

NOTES

SECOND AMENDMENT STANDARDS OF REVIEW: WHAT THE SUPREME COURT LEFT UNANSWERED IN *DISTRICT OF COLUMBIA V. HELLER*

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I. INTRODUCTION

In June 2008 the Supreme Court issued its opinion in the case of *District of Columbia v. Heller*,¹ its first directly concerning the Second Amendment since 1939.² *Heller* involved a series of D.C. laws that had the effect of banning the possession of handguns.³ At the narrowest level, the Court was deciding whether a ban on handguns violated the Second Amendment; however, the broader issue facing the Court concerned the fundamental meaning of the Second Amendment: does the amendment protect a collective or individual right to bear arms? To that question, the Court answered the latter,⁴ thus ending an at-times heated debate among legal scholars and those on both sides of the gun control debate.

But the Court left the door open for a new debate to begin in the Second Amendment context: what standard of review applies to legislation

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1. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).
2. That case was *United States v. Miller*, 307 U.S. 174 (1939).
3. *Heller*, 128 S. Ct. at 2788.
4. *Id.* at 2799.

that restricts an individual's right to bear arms? Writing for the majority, Justice Scalia noted that "[u]nder 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,"⁵ and—unapologetically⁶—failed to identify which standard the majority was using in this case. Justice Breyer's dissent chided Scalia for this move, claiming that this failure to be more specific "throw[s] into doubt the constitutionality of gun laws throughout the United States."⁷

To this point, there has been very little written in legal academia on the topic of Second Amendment standards of review. This is perhaps unsurprising, given that until 1989, when Sanford Levinson dubbed the Second Amendment the "embarrassing" amendment⁸ for "not [being] at the forefront of constitutional discussion, at least as registered in what the academy regards as the venues for such discussion—law reviews, casebooks, and other scholarly legal publications"⁹—there was very little written about the amendment at all. Since that time, most of the literature has focused on the issue that was central to *Heller*—the type of right the Second Amendment protects, collective or individual.¹⁰ Now that the individual-right theory has prevailed, the next logical step in the conversation is to address the standard-of-review issue.

This Note seeks to aid in that process. It suggests a few analytical tools that would allow a court to justify using intermediate scrutiny for

5. *Id.* at 2817–18 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)) (footnote and citation omitted). Justice Scalia explicitly excludes the rational basis test from the "standards of scrutiny that . . . have [been] applied to enumerated constitutional rights." *Id.* at 2817. In a footnote, he notes that the D.C. law would pass rational basis scrutiny, but claims that this test could not be used when dealing with regulations of a "specific, enumerated right." *See id.* at 2817 n.27.

6. *See id.* at 2821 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .").

7. *Id.* at 2870 (Breyer, J., dissenting).

8. Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 637 (1989).

9. *Id.* at 639–40 (footnotes omitted). Before Levinson's article, only 7 law review articles were published that included the terms "Second Amendment" or "right to bear arms" in the title. Westlaw search in JLR database, ti("second amendment" or "right to bear arms"), prior to December 1989. Since then, the same search shows 213 articles having been published. If the search term "gun!" is added to the search with an "or" connector, the disparity is equally glaring (70 articles before Levinson's article, 899 articles after).

10. The answer to the *Heller* question necessarily precedes the question of the appropriate standard of review. For example, if the Court had adopted the collective-right view of the Second Amendment, discussion of the appropriate standard of review would be unnecessary in most cases, as individuals who are not members in a militia would probably not be able to demonstrate that the government act infringes on a constitutionally recognized right.

nearly all firearm regulations. Part II provides an overview of the collective- and individual-right theories, as presented in *Heller*. Part III then discusses the purpose of standards of review and how courts determine which test is appropriate for a given issue. Part III also discusses the reasons that courts have valued variations of the same protected conduct differently, and as a result, assigned such variations different levels of judicial scrutiny. For example, the Supreme Court has afforded different levels of protection to different kinds of speech that do and do not promote the purpose of the First Amendment. Part IV summarizes a sample of the standards of review that have been suggested previously for the Second Amendment in the legal literature. Part V then attempts to justify why categorical exclusions and intermediate scrutiny could be used in Second Amendment jurisprudence as they are for the First Amendment, and why the justification for their use may be even stronger in the Second Amendment context. This part also conducts an exercise that seeks to eliminate the cause of much of the debate over the Second Amendment—the text—from the discussion by analyzing whether or not the right to bear arms would be considered a fundamental right under the Fourteenth Amendment’s concept of liberty *if the Second Amendment did not exist at all*. Finally, this Note analyzes how a court might address three types of gun control regulations under intermediate scrutiny.

II. *HELLER*’S RIGHT TO BEAR ARMS

Dick Heller, a special police officer, was denied a registration certificate for a handgun he wished to keep at his home in the District of Columbia.¹¹ This denial was unsurprising, given a series of D.C. laws essentially prohibiting the possession of handguns: one law made it illegal to carry an unregistered firearm,¹² and another prohibited the registration of handguns.¹³ Lawfully owned firearms were further required to be kept unloaded or bound by trigger lock unless being used for lawful recreational activities.¹⁴ Heller brought suit challenging the constitutionality of these laws, and his case reached the Supreme Court after the D.C. Circuit ruled in his favor, reversing the district court’s dismissal of his complaint.¹⁵

The task of the *Heller* Court was to make sense of the text of the

11. *Heller*, 128 S. Ct. at 2788.

12. D.C. CODE § 22-4504 (2001).

13. *Id.* § 7-2502.02.

14. *Id.* § 7-2507.02.

15. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *rev’g* 311 F. Supp. 2d 103 (D.D.C. 2004).

Second Amendment—“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”¹⁶—which has been recognized as “perhaps one of the worst drafted of all [the Constitution’s] provisions.”¹⁷ The amendment’s preamble, or prefatory clause,¹⁸ which sets forth its civic purpose, has been the primary cause of the interpretive split over the kind of right granted by the Second Amendment. Collective-right theorists give significant import to the prefatory clause, concluding that the amendment only protects the right to “possess and carry a firearm in connection with militia service.”¹⁹ Individual-right theorists, in turn, “minimize its weight,”²⁰ and find that the amendment protects an individual’s right to possess firearms, regardless of whether the possession is connected to militia service. This part compares and contrasts Justice Scalia’s majority and Justice Stevens’s dissenting opinions, which encapsulate the arguments of the individual-right and collective-right theorists, respectively, looking at how each (1) interprets the actual text of the Second Amendment, (2) views the importance of the prefatory clause in understanding the meaning of the amendment as a whole, and (3) handles Supreme Court precedent. While *Heller* dictates that the individual-right view of the Second Amendment is the “correct” one, understanding both sides of the debate provides useful background for discussing the appropriate standard of review to be used in future cases.

A. TEXTUAL INTERPRETATION

The differences between the individual- and collective-right views of the Second Amendment—and the corresponding majority and dissenting opinions—begin with the meaning ascribed to the amendment’s individual words. The details of each opinion’s analysis are not entirely relevant for the purposes of this Note, so this section provides only a brief overview. Justice Scalia’s majority opinion began with the operative clause and the words “right of the people.”²¹ Scalia noted that in each of the other three times these words are used in the Constitution, they “unambiguously refer to individual rights, not ‘collective’ rights, or rights that may be exercised

16. U.S. CONST. amend. II.

17. Levinson, *supra* note 8, at 644.

18. These terms both refer to the section that states “[a] well-regulated Militia, being necessary to the security of a free State.” U.S. CONST. amend. II.

19. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008).

20. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 301 (2000).

21. *Heller*, 128 S. Ct. at 2788.

only through participation in some corporate body.”²² Because the Court had previously held that the words “the people” must be interpreted in the same way throughout the Bill of Rights,²³ this created a “strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”²⁴ In contrast, Justice Stevens’s dissent challenged the idea that the right of the people refers to individual rights when used elsewhere in the Constitution. The right of the people in the First Amendment to assemble and petition the government, Stevens argued, is only effective when it involves groups of individuals in concert. And while the Fourth Amendment’s protection against unreasonable searches and seizures “need not be exercised in any collective sense,” it “describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct.”²⁵

The majority’s analysis then moved to the words “to keep and bear Arms,”²⁶ the one phrase of the amendment that most probably consider a nonissue. Justice Stevens’s dissent makes the argument, however, that during the Framing Era, the words “bear arms” implied a military usage.²⁷ The majority refuted this argument, noting that the word “bear” is more commonly understood as a synonym for “carry,” and even cited Justice Ginsburg—a dissenter in *Heller*—for this proposition.²⁸ Taken together with the above understanding of “the right of the people,” the majority stated that the operative clause clearly protects an individual’s right to keep and bear arms.

Justice Scalia, because he felt that there had to be a logical connection between the prefatory and operative clauses, next needed to determine whether the above interpretation of the operative clause comported with the prefatory clause. Within the Second Amendment, the phrase “a well-regulated Militia” has been the most debated. The *Heller* majority adopted the interpretation of individual-right theorists, which is that the militia refers to “all males physically capable of acting in concert for the common defense.”²⁹ According to Scalia, the problem with the collective-right view, and thus with the *Heller* dissent’s view, was that it “identif[ied] the wrong

22. *Id.* at 2790.

23. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

24. *Heller*, 128 S. Ct. at 2791.

25. *Id.* at 2827 (Stevens, J., dissenting).

26. *Id.* at 2791 (majority opinion).

27. *Id.* at 2828–30 (Stevens, J., dissenting).

28. *Id.* at 2793 (majority opinion) (citing *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

29. *Id.* at 2799 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

thing, namely, the organized militia.”³⁰ There were two militias contemplated by the Constitution: organized militias, such as the army and navy, which Congress was given power to create, and the unorganized militia, which was already in existence, and which the Militia Act of 1792³¹ gave Congress the power to call forth.³² Scalia’s winning argument was that by using the phrase “the militia,” as opposed to “a militia,” the Second Amendment must have referred to the preexisting, unorganized militia.³³ Adopting this view, the majority then found no conflict between the operative and prefatory clauses.

B. IMPORT OF THE PREFATORY CLAUSE

The most debated question related to Second Amendment interpretation asks what importance the prefatory clause plays in determining the amendment’s meaning. The clause has been deemed “arresting,”³⁴ for no other amendment in the Constitution has a similar clause setting forth its purpose,³⁵ and the collective-right camp uses this fact to argue that “[t]he relevance of the Second Amendment’s preamble to its meaning would seem so obvious as not to need justifying.”³⁶ Stevens’s dissent frequently refers to the prefatory clause as setting forth “*the purpose*”³⁷ of the amendment, thus seeking to eliminate from the discussion any argument that other purposes—such as hunting or self-defense—should be considered in an interpretation of the amendment.³⁸

Justice Scalia sought to refute this argument quickly, beginning his entire analysis by acknowledging the existence of the prefatory clause, and signaling that it would have a limited role to play in the outcome of the

30. *Id.* at 2800.

31. Act of May 2, 1792, ch. XXXIII, 1 Stat. 271 (“[E]ach and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia.”).

32. *See Heller*, 128 S. Ct. at 2800.

33. *Id.*

34. Dorf, *supra* note 20, at 300.

35. Levinson, *supra* note 8, at 644. Some suggest that the patents and copyrights clause, which gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” U.S. CONST. art. I, § 8, cl. 8, contains a similar preamble. Respondent’s Brief at 8, *Heller*, 128 S. Ct. 2783 (No. 07-290); Dorf, *supra* note 20, at 300; Levinson, *supra* note 8, at 644 n.38. However, I find the interpretation of the court in *Silveira v. Lockyer*, 312 F.3d 1052, 1068 n.23 (9th Cir. 2002), more compelling, as it understands that opening phrase as “set[ting] forth the substantive power granted to Congress, not limit[ing] . . . such a power.”

36. Dorf, *supra* note 20, at 301.

37. *See, e.g., Heller*, 128 S. Ct. at 2824 (Stevens, J., dissenting) (emphasis added).

38. *Id.* at 2825–26.

case. “The former does not limit the latter grammatically,” Scalia wrote in reference to the amendment’s prefatory and operative clauses, “but rather announces *a* purpose.”³⁹ He noted that there must be a “logical connection” between the two clauses, but in his view, the prefatory clause could only be used to clarify an ambiguity in the operative clause—it could not be interpreted to create one.⁴⁰ Additionally, Scalia undercut the uniqueness-of-the-preamble argument, pointing to an article by Eugene Volokh, who noted that the presence of a preamble in *state* constitutional provisions was not unique at all during the Framers’ era.⁴¹

The majority then refuted that the prefatory clause announced *the* purpose of the Second Amendment. Both the majority and dissent agreed⁴² that at the time of the Constitution’s ratification, there was a fear of “the new national government . . . us[ing] its power to establish a powerful standing army and eliminate the state militias;”⁴³ the Second Amendment’s protection of state militias was thus the Constitution’s method of assuaging these fears. The dissent argued that this was the only purpose of the amendment, and contrasted its language with contemporaneously adopted state constitutional provisions, some of which explicitly noted that the right to bear arms was intended to cover military *and* civilian usage. For example, Justice Stevens cited the Pennsylvania Declaration of Rights, which declared that “the people have a right to bear arms for the defence of themselves and the state,” and “the liberty to fowl and hunt.”⁴⁴ That the Framers deliberately left out of the Second Amendment similar civilian uses, Stevens argued, showed their “single-minded focus . . . on military uses of firearms, which they viewed in the context of service in state militias.”⁴⁵

The majority’s answer to this argument was that the prefatory clause “announce[d] the purpose for which the right was *codified*,” the breadth of the right itself, however, could be wider.⁴⁶ Justice Scalia noted that the

39. *Id.* at 2789 (majority opinion) (emphasis added).

40. *Id.* at 2789, 2790 n.4.

41. *Id.* at 2789 (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998)).

42. *See id.* at 2801; *id.* at 2831–33 (Stevens, J., dissenting).

43. Levinson, *supra* note 8, at 644.

44. *Heller*, 128 S. Ct. at 2825–26 (Stevens, J., dissenting).

45. *Id.* at 2826.

46. *Id.* at 2801 (majority opinion) (emphasis added). Volokh has a similar view of prefatory clauses in general, referring to them as “justifications.” Volokh, *supra* note 41, at 795 n.8. He remarks that in the Framing Era, constitutions were political documents that required the support of the people to gain acceptance, and these justification clauses served a persuasive and emotional purpose that helped to gain the allegiance of the citizenry. *Id.* at 795–96 & n.8.

Framers were constantly debating whether certain rights needed to be codified in the Bill of Rights; and the Federalists sought to overcome the Anti-Federalist's pervasive fear of federal elimination of the state militias by codifying the Second Amendment. The implication is that the right to bear arms, which was "even more important for self-defense and hunting,"⁴⁷ would have been protected even without the Second Amendment.

C. SUPREME COURT PRECEDENT

The Justices then had to deal with Supreme Court precedent, primarily the case of *United States v. Miller*.⁴⁸ In *Miller*, two men had transported a double-barrel shotgun with a barrel less than eighteen inches in length from Oklahoma to Arkansas in violation of the National Firearms Act of 1934. The defendants argued that the Act violated the Second Amendment, and the district court agreed.⁴⁹ The Supreme Court reversed, holding that:

[i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.⁵⁰

The Court then went on to state that the amendment's clear purpose was to assure the existence and effectiveness of the states' militias, and thus, "[i]t must be interpreted and applied with that end in view."⁵¹

According to the *Heller* dissent, the requirement that the "possession or use . . . ha[ve] 'some reasonable relationship to the preservation or efficiency of a well regulated militia'" provides clear Supreme Court precedent for the collective-right interpretation of the Second Amendment: if the *individual's* use of the firearm is not military in nature, there is no protection.⁵² And requiring that the amendment be interpreted in accordance with the prefatory clause is further evidence that the *Miller* Court adopted the collective-right view and placed significant import on

47. *Heller*, 128 S. Ct. at 2801.

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

49. *Id.* at 175–77.

50. *Id.* at 178.

51. *Id.*

52. *Heller*, 128 S. Ct. at 2845 (Stevens, J., dissenting) (quoting *Miller*, 307 U.S. at 178).

the prefatory clause itself.

Justice Scalia and the majority interpreted the phrase “reasonable relationship to . . . a well regulated militia” to refer to the *firearm itself*, not the individual’s use of the firearm.⁵³ In other words, according to the *Heller* majority, the result in *Miller* was based on the fact that sawed-off shotguns were not used by the military at the time, not that the petitioners’ use was unrelated to the military.⁵⁴ Had this not been the case, Scalia noted, “it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.”⁵⁵

D. THE HOLDING

The result of Justice Scalia’s analysis was a finding that the Second Amendment protects an individual’s right to keep and bear arms, regardless of any relationship to militia service. At the center of the Second Amendment is the ability to defend one’s self, family, and property; because the D.C. laws prohibited “an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose,” the laws were held unconstitutional.⁵⁶

As mentioned above, rather than identify the standard of review it was using to analyze the constitutionality of the D.C. gun laws before it, the majority simply stated that these laws would “fail constitutional muster” under any of them.⁵⁷ Justice Breyer’s dissent worried that failing to be more specific “throw[s] into doubt the constitutionality of gun laws throughout the United States.”⁵⁸ Taking heed of this concern, the next part of this Note begins a discussion of standards of review before attempting to justify the use of intermediate scrutiny for Second Amendment cases.

53. *Id.* at 2814 (majority opinion).

54. This interpretation of *Miller* can lead to peculiar outcomes: taken to its logical extremes, it suggests that the Court could find arms such as handguns outside the protection of the Second Amendment, while machine guns and other weaponry commonly used by the military could be granted protection. *E.g.*, Levinson, *supra* note 8, at 654–55; Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1122–23 (2000); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 666 (2000).

55. *Heller*, 128 S. Ct. at 2814.

56. *Id.* at 2817–18.

57. *Id.*

58. *Id.* at 2870 (Breyer, J., dissenting).

III. THE USE OF STANDARDS OF REVIEW AND THE HIERARCHY OF CONSTITUTIONAL VALUES THEY CREATE

This part provides an overview of the primary standards of review⁵⁹ applied by the Supreme Court in non-Second Amendment cases and how the Court decides which standard of review to use. This part also explains how the use of different standards of review reflects and implements a hierarchy of constitutional values, and that the choice of a particular standard of review reflects the Court's value determination of the right at issue as compared to other constitutionally protected rights. First, however, the following section discusses the purpose of standards of review and the analytical framework they provide courts that must resolve questions of constitutionality.

A. HOW STANDARDS OF REVIEW WORK

While the Constitution protects numerous rights, it does not set forth the boundaries of these rights or tell courts how to determine when government regulations have gone too far. This is the purpose of standards of review—they provide the judge with an “argument structure,”⁶⁰ or “rules for determining whether a particular challenged governmental act violates a substantive constitutional principle.”⁶¹

Standards of review achieve this purpose by forcing courts to address three primary concerns when resolving a claim that a government act violates the Constitution. First, a court must consider what types of government interests support upholding the constitutionality of a statute.⁶² As will be discussed more fully in the next section, the government must either put forth legitimate, important, or compelling interests, depending on the standard of review, to support a statute that infringes on a constitutional right.⁶³ A court must then consider “the relationship between the statute's

59. Standard of review is referred to alternatively as the “level of scrutiny” applied by the Court. *E.g.*, ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 539 (3d ed. 2006).

60. Michael H. Shapiro, *Constitutional Adjudication and Standards of Review Under Pressure from Biological Technologies*, 11 *HEALTH MATRIX* 351, 370 (2001).

61. David Chang, *Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review*, 58 *RUTGERS L. REV.* 777, 781 (2006) (emphasis omitted). *See also* CHERMERINSKY, *supra* note 59, at 539 (stating that a standard of review provides “instructions for balancing[,] . . . inform[ing] courts as to how to arrange the weights on the constitutional scale in evaluating particular laws”).

62. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 *U. PA. J. CONST. L.* 225, 227 (2002).

63. *E.g.*, CHERMERINSKY, *supra* note 59, at 540–41.

means and how it advances those governmental ends.”⁶⁴ The primary standards of review dictate that the means chosen be either rationally related, substantially related, or necessary to the ends sought by the government act.⁶⁵ Lastly, courts must examine the degree to which the right is impaired by the government act.⁶⁶ The answers to these inquiries will determine whether or not the government act is constitutional.

In a sense, the system of standards of review directs the constitutional analysis by forcing the court to sort different claims into separate categories.⁶⁷ Each claim of unconstitutionality in response to a government act requires a number of categorizations; labeling the right that has been allegedly infringed is the most important such categorization. The category that the infringed right is placed in⁶⁸—for example, categorizing the freedom of speech as a “fundamental right”⁶⁹—directs the court on how to answer the two main concerns discussed in the previous paragraph by dictating the appropriate standard of review to apply. The next section provides a brief overview of three primary standards of review and one alternative tool that courts utilize when addressing claims of unconstitutionality.

B. PRIMARY STANDARDS OF REVIEW UTILIZED IN CONTEMPORARY CONSTITUTIONAL JURISPRUDENCE

1. Rational Basis

The rational basis test is the lowest level of scrutiny applied to

64. Kelso, *supra* note 62, at 227.

65. *E.g.*, CHEMERINSKY, *supra* note 59, at 540–41. Again, I will discuss the required relationship between means and ends more fully in Part III.B.

66. Kelso, *supra* note 62, at 228; Shapiro, *supra* note 60, at 367–68. Often, this third inquiry ends when it is decided that a right has been infringed, and is addressed when considering the relationship between the statute’s means and the ends sought by the government. For example, requiring a statute to be rationally related to the government’s purpose implies that the burden on the individual right shall not be irrational, just as a requirement that a law be necessary to the governmental interest implies that the law place the least restrictive burden possible on the right. Other standards of review that apply to particular constitutional rights require a greater focus on the burden imposed—for example, the “undue burden” analysis applied by Justice O’Connor to abortion regulations in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), or the requirement that time, place, and manner regulations of speech leave open “ample alternative channels for communication,” Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 787–90 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

67. *See* Shapiro, *supra* note 60, at 367–68.

68. How the court decides which categories to assign to different rights will be discussed in Part III.C.

69. *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

government actions. Said another way, it is the standard of review most deferential to the government, and when used, rarely finds acts or statutes unconstitutional.⁷⁰ Under the rational basis test, a law will be upheld if it is “rationally related to a legitimate government purpose.”⁷¹ Perhaps stating the obvious, the legitimate-government-purpose requirement addresses the first concern mentioned in the previous section—the type of government interest required—that standards of review force courts to address, while the rationally related requirement goes to the relationship between the statute’s means and its ends. Courts reviewing a government act under the rational basis test grant the act a presumption of constitutionality; thus, in order to prevail, the plaintiff has the burden of showing that the law either has no legitimate purpose or is not rationally related to achieving that purpose.⁷²

In understanding just how deferential the rational basis test is to government actions, it should be noted that the legitimate purpose presented by the government to a reviewing court need not be the actual purpose that the government had in mind when enacting the statute or engaging in the challenged act.⁷³ As long as it is conceivable that the challenged government act could achieve any legitimate governmental purpose, it will be upheld as constitutional.⁷⁴ The Supreme Court explained this principle in *United States Railroad Retirement Board v. Fritz*, stating that “[w]here . . . there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,’ because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.”⁷⁵ Furthermore, as the rationally related requirement suggests, the rational basis test does not require that the challenged legislation actually be effective at achieving the government’s purpose—it must merely be conceivable that the purpose would be achieved.⁷⁶ The policy behind substantial deference to government enactments reflects respect for the separation of powers and representative government: “This is a necessary

70. See CHEMERINSKY, *supra* note 59, at 540; Kelso, *supra* note 62, at 230.

71. CHEMERINSKY, *supra* note 59, at 540 (emphasis removed).

72. *Id.*

73. *Id.*; D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 79 (“[T]he Court often has . . . imput[ed] purposes to a legislature, searching for any conceivable purpose or constructing its own plausible purpose.”).

74. CHEMERINSKY, *supra* note 59, at 540.

75. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (citation omitted).

76. See *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (“The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible.”).

result of different institutional competences, and its reasons are obvious. . . . [T]his Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems.”⁷⁷

An obvious question stems from this discussion: what constitutes a legitimate government purpose? Generally, a legitimate government purpose can be found anytime a state is exercising its traditional police powers.⁷⁸ “The traditional police powers of the States is defined as the authority to provide for the public health, safety, and morals”⁷⁹ Legitimate state purposes, however, can be much broader. As the Court stated in *Berman v. Parker*, “Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.”⁸⁰ Therefore, according to Erwin Chemerinsky, “Virtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test.”⁸¹

But while it seems that very few government acts would fail to meet this standard, the Court has had occasion to declare that certain purposes fail even this extremely lenient standard. These pronouncements usually occur in equal protection cases where the purpose behind legislation is to discriminate against certain groups. The Court in *Romer v. Evans*, for example, found unconstitutional an amendment to the Colorado state constitution that would have prohibited any legislative, executive, or judicial action that protected homosexuals from discrimination or granted such persons any benefits.⁸² In so holding, Justice Kennedy’s opinion stated that “[w]e cannot say that Amendment 2 is directed to any

77. *Id.* See also *Fritz*, 449 U.S. at 459–60 (“[The rational basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy. . . . [I]t is not within our authority to determine whether the Congressional judgment expressed in that Section is sound or equitable, or whether it comports well or ill with purposes of the Act. . . . The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.” (citations omitted)).

78. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); CHEMERINSKY, *supra* note 59, at 680.

79. *Barnes*, 501 U.S. at 569.

80. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

81. CHEMERINSKY, *supra* note 59, at 681.

82. *Romer v. Evans*, 517 U.S. 620 (1996).

identifiable legitimate purpose or discrete objective.”⁸³ The Court has also held that classifications made to protect those within the class from others’ biases are not legitimate government purposes. In *City of Cleburne v. Cleburne Living Center*,⁸⁴ the city defended a zoning ordinance requiring a special use permit for a home for the mentally retarded on the basis that it sought to protect the residents of the home from the negative attitudes toward mentally retarded persons.⁸⁵ The Court, refusing this argument, stated that “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently.”⁸⁶ The point to be had is that it should not automatically be assumed that the requirement of a legitimate government purpose is met.⁸⁷

2. Intermediate Scrutiny

Intermediate scrutiny gives less deference to the government than the rational basis test by replacing legitimate government purpose with important government purpose, and rationally related with substantially related. Thus, laws subject to this standard will be upheld if they “serve important governmental objectives and . . . [are] substantially related to achievement of those objectives.”⁸⁸ Although we know that a substantial relationship is more stringent than a reasonable relationship, and an important government interest is more forceful than a legitimate government interest, the line between one and the other is not obvious.⁸⁹

83. *Id.* at 635.

84. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

85. *Id.* at 448–49.

86. *Id.* at 448.

87. Although the Court in *Romer* stated that it was applying rational basis, commentators recognize that the Court was really applying a form of heightened scrutiny. Colorado put forth the public morality as a purpose of the law, and as the quote from *Berman* makes clear, public morality is usually considered a legitimate government purpose. See CHEMERINSKY, *supra* note 59, at 788.

88. *Craig v. Boren*, 429 U.S. 190, 197 (1976). While this formulation of intermediate scrutiny is common in Equal Protection jurisprudence, the language used to describe intermediate scrutiny varies depending on the area of law. For example, laws restricting commercial speech, to which intermediate scrutiny is said to apply, *see, e.g.*, CHEMERINSKY, *supra* note 59, at 541; Bhagwat, *supra* note 66, at 794, will be upheld if the government interest is *substantial* and the regulation *directly advances* that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). Commercial speech regulations also must be narrowly drawn. *See infra* notes 91–92 and accompanying text.

89. *See, e.g.*, Massey, *supra* note 54, at 1129. One formulation of the substantially related test that will be used in this Note requires that the government act “advance[e] or caus[e] the state goal to a significant extent, degree, or magnitude.” Roy G. Spece, Jr., *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281, 1314 (1978) (discussing the ambiguity of the

This troublesome line-drawing issue might be reconciled, however, if one sees intermediate scrutiny, which was created well after rational basis review and strict scrutiny were already established, as the Court's desire to find a middle ground between the two other standards.⁹⁰

Another unsettled concern is how narrowly the regulation must be drawn to satisfy intermediate scrutiny. Strict scrutiny, as discussed in Part III.B.3 *infra*, requires that the regulation be the least restrictive means of achieving the government's purpose. Under intermediate scrutiny, however, the Court has taken a more varied approach. For example, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court required that regulations of commercial speech be "[no] more extensive than is necessary,"⁹¹ and invalidated the Commission's order because it "reache[d] all promotional advertising," not just those advertisements that subverted the Commission's interest in promoting conservation or misled the public.⁹² But in *Ward v. Rock Against Racism*, which involved regulations of speech in a public forum, the Court stated that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."⁹³

In addition to placing higher standards on the government by requiring an important government interest and substantial relationship, intermediate scrutiny also places the party challenging the government act in a preferred position by shifting the burden of proof to the government.⁹⁴ Unlike the rational basis test, the purpose of the government act espoused at trial must be the actual purpose that the legislature had in mind when it enacted the

intermediate scrutiny test).

90. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1298–1300 (2007) (discussing the emergence of intermediate scrutiny as a result of a divided Court and the lessened self-discipline that intermediate scrutiny allows).

91. *Cent. Hudson Gas & Elec.*, 447 U.S. at 566. The Court has since abandoned this articulation of the narrowly tailored standard, at least in relation to commercial speech. See *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (requiring commercial speech regulations to the "reasonable . . . [but] not necessarily the least restrictive means").

92. *Cent. Hudson Gas & Elec.*, 447 U.S. at 569–71.

93. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

94. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that where the government has made classifications based on gender, "[t]he burden of justification is demanding and it rests entirely on the State"); *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

statute—the court cannot conjure up any allowable purpose it can think of, as it can under the rational basis test. “The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”⁹⁵ Each of these points gives a person challenging the constitutionality of a government act reason to favor intermediate scrutiny over the rational basis test.

Intermediate scrutiny has been applied in cases involving gender discrimination, discrimination against nonmarital children, discrimination against undocumented alien children in regard to education, regulation of commercial speech, and time, place, or manner restrictions of speech.⁹⁶ There is also a debate as to whether the Supreme Court has adopted intermediate scrutiny, instead of the rational basis test, to its review of discrimination based on sexual orientation.⁹⁷

3. Strict Scrutiny

The most demanding standard of review (from the perspective of the government) is strict scrutiny, famously described as “‘strict’ in theory and fatal in fact.”⁹⁸ Under this standard, government acts will be upheld as constitutional only when the act is “necessary to further a compelling governmental interest.”⁹⁹ For an act to be necessary, it must present the “least restrictive or least discriminatory alternative” available.¹⁰⁰ Along with having to meet these higher standards, the government also faces a presumption of unconstitutionality, meaning that it bears the burden of proving that the law is in fact necessary to achieve a compelling state interest.¹⁰¹

95. *United States v. Virginia*, 518 U.S. at 533.

96. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 517 n.23 (1981); CHEMERINSKY, *supra* note 59, at 541.

97. *See, e.g., CHEMERINSKY, supra* note 59, at 788–89 (discussing the lack of clarity used by the Court in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003)).

98. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Despite the popularity that this phrase has garnered over the years, the suggestion that the application of strict scrutiny signals an automatic death knell for a government act has been challenged. *See Shapiro, supra* note 60, at 399 (“[H]owever lofty the rank of a constitutional right, no standard of review properly imposes a truly automatic loss on government, even though government may, overall, rarely win the battles fought within the strictest standards.”).

99. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

100. CHEMERINSKY, *supra* note 59, at 541.

101. *See United States v. Am. Library Ass’n*, 539 U.S. 194, 235 (2003) (Souter, J., dissenting) (describing censorship laws as “presumptively invalid owing to strict scrutiny”); CHEMERINSKY, *supra* note 59, at 542.

Although the above formulation of the strict scrutiny test is a foundational principle for first-year law students taking a constitutional law class, this modern formulation only emerged over the last fifty years as a complement to the “Supreme Court’s solidifying commitment to a jurisprudential distinction between ordinary rights and liberties, which the government could regulate upon the showing of any rational justification, and more fundamental or ‘preferred’ liberties entitled to more stringent judicial protection.”¹⁰² In this way, strict scrutiny acts as the manifestation of a hierarchy of constitutional rights and values that has been discussed throughout this Note. Strict scrutiny, taking these rights into account, also “smoke[s] out” legislation motivated by illegitimate or illicit purposes.¹⁰³ The constitutional rights to which strict scrutiny applies illustrate this point. For example, it is difficult to see how there would ever be a licit motive in passing a law that makes classifications based on race or regulates political speech, except in extremely exigent circumstances.

Strict scrutiny is applied to racial, or suspect, classifications under the Equal Protection Clause; it provides the default rule for assessing content based regulations of speech and exclusions of the press from criminal trials; it is used to assess alleged violations of fundamental rights under procedural and substantive due process; and it is used when addressing statutes that impose substantial burdens on freedom of association.¹⁰⁴

4. An Alternative Principle: Categorical Exclusions

Another tool that courts use when “doing” constitutional law—and one that can, and often does, play a role in Second Amendment jurisprudence—is the categorical exclusion. Although categorical exclusions are not standards of review, they fit into this discussion because they can play a major role in answering questions of constitutionality: if the allegedly infringed right (or person claiming the right) falls within a categorical exclusion, the plaintiff’s claim will almost certainly fail.¹⁰⁵

Categorical exclusions are most commonly used in First Amendment freedom of speech jurisprudence. As used in that context, categorical exclusions essentially differentiate between speech as understood in everyday language, and speech as understood under the First Amendment. Said another way, certain kinds of speech will not be considered speech

102. See Fallon, *supra* note 90, at 1285.

103. *Id.* at 1308–11; Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 700–01 (2007) (quoting *Johnson v. California*, 543 U.S. 499, 506 (2005)).

104. See CHEMERINSKY, *supra* note 59, at 542; Fallon, *supra* note 90, at 1268–69.

105. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

that is protected under the First Amendment. This doctrine was laid out famously in *Chaplinsky v. New Hampshire*, where a Jehovah's Witness challenged, on First Amendment grounds, a conviction for violating a state law that prohibited what would be considered "fighting words."¹⁰⁶ The Court upheld the conviction, stating that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."¹⁰⁷

Why does speech that falls within these categories fail to raise Constitutional problems?

[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . [and are] "not in any proper sense communication of information or opinion safeguarded by the Constitution . . ."¹⁰⁸

The Court has used similar reasoning to place obscene language¹⁰⁹ and libelous speech¹¹⁰ outside the protection of the First Amendment.

C. ASSIGNING STANDARDS OF REVIEW TO CONSTITUTIONALLY PROTECTED RIGHTS

What is hopefully apparent from the above discussion is that when a judicial system applies varying degrees of scrutiny to review alleged infringements of different constitutional rights, it means certain rights are valued more than others—that is, the standard of review suggests each right's ranking in a constitutional hierarchy of rights.¹¹¹ For instance, the application of strict scrutiny to regulations of sexual speech,¹¹² as opposed to rational basis review of laws criminalizing assisted suicide,¹¹³ implicitly

106. *Id.*

107. *Id.* at 571–72 (footnote omitted).

108. *Id.* at 572 (footnote and citation omitted).

109. *Roth v. United States*, 354 U.S. 476, 484 (1957) (describing obscenity as "utterly without redeeming social importance").

110. *Beauharnais v. Illinois*, 343 U.S. 250, 255–57, 266 (1952) (citing *Chaplinsky*, 315 U.S. at 571–72).

111. *See, e.g.,* Shapiro, *supra* note 60, at 367 n.19 ("[I]mplementing a constitutional hierarchy amounts to the application of a standard of review.").

112. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.").

113. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests.").

reflects an institutional belief that the freedom of speech is more highly valued than the right to have a person help in ending another's life. If this was not the case, the government would not have to sustain a significantly greater burden in justifying an infringement on political speech. The principle is perhaps exhibited most clearly in Equal Protection jurisprudence, where certain classifications are scrutinized more closely than others. The Supreme Court has applied each of the primary standards of review to alleged Equal Protection violations. Distinctions in laws based on race are considered suspect classifications and are reviewed under strict scrutiny,¹¹⁴ whereas distinctions based on gender are labeled as only semi-suspect classifications subject to intermediate scrutiny.¹¹⁵ Distinctions based on other characteristics are considered nonsuspect and receive only rational basis review.¹¹⁶

*United States v. Carolene Products Co.*¹¹⁷ and its “now famous ‘footnote 4’”¹¹⁸ is a common place to begin a discussion of the Supreme Court's recognition of a constitutional hierarchy of values. The Court there was reviewing a federal law prohibiting the shipping of filled milk in interstate commerce which had been challenged as violating the Due Process Clause of the Fifth Amendment.¹¹⁹ In upholding the law, the Court noted that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”¹²⁰ Justice Stone then went on to add:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten

114. See *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (“Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns Such classifications are subject to the most exacting scrutiny” (citation omitted)).

115. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). Classifications based on sexual orientation generally are thought to trigger heightened scrutiny, despite the fact that the court uses the language of rational basis. See *supra* note 87.

116. See, e.g., *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (“[T]he classification [between those who advertise their own products on their trucks and those who advertise for others] has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection.”).

117. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

118. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.4, at 775 (4th ed. 2007).

119. *Carolene Prods.*, 304 U.S. at 145–47.

120. *Id.* at 152.

amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹²¹

Although this footnote is entirely dictum, it suggests Supreme Court recognition of a value difference between the economic liberty at issue in *Carolene Products* and rights explicitly mentioned in the Constitution. This has been evidenced by “the Court’s almost total abandonment of any real scrutiny of economic legislation . . . [in contrast to] its increasingly strict examination of legislation and governmental actions that affect civil rights or liberties.”¹²² But how does the Court decide where to place certain rights in the hierarchy? Some have argued that the enumerated rights of the Constitution must be viewed as more important than unenumerated rights (if such rights exist at all) that fall under the concept of liberty,¹²³ while others believe that the Ninth Amendment renders this illogical.¹²⁴ Determining where the constitutional right falls in the hierarchy requires at least some extratextual analysis.¹²⁵

121. *Id.* at 152 n.4 (citations omitted).

122. 2 ROTUNDA & NOWAK, *supra* note 118, § 15.4, at 782.

123. *See Adamson v. California*, 332 U.S. 46, 91–92 (1947) (“[T]o pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of ‘natural law’ deemed to be above and undefined by the Constitution is another. ‘In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.’” (footnotes omitted)).

124. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1061 (1990) (“But even if we were to accept the premise that enumerated rights are more important than unenumerated rights, that does not mean that the process of defining the boundaries of the enumerated rights is any less *subjective* an enterprise than that of determining what liberties are fundamental.”).

125. *See id.* at 1060.

It makes sense to start with a discussion of fundamental rights, as the Court has actually provided some guidelines for how to determine if a right is fundamental. Strict scrutiny is generally thought to apply to “any governmental actions which limit the exercise of ‘fundamental’ constitutional rights.”¹²⁶ So what constitutes a fundamental right? Generally, they can be said to be rights “having a value so essential to individual liberty in our society that they justify [judicial review of] acts of other branches of government.”¹²⁷ The Court has put forward alternative formulations for determining what rights are deemed fundamental. In *Palko v. Connecticut*, the Court stated that fundamental rights were those “implicit in the concept of ordered liberty,” “the very essence of a scheme of ordered liberty,” or “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹²⁸ One method of determining if a right satisfies these criteria is to look to precedent as evidence of tradition and history. The Court in *Roe v. Wade* used this principle in part, stating that “going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”¹²⁹ This tool, obviously, is only useful when dealing with rights that have in fact been the cause of prior litigation. Another method of determining whether a right has been rooted in tradition is to examine how extensively the right has been regulated in the past. The *Roe* Court engaged in an extended discussion of the history of abortion regulations;¹³⁰ the Court in *Bowers v. Hardwick*¹³¹ and *Lawrence v. Texas*,¹³² although reaching opposite conclusions, did the same for laws related to sodomy. The existence of more regulations suggested that the right was not fundamental, while the absence of regulations suggested an opposite conclusion.¹³³

In order to utilize history and tradition to determine if a right is fundamental, a court must first define the right so it knows what kind of

126. 2 ROTUNDA & NOWAK, *supra* note 118, § 15.7, at 808.

127. *Id.*

128. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969). *See also* *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (finding a fundamental right in the sanctity of family because “the institution of the family is deeply rooted in this Nation’s history and tradition”).

129. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

130. *Id.* at 129–47.

131. *Bowers v. Hardwick*, 478 U.S. 186, 192–94 & nn.5–7 (1986) (finding that laws proscribing sodomy have “ancient roots”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

132. *Lawrence*, 539 U.S. at 567–71 (questioning the historical analysis conducted in *Bowers*).

133. For a discussion of the problems with looking to history and tradition to determine which rights are “fundamental,” see generally Tribe & Dorf, *supra* note 124.

traditions to look for; it then must decide which traditions actually matter. Regarding the first issue, Justice Scalia wrote that when inquiring into whether the right at issue is fundamental, the Court should view the right at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”¹³⁴ Framing the right at issue in such a narrow form was especially significant in *Michael H. v. Gerald D.*: instead of deciding whether there was a tradition of protecting parenthood generally,¹³⁵ which there almost certainly was, Scalia asked whether there was a tradition “regarding the natural father’s rights vis-a-vis a child whose mother is married to another man,”¹³⁶ which there was not. The need for such narrow issue framing, according to Scalia, is that it reduces the chance of “arbitrary decisionmaking” by focusing the analysis on a very specific tradition.¹³⁷

The Court, however, does not appear to have adopted Justice Scalia’s suggested methodology for framing the right at issue, as evidenced by contrasting the opinions in *Bowers*¹³⁸ and *Lawrence*.¹³⁹ In both cases, the Court was forced to decide the constitutionality of state laws criminalizing sodomy between consenting adults.¹⁴⁰ The *Bowers* court framed the issue presented in a manner suggested by Scalia’s *Michael H.* opinion: “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”¹⁴¹ Justice Kennedy’s opinion in *Lawrence*, however, took issue with this manner of framing the issue, stating that it “fail[ed] to appreciate the extent of the liberty at stake” by “demean[ing] the claim the individual put forward.”¹⁴² Instead, the Court questioned “whether the petitioners were free as adults to engage in the private conduct in the exercise of their

134. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). It should be noted that only Chief Justice Rehnquist joined this part of Justice Scalia’s opinion. Justice O’Connor filed a concurrence with Justice Kennedy specifically because they did not agree with this footnote.

135. *Id.* at 139 (Brennan, J., dissenting).

136. *Id.* at 127 n.6 (majority opinion).

137. *Id.* This proposition has not gone without challenge. See Tribe & Dorf, *supra* note 124, at 1058–59 (arguing that some judicial value judgments are necessary and that Scalia’s suggestion “provides . . . a method for disguising the importation of values”).

138. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

139. *Lawrence*, 539 U.S. 558.

140. *Id.* at 563; *Bowers*, 478 U.S. at 190. The law in *Lawrence*, however, only criminalized those acts when committed by members of the same sex. *Lawrence*, 539 U.S. at 563.

141. *Bowers*, 478 U.S. at 190. When framed in this manner, the Court’s conclusion that such a right is not fundamental is of no surprise.

142. *Lawrence*, 539 U.S. at 567.

liberty under the Due Process Clause of the Fourteenth Amendment.”¹⁴³ Kennedy’s formulation of the right at issue is stated at a higher level of abstraction than it was in *Bowers*, calling in to question whether Scalia’s methodology has any standing effect.

Lawrence also provided a clue as to the second inquiry noted above: that is, deciding which traditions matter the most in determining whether the right should be deemed fundamental. Primarily, the Court suggested that the traditions being reviewed did not have to go back quite as far as one might think for them to be considered fundamental. In response to the *Bowers* Court’s comment that homosexual conduct had been regulated throughout the history of Western Civilization, Justice Kennedy found that “our laws and traditions in the past half century are of most relevance here.”¹⁴⁴ Essentially, the Court decided that society’s “emerging awareness” relating to certain rights could be more important than considering how previous generations viewed the right at issue.

Another important inquiry involves the reasons that courts have applied a tiered system of standards of review within the same fundamental right. Why is, for example, political speech governed by strict scrutiny, while commercial speech garners only intermediate scrutiny, when the right at issue in both cases is speech? Clearly, simply describing conduct as speech does not allow one to determine the level of constitutional protection that such conduct will receive. At least one of the primary reasons is that commercial speech does not seem to advance the primary objectives the Framers had in mind when they decided that the freedom of speech required protection in the first place.¹⁴⁵

Many theories have been developed on why the freedom of speech is protected, but three of the primary reasons include advancing truth,

143. *Id.* at 564.

144. *Id.* at 571–72. In his analysis of these emerging traditions, Justice Kennedy took account of recent holdings by the European Court of Human Rights. *Id.* at 573. It is not the purpose of this Note to engage in a discussion of whether a review of foreign traditions or events is appropriate when determining the rights that are secured by the U.S. Constitution. Given that countries such as England and Australia have severely limited or even banned ownership of handguns in the last ten to fifteen years, however, there are obvious potential impacts on the Second Amendment if the Court were to look to emerging foreign traditions in the area of gun ownership. See Jon E. Dougherty, *Crime Up Down Under*, WORLDNETDAILY, Mar. 3, 2000, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=15304.

145. See, e.g., C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandry in Nike*, 54 CASE W. RES. L. REV. 1161, 1171–72 (2004) (justifying the lesser status of commercial speech on the grounds that a “limitation on this speech is not a distortion of debate” and noting that “[a]ny regulation of commercial speech leaves people on all sides of the world-wide debate completely free to present their views and their understanding of the facts”).

promoting self-government, and preserving autonomy.¹⁴⁶ The Supreme Court has acknowledged that the First Amendment reflects a commitment to each of these goals.¹⁴⁷ Simultaneously, however, “[the] Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others.”¹⁴⁸ The first of these occasions occurred in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁴⁹ the first time the Court emphatically recognized that commercial speech was justified to some level of First Amendment protection. Justice Blackmun’s majority opinion recognized “commonsense differences between speech that does ‘no more than propose a commercial transaction’ and other varieties” of speech which “suggest that a different degree of protection is necessary.”¹⁵⁰ After the Court laid out some practical differences between the two kinds of speech in order to justify a reduced level of protection for commercial speech,¹⁵¹ Justice Stewart’s concurrence then posited that “[t]he First Amendment protects the advertisement because of the ‘information of potential interest and value’ conveyed rather than because of any direct contribution to the interchange of ideas.”¹⁵² It would appear then that commercial speech is

146. See, e.g., CHEMERINSKY, *supra* note 59, at 925–29; KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 4–7 (3d ed. 2007).

147. For Supreme Court discussion on the search for truth, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (acknowledging that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”); as to the promotion of self-governance, see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (discussing a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (“Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.”), *overruled by Brandenburg v. Ohio*, 395 U.S. 44 (1969); as to autonomy, see *Whitney*, 274 U.S. at 375 (“Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.”).

148. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985).

149. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

150. *Id.* at 771–72 n.24 (citation omitted).

151. For example, the Court noted that less protection could be afforded commercial speech because it can be more easily verifiable and is likely to be chilled by government regulation. *Id.* at 771 n.24, 780–81. See also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 n.6 (1980) (noting that commercial speakers are better situated to determine the accuracy of their speech than the public).

152. *Va. State Bd. of Pharmacy*, 425 U.S. at 780 (Stewart, J., concurring) (citation omitted).

granted only intermediate scrutiny because, while it serves *an* important purpose, it does not further the three primary interests that the First Amendment had in mind.

What is interesting is not only that the Court grants varied protection to certain rights based on assumed purposes—ascribing purposes to constitutional provisions is necessary to determine the boundaries of the rights protected¹⁵³—but also, how this practice of assuming purposes would apply where the Framers *did* explicitly provide a purpose to one of the Constitution’s provision, as is the case with the Second Amendment.

A second reason to subject the “same” right—that is, the right as understood at a high level of abstraction—to multiple levels of judicial scrutiny may have ties to the Court’s methodology of surveying history and tradition to determine if a right is fundamental. Just as a history and tradition of regulation may be proof that a right has not been deemed fundamental,¹⁵⁴ a history of regulation might also suggest that if some right is found, that right might not be afforded the greatest judicial scrutiny. The case of commercial speech is again illustrative. For example, in *Ohralik v. Ohio State Bar Ass’n*, the Court followed a discussion on the lower protection afforded commercial speech with numerous examples of commercial speech regulation that had been previously upheld.¹⁵⁵ Similarly, Thomas Jackson and John Jeffries, in an article disapproving of the *Virginia State Board of Pharmacy* decision, provided a series of examples of commercial speech regulations that had been allowed to show “[t]hat such restraints have long been assumed constitutional is tribute to the prevalence of the notion that commercial speech is something apart from the freedom of speech and press guaranteed by the first amendment.”¹⁵⁶ Although Jackson and Jeffries provided these examples to suggest that commercial speech should be afforded no protection,¹⁵⁷ perhaps the existence of these regulations, and accompanying acceptance of their constitutionality, should lead to a different result. Because the history and tradition of commercial speech is dotted with accepted regulations, rather than taking commercial speech outside the realm of First Amendment protection, these accepted regulations may just suggest that commercial speech should be afforded lesser protection in the form of a

153. See Levinson, *supra* note 8, at 644 (“It would be impossible to make sense of the Constitution if we did not engage in the ascription of purpose.”).

154. See *supra* notes 127–32, 144 and accompanying text.

155. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

156. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 4–5 (1979).

157. *Id.* at 5.

less strict standard of review.

IV. PREVIOUSLY APPLIED OR SUGGESTED STANDARDS OF REVIEW IN SECOND AMENDMENT JURISPRUDENCE

Up to this point, this Note has provided an overview of the major points of debate over the Second Amendment and some of the issues involved in assigning a standard of review to a constitutionally protected right. Some authors, and at least one court, have attempted to address all of these issues and have suggested standards of review for use in the Second Amendment context. This section outlines a few of these suggestions.

A. JUSTICE BREYER'S *HELLER* DISSSENT: AN INTEREST-BALANCING APPROACH

As noted above, Justice Breyer chided the *Heller* majority for failing to specify the standard of review it used in holding the D.C. handgun-prohibition laws unconstitutional¹⁵⁸—and he then proceeded to propose a novel standard: the “interest-balancing inquiry.”¹⁵⁹ Breyer proposed this test only after suggesting why strict scrutiny would be inappropriate. First, he noted that the majority opinion approved of certain laws restricting the right to bear arms—for example, prohibitions on concealed weapons and forfeiture by criminals of the Second Amendment right—which would be called into doubt under a strict scrutiny test.¹⁶⁰

The next issue with evaluating gun control laws under strict scrutiny, Justice Breyer noted, is the formulation of the test itself. As discussed above, the strict scrutiny test requires that a regulation be necessary to achieve a compelling government interest. But Breyer noted that the primary purpose behind all gun control laws is the safety of the community and the prevention of crime, which the Court has already held to be compelling state interests.¹⁶¹ In practice then, applying strict scrutiny would turn into balancing “the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.”¹⁶²

158. The only specification provided by the majority was that the rational basis test, under which the D.C. laws would have survived, should *not* be used in Second Amendment jurisprudence. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–18 n.27 (2008).

159. *Id.* at 2852 (Breyer, J., dissenting).

160. *Id.* at 2851.

161. *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

162. *Id.* at 2852.

Breyer's preferred test would assess whether one right is disproportionately burdened, asking "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."¹⁶³ Such a test, in Breyer's vision, would be less deferential than rational basis and more forgiving than strict scrutiny, and would normally lead to the Court deferring to the judgment of the legislature, which has greater expertise in making empirical judgments.¹⁶⁴

Under this newly formulated test, Justice Breyer found each of the D.C. laws constitutional. As mentioned above, Breyer noted that the government's interest in saving lives was compelling and, despite conflicting views on whether gun control laws promote that interest, concluded that there was adequate support that they do. But under this interest-balancing inquiry, the important question was, do the laws "*disproportionately* burden Amendment-protected interests?"¹⁶⁵

To answer this question, Breyer first looked at the D.C. laws and found that they directly addressed the government interest and that there were no less restrictive solutions. There were no less restrictive solutions because the goal of the laws is to reduce the handgun population, and a pure ban is the only way for police officers to assume that any handgun seen is illegal; licensing restrictions would not reduce the handgun population (at most, they would just stop an increase in population); requiring safety devices for handguns only makes them more difficult to be used for self-defense while leaving them operable for criminals and domestic abusers.¹⁶⁶ Breyer also addressed the three interests that the majority suggested were protected by the Second Amendment—the preservation of a well-regulated militia, hunting, and self-defense—and found the burden on them to be minimal. Several amici filed briefs arguing that preexisting knowledge of handguns was useful for military purposes, and that the District's ban could have a negative effect on military service. Breyer challenged this argument, noting that the laws at issue only restricted the ability of citizens to train with handguns within the District of Columbia—a relatively small area that residents could easily (and at a low cost) travel outside of for training purposes. As a result, the handgun prohibition's burden on this interest was "little, or not at all."¹⁶⁷ Similarly,

163. *Id.*

164. *See id.*

165. *Id.* at 2865.

166. *Id.* at 2864.

167. *Id.* at 2861–63.

Breyer found little to no burden on the interest of hunting. The laws did not prohibit the type of firearms that are used for hunting, while the urban nature of Washington, D.C. made the issue moot.¹⁶⁸

As to the final interest—the ability to engage in self-defense—Breyer admitted that the handgun prohibition created a burden. But the reason for this was the same reason why handguns are useful both for self-defense and for committing crimes—they are easy to hold, carry, and maneuver in enclosed spaces.¹⁶⁹ Finally, Breyer downplayed the burden on the self-defense interest, calling it “at most a subsidiary interest, that the Second Amendment seeks to serve.”¹⁷⁰

Unsurprisingly, Justice Scalia derailed Breyer’s new test as “judge-empowering,” stating that “[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”¹⁷¹ Such an approach, according to Scalia, subjects the Second Amendment to the assessment of future judges, which “is no constitutional guarantee at all.”¹⁷²

B. REASONABLE REGULATION

Under the reasonable-regulation test, a court asks whether the regulation at issue is a reasonable limitation on the right to bear arms.¹⁷³ Instead of inquiring whether there is a rational basis for believing the statute promotes a legitimate government interest, as under the rational basis test, the reasonable-regulation test focuses on balancing the interest of the right to bear arms with the government’s interest in promoting the public welfare.¹⁷⁴

The use of the reasonable-regulation test for Second Amendment cases is intriguing for two reasons. First, reasonable regulation is a test used by courts in the forty-two states that have constitutional provisions protecting an *individual* right to bear arms.¹⁷⁵ So, even though these states

168. *Id.* at 2863.

169. *Id.*

170. *Id.* at 2866.

171. *Id.* at 2821 (majority opinion).

172. *Id.*

173. *See, e.g.,* Bleiler v. Chief, Dover Police Dept., 927 A.2d 1216, 1223 (N.H. 2007); State v. Cole, 665 N.W.2d 328, 338 (Wis. 2003); Winkler, *supra* note 103, at 716–17.

174. *See* Bleiler, 927 A.2d at 1223; Cole, 665 N.W.2d at 338.

175. *See* Winkler, *supra* note 103, at 716–17. An example of a state constitutional provision protecting an individual right to bear arms is “[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” WIS. CONST. art. I, § 25.

clearly and explicitly grant individuals the right to bear arms, their courts do not apply the most scrutinizing judicial review. And although courts go through the process of identifying the government interests and burden on the individual's right, "this balancing is decidedly tipped in favor of the government" due to the "paramount" interest the states have in preventing violence in society.¹⁷⁶ As Adam Winkler notes, "In thirty-six of the forty-two states with individual right-to-bear-arms guarantees, no gun control measure has been invalidated in over half a century under" the reasonable-regulation test.¹⁷⁷

The reasonable-regulation standard is also intriguing because it is the test recommended by the Solicitor General (in office at the time *Heller* was argued), despite its support of the individual-rights theory.¹⁷⁸ This recommendation caused more than a little controversy amongst gun control opponents, who thought they had a firm ally in the Bush administration.¹⁷⁹ After all, the Solicitor General's brief essentially stated its belief that all federal firearms regulations would satisfy the reasonable-regulation test.¹⁸⁰ In reaching this conclusion, the Solicitor General surveyed the history of firearms regulations and found that this history supported a grant to Congress of substantial leeway in creating laws that restrict on the right to bear arms.¹⁸¹ This is fairly similar to what the Court did when it surveyed history and tradition to see if a fundamental right existed in *Roe*, *Bowers*, and *Lawrence*.¹⁸²

The most extensive discussion regarding the appropriateness of the reasonable-regulation test was conducted by Winkler.¹⁸³ Winkler started by

176. Winkler, *supra* note 103, at 717–18.

177. *Id.* at 718.

178. See Brief for the United States as Amicus Curiae at 20–21, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

179. See, e.g., Dahlia Lithwick, *Moving Targets: The Solicitor General Is the Latest Target in the Showdown Over Guns*, SLATE, Mar. 14, 2008, <http://www.slate.com/id/2185927> (describing the Justice Department's position as an "unprecedented intramural implosion"); John R. Lott Jr., *Bad Brief*, NAT. REV. ONLINE, Jan. 14, 2008, <http://article.nationalreview.com/?q=ZmlyM2ZIMDhkOTFkMTc5ZGZhMjU0ZDE4N2QzN2U2YzM=> (criticizing the Justice Department's position); Posting of KidColt to GOPUSA, <http://www.gopusa.com/forum/showthread.php?t=45625> (Jan. 17, 2008, 16:37 EST) ("Solicitor General, Bush Justice Dept. betray gun owners!"). The Justice Department's brief even caused controversy within the Bush administration, causing Vice President Cheney to personally sign on to a separate amicus curiae brief. See Brief for Amici Curiae 55 Members of U.S. Senate, the President of the U.S. Senate, and 250 Members of U.S. House of Representatives in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290).

180. See Brief for the United States as Amicus Curiae, *supra* note 178, at 20–21.

181. *Id.* at 22–24.

182. See *supra* notes 127–32 and accompanying text.

183. See Winkler, *supra* note 103, at 715–26.

giving reasons that strict scrutiny did not apply. He first challenged the thought that strict scrutiny would be required if the right to bear arms was a fundamental right by pointing out a number of other fundamental rights that receive less-than-strict judicial scrutiny.¹⁸⁴ He also noted that gun regulation did not fit strict scrutiny's "invidious motive theory" because such laws were almost always implemented in order to promote public welfare, an obviously legitimate motive.¹⁸⁵ In support of the reasonable-regulation test, Winkler looked to its use in state courts,¹⁸⁶ as discussed *supra*,¹⁸⁷ and the history of gun regulation,¹⁸⁸ much as did the Solicitor General in its *Heller* brief. Under Winkler's version of reasonable regulation, only gun control measures that render the right to bear arms a nullity would be declared unconstitutional.¹⁸⁹

C. SEMI-STRICT SCRUTINY

The semi-strict scrutiny test, developed and suggested by Calvin Massey,¹⁹⁰ straddles the line between strict scrutiny and traditional intermediate scrutiny. In Massey's words,

only *material infringements* of the right ought to trigger the presumption of invalidity that places on the government the burden of justifying the infringement. . . . When a material infringement is established, the government should be required to justify its infringement by proving that the infringing regulation, in *purpose and effect*, is *substantially related* to the achievement of a *compelling objective*. This hybrid form of heightened scrutiny, "semi-strict" scrutiny, if you will, would protect the individual right of armed self-defense while still allowing the state a reasonable and practical opportunity to curtail arms possession when there is clear public necessity for doing so.¹⁹¹

To get to this point, Massey starts with the proposition that the Second Amendment has failed in its intended purpose—whatever that may have been. If the right to bear arms was protected due to the Framers' distrust of standing armies, the amendment has failed, for standing armies have been a

184. *Id.* at 696–700. For a more extended discussion of Winkler's theory on fundamental rights and strict scrutiny, see Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

185. *See* Winkler, *supra* note 103, at 700–05.

186. *Id.* at 716–19.

187. *See supra* notes 173–74.

188. Winkler, *supra* note 103, at 708–12.

189. *Id.* at 717 (citing courts from Wisconsin, Colorado, North Carolina, Wyoming, Nebraska and Rhode Island).

190. Massey, *supra* note 54, at 1125–35.

191. *Id.* at 1137.

fixture of this country for quite some time.¹⁹² Alternatively, if the intent was to provide a means for the people to resist government tyranny, it has also failed, for “[a]lmost nobody believes that the citizenry is constitutionally entitled to resist governmental tyranny by force of arms.”¹⁹³ In light of this failure, Massey applies a theory he calls “constitutional *cy pres*” to the Second Amendment. This theory reconstrues constitutional provisions that have failed in ways that “will deliver as much of its essential purpose as can be provided within the context of the present constitutional structure.”¹⁹⁴ Because, in Massey’s eyes, the “undeniable theme of the arms right is defense,” the Second Amendment can and should be interpreted today as a mechanism to provide for individual self-defense.¹⁹⁵

Having framed the Second Amendment around the “legitimate entitlement to possess and to use firearms in self-defense,” Massey opines that a material infringement on the right depends on the “utility of the weapon in question.”¹⁹⁶ There would be no material infringements, in Massey’s view, as long as the regulation allowed “reasonable access to and use of firearms that are both suited to self-defense and that do not have an inherent high risk of collateral damage.”¹⁹⁷ Under this test, semiautomatic firearms present the hardest case: they are highly effective for self-defense purposes, but impose an intermediate level of collateral damage as compared to revolvers, single-shot guns, and fully automatic firearms.¹⁹⁸

The result of this semi-strict scrutiny test is that almost all regulations that fall short of a ban of a type of firearm would not be considered material infringements, and as such would be considered constitutional.¹⁹⁹

V. ALTERNATIVE APPROACHES TO THE STANDARD OF REVIEW QUESTION

By applying some of the principles discussed in Part III, this Note claims that even though the Supreme Court has determined that the Second Amendment protects an individual right to bear arms, strict scrutiny does not have to be the sole, or even primary, standard of review used when

192. *Id.* at 1123.

193. *Id.*

194. *Id.*

195. *Id.* at 1123–24.

196. *Id.* at 1125, 1127.

197. *Id.* at 1127–28.

198. *Id.*

199. *Id.* at 1128.

determining the constitutionality of firearm regulations.

A. TAKING TIPS FROM FIRST AMENDMENT ANALYSIS

1. Categorical Exclusions

The most obvious principle to borrow from the First Amendment is the categorical exclusion. Although the Court has not used the phrase categorical exclusion in the Second Amendment context, it has nonetheless already used the principle²⁰⁰ to hold that convicted felons have no Second Amendment rights.²⁰¹ This is equivalent to saying that felons are not included in the Second Amendment's definition of people, whose right to bear arms the amendment protects.²⁰²

The categorical exclusion principle can also be used to exclude certain types of firearms from the amendment's definition of arms. Machine guns, grenade launchers, and more high-powered weapons seem to be obvious candidates for categorical exclusion, given their extreme nature. Excluding such arms from the Second Amendment right is justified by using the same reasoning the *Chaplinsky* Court used when excluding fighting words from the ambit of the First Amendment: the value provided by the fighting words/machine gun is so slight that it will always be outweighed by "the social interest in order and morality."²⁰³ In other words, the interest that one would have in possessing a machine gun—for example, the ability to

200. I use the word "principle" here because the exclusions of categories of people are not perfectly analogous to categorical exclusions in the First Amendment context, which involves categories of the individual's interest. A closer parallel to the First Amendment would be the exclusions of types of arms—this is discussed in the following paragraph.

201. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (stating that federal laws which prohibit the possession of firearms by felons do not "trench upon any constitutionally protected liberties").

202. See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983) ("The constitutionality of such legislation cannot seriously be questioned on a theory that felons are included within 'the people' whose right to arms is guaranteed by the second amendment."). At first glance, this may appear to be in direct opposition to the Court's holding in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (holding that the phrase "the people" as used in the First, Second, Fourth, Ninth, and Tenth Amendments is a term of art that refers to a class of people that are part of a national community). However, as the Court in *Lewis* stated, "a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm." *Lewis*, 445 U.S. at 66. The Department of Justice also has categorized felons as being categorically excluded from the Second Amendment. Brief for the United States as Amicus Curiae, *supra* note 178, at 25 ("Because such individuals fall outside the protection of the Second Amendment, a law restricting gun ownership by felons need not satisfy the heightened scrutiny appropriate for laws prohibiting the possession of categories of guns by law-abiding citizens.").

203. See *supra* notes 107–08 and accompanying text.

repel home invasions or attack by mobs—can never justify the increased potential of collateral damage resulting from the use of such a weapon. Excluding certain arms such as machine guns and even more destructive weapons would also solve the problem that collective-right theorists have with certain interpretations of the *Miller* decision: that a straightforward reading of the requirement that, to be protected, a weapon have a relationship to the “preservation of efficiency” of the Militia, could be interpreted to mean that the deadlier a weapon is, the more it is protected by the Second Amendment.²⁰⁴

2. Diminished Scrutiny When the Use Is Not Related to the Purpose of the Amendment

As mentioned above, the Court affords commercial speech less protection than other kinds of protected speech by subjecting regulations of commercial speech to intermediate scrutiny rather than strict scrutiny.²⁰⁵ Courts have inferred a purpose behind the First Amendment protection of speech. Speech, such as political speech, that serves these implied purposes is granted strict scrutiny; because commercial speech does not serve these implied purposes, only intermediate scrutiny applies. This purpose does not appear on the face of the First Amendment, but as noted, courts have *inferred* the purpose. Because the prefatory clause of the Second Amendment *does* provide its purpose, there is an even stronger argument to apply the multitiered system of standards of review in the Second Amendment context. Regulations of the use of arms by individuals that are not part of a well-regulated militia, therefore, would be afforded less than strict scrutiny.

This proposition obviously makes an assumption that can be, and has been, heavily debated: that there is a clear purpose to the Second Amendment. Individual-rights proponents—and the *Heller* majority, more importantly—believe that preserving a well-regulated militia was not the only reason the Framers thought that protection of the right to bear arms was necessary; they also believe that the Second Amendment was intended to preserve the ability to defend oneself and one’s property.²⁰⁶ The evidence to support such a proposition, however, may be significantly lacking: “if one scans the vast corpus of writings from the ratification debates, virtually every reference to bearing arms occurs within the context

204. See Levinson, *supra* note 8, at 654–55; Yassky, *supra* note 54, at 666.

205. See *supra* notes 146–53 and accompanying text.

206. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–18 (2008).

of the debate over the militia.”²⁰⁷ This suggests that notions of self-defense played no role at all during ratification of the Second Amendment, which in turn supports the view that the purpose stated in the prefatory clause should be given greater weight in defining the right to bear arms. The Second Amendment is the only constitutional provision with such a clause, and the fact that state constitutional provisions often contained similar clauses does not change the fact that in the U.S. Constitution, it is exceptional. Moreover, placing increased importance on the prefatory clause’s purpose comports with the general doctrine that all constitutional clauses be given effect.²⁰⁸ The prefatory clause has already been afforded little, if any, interpretive weight by the *Heller* decision. Elevating its status in determining the appropriate standard of review would cure this deficiency in a manner consistent with *Heller*’s view on the role prefatory clauses should play in interpreting the operative clauses—that is, they should be used only to resolve ambiguities in the operative clause, but not to supersede its plain meaning.²⁰⁹ By impacting only the standard of review, the prefatory clause could not be said to supersede the operative clause’s grant of an individual right; it merely helps clarify the scope of that right, which, based on the differing views held by the *Heller* majority and dissent, is clearly ambiguous.

Further, it seems odd that the Framers would have found it necessary to protect the right to self-defense, as it is not a right that the government would ever directly intend to take away. The other rights protected by the Bill of Rights are of a nature that, in certain circumstances, the government would benefit if such rights did not exist. For example, speech critical of the government and the prohibition of unreasonable searches and seizures each make it slightly more difficult for the government to govern. The same can not be said about the right to self-defense from criminal attack.²¹⁰

Recall also the declaration in *Miller* that the Second Amendment must

207. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 499 (2004).

208. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

209. See *supra* notes 39–40 and accompanying text.

210. For an opposing viewpoint, see *Silveira v. Lockyer*, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (suggesting that the right to bear arms is necessary for self-defense against governments by illustrating that atrocities such as the Holocaust and Cambodia’s killing fields were carried out against populations that had been disarmed). The relevant point is that while a government would not have an interest in preventing self-defense against criminal attacks, doing so would have the effect of depriving the people of their ability to defend against government attacks. Still, the problem with giving this argument constitutional backing is that “[a]lmost nobody believes that the citizenry is constitutionally entitled to resist governmental tyranny by force of arms.” Massey, *supra* note 54, at 1123.

“be interpreted and applied with [assurance, continuation, and effectiveness of the Militia] in view.”²¹¹ In other words, the Court required that the prefatory clause influence how the right secured by the amendment is interpreted. Using the language of the prefatory clause to color what standard of review should be used would allow a court to stay faithful to the *Miller* requirement.²¹²

B. WHAT IF THE SECOND AMENDMENT DID NOT EXIST?

A great deal of the debate over the meaning of the Second Amendment undoubtedly results from its extraordinarily conflicting wording. So, one might ask what the status of the right to bear arms would be if it were divorced from the Second Amendment’s language. This section analyzes the right to bear arms as if the Second Amendment had never been written, and one was forced to consider whether the right fell within the liberty interest protected by the Fourteenth Amendment.²¹³ This section first addresses whether the right to bear arms is a fundamental right as defined by Supreme Court precedent, and if so, whether this means that strict scrutiny must apply. This section then considers how regulations of the right to bear arms would be reviewed if there was not a specific fundamental right to bear arms, but only a fundamental right to self-defense.

1. A Fundamental Right to Own and Possess Firearms

If the Second Amendment did not exist, regulations such as those at issue in *Heller* would undoubtedly still be challenged as violating a constitutional right. Instead of falling under the rubric of the Second Amendment, however, such challenges would be made under the Due Process Clause of the Fifth and Fourteenth Amendments.²¹⁴ In order to

211. *United States v. Miller*, 307 U.S. 174, 178 (1939).

212. Granting the purpose stated in the prefatory clause greater importance than other justifications for the Second Amendment when determining the appropriate standard of review should not offend those who believe that extratextual values are necessary when interpreting the Constitution. *Cf.* Tribe & Dorf, *supra* note 124, at 1074 (discussing the importance of taking extratextual values into account when interpreting what the Constitution means). By subjecting laws that may, for example, infringe on the right to own firearms for hunting purposes to intermediate scrutiny rather than rational basis, such extratextual values have implicitly been incorporated into the analysis.

213. An obvious rebuttal to this proposition is “but it *is* written in the Constitution—doesn’t that count for something?” However, this still could be an effective exercise not only because it eliminates the debate over the meaning of words, preambles, and commas, but also because it allows the debate to move away from the Framers’ original intent, and whether that original intent should matter almost 220 years later.

214. Although drafted nearly eighty years apart, the Court has held that the due process referenced

determine what standard of review should be used, a court would have to determine if a fundamental right is at stake by deciding if the right is “so rooted in the traditions and conscience of our people as to be ranked as fundamental;”²¹⁵ if the answer is yes, strict scrutiny would ordinarily apply.

Before this question can be answered, however, a court must first decide how to frame the right at issue. Assume that the challenged regulation is a prohibition against the possession of sawed-off shotguns. Should the court search tradition for a general right to possess firearms, or should it frame the issue at the most specific level possible, as Justice Scalia advised in *Michael H.*,²¹⁶ and look for a fundamental right to own or possess a sawed-off shotgun? The level of generality that a court uses to frame the issue could lead to opposite results, as the decisions in *Bowers* and *Lawrence* demonstrate. In the firearm context, framing the right at the most specific level of generality would most likely preclude a court from finding that possession of any truly novel firearm constitutes a fundamental right, and therefore, regulations related to such firearms would be subject only to rational basis review. The same would be true of more extreme firearms, such as grenade launchers, the possession of which has no place in the conscience of the American people.

A more difficult case would deal with assault weapons, described as “semi-automatic firearms designed with military features to allow rapid and accurate spray firing,” and which have no sporting purpose.²¹⁷ Such firearms were federally banned by the Violent Crime Control and Law Enforcement Act of 1994²¹⁸ until the law expired in 2004, but seven states, the District of Columbia, and numerous municipalities continue to prohibit assault weapons.²¹⁹ So, there exists a varied history of allowing possession of such weapons. *Lawrence* suggests that recent history should be given the most weight in determining if a fundamental right exists.²²⁰ From a national perspective then, the most recent emergence is one of allowing assault weapon ownership. There are obvious issues with basing a constitutional decision on such recent emerging “traditions.” First, even *Lawrence*’s analysis consisted of emerging traditions over a fifty-year period. Allowing

in each amendment is the same. *See, e.g.,* *Adamson v. California*, 332 U.S. 46, 66–67 (1947) (Frankfurter, J., concurring).

215. *See supra* note 128.

216. *See supra* notes 134–37 and accompanying text.

217. LEGAL COMMUNITY AGAINST VIOLENCE, REGULATING GUNS IN AMERICA 19 (2008), http://www.lcav.org/library/reports_analyses/RegGuns.entire.report.pdf [hereinafter LCAV].

218. 18 U.S.C. § 922(v)(1) (repealed 2004).

219. *See LCAV, supra* note 217, at 20–26.

220. *See supra* note 144.

the possession of assault weapons over a four-year period to create a fundamental right must be a misuse of Justice Kennedy's emerging traditions discussion. Moreover, doing so would create an inconsistent Constitution and demean those rights that are truly fundamental. Another potential issue deals with public opinion. Although they should not be considered conclusive, polls showed that 77 percent of eligible voters in 2004 favored renewal of the federal assault-weapons ban, and 65 percent sought to strengthen the ban.²²¹ In light of *Palko*'s definition of a fundamental right—a right “so rooted in . . . the conscience of [the] people” that it should be regarded as fundamental—one could reasonably suggest that such polls indicate that the right to possess assault weapons is not at all rooted in the conscience of the American public.²²²

At the other end of the spectrum, history and tradition most likely suggest the existence of a fundamental right to own and possess firearms in general. The Supreme Court has said that “there is a long tradition of widespread lawful gun ownership by private individuals in this country.”²²³ The determination that a right is fundamental generally requires that strict scrutiny be the standard of review used when that right is infringed. History does show, however, that the right to own and possess firearms has always been heavily regulated. The right to bear arms, which individual-right proponents frequently note existed prior to ratification of the Second Amendment, was prohibited in England in certain circumstances as far back as 1328.²²⁴ Even the common law regulated “when and how one might travel with arms.”²²⁵ When the Bill of Rights was ratified, “a variety of gun regulations were on the books” and “individual states adopted even more stringent types of regulations” shortly after the Second Amendment was adopted.²²⁶ Some of the earliest gun regulations were state laws that required a person to take an oath of loyalty to the individual state or collective states, or else be disarmed of all firearms.²²⁷ In the 1800s, states instituted regulations that prohibited carrying concealed weapons, selling firearms that could be easily concealed, and firing guns under certain

221. LCAV, *supra* note 217, at 19.

222. For an extended discussion of the role of public opinion in constitutional adjudication, see generally James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037.

223. *Staples v. United States*, 511 U.S. 600, 610 (1994).

224. *See Winkler, supra* note 103, at 709.

225. Cornell & DeDino, *supra* note 207, at 501.

226. *Id.* at 502.

227. *Id.* at 506. That states required oaths of loyalty could be seen as striking a fatal blow to the idea that the Framers wanted to preserve the ability for individuals to defend themselves against a tyrannical government.

circumstances.²²⁸ Today, common gun control laws require background checks (at the federal²²⁹ and state level²³⁰), purchase waiting periods,²³¹ permits or licenses prior to firearm purchase,²³² and firearm registration;²³³ they restrict multiple firearms sales and purchases;²³⁴ and they either prohibit or require licenses to carry concealed firearms.²³⁵

What this brief overview of firearm regulations shows is that even if a court were to find that a fundamental right to bear arms exists—and by fundamental, I mean in the sense that it satisfies *Palko*'s “rooted in history” analysis²³⁶—the right has long been, and continues to be, heavily regulated. In arguing that this long history of firearms regulations supports the use of the reasonable-regulation standard for Second Amendment cases, Winkler cites to *Klein v. Leis*, in which the Ohio Supreme Court upheld a municipal ordinance prohibiting the carrying of concealed weapons.²³⁷ There, the court cited a history of statutes and case law as evidence that the individual right to bear arms protected by the state—although fundamental in the *Palko* sense—had always been limited, and thus subject to reasonable regulation.²³⁸ The Supreme Court has also used this mechanism to help determine an appropriate standard of review, albeit in a context that did not involve a fundamental right. The *Ohralik* Court, discussed *supra*, appeared to justify intermediate scrutiny for laws regulating commercial speech on

228. *Id.* at 513.

229. 18 U.S.C. § 922(s) (2000).

230. Every state but Vermont has a law requiring background checks. *See* LCAV, *supra* note 217, at 109.

231. *Id.* at 134–38.

232. *Id.* at 178–86.

233. *Id.* at 190–95.

234. Federal law imposes only a reporting requirement. *See* 18 U.S.C. § 923(g)(3)(A). Three states limit the purchase by individuals of one firearm per month. *See* LCAV, *supra* note 217, at 140.

235. Two states, Illinois and Wisconsin, prohibit the carrying of concealed weapons. *See* LCAV, *supra* note 217, at 205. Forty-six states and the District of Columbia require licenses or permits. *Id.* at 206–08. Alaska and Vermont are the only states that do not require a license or permit to carry a concealed firearm. *Id.* at 208. Of the states requiring a license or permit, ten require a showing of good cause before issuing the license or permit. *Id.* Numerous municipalities also prohibit the carrying of concealed firearms. *Id.* at 212.

236. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969). There is an argument to be made that by subjecting the individual right to bear arms to the deferential reasonable-regulation standard rather than strict scrutiny, state courts are deciding that the right to bear arms is not a fundamental right as generally defined under the Constitution. In other words, that argument would say that a fundamental right is defined as “a right subjected to the highest level of scrutiny.” This Note uses fundamental to describe a right that is “so rooted in the traditions and conscience of the people.”

237. Winkler, *supra* note 103, at 711 (citing *Klein v. Leis*, 795 N.E.2d 633, 636 (Ohio 2003)).

238. *Klein*, 795 N.E.2d at 636–38.

the fact that such speech had always been subject to regulation.²³⁹ Because there is an equally, if not more, robust history of regulation in the firearms context, the Court should not be hesitant to subject laws that may infringe on the right to bear arms to intermediate, rather than strict, scrutiny.²⁴⁰

2. A Fundamental Right to Self-Defense

If a court conducting the analysis in Part V.B.1 (framing the issue somewhere along the spectrum between the most specific and most general level) were to find that a specific fundamental right to bear arms did not exist, the individual challenging the government act might try claiming that an alternative fundamental right has been infringed: the right to self-defense. A plaintiff that could successfully argue that the right to self-defense is a fundamental right would then claim that the firearm regulation deprives one of the ability to benefit from the right to self-defense.²⁴¹

The plaintiff's first step, obviously, is to convince a court that the right to self-defense is fundamental. The plaintiff would likely succeed in this endeavor.²⁴² Although it has not been explicit in stating that self-defense is a fundamental right, the Supreme Court has classified the "right to personal security" as a liberty interest protected by the Due Process Clause.²⁴³ Justice Scalia's *Heller* opinion went further, describing self-defense as an "inherent right"²⁴⁴ that is the "central component of the right [to bear arms]

239. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (stating that "speech proposing a commercial transaction . . . occurs in an area traditionally subject to government regulation").

240. Although still not dealing with a fundamental right, the analogy can be pushed one step further upon recognition of one of the primary reasons that regulation of commercial speech is thought necessary: its potential danger to the public. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring) (noting that the "government may take broader action to protect the public from injury produced by false or deceptive price or product advertising"). This is the same governmental interest served by gun regulations as well.

241. Framing the issue in the context of a right to self-defense is similar to the approach taken by *Massey*. See *supra* Part IV.C. The differences though are that: (1) *Massey* is still interpreting the Second Amendment; here, we are assuming that that amendment, and the preconceived notions of its meaning that come from reading its language, never existed; and (2) this method requires a finding that self-defense is a fundamental right.

242. *But see* *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007) (stating that "there is no precedent for a fundamental right to self-defense . . . in the criminal context"); *Rowe v. DeBruyn*, 17 F.3d 1047, 1052 (7th Cir. 1994) (finding no constitutional right of prisoners to self-defense).

243. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). See also *Olmstead v. United States*, 277 U.S. 438, 474–75 (1928) (Brandeis, J., dissenting) (discussing an "indefeasible right of personal security"). One commentator believes that in a string of cases from 1893–96, the Supreme Court was "quite open in [its] endorsement of the right to self-defense." Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL'Y 187, 202 (2006).

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

itself.”²⁴⁵ Lower courts have been somewhat more direct.²⁴⁶ Numerous commentators, including the favorite of many, William Blackstone, have supported self-defense as a fundamental right.²⁴⁷ Forty-four state constitutions protect the right to self-defense.²⁴⁸ Additionally, history and tradition show that self-defense has been an element of the common law that predates the Constitution.²⁴⁹ All of these facts point to self-defense as a fundamental, constitutionally protected right.

Once self-defense has been determined to be a fundamental right, two paths could be taken. The plaintiff could claim that: (1) the firearm ban infringes on the right to self-defense, or (2) a fundamental right to bear arms can be extracted out of the fundamental right to self-defense, and as such, the firearm ban infringes on the right to bear arms. The California Supreme Court, interpreting its own constitution, has rejected the second argument.²⁵⁰ Massey takes the first path and suggests that absolute bans of certain kinds of firearms would impose a material infringement on the right to self-defense, but that “most regulations that are short of absolute

245. *Id.* at 2801 (emphasis removed).

246. *See Griffin v. Martin*, 785 F.2d 1172, 1186–87 n.37 (4th Cir. 1986) (“It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson’s choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later.”), *withdrawn*, 795 F.2d 22 (4th Cir. 1986); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) (“The right of defense of self . . . is a fundamental part of our concept of ordered liberty.”). *See also Lannert v. Jones*, 321 F.3d 747, 754–55 (8th Cir. 2003) (finding a fundamental right to self-defense); *Taylor v. Withrow*, 288 F.3d 846, 851 (6th Cir. 2002) (same).

247. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *4 (“Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.”); Johnson, *supra* note 243, at 187 (“[S]elf-defense is a basic raw material of our social and political structure, a right from which other constitutional guarantees have been derived and therefore . . . in the first echelon of fundamental constitutional rights.” (footnote omitted)); Nelson Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229, 247 (2008) (“[T]he most fundamental of all rights is the right of self defense.”); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1818–21 (2007).

248. Volokh, *supra* note 247, at 1819.

249. *See, e.g.,* Cornell & DeDino, *supra* note 207, at 499 (stating that “[t]he right of individual self-defense was well-established under common law” in the eighteenth century); Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 355 (2007) (noting that Roman law recognized a right to self-defense).

250. California’s state constitution does not have a right-to-bear-arms provision, but does have an explicit constitutional right to self-defense. *See Kasler v. Lockyer*, 2 P.3d 581, 585–86 (Cal. 2000). The *Kasler* court rejected the argument that a fundamental right to bear arms could be extracted out of the right to self-defense. *Id.* What is not clear, however, is whether that court considered the right to self-defense to be fundamental. *See id.* at 586 (stating that the law at hand did not burden any state fundamental right).

prohibitions” would not be infringements.²⁵¹ It seems possible, however, that prohibitions on carrying concealed weapons could also be considered materially infringing. After all, the ability to defend oneself from armed attack while walking down the street is severely hampered if the victim, abiding the law, is lacking weaponry commensurate with that of the attackers.

The recognition of a fundamental right to self-defense could very well impact the determination of the appropriate standard of review for gun regulations. The history of gun regulations discussed above would still be relevant—after all, the establishment of self-defense as a fundamental right presupposes that the right existed when these extensive gun regulations were put in place. The hurdle for government acts, however, appears to be greater when balancing the interests of the parties when the individual is framing the discussion in the context of self-defense. Why? Because the value of the right to keep and bear arms, without any context, does not seem to compare to the government’s interest in, say, preventing violent crime; but when the individual’s interest is framed as a self-defense right, evoking self-autonomy and preservation interests, the scales are more evenly weighted.

C. IMPLICATIONS OF A TIERED SYSTEM OF STANDARDS OF REVIEW

So far, Part V has attempted to justify a standard of review for alleged infringements of the Second Amendment that is less than strict scrutiny—more specifically, intermediate scrutiny in its standard formulation, requiring a substantial relation to advancement of an important governmental interest. This section will briefly review what the use of this standard would mean to three types of gun laws: background checks and licensing laws,²⁵² concealed weapon prohibitions, and absolute bans.

On a preliminary note, the three primary concerns when dealing with the argument structure provided by standards of review are the level of infringement on the right, the importance of the governmental interest in enacting the regulation, and the relationship or fit between that interest and the means chosen by the government. In the Second Amendment context, the debate will almost always focus on the level of infringement of the right

251. Massey, *supra* note 54, at 1128. The issue of when an infringement of the right to self-defense actually occurs would likely be a hotly contested point given the many ways one can conduct self-defense. For example, a prohibition on shotguns would not affect the ability to use handguns for self-defense.

252. Background checks and licensing laws can be separate and distinct kinds of gun control laws, but background checks are often a part of the licensing process.

and the relationship or fit between the governmental interest and the means chosen to advance that interest. This is because the government interest in nearly all gun regulations is some form of public safety—for example, the prevention of violence or reduction of crime—which satisfies even the compelling-interest requirement of strict scrutiny.²⁵³

1. Background Checks and Licensing Laws

Laws requiring background checks and licenses (to purchase or for concealed carry), as typically modeled today, would be valid under intermediate scrutiny.²⁵⁴ Such laws, although imposing a slight burden, probably do not actually impinge on the right to bear arms in the first place. Background checks are completed almost immediately²⁵⁵ and only involve searches into databases that are already maintained by federal or state agencies.²⁵⁶ Licensing laws usually involve completion of a background check, successful completion of written and performance-based tests, and in some states, completion of a safety training course.²⁵⁷ Required safety courses can be completed in one day, with costs ranging from \$75 to \$195.²⁵⁸ The Court has allowed slight burdens to be imposed on other constitutional rights without triggering analysis under a standard of review—for example, requirements that abortions be conducted by licensed physicians impose a slight burden, but are not deemed a constitutional infringement.²⁵⁹ Typical background check and licensing laws set similarly low hurdles, and thus, probably do not create a significant enough burden to trigger the use of intermediate scrutiny.

Assuming *arguendo* that a court found that such laws create enough of an infringement of the right to bear arms to require an inquiry into whether the government act was substantially related to an important interest, a

253. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2857 (2008) (Breyer, J., dissenting); Winkler, *supra* note 103, at 727.

254. It is possible that such laws could impose requirements beyond those mentioned here, and would thus create a greater burden on the right. Such laws might make the cost of acquiring licenses exorbitantly high or require extremely long training courses. However, this Note only addresses background checks and license laws as they generally exist today.

255. Background checks can take less than twenty minutes. See Jon S. Vernick, James G. Hodge, Jr. & Daniel W. Webster, *The Ethics of Restrictive Licensing for Handguns: Comparing the United States and Canadian Approaches to Handgun Regulation*, 35 J.L. MED. & ETHICS 668, 668 (2007).

256. See LCAV, *supra* note 217, at 105–06.

257. *Id.* at 177, 183–84.

258. For a list of safety courses in Connecticut, which requires the completion of such courses before a license to purchase a pistol is issued, see National Rifle Association Headquarters, Education & Training Programs, <http://www.nrahq.org/education/training/find.asp?Location=USACT> (last visited Mar. 15, 2009).

259. See *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975).

court should have no problem upholding the garden variety background checks and licensing laws discussed *supra*. The government interest would be considered important whether it was framed generally—as an interest in public safety—or narrowly—say, as an interest in preventing those who are categorically excluded from the right to bear arms from acquiring arms. Moreover, such laws are also substantially related to advancing either of these interests. Background checks are the primary means used to determine if the would-be gun purchaser falls into the category of people—such as felons, the mentally ill, and drug or alcohol offenders—who have been excluded from the right to bear arms.²⁶⁰ Laws that require the successful completion of training classes prior to license issuance also substantially serve the important government interest, whether that interest is framed generally or narrowly: a person who does not know how to safely operate a firearm is a danger to public safety and can be viewed as no more competent to operate a firearm than a mentally ill person.

2. Concealed-Carry Prohibitions

There is little precedential support for a constitutional right to carry concealed firearms. The Supreme Court has said that “the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons.”²⁶¹ Even Don Kates, one of the most prominent advocates of the individual-right theory, believes that historical evidence shows that

the amendment’s language was apparently intended to protect the possession of firearms for all legitimate purposes, but to guarantee the right to carry them outside the home only in the course of militia service. Outside that context the only carrying of firearms which the amendment appears to protect is such transportation as is implicit in the concept of a right to possess.²⁶²

These statements, however, do not appear to have considered that a fundamental right to self-defense would be implicated by such laws.

Under the intermediate standard of review that this Note advocates, the government interest must be important. This will not be a difficult hurdle for the government, as its interests in preventing violent crime, the

260. See LCAV, *supra* note 217, at 105. For a summary of federal, state, and local laws that define “prohibited purchasers” of firearms, see *id.* at 69–79.

261. *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897). The Department of Justice adopted this holding in its amicus brief in *Heller*. Brief for the United States as Amicus Curiae, *supra* note 178, at 24 n.6.

262. *Kates*, *supra* note 202, at 267.

use of firearms in public, and other gun-related societal harms, would all satisfy even the compelling-interest standard. Whether concealed-weapons laws substantially advance these interests is more questionable. Some have suggested that by allowing the public to carry concealed weapons, incidents of crime actually decrease.²⁶³ The most recent studies, however, report that the effect of concealed-weapon laws on crime is inconclusive.²⁶⁴ In this situation, the result will depend on how the court balances the competing social interests,²⁶⁵ and the balance would most likely tip in favor of the government. While the government interest is of the highest order, the individual's interest in self-defense would seem to be diminished somewhat when the individual is outside the home (where concealed weapons have an effect). In that setting, the risk of collateral damage to innocent bystanders and by impulse reactions is much greater than when defending oneself in the confines of a private residence. As such, concealed weapon prohibitions are likely to be found to be constitutional under intermediate scrutiny.

3. Absolute Handgun Bans

In addition to the ban in the District of Columbia at issue in *Heller*, Chicago and at least twelve other Illinois communities also ban handguns.²⁶⁶ The constitutionality of such laws is no longer in limbo after *Heller*—absolute handgun bans are unconstitutional. Justice Breyer challenged Justice Scalia's statement that this conclusion would have been reached under any standard of review, so it is worthwhile to analyze such laws under the intermediate scrutiny suggested in this Note.

Proponents of handgun bans focus on the different types of damage such firearms create, be it violent crime, suicide, or unintentional injury.²⁶⁷ Handguns are the tool of choice for those committing violent crimes, as statistics show that 80 percent of homicides by firearm are committed with a handgun.²⁶⁸ More generally, studies have reported that the United States, which has a relatively high prevalence of handgun ownership, has the

263. JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 5–7, 94 fig. 4.11–.13 (2d ed. 2000).

264. See COMM. TO IMPROVE RESEARCH INFO. AND DATA ON FIREARMS, NAT. RESEARCH COUNCIL, *FIREARMS AND VIOLENCE: A CRITICAL REVIEW* 150 (Charles F. Wellford et al. eds., Nat'l Academics Press 2004) (“[W]ith the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates.”).

265. See Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 85–86.

266. LCAV, *supra* note 217, at 40.

267. See *id.* at 38.

268. This is despite the fact that handguns constitute only 34 percent of all firearms in America. *Id.*

highest rate of homicide and firearm-related homicide of all other democratized, high-income nations.²⁶⁹ Handgun ownership has also been related to higher incidences of suicide and unintentional injury.²⁷⁰ As to the effectiveness of handgun bans in reducing violent crime, one study reported that after passing the law at issue in *Heller*, the District of Columbia saw 25 and 23 percent declines in homicides and suicides by firearms, respectively.²⁷¹

Handgun-ban opponents argue that such laws are ineffective at reducing (and may even increase) the incidence of violent crime. As to the ineffectiveness of handgun bans, opponents argue that such bans only prevent law abiding citizens from acquiring handguns; the criminals that use handguns to commit violent crimes will still acquire them either on the black market or by importing them from a jurisdiction where handguns are not prohibited.²⁷² In his oft-cited work, John Lott argues that laws allowing concealed-handgun permits actually reduce crime by appealing to criminals' self-preservation: the fear of a would-be victim possessing a firearm deters the criminal from committing the act.²⁷³

On a preliminary note, the constitutionality of a handgun ban can only be accurately analyzed if one makes assumptions about prohibitions of other types of firearms. For instance, if all other firearms are also banned, a prohibition on handguns could not survive, for the general right to bear arms would be completely eviscerated. This analysis will assume that the law here is targeting only handguns, and that firearms such as rifles and shotguns can still be legally owned.

The first step in determining whether such a ban would be constitutional is to decide how to frame the right; this will help the court determine if the right has actually been impinged.²⁷⁴ If the interest is framed as the right of an individual to own and possess handguns, a ban on handguns is clearly an infringement sufficient to trigger intermediate scrutiny. On the other hand, as hinted at in the previous paragraph, viewing

269. Vernick et al., *supra* note 255, at 672.

270. See LCAV, *supra* note 217, at 38–39; Vernick et al., *supra* note 255, at 671.

271. LCAV, *supra* note 217, at 39.

272. See James B. Jacobs, Debate, *What We Can Expect of Gun Control?*, 156 U. PA. L. REV. PENNUMBRA 188, 192–93 (2007).

273. LOTT, *supra* note 263, at 5, 94. Lott's methodology has been challenged and his conclusions undermined. See generally Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003).

274. This would also help guide the analysis to determine how rooted in history and tradition the right is. However, since the purpose of this section is to analyze a handgun prohibition under intermediate scrutiny, this step is not necessary.

the individual's interest as a general right to bear arms may lead to a determination that banning only one specific type of firearm is not enough of an infringement to trigger intermediate scrutiny. Even if framed at this more abstract level of generality, however, banning handguns would probably be seen as a material infringement, given that they make up 34 percent of all firearms in the United States,²⁷⁵ are the most convenient type of firearm for self-defense, and create a low risk of collateral damage (relative to other firearms).²⁷⁶

Moving on to the intermediate scrutiny analysis, satisfying the important government interest test will not be an issue. As discussed in previous paragraphs, the government's stated and actual purpose will probably be improving some form of public safety—for example, reducing violent crime or homicides by firearms—and this is sufficient to satisfy intermediate scrutiny's requirement.

A court deciding the constitutionality of a handgun ban under intermediate scrutiny would then have to determine if such a ban substantially advanced the important government interest in reducing violent crime committed with firearms. As the previous paragraphs show, different studies produce completely opposite results: some show that decreasing the number of handguns reduces crime while others show that fewer guns lead to an increase in crime. These studies are one tool that a court might use to determine if handgun bans are substantially related—or said another way, “advance[e] or caus[e] the state goal to a significant extent, degree, or magnitude”²⁷⁷—but such studies are clearly inconclusive. It could be argued that such situations suggest an appropriate opportunity for judicial deference to the legislative branches.

Another possibility is for the court to engage in a balancing test of the competing interests. The government's interest is clear and is of the highest order; the individual's interest is also of the highest order when viewed under the auspices of a fundamental right to self-defense. From this perspective, the individual's interest could end up taking preference, especially if there are other restrictions on the use of handguns. A prohibition on carrying concealed handguns, for example, would mitigate the risk of collateral damage, as such a law would limit the use of handguns for self-defense to the home, where the chance of injury to innocent bystanders would be lessened.

275. LCAV, *supra* note 217, at 38.

276. See Kates, *supra* note 202, at 261–62.

277. See Spece, *supra* note 89, at 1314.

Finally, the issue of constitutionality could be decided by the burden of proof. Under intermediate scrutiny, the burden is on the government to show that the legislation substantially advances its interest. Falling back on the burden of proof to hold absolute handgun bans unconstitutional, in light of the high-value interests at stake, may be all that a court could do.

VI. CONCLUSION

The Court's *Heller* opinion provided closure as to one issue in the debate over the Second Amendment—the amendment protects an individual, not collective, right to bear arms—but at the same time, left open another issue that should become the focus of legal scholars considering the scope of the right to bear arms. This Note, by taking cues from First Amendment jurisprudence and looking at the history of firearms regulations, argues that intermediate scrutiny is the appropriate standard of review courts should use when evaluating the constitutionality of gun control laws (that is, those that do not regulate military usage).

Subjecting government acts that infringe on the right guaranteed by the Second Amendment to intermediate scrutiny seems fair when one balances the competing interests at stake. On one hand, the government's interest in enacting most, if not all, firearm regulations is almost always going to be compelling: protecting the public from the damage that guns can inflict is of the highest order of governmental purposes. On the other hand, the right involved is one of the Constitution's enumerated rights, and, at least at a high level of abstraction, is so rooted in history that it would probably be considered fundamental (even without the Second Amendment). This fundamental right, however, is unique among constitutional provisions because exercising this right allows one to directly and immediately deprive others of their fundamental rights to life and liberty. Given such competing interests, a standard that does not give so much deference to the government as does rational basis, but also does not place a hurdle as high as strict scrutiny, seems a reasonable middle ground.

The weakness of the intermediate scrutiny test—that it is malleable and, in the eyes of some, gives judges too much discretion—could result in less predictable Second Amendment jurisprudence. This would represent a failure of the standard of review “to give notice of constitutionally proscribed or prescribed conduct.”²⁷⁸ But with a right that provides the opportunity to preserve one's own fundamental rights while simultaneously

278. *Id.* at 1289.

depriving others of their own, perhaps that is the best that can be hoped for.