcoming Oct. 2009) (manuscript at 48, available at <http://ssrn.com/abstract=1290584>) ("All the evidence surrounding the liberty interests entailed by the Second Amendment lead to the conclusion that it is a fundamental right . . ."); Nelson Lund, *Anticipating*, *supra* note 21, at 195–96.

162. 128 S. Ct. 2783, 2817 n.26 (2008).

163. *Id.* at 2816–17.

164. This list presumably might be read as passing constitutional muster because the regulations present insufficient burdens on the Second Amendment right. However, as will be discussed *infra* Part IV.B.3, because *Heller* should not be read as supporting a burden-type analysis, these regulations should not be read as passing constitutional muster under any form of burden analysis.

165. For greater detail on this argument, see *supra* Part IV.A.1.b and accompanying notes.

are constitutionally permissible because they pass the heightened scrutiny required under the Second Amendment. A twenty-four-hour waiting period for purchasing a firearm directly infringes upon the core right to possess a firearm for self-defense in the home. Prohibiting felons and the mentally ill from possessing firearms for self-defense in the home also infringes upon the core right.<sup>166</sup> And prohibiting citizens from carrying firearms in a government building infringes upon the peripheral right to possess a firearm for purposes of self-defense, regardless of location.<sup>167</sup> Thus, given that these measures infringe upon the broad, protected right, they must be “presumptively lawful” because they pass constitutional muster.<sup>168</sup>

Second, when the *Heller* Court limited the scope of the right as applying only to certain purposes and classes of weapons, it used language clearly implying that it was limiting the right based on a general principle.<sup>169</sup> However, in identifying the list of “presumptively lawful regulatory measures,” the Court used no such language or strong hints; it merely stated matter-of-factly that the measures are constitutional. The conspicuous difference in language—broad, sweeping explanations versus specific, narrow examples—strongly suggests that the “presumptively lawful regulatory measures” are not general principles that limit the scope of the Second Amendment right. Rather, these measures seemingly fall under the scope of the right yet satisfy the heightened scrutiny required by the Second Amendment, given Justice Scalia’s invocation of *Carolene Products* footnote four.<sup>170</sup>

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166. The *Heller* Court waffles as to whom the core right extends. At one point, it implies that the core right extends to *all* citizens. See 128 S. Ct. at 2818 (“[The District’s ban] makes it impossible for *citizens* to use [handguns] for the core lawful purpose of self-defense and is hence unconstitutional.”) (emphasis added). Later, however, it implies that the core right only extends to “law-abiding, responsible citizens.” *Id.* at 2821. Even assuming that the felon- and mentally-ill-in-possession statutes do not infringe upon the core right, they certainly infringe upon the greater, peripheral right protecting the right of all citizens, regardless of status, to possess a firearm in the home for purposes of self-defense.

167. See O’Shea, *supra* note 130, at 378–79.

168. In Part IV.B.2.c, I will discuss why these measures pass the heightened scrutiny required by the Second Amendment.

169. As to certain purposes (and aside from the repeated mentions of “lawful purposes,” see *supra* note 136), the *Heller* Court stated, “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 128 S. Ct. at 2816. As to lawful purposes, the Court wrote, “We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those ‘in common use at the time.’ We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.” *Id.* at 2817 (internal citations omitted).

170. I nonetheless concede that, of all the puzzle pieces, this is the strangest one to place.

To be sure, the precise scope of the Second Amendment right remains sufficiently vague such as to raise genuine doubts as to whether this list reveals limits in the scope of the right or, rather, hints to the applicable level of scrutiny. However, these two reasons suggest that the list provides insight into the Second Amendment standard of review, rather than the scope of the right.

*B. Assembling the Second Amendment Framework Puzzle*

With the various pieces from *Heller* now fully exposed, the puzzle of the Second Amendment framework can be assembled. Under the assumptions listed in the Introduction, a general two-pronged test emerges. This test provides a workable and jurisprudentially faithful framework for lower courts reviewing Second Amendment challenges to direct regulations of firearms. Under the first prong, a court will ask whether the challenged regulation falls within the scope of the Second Amendment right. Under the second prong, a court will determine whether the challenged regulation meets the heightened scrutiny required by the Second Amendment. Each prong contains multiple parts and questions, as discussed below.

1. The First Prong: Does the Challenged Regulation Fall within the Scope of the Second Amendment Right?

The first prong of the Second Amendment framework asks the general question of whether the challenged regulation falls within the scope of the right protected by the Second Amendment.<sup>171</sup> In their immediate reactions to *Heller*, most commentators have ignored this essential prong, instead jumping prematurely to the level of scrutiny that will be applied.<sup>172</sup> As discussed previously, the *Heller* Court signaled that the Second Amendment is not necessarily triggered anytime there is a challenged regulation involving a weapon.<sup>173</sup> Two sub-questions constitute this first prong.

To determine whether the challenged regulation falls within the scope of the Second Amendment right, a reviewing court must first ask the sub-question: Does the challenged regulation implicate a

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171. As will be explained in greater detail *infra* Part IV.B.3, I believe that the *Heller* text (if taken at face value) does not support Professor Eugene Volokh's proposed Second Amendment framework, regardless of whether his framework makes normative sense. Regardless, on the point at issue presently—that a court must first determine if the challenged regulation even falls within the scope of the protected right—we are in complete consensus. See Volokh, *supra* note 20, at 1449.

172. See, e.g., Wilkinson, *supra* note 13, at 29; Levy, *What's Next?*, *supra* note 116.

173. See *supra* Part IV.A.1 and accompanying notes.

lawful purpose for which firearms are used? As discussed earlier, the *Heller* Court sent a conclusive sign that the Second Amendment right only extends to the keeping and bearing of firearms for lawful purposes.<sup>174</sup> For example, a party can assert a Second Amendment claim against a regulation that prevents her from keeping a gun for hunting, as hunting is a traditionally lawful purpose.<sup>175</sup> However, a party does not have a valid Second Amendment claim against a regulation that prevents her from firing a weapon in a crowded street, as such a purpose is not lawful. Thus, if the party's challenge is based on keeping or bearing a firearm for an unlawful purpose, the Second Amendment is not implicated.<sup>176</sup>

A reviewing court must then ask a second sub-question: Does the challenged regulation implicate a firearm, or class of firearms, that is "in common use at the time"?<sup>177</sup> Although the *Heller* Court largely buried this significant holding in the text, it nonetheless explicitly held that the Second Amendment extends only to those firearms in common use.<sup>178</sup> But the *Heller* Court provided few clues as to the meaning of "in common use," other than holding by implication that handguns fall into this category.<sup>179</sup> Presumably, the term could be defined in three ways: quantitatively (i.e., based on firearms ownership statistics), qualitatively (i.e., based on a normative

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174. See *supra* Part IV.A.1.c and accompanying notes.

175. While the *Heller* Court did not deal with such a hypothetical, given its focus on traditionally lawful purposes, it is extremely dubious that a state could sidestep the requirements of the Second Amendment merely by redefining a traditionally lawful purpose as an unlawful purpose.

176. For an example of a court disposing of a Second Amendment challenge on this first sub-question, see *United States v. Jackson*, 555 F.3d 635 (7th Cir. 2009), discussed *supra* note 138.

177. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). Statements by some commentators imply the existence of this crucial sub-question. See, e.g., Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 268 (2008) ("It follows that certain unusual or especially dangerous weapons, such as sawed-off shotguns, are also outside of the domain of the Second Amendment.").

Notably, Professor Lund vehemently disagrees with the *Heller* Court's holding that Second Amendment protection partially turns on whether the firearm at issue is "in common use at the time," arguing that this sub-question focusing on commonality "[is] neither dictated nor supported by judicial precedent, and it has no basis in the historical sources [Justice Scalia] cites." Lund, *Originalist Jurisprudence*, *supra* note 120, at 1366. Regardless of the validity of his assertions, Professor Lund therefore confirms the existence of this first prong, and specifically the second sub-question, of the test (assuming the text of *Heller* is given full effect).

178. See *supra* Part IV.A.1.d and accompanying notes.

179. See 128 S. Ct. at 2817–18 ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose . . . . Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' . . . would fail constitutional muster.").

judgment of what firearms people generally use for lawful purposes), or some combination thereof.<sup>180</sup> The text of the *Heller* opinion hints that the Court defines “in common use” qualitatively, as it notably omits any statistics in support of its conclusion that handguns are in common use and instead relies on conclusory language.<sup>181</sup> Additionally, the *Heller* Court uses similar language (and no statistics) to explain why military weapons, such as the M-16, are not “in common use” and thus are not protected under the Second Amendment.<sup>182</sup> Though it appears that the *Heller* Court defines the term qualitatively, the determination of whether a firearm is in common use is central to whether the challenged regulation falls within the scope of the Second Amendment right.

If either of these two sub-questions is answered in the negative, then the Second Amendment is not implicated and heightened review is unnecessary.<sup>183</sup> Accordingly, under *Carolene Products* footnote four, a reviewing court will approach the challenged regulation with a presumption of constitutionality and accord the legislature due deference through the application of rational basis review.<sup>184</sup> So long as any legitimate government purpose for the regulation can be conjured up *ex post*, the regulation will pass constitutional muster.<sup>185</sup> Thus, a necessary condition for heightened Second Amendment scrutiny is that the challenged regulation fall within the scope of the right, as defined broadly through these two sub-questions.

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180. The Eighth Circuit, for example, appeared to hold as a matter of qualitative judgment that the machine gun was not a firearm in common use for lawful purposes. See *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (stating without empirical evidence that “[m]achine guns are not in common use by law-abiding citizens for lawful purposes”); cf. *United States v. Ross*, No. 08-1120, 2009 U.S. App. LEXIS 9044, at \*6 (3d Cir. Apr. 27, 2009) (“Nothing in *Heller* supports Ross’s challenge to the constitutionality of a statute criminalizing the possession of a machine gun.”).

181. See *Heller*, 128 S. Ct. at 2818 (“Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home . . .”).

182. *Id.* at 2817.

183. See *Volokh*, *supra* note 20, at 1449 (“Sometimes, a constitutional right isn’t violated by a restriction because the restriction is outside the terms of the right as set forth by the constitution.”).

184. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Of course, this assumes that the law does not run afoul of another provision of the Constitution. Heightened scrutiny would obviously apply if, for example, the law discriminated on the basis of race.

185. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

## 2. The Second Prong: Does the Challenged Regulation Satisfy Heightened Scrutiny?

If a reviewing court determines that the challenged regulation falls within the scope of the Second Amendment right, it must next move to the test's second prong and determine whether the challenged regulation passes heightened scrutiny.<sup>186</sup> This subsection argues that strict and intermediate scrutiny, as traditionally defined, do not comport with the language of the *Heller* opinion.<sup>187</sup> It therefore concludes that the *Heller* decision most supports application of a deferential form of strict scrutiny to Second Amendment claims.

### *a. Conventional Strict Scrutiny*

Given the *Heller* Court's invocation of *Carolene Products* footnote four, commentators like Robert Levy have argued that regulations infringing upon the Second Amendment should face the most rigorous form of scrutiny:<sup>188</sup> conventional strict scrutiny, which requires the government to demonstrate that the regulation is narrowly tailored to advance a compelling government interest.<sup>189</sup> After all, "[s]trict scrutiny is the standard of the Founders, who in truth saw most of the Bill of Rights as near absolutes."<sup>190</sup> However, in

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186. As discussed earlier, the *Heller* Court signaled that it would subject Second Amendment claims to heightened scrutiny. See *supra* Part IV.A.2 and accompanying notes. Additionally, Professors Brandon Denning and Glenn Reynolds argue that, even beyond this signal, "it is clear from the fact that [*Heller*] affirmed the D.C. Circuit that some sort of heightened standard was used." Brandon P. Denning & Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 OHIO ST. L.J. 671, 674 (2008).

187. See generally Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984) (arguing that the three traditional levels of scrutiny are giving way to more nuanced categories of review).

188. See Levy, *New Paradigm*, *supra* note 145.

189. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995). Dean Chemerinsky provides a helpful summary of strict scrutiny:

Under strict scrutiny, a law will be upheld if it is necessary to achieve a compelling government purpose. In other words, the court must regard the government's purpose as vital, as 'compelling.' Also, the law must be shown to be 'necessary' as a means of accomplishing the end. This requires proof that the law is the least restrictive or least discriminatory alternative. If the law is not the least restrictive alternative, then it is not 'necessary' to accomplish the end.

CHEMERINSKY, *supra* note 122, § 6.5, at 541–42.

190. Roy Lucas, *From Patson & Miller to Silveira v. Lockyer: To Keep and Bear Arms*, 26 T. JEFFERSON L. REV. 257, 330 (2004) (arguing, albeit pre-*Heller*, that Second Amendment claims should be subject to strict scrutiny); see also Kopel, *The Natural Right*, *supra* note 16, at 247 ("By the Declaration's principles, the time that is most appropriate for rigorous judicial review is when a government infringes on one of the natural rights which the very government was established to protect.").

his persuasive attack against applying strict scrutiny in reviewing Second Amendment claims, Professor Adam Winkler refutes this argument, explaining that “strict scrutiny is applied in cases arising from only two textual provisions of the Bill of Rights, the First and Fifth Amendments.”<sup>191</sup> Thus, mere inclusion of the Second Amendment in the Bill of Rights cannot be the sole persuasive rationale for application of strict scrutiny in the present context.

A strong argument for conventional strict scrutiny comes from the *Heller* Court’s indication that the right to keep and bear arms is fundamental.<sup>192</sup> The Court has generally employed strict scrutiny in reviewing claims burdening fundamental rights.<sup>193</sup> Furthermore, Justice Scalia, the author of *Heller*, has argued that all fundamental rights should be subject to strict scrutiny.<sup>194</sup> Thus, if the Second Amendment right to keep and bear arms is indeed fundamental, conventional strict scrutiny may be the correct standard of review.

Despite these arguments, the *Heller* Court’s inclusion of examples of laws that did not run afoul of the Second Amendment<sup>195</sup> suggests that conventional strict scrutiny likely is not and will not be the test.<sup>196</sup> Under the Supreme Court’s conventional strict scrutiny, the government bears the burden of demonstrating that the law is narrowly tailored to meet a compelling state interest.<sup>197</sup> Laws reviewed under strict scrutiny therefore begin with a presumption of unconstitutionality<sup>198</sup> so difficult to overcome that Justice Marshall once famously described the Court’s “conventional ‘strict scrutiny’ [as] scrutiny that is strict in theory but fatal in fact.”<sup>199</sup> But by listing

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191. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 694 (2007).

192. See *supra* Part IV.A.2.a and accompanying notes.

193. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); see also CHEMERINSKY, *supra* note 122, § 10.1.1 (“The Supreme Court has held that some liberties are so important that they are deemed to be ‘fundamental rights’ and that generally the government cannot infringe upon them unless strict scrutiny is met.”).

194. See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

195. 128 S. Ct. 2783, 2816–17 (2008).

196. As discussed previously, the *Heller* Court’s inclusion of this list does not delineate the scope of the Second Amendment right nor does it suggest a burden analysis; it rather hints at the level of scrutiny to be applied to laws directly regulating firearms. See *supra* Part IV.A.1.c and accompanying notes.

197. E.g., *Miller v. Johnson*, 515 U.S. 900, 920–21 (1995).

198. See Klukowski, *supra* note 161, at 41 (arguing that “laws subject to [strict scrutiny] are presumptively invalid, shifting the burden to the government to defend them”).

199. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). The Court later tried to distance itself from Justice Marshall’s position, arguing that “[s]trict scrutiny is not ‘strict in theory, but fatal in fact.’” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Nonetheless, disputes concerning the flexibility (or inflexibility) of strict scrutiny continue unabated today. See, e.g., Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1759 (2006) (“For some, the test is ‘strict’ in theory but fatal in fact; for others, searching

regulations *not even under review* that would survive Second Amendment analysis, the *Heller* Court indicated that some Second Amendment regulations are not only presumptively constitutional but altogether constitutional. The *Heller* Court's sua sponte determination that these regulations did not run afoul of the Second Amendment demonstrates that the Court applied some weaker form of review in preemptively upholding these measures, rather than engaging in the searching review required by conventional strict scrutiny.<sup>200</sup> If the *Heller* Court had truly subjected this list of "presumptively lawful regulatory measures" to conventional strict scrutiny,<sup>201</sup> it is doubtful that any of the regulations would be upheld.<sup>202</sup> Simply put, conventional strict scrutiny cannot be the Second Amendment standard of review if the *Heller* opinion is taken at face value.

*b. Intermediate Scrutiny and the First Amendment Content-Based/Content-Neutral Standard*

With conventional strict scrutiny ruled out, it is possible that the Court would apply intermediate scrutiny to Second Amendment claims. Intermediate scrutiny requires that the regulation be substantially related to advancing an important government interest.<sup>203</sup> Yet intermediate scrutiny seems unlikely for two primary reasons. First and foremost, the text of the *Heller* decision, when combined with the Court's constitutional jurisprudence, counsels against intermediate scrutiny. The *Heller* Court strongly implied that the Second Amendment right was fundamental,<sup>204</sup> and the Court has not subjected fundamental rights to intermediate scrutiny. It seems unlikely that the Court would suddenly reverse course on this issue. Professor Winkler counters that the recognition of a fundamental right is not fatal to application of intermediate scrutiny because strict

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for a way to justify [immigration deportation closure hearings], the test is strict in theory but quite flexible in fact.").

200. The language perhaps reflects the suspicion of numerous commentators that the members of the *Heller* majority are divided in terms of what standard of review to apply to Second Amendment claims. See, e.g., Dennis A. Henigan, *The Heller Paradox: A Response to Robert Levy*, CATO Unbound, July 16, 2008, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy/> ("First, it is clear that there are not five votes on the Supreme Court for applying a 'strict scrutiny' standard to gun laws.").

201. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.26 (2008).

202. See Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. (forthcoming 2009), available at <http://ssrn.com/abstract=1347186>, at 8 ("[I]t is doctrinally impossible to conclude that strict scrutiny governs Second Amendment claims, while also upholding the four *Heller* exceptions.").

203. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

204. See *supra* Part IV.A.2.a and accompanying notes.

scrutiny is not automatically triggered where “the underlying burden is only incidental.”<sup>205</sup> Although Professor Winkler is correct, laws that directly regulate firearms do not present an incidental burden; they present a *direct* burden on the presumably fundamental Second Amendment right.<sup>206</sup>

Second, intermediate scrutiny seems an unlikely choice for those Justices in the *Heller* majority and especially Justice Scalia, the author of the opinion. Professor Mark Tushnet has argued that “[s]trict scrutiny is more compatible with the methodological approach Justice Scalia explicitly defends, intermediate scrutiny with the approach he explicitly criticizes” because intermediate scrutiny invites a greater degree of judicial balancing than does strict scrutiny.<sup>207</sup> Given Justice Scalia’s abhorrence for judicial balancing, as evidenced by his swift dismissal of Justice Breyer’s proposed interest-balancing test, it is quite difficult to imagine *Heller* as implicitly supporting intermediate scrutiny. In sum, the text of the *Heller* decision and the judicial methodology of *Heller*’s author strongly counsel against the application of intermediate scrutiny.

Recognizing the problems inherent in applying intermediate scrutiny, many commentators argue for a compromise by applying the First Amendment content-based/content-neutral test in the Second Amendment context because of the Second Amendment’s strong kinship with the First Amendment.<sup>208</sup> The language of *Heller* lends support to this position. The *Heller* Court most often compared the right to keep and bear arms to the right of free speech,<sup>209</sup> and the

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205. Winkler, *supra* note 191, at 698; *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1176–80 (1996) (noting that the severity of a burden does not determine whether it is direct or incidental, and an incidental burden can have a major impact on the exercise of constitutional rights); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 868–73 (1994) (explaining that the “undue burden” inquiry looks to the severity of infringement to determine the appropriate level of scrutiny, rather than categorizing the infringement as direct or indirect).

206. *See* Planned Parenthood of Se. Pa. v. Casey 505 U.S. 833, 987–88 (1992) (Scalia, J., dissenting) (comparing a “law of general applicability which places only an incidental burden on a fundamental right” to a “law which *directly* regulates a fundamental right”). For an insightful discussion of direct and incidental burdens, *see generally* Dorf, *supra* note 205.

207. Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 431 (2009).

208. *See, e.g.*, Christopher A. Chrisman, *Mind the Gap: The Missing Standard of Review Under the Second Amendment (and Where to Find It)*, 4 GEO. J.L. & PUB. POL’Y 289 (2006) (pre-*Heller* argument); Klukowski, *supra* note 161, at 41–42 (post-*Heller* argument).

209. *See* 128 S. Ct. 2783, 2791 (2008) (“Just as the First Amendment protects modern forms of communications . . . and the Fourth Amendment applies to modern forms of search, the Second Amendment extends *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”); *id.* at 2797 (“We look to [the

Court generally subjects restrictions on the First Amendment right of free speech to varying scrutiny depending on the content of the speech. Specifically, if the regulation is content-based, the Court will apply strict scrutiny; if the regulation is content-neutral, the Court will apply intermediate scrutiny.<sup>210</sup> Given the *Heller* Court's signal that the Second Amendment bears a strong resemblance to the First Amendment, it is arguable that the Court would subject challenges under the Second Amendment to the same level of scrutiny as the First Amendment. Because the vast majority of firearms regulations will be content-neutral, the applicable standard of review would generally be intermediate scrutiny.<sup>211</sup> Of the post-*Heller* commentary, this position boasts the greatest consensus.<sup>212</sup>

However, application of the First Amendment approach is akin to forcing a square block into a round hole: though jamming the block into the hole may seem convenient, the block simply cannot fit. First,

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historical background of the Second Amendment] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”); *id.* at 2799 (“Of course the [Second Amendment] right was not unlimited, just as the First Amendment’s right of free speech was not.”); *id.* at 2816 (“Th[e] Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified.”); *id.* at 2821 (“The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different.”). Moreover, one of the sources that the *Heller* Court relied upon in arriving at its holding compared the Second Amendment to the First Amendment. *Id.* at 2812 (“The clause is analogous to the one securing the freedom of speech and of the press.”) (quoting J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152–53 (1868)). Most commentators agree that the Second Amendment’s closest analog in the Bill of Rights is the First Amendment. For an example of the pre-*Heller* argument, see Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 239 (2004). For an example of the post-*Heller* argument, see Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III* (George Mason Univ. Law & Econ. Research Paper Series, No. 08-61), available at [http://ssrn.com/abstract\\_id=1309714/](http://ssrn.com/abstract_id=1309714/).

210. *Turner Broad. Sys. v. Fed. Comm’n Comm’n*, 512 U.S. 622 (1994), discussed in CHEMERINSKY, *supra* note 122, § 11.2.1.

211. That is, such regulations will focus on the time, place, and manner of possession and use of a firearm, rather than the general firearm itself.

212. See Chrisman, *supra* note 208, at 292 (pre-*Heller*); David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENV. U. L. REV. 901, 941 (2009); Klukowski, *supra* note 161, at 41–42; Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 DAYTON L. REV. 35, 56–57 (2002) (pre-*Heller*); Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J.L. & PUB. POL’Y 607, 622 (2008). Professor Volokh also argues for a variation of the First Amendment standard: “[W]e can also borrow from the First Amendment time, place, and manner restriction test, and articulate the substantial burden inquiry as an inquiry into the presence of ‘ample alternative channels’ for exercising the right.” Volokh, *supra* note 20, at 1458.

it is difficult to compare speech to firearms.<sup>213</sup> While speech can incite violence that leads to injury (e.g., racial slurs sparking a hate crime), the use of firearms itself causes violence and injury. Although the power of free speech should not be overlooked, it is somewhat naïve to believe that speech has the same practical impact as firearms.<sup>214</sup> Second, even assuming that speech is analogous to firearms, the First Amendment content-based/content-neutral standard does not fit for laws directly regulating firearms. Professor Tushnet has argued previously that, in practice, every firearms regulation will be deemed content-based because at the core of any firearms regulation is just that: the regulation of firearms.<sup>215</sup> By contrast, the rationale behind certain speech regulations will be, for instance, maintaining quiet in an area, as opposed to restraining speech in and of itself.<sup>216</sup> Put differently, application of the First Amendment content-based/content-neutral standard yields little practical guidance because firearms regulations facially regulate a fundamental right and are therefore always content-based.<sup>217</sup> Therefore, although application of the First Amendment content-based/content-neutral test appears to be a convenient fit, a closer examination of the doctrine reveals its fatal inadequacies in the Second Amendment context.

*c. Deferential Strict Scrutiny*

With the foregoing tests eliminated, the prediction becomes far clearer: the Court has in mind or is likely to embrace a deferential form of strict scrutiny.<sup>218</sup> Such a standard would not be “fatal in fact” but merely stringent in application. As discussed earlier, the Court is typically unwilling to show deference to the government when it

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213. Tushnet, *supra* note 207, at 430 (“I find it quite difficult to figure out what might be the analogy in the Second Amendment context to the distinction between content-based and content-neutral regulations.”).

214. Further illustrating this point is the common adage, “Sticks and stones may break my bones, but words will never hurt me.”

215. Tushnet, *supra* note 207, at 430–31 (“More generally, the intuition behind the doctrines dealing with content-neutral regulations is that they are not ‘about’ speech, but rather are ‘about’ urban amenities like quiet or ‘about’ the streets, and only incidentally restrict the dissemination of expression. In contrast, gun regulations are ‘about,’ well, guns.”).

216. *Id.*

217. Whether the First Amendment content-neutral standard works for laws that have a secondary effect on the protected Second Amendment right is beyond the scope of this Comment.

218. Professors Reynolds and Denning appear to be in consensus on this point. See Glenn H. Reynolds & Brandon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406, 410 (2008) (“Even if a reviewing court adopts the kind of intermediate standard of review urged by the Solicitor General, it might simply apply the standard in a way that defers to governmental judgments about the necessity of regulation.”).

strictly scrutinizes a regulation infringing upon a fundamental right.<sup>219</sup> However, the exceptions listed by the *Heller* majority signal that the Court is willing to give the government some leeway in terms of satisfying strict scrutiny in the Second Amendment context because of the clear public safety issues involved with firearms regulations.<sup>220</sup>

A deferential form of strict scrutiny has been suggested in other contexts by members of the Court.<sup>221</sup> The *Grutter* Court, while applying strict scrutiny, deferred to the University of Michigan's judgment that student body diversity was necessary to achieve the law school's academic mission.<sup>222</sup> Although three of the members of the *Heller* majority dissented from *Grutter* on the issue of deference,<sup>223</sup> Justices Scalia and Thomas in particular previously argued in *Johnson v. California*—Justice Thomas writing for the duo in dissent—that the Court may employ a deferential form of review even where strict scrutiny normally applies.<sup>224</sup> To be sure, the context in *Johnson*—an inmate's equal protection challenge to a state policy of placing inmates of the same race in the same cell—differs significantly from the Second Amendment context.<sup>225</sup> Nonetheless, *Johnson* remains highly instructive. Justices Scalia and Thomas were willing to apply a form of deferential review where strict scrutiny would usually apply out of prison safety concerns.<sup>226</sup> Similar safety concerns are present in the *Heller* opinion: the *Heller* Court's focus on the Second Amendment's implications of heightened public safety concerns (exemplified by the Court's listing of “presumptively lawful regulatory measures”) signals a likeliness to defer to the government

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219. See *supra* Part IV.B.2.a and accompanying notes.

220. Even the supporters of the *Heller* decision appear to envision such a form of watered-down strict scrutiny. See, e.g., Neily, *supra* note 22, at 158 (“And that takes us to the implications of the *Heller* decision, which I think will be *fairly modest in terms of their impact on existing gun laws*, but hopefully more significant from a symbolic standpoint.”) (emphasis added).

221. See, e.g., *Panel Two: Living with Lawrence*, 7 GEO. J. GENDER. & L. 299, 321 (2006) (discussing “the disintegration of the tiers of scrutiny”).

222. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). In recognizing student body diversity within the University of Michigan Law School as a compelling interest, Justice O'Connor emphasized that “universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders.” *Id.* at 332; cf. LOUIS ELBEL, THE VICTORS (1898), available at [http://www.lib.umich.edu/files/victors\\_0.pdf](http://www.lib.umich.edu/files/victors_0.pdf) (saluting “[the University of] Michigan[,] the leaders and best”).

223. See *Grutter*, 539 U.S. at 380 (Rehnquist, C.J., dissenting) (“Although the Court recites the language of our strict scrutiny analysis, its application of that view is unprecedented in its deference.”).

224. 543 U.S. 499, 524 (2005) (Thomas, J., dissenting).

225. *Id.*

226. See *id.* at 526–27 (explaining how “housing inmates in double cells without regard to race threatens not only prison discipline, but also the physical safety of inmates and staff”).

under the special circumstances presented by firearms.<sup>227</sup> As demonstrated by *Grutter* and Justice Thomas's *Johnson* dissent, such deference is not necessarily in opposition to the Court's constitutional jurisprudence.

Under this watered-down version of Second Amendment strict scrutiny, a reviewing court would accord the government limited deference in satisfying both the compelling-interest and narrow-tailoring prongs. Given the list of "presumptively lawful regulatory measures,"<sup>228</sup> it appears that the *Heller* Court accepts public safety, or what Professor Eugene Volokh calls "danger reduction,"<sup>229</sup> as a compelling government interest—or else these measures would fail on the first prong of Second Amendment strict scrutiny. If the *Heller* Court itself is willing to imply public safety as a compelling interest without any prodding from the government on these regulations, it likely would accept virtually any argument by the government that there is a compelling interest—i.e., public safety—for a direct firearms regulation. Thus, the compelling interest prong does little work in the Second Amendment context; the key to this form of deferential strict scrutiny turns on narrow tailoring.

Under the deferential prong of narrow tailoring, a reviewing court would make a subjective determination as to the necessity of the challenged regulation to further public safety. As Professor Volokh explains, the reviewing court may "demand empirical evidence only" where it is skeptical of the law's necessity to public safety.<sup>230</sup> Professor Volokh identifies this approach as one that the Court has employed in certain strict scrutiny situations; however, he subsequently dismisses it, arguing that (1) it would lead to unpredictability in results and (2) judges are unqualified to determine when empirical evidence on public safety and firearms is or is not necessary.<sup>231</sup>

Professor Volokh may be correct from a normative standpoint, but the question for present purposes is which test the *Heller* opinion fairly reflects or presages. In identifying the list of "presumptively lawful regulatory measures," the Court did not ask for empirical evidence. Instead, it assumed that such regulations were necessary in furtherance of public safety, a compelling interest in the Second Amendment context. Whether the *Heller* majority was qualified to

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227. 128 S. Ct. 2783, 2816–17, n.26 (2008).

228. *Id.* at 2816–17.

229. See Volokh, *supra* note 20, at 1459.

230. *Id.* at 1469.

231. *Id.*

make such an assumption is a debate for another forum; here, the Court deferred to its own wisdom—correct or incorrect—that these regulations were necessary. Given that the *Heller* Court applied this approach to regulations it introduced sua sponte, it would likely apply the same deferential, yet subjective, approach to firearms regulations directly at issue in the future.

Of course, such deferential strict scrutiny review would have limits. As *Heller* made clear, a prohibition on a class of firearms in common use that are typically used for lawful purposes runs afoul of the Second Amendment.<sup>232</sup> Thus, if the regulation at issue were similar to the District's blanket ban, a reviewing court would refuse to defer to the government and, moreover, would likely strike it down for overbreadth.

In sum, the Second Amendment framework, as determined through the textual clues of *Heller*, can be stated briefly in the following two-part test. First, does the challenged regulation fall within the scope of the protected Second Amendment right? To satisfy this prong, the party must show both that the challenged regulation implicates a lawful purpose for which firearms are typically used *and* that the regulation involves a class of firearms that is “in common use at the time.” Second, assuming that these prerequisites are satisfied, does the challenged regulation satisfy deferential strict scrutiny? For this prong, a reviewing court would be willing to show a limited amount of deference to the government in both the compelling-interest and narrow-tailoring requirements—but only to a certain point (e.g., it would not accept a blanket prohibition like the one in *Heller*).

### 3. Rejecting Burden Analysis

Professor Volokh proposes a notable doctrinal framework in which the applicable level of review generally is based on the level of burden presented by the challenged regulation.<sup>233</sup> His argument is that application of a unitary test—such as the form of deferential strict scrutiny suggested above—“do[es not] make sense,” as other constitutional provisions are not subjected to a singular rigid framework.<sup>234</sup> Moreover, he quotes portions of *Heller* that seemingly support application of a burden-type test.<sup>235</sup> At the end of the day, his

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232. 128 S. Ct. at 2817–18.

233. See Volokh, *supra* note 20, at 1446–47.

234. *Id.* at 1443.

235. See *id.* at 1456.

Second Amendment framework largely turns on the level of burden presented by the regulation:

The best way to protect self-defense rights, I think, is to acknowledge that courts are likely to find slight burdens to be constitutional, to focus on defining the threshold at which the burden becomes substantial enough to be presumptively unconstitutional, and to concretely evaluate the burdens imposed by various gun restrictions.<sup>236</sup>

Put differently, the substantial burden test is the Second Amendment analog to the undue burden test in the abortion context.<sup>237</sup>

Professor Volokh may be correct that his proposed substantiality test presents “[t]he best way” for courts to enforce the right protected by the Second Amendment in a doctrinally honest manner. However, it is quite difficult to read *Heller* as supporting any type of burden analysis for laws that directly regulate the use or possession of firearms. Looking to the text itself, *Heller* implied that such an analysis into the level of burden was improper.<sup>238</sup> But even absent this strong textual indication, the *Heller* opinion cannot be read as supporting anything resembling an undue burden test simply due to the Justice who wrote the opinion (and at least one other Justice who joined it). In his memorable dissent in *Planned Parenthood v. Casey*, Justice Scalia—joined by Justice Thomas, among others—lambasted the notion of undue burden, arguing:

I agree, indeed I have forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right . . . , but that principle does not establish the quite different (and quite dangerous) proposition that a law which directly regulates a fundamental right will not be found to violate the Constitution unless it imposes an “undue burden.”<sup>239</sup>

His argument continues with equal vigor today. It is nearly impossible to imagine Justice Scalia writing an opinion—or Justice Thomas joining one—that implicitly endorses a burden-threshold test to challenges to laws directly regulating the presumably fundamental

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236. *Id.* at 1461.

237. *See id.* at 1459 (“But there’s no doubt that there’ll be controversy about the substantiality inquiry, just as there’s controversy about how large a burden on abortion rights must be to qualify as substantial . . . .”). The undue burden test can be found in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–78 (1992).

238. *See* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (“[Justice Breyer] proposes, explicitly at least, none of the traditionally expressed levels [of scrutiny] (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’”) (emphasis added).

239. *Casey*, 505 U.S. at 987–88 (Scalia, J., dissenting) (first emphasis added).

right to bear and keep firearms.<sup>240</sup> Although *Heller* does not address the situation of a facially neutral law that has the secondary effect of burdening the Second Amendment right, the decision simply cannot be interpreted as supporting a substantial, or undue, burden test for laws that directly regulate firearms. Both the opinion's text and the composition of the majority belie such an interpretation.

Again, as a matter of doctrinal honesty, Professor Volokh's proposal may present the best framework for analyzing Second Amendment claims. However, this Comment has focused on building a framework from the clues hidden within the text of *Heller* and from the Court's constitutional jurisprudence. And this Comment contends that, however logically inconsistent, a faithful reading of *Heller* best supports the proposed two-pronged doctrinal framework: whether the challenged regulation (1) falls within the scope of the protected Second Amendment right, and (2) satisfies deferential strict scrutiny.

## V. CONCLUSION

*Heller* dramatically altered the Second Amendment playing field. Although the Second Amendment was enacted in 1791, it has taken over two hundred years for the Supreme Court to conclude decisively that the amendment protects an individual right to keep and bear arms. However, now that the individual right has been recognized, the gates previously holding back the flood of potential challenges under the Second Amendment have swung wide open. Without any clear direction from the Supreme Court on how to review these claims, the lower federal courts have already struggled in their initial Second Amendment cases, thereby lending credence to the fear of Judge J. Harvie Wilkinson<sup>241</sup> that the result of *Heller* will be to sink the federal judiciary in a Second Amendment quagmire for the foreseeable future.

Yet, rather than waiting for clarification from the Court, perhaps courts can better use *Heller* to dig themselves out. As this Comment has argued, the Supreme Court has hidden within *Heller* numerous textual puzzle pieces that can be assembled into a two-part framework for scrutinizing Second Amendment challenges to direct

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240. Along a similar vein, see Larson, *supra* note 202, at 8 ("The irony of an undue burden test somehow emerging implicitly from the pen of Justice Scalia, however, would be rich indeed, and I doubt that a Court majority would embrace this as the relevant test.")

241. See Wilkinson, *supra* note 13, at 288 ("Circuit splits and open questions [regarding the Second Amendment] will persist for our lifetimes."); see also Posner, *supra* note 13, at 32 ("It may take many years for the dust to settle [surrounding the Second Amendment]—many years that our litigious society does not need.")

regulations of firearms. Under this general test, a reviewing court will determine if (1) the challenged regulation falls within the scope of the right protected by the Second Amendment, and (2) the regulation satisfies a watered-down version of strict scrutiny. Rather than punting on the issue until the Supreme Court announces a test, lower courts could apply this standard of review because it is faithful to the opinion in *Heller*. There is no reason for “[c]ircuit splits and open questions” to “persist for our lifetimes.”<sup>242</sup> The Second Amendment framework is hidden within *Heller*.

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242. Wilkinson, *supra* note 13, at 288.

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