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Strictly Speaking: Courts Should Not Adopt Strict Scrutiny for Firearm Regulations

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Strictly Speaking

Courts Should Not Adopt Strict Scrutiny for Firearm Regulations

"[I]n 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F–150 trucks sold, the most commonly sold vehicle in the United States."[1]

INTRODUCTION

The meaning of the Second Amendment's guarantee of the right "of the people to keep and bear Arms" is the subject of much controversy.[2] Until recently, a longstanding question was whether the Second Amendment protects an individual's private right to bear arms outside the context of the maintenance of a militia.[3] In *District of Columbia v. Heller*, the Supreme Court of the United States affirmed the individual right to bear arms, holding that the District of Columbia's legislative ban on handgun possession in the home violated the Second Amendment.[4] Central to this holding was an emphasis on self-defense and the right of law-abiding citizens to use a handgun "in defense of hearth and home."[5] The Court stressed that the right to bear arms "is not unlimited,"[6] but declined to define a

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[1] Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016), *aff'd in part, vacated in part en banc* 849 F.3d 114 (4th Cir. 2017).

[2] *Compare* David French, *Of Course the Second Amendment Protects and Individual Right to Keep and Bear Arms*, NAT'L REV. (Apr. 13, 2016, 4:00 PM), http://www.nationalreview.com/article/433993/second-amendment-protects-individual-right-keep-bear-arms [https://perma.cc/V4PB-C8LA] (quoting U.S. CONST. amend. II), *with* Dorothy Samuels, *The Second Amendment Was Never Meant to Protect an Individual's Right to a Gun: How the Supreme Court upended the well-established meaning of the Second Amendment*, THE NATION (Sept. 23, 2015), https://www.thenation.com/article/how-the-roberts-court-undermined-sensible-gun-control/ [https://perma.cc/ZSC7-Y7WF].

[3] District of Columbia v. Heller, 554 U.S. 570, 636–37 (2008) (Stevens, J., dissenting); *see also* Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 718–22 (2006).

[4] *Heller*, 554 U.S. at 635 (2008).

[5] *Id.*

[6] *Id.* at 626.

standard of review for challenges to firearm regulations, suggesting that the District's legislative ban would fail under any level of scrutiny that has been applied to enumerated constitutional rights.[7]

When the *Heller* decision was announced, then-Republican nominee for President, Senator John McCain, praised the decision and argued that Chicago and other municipalities' bans on handguns infringed on constitutional rights.[8] Then-Democratic Presidential nominee, Senator Barack Obama, hailed the ruling as the first clear statement on the Second Amendment in 127 years but also qualified that, "what works in Chicago may not work in Cheyenne."[9] *Heller* created a division of opinion in President George W. Bush's administration, with Vice President Dick Cheney applauding the decision and other administration officials fearing the unraveling of a wide range of gun regulations, including a federal law on machine guns.[10]

By declining to adopt or define the standard of review the Court was employing, or how future challenges to firearm regulations should be resolved, the *Heller* decision opened the floodgates for legal challenges to firearm regulations across the nation.[11] For example, following *Heller* the National Rifle Association (NRA) signaled almost immediately that it would file "lawsuits in San Francisco, Chicago and several of its suburbs."[12]

In failing to expressly adopt a standard of review, but suggesting that the District's law would fail under any level of scrutiny, the Court in *Heller* was implementing some form of heightened review by implying that rational basis was not an option.[13] This is important because the standard of review a court employs influences the outcome of a court's decision. When a court reviews whether a legislative act is constitutional, a strict scrutiny standard of review requires the government to prove its restriction is "narrowly tailored to achieve a compelling government interest," while intermediate scrutiny requires the government to "demonstrate . . . a reasonable fit between the challenged regulation and a substantial government

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[7] *Id.* at 628–29.

[8] *See* Dina Temple-Raston, *Supreme Court: Individuals Have Right to Bear Arms*, NPR (June 26, 2008, 10:31 AM), http://www.npr.org/templates/story/story.php?storyId=91911807 [https://perma.cc/ATN8-8QWT].

[9] *See id* (quoting statement of Barack Obama).

[10] *See id.*

[11] *Heller*, 554 U.S. at 718 (Breyer, J., dissenting).

[12] Temple-Raston, *supra* note 8.

[13] *See* United States v. Chester, 628 F.3d 673, 680–82 (4th Cir. 2010); *see also* United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010).

objective."[14] As the least demanding level, rational basis requires a law to have some "conceivable valid function" to withstand constitutional scrutiny.[15]

The Court's decision led many to predict chaos and confusion in the wake of *Heller* over future gun regulations.[16] Indeed, courts have continually grappled with the issue of an appropriate standard of review for a wide range of legislation regulating firearms.[17] The Court's failure to provide a standard of review, and *Heller's* acknowledgement of an ill-defined set of lawful regulatory measures—such as the "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"[18]—prohibits citizens and legislators from knowing under what standard firearm regulations will be reviewed moving forward, and what regulations are permissible under the *Heller* holding.[19] This lack of guidance is important because the *Heller* decision pronounced the individual right to a handgun for self-defense as a fundamental right, but the Supreme Court has not clarified the appropriate standard of review that should accompany this core constitutional right.[20]

Following *Heller*, many courts reacted by applying intermediate scrutiny to challenges pertaining to firearm regulations.[21] This default is not only because of *Heller's* implication that rational basis was not appropriate,[22] but also because of the evolving stage of Second Amendment doctrine under judicial review.[23] Particularly, the scope of the types of weapons protected under the Second Amendment and its

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[14] Kolbe v. Hogan, 813 F.3d 160, 179 (4th Cir. 2016) (quoting Abrams v. Johnson, 521 U.S. 74, 82 (2010); *Chester*, 628 F.3d, 683), *aff'd in part, vacated in part en banc* 849 F.3d 114 (4th Cir. 2017).

[15] Friedman v. City of Highland Park, Ill., 784 F.3d 406, 410 (7th Cir. 2015) (citing Vance v. Bradley, 440 U.S. 93, 99).

[16] McDonald v. City of Chicago, Ill., 561 U.S. 742, 923 (2010) (Breyer, J., dissenting); *see generally* Lawrence Rosenthal & Joyce Lee Malcolm, Colloquy Debate, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437 (2011).

[17] *See* Joe Palazzolo, *Federal Appeals Court to Hear Two Cases Challenging D.C. Gun Law: Living in a High-Crime Neighborhood Isn't Reason Enough to Carry a Concealed Gun, Washington Police Say*, WALL ST. J., (Sept. 17, 2016), http://www.wsj.com/articles/federal-appeals-court-to-hear-two-cases-challenging-d-c-gun-law-1474104606 [https://perma.cc/7HQQ-LCWQ].

[18] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[19] *Id.* at 679–80 (Stevens, J., dissenting); *see also* United States v. Chester, 628 F.3d 673, 677 (4th Cir. 2010).

[20] *See* New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015), *cert. denied*, Shew v. Malloy, 136 S. Ct. 2486 (2016).

[21] *See Chester*, 628 F.3d at 682–83; United States v. Marzzarella, 614 F.3d 85, 97 (3rd Cir. 2010) (citing District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008)).

[22] United States v. Skoien, 614 F.3d 638, 651 (7th Cir. 2010).

[23] *See Marzzarella*, 614 F.3d at 99–101.

purpose are not completely settled.[24] In his closing words in the *Heller* decision, Justice Antonin Scalia hinted at a loose set of exceptions for firearm regulations that would be addressed if they came before the Court.[25] While an individual's right to bear arms in defense of "hearth and home"[26] is now deemed a fundamental right,[27] "strict scrutiny does not apply automatically" every time a constitutionally enumerated right is concerned.[28]

Despite the hesitancy of many courts to apply even a heightened form of review, in *Kolbe v. Hogan* the Fourth Circuit remanded a case involving Maryland's Firearm Safety Act (FSA), instructing the lower court to apply strict scrutiny in its review.[29] By banning the possession or purchase of all assault weapons, the panel found that the FSA implicated a "core protection of the Second Amendment—'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'"[30]—and became the first court to explicitly adopt strict scrutiny in reviewing legislation regulating firearms.[31] In departing from other circuit courts of appeals and elevating firearm regulations to the highest echelon of judicial review recognized by U.S. courts,[32] the Fourth Circuit subjected the rights guaranteed by the Second Amendment—whatever their scope may be[33]—to much more "robust judicial protection."[34]

This use of strict scrutiny proved to be short-lived, however, as just one year after its initial ruling in a significant turn of events, the Fourth Circuit released an en banc decision[35] vacating the appellate court panel opinion.[36] The en banc decision not only rejected strict scrutiny as the appropriate standard of review, but also stated that the assault weapons at issue in *Kolbe* were beyond the scope of the *Heller* decision altogether, and therefore not protected under the Second Amendment.[37] Even if the assault weapons fell under Second

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[24] *Chester*, 628 F.3d at 676.

[25] *Heller*, 554 U.S. at 635.

[26] *Id.*

[27] McDonald v. City of Chicago, Ill., 561 U.S. 742, 767 (2010).

[28] *Marzzarella*, 614 F.3d at 96.

[29] Kolbe v. Hogan, 813 F.3d 160, 168 (4th Cir. 2016), *aff'd in part, vacated in part en banc* 849 F.3d 114 (4th Cir. 2017).

[30] *Id.* (quoting *Heller*, 554 U.S. at 635).

[31] *Id.* at 182.

[32] *See Marzzarella*, 614 F.3d at 96.

[33] *See* District of Columbia v. Heller, 554 U.S. 570, 624–26 (2008).

[34] McDonald v. City of Chicago, Ill., 561 U.S. 742, 784–85, 879 (2010) (Stevens, J., dissenting).

[35] En banc means a decision by all judges of the circuit, rather than a select panel of judges from that circuit. *En Banc*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[36] *See* Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc).

[37] *Id.* at 121.

Amendment protection, the en banc decision noted, the regulation would be subject to intermediate scrutiny and would satisfy that standard of review.[38] This marks a dramatic development in Second Amendment jurisprudence, revealing courts' difficulties in addressing firearm regulations absent a defined standard of review.

Since *Heller* expressed limitations and exceptions without clearly defining them,[39] it is uncertain what the Second Amendment protects, nor is it clear whether these exceptions fall under a uniform standard of review or are subject to more individualized treatment.[40] Compounding this issue is the difficulty in determining what will withstand constitutional evaluation in the context of firearm regulations under a strict scrutiny standard of review.[41] The en banc decision in *Kolbe* addressed some of these open questions,[42] but went a step further by declaring the assault weapons at issue to be weapons of war, beyond the scope of the *Heller* decision, and therefore outside the reach of Second Amendment protection.[43]

The Fourth Circuit's embrace and subsequent rejection of strict scrutiny,[44] in connection with the vastly different ruling of the en banc decision declaring assault weapons to be beyond Second Amendment protection, exhibits why other courts should not employ a strict scrutiny analysis when evaluating firearm regulations. A more flexible standard of review is needed and other courts should not follow the Fourth Circuit's experiment with strict scrutiny for two reasons. First, because the Supreme Court declined to explicitly adopt strict scrutiny, lower courts should not take this initiative on their own because of the potential for a circuit split.[45] Such adoption would create greater

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[38] *Id.*

[39] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[40] *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009) (discussing the assumption of *Heller's* exceptions as valid law and the implications for future gun regulations).

[41] *Heller*, 554 U.S. at 679 (Stevens, J. dissenting).

[42] Kolbe v. Hogan, 849 F.3d 114, 135–36 (4th Cir. 2017).

[43] *Id.* at 135.

[44] *Id.* at 121.

[45] *See, e.g.*, Tyler v. Hillsdale Cty. Sheriff's Dep't., 775 F.3d 308, 311–12, 328–29 (6th Cir. 2014) (applying strict scrutiny to a statute that prohibited individuals who had been committed to mental institutions from possessing firearms); United States v. Armstrong, III, 706 F.3d 1, 7–8 (1st Cir. 2013), *vacated*, Armstrong, III, v. United States, 134 S. Ct. 1759 (2014) (discussing, but not explicitly adopting, strict scrutiny for firearm regulations); Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 195 (5th Cir. 2012) (comparing different levels of scrutiny for various legislation regulating firearms and indicating that strict scrutiny applies to some handgun regulations); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (holding that "a categorical ban on gun ownership by a class of individuals must be supported by

confusion over Second Amendment jurisprudence while it is still not clear what rights are protected. Second, because the scope and potential exceptions to Second Amendment protections are not settled, a more flexible standard of review—higher than rational basis, but lower than strict scrutiny—is better suited to accommodate challenges to firearm regulations in relation to states' rationales for those regulations. Similar to how commercial speech is permissibly subject to greater restrictions than individual speech in the First Amendment context,[46] strict scrutiny should not be uniformly applied to potentially varying degrees of lawful behavior under the Second Amendment. While the boundaries of what the Second Amendment protects remain ambiguous, courts should refrain from adopting strict scrutiny and employ intermediate scrutiny, weighing the justifications for the legislation at hand against the burdens imposed on lawful gun ownership.

This note examines the relationship between the right to bear arms as an individual right, the ongoing debate over firearm regulations in society as a whole, and the appropriate standard of review courts should utilize in addressing legislation that impacts Second Amendment rights. Part I explores the background of *District of Columbia v. Heller*, its application to individual states via the Fourteenth Amendment following *McDonald v. City of Chicago*, and the exceptions and limitations left open by these decisions in an effort to formulate a rule dictating the scope of the Second Amendment under current U.S. jurisprudence and the ambiguous language of the Second Amendment. Part II confronts the circuit courts' approaches to firearm regulations, including the Fourth Circuit's departure from other courts of appeals with its premature adoption and ultimate rejection of strict scrutiny. Part III discusses what qualifies for Second Amendment protection, and that specifically, the individual right to a gun is limited to the home for self-defense. This Part provides a solution to the open-ended language of the Second Amendment offering that, until the Supreme Court clearly defines the rights under the Second Amendment, courts should adhere to intermediate scrutiny in evaluating challenges to firearm regulations.

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some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective." (quoting and citing United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010)).

[46] United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010).

I. BACKGROUND ON *HELLER* AND *MCDONALD*: EXCEPTIONS AND LIMITATIONS

An understanding of the background of *Heller* is crucial in assessing why circuit courts are struggling to apply its holding to challenges to firearm regulations. In *Heller*, the Supreme Court enumerated exceptions and limitations of the right to bear arms, but the majority's vague language left circuit courts guessing as to the scope of those exceptions. Importantly, the Court explicitly refused to state what level of scrutiny lower courts should apply to firearm regulations.[47]

A. An Individual Right to Bear Arms

The question presented in *Heller* was "whether [the] District of Columbia['s] prohibition on the possession of usable handguns in the home violated the Second Amendment"[48] and, in a controversial decision,[49] the Court announced that it did.[50] The D.C. law at issue banned handgun possession in the home and required any lawful firearm in a home to be "disassembled or bound by trigger lock."[51] By making it illegal to carry unregistered firearms while also prohibiting the registration of handguns,[52] the D.C. law effectively banned all handguns.[53]

As a special officer at the Thurgood Marshall Judiciary Building in D.C., respondent Dick Heller was certified to carry a handgun at work, but was refused permission by the city when he applied to register a handgun that he sought to keep at home.[54] Challenging the law as a violation of his Second Amendment rights to keep and bear arms, Heller sought to prevent the city from enforcing the registration and license requirements of handguns, as well as the trigger-lock constraint because it rendered firearms in the home inoperable.[55] The district court dismissed the suit, but the Court of Appeals for the

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[47] *See supra* notes 3, 6–7 and accompanying text.

[48] District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

[49] *District of Columbia v. Heller: One of the Supreme Court's most important Second Amendment decisions*, PARENTS AGAINST GUN VIOLENCE (Feb. 15, 2013), http://www.parentsagainstgunviolence.com/district-of-columbia-v-heller-one-of-the-supreme-courts-most-important-second-amendment-decisions/ [https://perma.cc/WF77-AE88] (discussing the implications of *Heller* for gun control and ownership and the 5–4 split in the decision).

[50] *Heller*, 554 U.S. at 635.

[51] D.C. Code Ann. §§ 7-2502.02(a)(4), 7-2507.02 (West 2001).

[52] *Heller*, 554 U.S. at 574–75.

[53] *Id.* at 628.

[54] *Id.* at 575.

[55] *Id.* at 575–76.

District of Columbia Circuit reversed, holding that the Second Amendment protects an individual right to possess firearms in the home.[56] Because the regulations served as a total ban on handguns, the D.C. Circuit held that it violated this right.[57]

A critical component of the Supreme Court's *Heller* decision was the focus on handguns in the context of overall firearm ownership.[58] The *Washington Times* posted a list of the best guns for home protection, which revealed that nineteen out of the top twenty-one guns are handguns.[59] This list bolsters the Court's assertion that "handguns are the most popular weapon chosen by Americans for self-defense in the home,"[60] and at the very least, acknowledges that handguns are a weapon of choice for self-defense.

In affirming the D.C. Circuit's opinion, the Supreme Court emphasized self-defense as a core right of the Second Amendment, and possession of a handgun in the home as an essential element of this right.[61] While the Court also suggested a limitation that the right does not pertain to "any sort of confrontation,"[62] it made clear that any limitation cannot inhibit this fundamental right by stating, "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[63] The Court's emphasis on the *individual* right of self-defense and possession of a handgun heightens the significance of the right to bear arms as a whole, possibly requiring a higher level of constitutional scrutiny.[64] By further personalizing the right to bear arms as fundamental "to 'keep' and use for protection of one's home and family,"[65] the majority decision indicated the prospect that firearm regulations required an elevated standard of review, closer to strict scrutiny.[66]

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[56] *Id.* at 576.

[57] *Id.*

[58] *Id.* at 629.

[59] *21 best guns for home protection*, WASH. TIMES, http://www.washingtontimes.com/multimedia/collection/21-best-guns-home-protection/ [https://perma.cc/PD8B-9AR6].

[60] *Heller*, 554 U.S. at 629.

[61] *Id.* at 629–30.

[62] *Id.* at 595 (emphasis omitted).

[63] *Id.* at 635.

[64] *See* Jonathan Zimmer, *Regulation Reloaded: The Administrative Law of Firearms After District of Columbia v. Heller*, 62 ADMIN. L. REV. 189, 220–21 (2010).

[65] *Heller*, 554 U.S. at 628–29 (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (2007)).

[66] Zimmer, *supra* note 64, at 200–01 (discussing that gun regulators should assume strict scrutiny will be the standard of review but how that does not mean challenged laws will always be struck down).

Broadening this discussion in reference to the role of the judiciary, the Court stated that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all" and that, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[67] Despite this emphasis on the constitutional guarantee of the right, and the insulation from judicial interpretation meant by such a guarantee, the Court declined to explicitly adopt strict scrutiny as the appropriate standard of review for firearm regulations, finding that the D.C. regulations would fail under any level of scrutiny.[68]

The majority decision provoked a fiery dissent from Justice Stephen G. Breyer, who was joined by Justices Stevens, Souter, and Ginsburg.[69] Incorporating the majority decision's notion that the individual right to bear arms is not absolute, the dissent highlighted various historical examples of firearm regulations, including those that restricted the use of firearms in the home for self-defense.[70] In connecting this to the D.C. law at issue, Justice Breyer argued that it was an appropriate legislative response to the acknowledged social problem of overwhelming gun violence.[71] In expanding on the idea that Second Amendment rights are not absolute, he proposed that this notion in itself subjects the right to government regulation,[72] and that the real question regarding firearm regulations is "whether the statute imposes burdens that, when viewed in the light of the statute's legitimate objectives, are disproportionate."[73] While this interest-balancing test could seem nebulous,[74] the *Heller* majority's approval of a lawful set of regulatory measures[75] complicates any attempt to apply strict scrutiny as it is not certain how these lawful regulatory measures would withstand constitutional inquiry under such a demanding standard of review.[76]

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[67] *Heller*, 554 U.S. at 634–35.

[68] *Id.* at 628–29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster." (quoting *Parker*, 478 F.3d at 400)).

[69] *Id.* at 681 (Breyer, J., dissenting).

[70] *Id.* at 683 (explaining how the three the largest cities during the colonial period—Boston, Philadelphia, and New York City—restricted the use of firearms within city limits).

[71] *Id.* at 682.

[72] *Id.* at 683.

[73] *Id.* at 694 (citation omitted).

[74] Temple-Raston, *supra* note 8.

[75] *Heller*, 554 U.S. at 626–27 (discussing prohibitions on concealed weapons, felons, the mentally ill, etc.).

[76] *Id.* at 688 (Breyer, J., dissenting).

The District passed the law at issue in *Heller* with the purpose of promoting public safety by targeting unregistered firearms.[77] The legislature viewed the law as a way to bolster the ability of the Metropolitan Police Department to promote public safety in a region of high urban and government concentration.[78] The legislature considered it to be an effective means to reduce gun-related crimes and deaths, and Justice Breyer augmented this purpose, noting the discrepancy that for every intruder stopped by a homeowner with a firearm, there are four gun related accidents within the home.[79] In fact, statistics show that "[t]he notion that a good guy with a gun will stop a bad guy with a gun is a romanticized vision of the nature of violent crime."[80] For example, in a five-year study conducted by the Violence Policy Center, there was "one justifiable killing for every thirty-two murders, suicides, or accidental deaths."[81] In concluding that D.C.'s interest was compelling, Justice Breyer emphasized that it is legislators, not judges, who have the chief responsibility in acting on policy conclusions,[82] and ultimately an interest-balancing approach of weighing the needs and burdens is what justified the statute.[83] In this way, the law did not *"disproportionately* burden Amendment-protected interests."[84]

In a separate dissent, Justice John Paul Stevens expounded on how the Court's decision that the Second Amendment protects an individual right to bear arms provided no guidance as to "the scope of that right."[85] Furthermore, the lack of a clearly defined scope of the individual right to bear arms reserves for future cases the challenge of actually outlining that scope and the boundaries of a permissible regulation.[86] And while the *Heller* decision made it clear that law-abiding citizens have the right to a gun in the home, it did not provide guidance for how state legislatures can regulate gun ownership beyond

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[77] *Firearm Control Regulations Act of 1975: Hearing on H. Con. R. 694 Before the H. Comm. on the District of Columbia*, 9th Cong. 7 (1976).

[78] *See* Edward D. Jones, III, *The District of Columbia's "Firearm Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States—Or Is It?*, 455 ANNALS AM. ACAD. POL. & SOC. SCI.: GUN CONTROL 138, 142 (1981).

[79] *Heller*, 554 U.S. at 693–94 (Breyer, J., dissenting) (quoting *Firearms Control Regulations Act of 1975: Hearing and Disposition before the H. Comm. on the District of Columbia*, 94th Cong., 2d Sess. on H. Con. Res. 694, Ser. No. 94-24 at 25 (1976).

[80] Scott Martelle, *Gun and self-defense statistics that might surprise you—and the NRA*, L.A. TIMES, (June 19, 2015), http://www.latimes.com/opinion/opinion-la/la-ol-guns-self-defense-charleston-20150619-story.html [https://perma.cc/Y9ET-Z2ZT].

[81] *Id.*

[82] *Heller*, 554 U.S. at 705 (Breyer, J., dissenting).

[83] *Id.* at 710–11.

[84] *Id.* at 714–23 (emphasis in original).

[85] *Id.* at 636 (Stevens, J., dissenting).

[86] *Id.* at 679.

the scope of that immediate right, or even what type of guns are protected under the Second Amendment.[87] Highlighting the impact of the *Heller* decision on future cases, and echoing Breyer's concerns over permissible legislation, Stevens stated that "[u]ntil today, it has been understood that legislatures may regulate civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia."[88] In confronting Justice Scalia's fear of judicial discretion in addressing challenges to enumerated rights,[89] Stevens predicted that, in light of the *Heller* decision, legislatures would face limited policy choices and that would ultimately result in a much more active judicial role in making policy decisions.[90]

Without guidance on a standard of review, there is greater potential for lower courts to interpret *Heller* in vastly different ways, and legislatures will be forced to draft policies in the uncertain shadows of what is and is not permissible under the *Heller* holding.[91] Indeed, this is exactly what has happened in *Heller*'s wake as the circuits struggle to interpret and apply the decision to new firearm regulations.

B. What Is the Standard and What Does It Protect?

The *Heller* Court's failure to provide a standard of review compounds the difficulty in knowing what regulations are permissible and what is protected by the Second Amendment. Should regulations burdening the core right of self-defense in the home be subject to strict scrutiny while restrictions outside of that core right receive intermediate scrutiny because they impact other interests such as public safety?[92] Justice Breyer reasoned that in the context of firearm regulations, "true strict-scrutiny" would be impossible for legislation to survive because nearly all gun-control measures attempt to promote public safety, and historically, the Court has found numerous occasions where public safety concerns justify restrictions on individual liberties.[93] This presents a perpetual problem because there is an inherent tension between promoting public safety through

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[87] *See* Temple-Raston, *supra* note 8.

[88] *Heller*, 554 U.S. at 679 (Stevens, J., dissenting).

[89] *Id.* at 634–35 (majority opinion).

[90] *Id.* at 679–80 (Stevens, J., dissenting).

[91] *See* Ian W. Henderson, *Rights, Regulations, and Revolvers: Baltimore City's Complex Constitutional Challenge Following* District of Columbia v. Heller, 39 U. BALT. L. REV. 423, 446 (2010).

[92] *See* Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1165 (2011).

[93] *Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

firearm regulations and the duty of legislators to protect the individual right to a gun.[94]

An important component to this lack of a standard of review is what actually is being discussed and what is truly protected under the Second Amendment. The *Heller* Court espoused the individual right to bear arms, and forcefully stated that the D.C. statute banning handgun possession in the home and its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense, violated the Second Amendment.[95] This right is not for "any sort of confrontation,"[96] but does that mean the individual right only applies to the home? Or for self-defense? It is important not to dismiss the existence and justifications of the constitutional right to bear arms,[97] but what is more difficult to assess is the extent to which Second Amendment protections apply, especially when the Court stated it would address exceptions to the Second Amendment "if and when those exceptions come before us."[98]

The Court still has not explained the exceptions in *Heller*, and it is unclear the degree to which a weapon is "in common use at the time,"[99] what is "dangerous and unusual,"[100] and what confrontations and purposes are protected under the Second Amendment.[101] Further clarity is needed to determine what defines these exceptions and when they should be applied in order to inform the general public of what rights are protected under the Second Amendment.

While the clarity of such exceptions is limited in *Heller*, the Court did state that, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[102] The Court may have had reasons for not explicitly clarifying the boundaries of these exceptions, but courts evaluating post-*Heller* cases are left with the burden of having to address them.[103]

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[94] *See* Zimmer, *supra* note 64, at 220.

[95] *Heller*, 554 U.S. at 635.

[96] *Id.* at 595 (emphasis omitted).

[97] *See* THE FEDERALIST NO. 51, at 331 (James Madison) (Robert Scigliano ed. 2000) ("If men were angels, no government would be necessary.").

[98] *Heller*, 554 U.S. at 635.

[99] *Id.* at 624.

[100] *Id.* at 627 (quoting 4 BLACKSTONE 148–49 (1769)).

[101] *Id.*

[102] *Id.* at 626–27.

[103] *Id.* at 635–36; *see generally* Larson, *supra* note 40, at 1372 (discussing that the *Heller* exceptions will ultimately have to be justified under some standard of scrutiny).

Although Justice Scalia emphasized that the "enshrinement of constitutional rights necessarily takes certain policy choices off the table,"[104] the debate between blanket bans on firearms and reasonable regulation requires legislatures to engage in a policy discussion.[105] The disconnect between the majority and dissents in the *Heller* decision highlight the controversial nature of discussions regarding Second Amendment rights, and the debate over how legislatures make policy determinations consistent with the guarantees of the Second Amendment. The jurisprudential result is one of confusion, with some advocating that the "right shall not be infringed" in anyway, and others purporting to read a form of heightened scrutiny into *Heller's* decision.[106]

By failing to define a standard of review and creating a loose set of exceptions to the rights protected by the Second Amendment, the *Heller* decision requires the Supreme Court to further direct the course of Second Amendment jurisprudence.[107] This is especially true in light of the Fourth Circuit's decision in *Kolbe*, where that court chose to apply strict scrutiny to the FSA,[108] and in a subsequent en banc opinion, rejected not only that standard of review, but even the notion that assault weapons are constitutionally protected.[109] This is important not only for the guidance of lower courts and legislators, but also to keep the general public informed of their rights under the Second Amendment.[110] Because these rights are not clear, and until the Supreme Court provides guidance as to what is and is not protected by the Second Amendment, courts should apply intermediate scrutiny.

C. An Individual Right to Bear Arms: Application to the States

Within two years of the *Heller* decision, the Supreme Court addressed the question of whether the Second Amendment right to keep and bear arms applies to the states.[111] In consideration of the Court's rulings that many of the Bill of

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[104] *Heller*, 554 U.S. at 636.

[105] *Id.* at 702–03 (Breyer, J., dissenting).

[106] Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?*, 23 WM. & MARY BILL RTS. J. 1143, 1183 (2015).

[107] *Id.*

[108] Kolbe v. Hogan, 813 F.3d 160, 168 (4th Cir. 2016), *aff'd in part, vacated in part en banc* 849 F.3d 114 (4th Cir. 2017).

[109] *Kolbe*, 849 F.3d at 121.

[110] *See* Charles, *supra* note 106, at 1143–45.

[111] McDonald v. City of Chicago, Ill., 561 U.S. 742, 750 (2010).

Right's provisions apply to both the Federal government and the states, the Court in *McDonald* held that the Second Amendment right of an individual to possess a gun is fully applicable to the states.[112]

Joined by the National Rifle Association (NRA)[113] and multiple individuals, plaintiff Otis McDonald challenged the City of Chicago's ordinance which required a registration certificate for firearms but also prohibited the registration of most handguns.[114] In the same suit, plaintiffs also challenged an additional ordinance from the nearby city of Oak Park, Illinois, which made it illegal to keep any firearm such as a pistol, revolver, or small arm (essentially all handguns).[115] Plaintiffs argued that they had the right to a handgun in the home for protection and that this right was being denied because the ordinances required them to store their firearms outside of the cities' limits.[116]

The Chicago City Council passed its ordinance "to protect [its] residents . . . from the loss of property and injury or death from firearms."[117] The district court dismissed the suit citing to Seventh Circuit precedent upholding such bans,[118] and the Seventh Circuit affirmed, refusing to incorporate and apply to the states the Second Amendment's right to keep and bear arms through the Fourteenth Amendment's Due Process Clause.[119] In reversing, the Supreme Court stressed the "paucity of precedent sustaining bans comparable to those at issue here and in *Heller*," stating that incorporation of the Second Amendment to the states via the Due Process Clause of the Fourteenth Amendment would not endanger every law regulating firearms across the country.[120] The Court contended that the decision would have no

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[112] *Id.*

[113] The National Rifle Association is a group that represents firearm advocates, and through its tax-exempt affiliate, the NRA Foundation, provides financial and political support for promoting Second Amendment protection for firearm-related activities. *A Brief History of the NRA*, NRA, https://home.nra.org/about-the-nra/ [https://perma.cc/6MPZ-PKVA].

[114] *McDonald*, 561 U.S. at 750–52.

[115] *Id.*

[116] *Id.* at 751–52.

[117] CITY COUNSEL OF THE CITY OF CHI., ILL. JOURNAL, Regular Meeting—Friday, March 19, 1982, at 10049 (1982), http://chicityclerk.com/legislation-records/journals-and-reports/journals-proceedings [https://perma.cc/4NHB-KXZM].

[118] Nat'l Rifle Ass'n of America, Inc. v. Oak Park, 617 F.Supp.2d 752, 753–54 (N.D. Ill. 2008) (citing Quilici v. Vill. Of Morton Grove, 695 F.2d 261 (7th Cir. 1982)), *aff'd* 567 F.3d 856 (7th Cir. 2009), *rev'd McDonald*, 561 U.S. 742.

[119] *Nat'l Rifle Ass'n of America, Inc.*, 567 F.3d at 857–58.

[120] *McDonald*, 561 U.S. at 742, 786.

inhibitory impact on state and local experimentation with reasonable firearm regulations.[121]

In fact, the Court characterized the municipal respondents as being "at war with [the] central holding in *Heller*," and that in effect, respondents were requesting the right acknowledged in *Heller* to be a "second-class right, subject to an entirely different body of rules than other Bill of Rights guarantees."[122] In connecting the individual right to bear arms as a fundamental right, the Court emphasized that the Framers of the Fourteenth Amendment considered the right to bear arms as fundamental, deeply rooted in history, and connected to an ordered scheme of liberty.[123]

Deeming the right fundamental does not mean strict scrutiny should apply,[124] and compounding the issue is the fact that strict scrutiny is not always applied as rigidly under considerations of Due Process.[125] While the majority decision in *McDonald* reiterated a rejection of interest-balancing as proposed by Justice Breyer in his dissent in *Heller*,[126] the dissent in *McDonald* poignantly addressed the fact that the Court was still not explaining the *Heller* rights' "precise contours . . . under [any] standard of review."[127] Moreover, because *Heller* based an understanding of the rights under the Second Amendment as fundamental due to the right to private self-defense of the home,[128] the implications on regulations beyond the home are not exactly clear.[129]

While the Court aspired to an objective method regarding Second Amendment rights concerns, by dismissing an interest-balancing test and failing to provide a standard of review for the already ambiguous scope of the Second Amendment, "[t]here is no objective, neutral answer to [any of] these questions" regarding the potential future implications of firearm regulations.[130] In instituting a national individual right to a firearm absent a specified level of scrutiny or interest-balancing test, the Court invited a "tsunami of legal uncertainty, and thus

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121 *Id.* at 785–86.

122 *Id.* at 780.

123 *Id.* at 776–78.

124 *See* United States v. Marzzarella, 614 F.3d 85, 96 (3rd Cir. 2010); *see generally* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

125 *See* Stacy L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court Supposed to Do Post-McDonald?*, 21 CORNELL J. L. & PUB. POL'Y 489, 496 (2015).

126 *McDonald*, 561 U.S. at 785–86 (citing District of Columbia v. Heller, 554 U.S. 570, 633–35 (2008)); *Heller*, 554 U.S. at 694 (Breyer, J., dissenting).

127 *McDonald*, 561 U.S. at 904 (Stevens, J., dissenting).

128 *Heller*, 554 U.S. at 633–35.

129 *McDonald*, 561 U.S. at 911 (Stevens, J., dissenting).

130 *Id.* at 906.

litigation," by not clearly defining the scope of the right.[131] Because the Supreme Court failed in its *McDonald* decision to clarify the extent of Second Amendment protections provided in *Heller*, courts should not adopt strict scrutiny for firearm regulations, and the democratic process in creating reasonable regulations for firearms in the context of public safety should be a guide for judicial discretion.[132]

II. POST-*HELLER* & *MCDONALD:* STANDARDS OF REVIEW & THE FOURTH CIRCUIT'S DEPARTURE

Several circuit courts have used different approaches to evaluate firearm regulations. Notably, the Fourth Circuit departed from other circuit courts of appeals with its adoption of strict scrutiny. This Part explores circuit courts' approaches to firearm regulations and addresses the premature implementation of strict scrutiny due to the fact that much of the Second Amendment still remains open-ended in terms of what it actually protects.

A. A Two-Pronged Approach

The day after *McDonald* was decided, the United States Court of Appeals for the Third Circuit issued its decision in *United States v. Marzzarella*,[133] instituting a two-pronged approach to assessing firearm regulations, and providing an opportune example of a regulation not specifically addressed in *Heller*.[134] Defendant, Michael Marzzarella, was convicted of possessing a stolen handgun with an erased serial number in violation of federal law outlawing the sale, transfer, or possession of firearms with removed, altered, or erased serial numbers.[135] In affirming Marzzarella's conviction, the Third Circuit held that the Second Amendment does not protect the right to possess a handgun with a removed serial number, even for self-defense in the home.[136]

As a regulation not mentioned in *Heller*, challengers to firearm laws can potentially make a strong argument that the right to bear arms in defense of "hearth and home"[137] should turn on functionality, and the fact that a gun has an erased, or partially removed, serial number should not disconnect it from

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131 *Id.* at 887 (footnote omitted).
132 *See id.* at 880.
133 United States v. Marzzarella, 614 F.3d 85 (3rd Cir. 2010).
134 *Id.* at 93.
135 *Id.* at 87–88 (citing 18 U.S.C. § 922(k)).
136 *Id.*
137 *Heller*, 554 U.S. at 635.

Heller's individual right to a gun in the home for self-defense.[138] After all, "[w]ith or without a serial number, a pistol is still a pistol . . . [but] [b]y this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense."[139] Further, the sorts of "dangerous and unusual weapons"[140] rejected as being protected by the Second Amendment in *Heller* could be protected under this type of reasoning.[141] The *Marzarrella* court quickly dismissed the contention that because guns in common use in 1791 did not possess serial numbers, Marzzarella's right to a handgun with a removed serial number was constitutionally protected.[142] The court, however, considered the argument that Marzzarella's interest in defense of home was implicated, and had to reconcile this interest with a firearm that could be deemed dangerous and unusual because it had an erased serial number.[143]

In addressing this quandary, the *Marzzarella* court instituted a two-part test for firearm regulations:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.[144]

With this framework for analysis, the Third Circuit found that the challenged law met the first part of the test by implicating self-defense, and approached the second question of what standard of review courts should apply regarding firearm regulations.[145]

Speedily rejecting rational basis as being contrary to *Heller's* holding, the court responded to Marzzarella's contention that strict scrutiny should apply by pointing to the range of potential Second Amendment challenges, and the fact that strict scrutiny may not be appropriately applied to any given situation.[146] In distinguishing the present case from *Heller*, the court noted that the District of Columbia's handgun ban in *Heller* "[was] an example of a law at the far end of the spectrum of infringement on protected Second Amendment rights."[147]

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138 *Marzzarella*, 614 F.3d at 93–94.
139 *Id.* at 94.
140 *Heller*, 554 U.S. at 627 (quoting 4 BLACKSTONE 148–49 (1769)).
141 *Marzzarella*, 614 F.3d at 94–95.
142 *Id.* at 93.
143 *Id.* at 94.
144 *Id.* at 89 (internal citation omitted).
145 *Id.* at 95–96.
146 *Id.* at 97.
147 *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 629 (2008)).

In finding that the Second Amendment may elicit more than one level of scrutiny due to the range of potential issues affecting Second Amendment rights, the court concluded that a less exacting standard than "[what] would have applied" to the District of Columbia's handgun ban was appropriate for the present case.[148] Absent a clear standard of review from the *Heller* decision, the Third Circuit in *Marzzarella* adopted intermediate scrutiny, and ultimately determined that the regulatory burden at issue did not severely limit the lawful possession of firearms.[149]

Considering the right to self-defense and the public safety concerns for restricting untraceable firearms due to erased serial numbers, the Third Circuit importantly focused on the operability of a firearm with or without a serial number.[150] At the same time, the court carefully balanced its decision concluding that, "Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned in *Heller*. Accordingly, we hesitate to say Marzzarella's possession of an unmarked firearm in his home is unprotected conduct."[151] Under intermediate scrutiny, however, the regulation was deemed sufficiently tailored so as to not limit the possession of other lawful firearms, and the court determined that there is no right to a gun with an erased serial number for self-defense, even if the gun functions the same with or without an identifiable serial number.[152]

Following *Marzzarella's* adoption of a two-pronged test, the Fourth Circuit vacated its initial opinion in *United States v. Chester*, granting a panel rehearing to "provide district courts in this Circuit guidance on the framework for deciding Second Amendment challenges."[153] In addressing the presumptively lawful regulations mentioned in *Heller*, the court noted that no consensus regarding an appropriate level of scrutiny for firearms had emerged, but that the *Marzzarella* two-prong approach proved effective.[154]

The question presented in *Chester* was whether defendant William Chester's conviction for illegal possession of a firearm under 18 U.S.C. § 922(g)(9)—which made it illegal for anyone who had been convicted of a misdemeanor crime of domestic violence

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[148] *Id.*

[149] *See id.*

[150] *Id.* at 93–95.

[151] *Id.* at 101.

[152] *Id.* at 100–01.

[153] United States v. Chester, 628 F.3d 673, 678 (4th Cir. 2010).

[154] *Id.* at 678–80 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)) (citing *Marzzarella*, 614 F.3d, at 89).

to be in possession of a firearm—violated his Second Amendment rights in consideration of the *Heller* decision.[155] The court held that, because of Chester's record as a domestic violence misdemeanant, his assertion did not fall within the core right identified in *Heller*: the right of a "*law-abiding*, responsible citizen to possess and carry a weapon for self-defense," and therefore his claim was not protected under the Second Amendment.[156]

The court dedicated a significant portion of its decision to discussing *Heller's* list of presumptively lawful regulatory measures, specifically "the longstanding prohibitions on the possession of firearms by felons and the mentally ill."[157] Similar to *Marzzarella*, the court in *Chester* was presented with a novel issue not specifically addressed in *Heller*. For the first prong of the *Marzzarella* test, the court had to decide whether the prohibition on the possession of firearms by felons included misdemeanants of domestic violence like Chester.[158] Because the scope of what *Heller* decided "is far from clear," the court could not conclude absolutely that such felons are not afforded Second Amendment protections.[159]

Therefore, the court moved to the second prong and endeavored to ascribe a level of scrutiny appropriate for Chester's case. In evaluating its options, the court noted that strict scrutiny would be too broad because of the potential range of different gun regulations.[160] Because of Chester's domestic-violence history, the Fourth Circuit found that he was not the sort of law-abiding citizen entitled to Second Amendment protections under the *Heller* decision and its emphasis on self-defense.[161] The court concluded intermediate scrutiny would be appropriate "for Chester and similarly situated persons," remanding the case so the district court could apply intermediate scrutiny and determine whether the government carried its burden of a regulatory measure that provided "'a reasonable fit' . . . [to] a 'substantial' government objective."[162] On remand under this standard, the district court convicted Chester, and the Fourth Circuit affirmed.[163] In dealing with a

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[155] *Id.* at 674.

[156] *Id.* at 683 (emphasis in original) (citing *Heller*, 554 U.S. 634–35).

[157] *Id.* at 677 (quoting *Heller*, 554 U.S. at 626).

[158] *Id.* at 680.

[159] *Id.* at 681 (quoting United States v. McCane, 573 F.3d 1037, 1048 (10th Cir. 2009)).

[160] *Id.* at 682.

[161] *Id.* at 683 (citing *Heller*, 554 U.S. at 635).

[162] *Id.* at 683 (quoting Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, at 480 (1989)) (citing United States v. Marzzarella, 614 F.3d 85, 97–98 (3rd Cir. 2010)).

[163] *See* United States v. Chester, 847 F.Supp.2d 902 (S.D.W. Va. 2012), *aff'd* 514 F. App'x. 393 (4th Cir. 2013).

question not fully explained by *Heller*, the Fourth Circuit properly applied intermediate scrutiny as a means to balance the substantial public safety concerns while protecting lawful gun ownership.

B. Rejecting the "'[L]evels of [S]crutiny' Quagmire"[164] and Balancing Interests

In *United States v. Skoien*, the Court of Appeals for the Seventh Circuit took a different slant to a very similar issue as presented in *Chester*. Defendant Steven Skoien had two prior convictions for "misdemeanor crime[s] of domestic violence" and challenged 18 U.S.C. § 922(g)(9), which forbade him from carrying firearms, as a violation of his Second Amendment rights under the *Heller* holding.[165] As in *Chester*, the question presented centered on whether *Heller's* endorsement of prohibitions on the possession of firearms by felons included repeat misdemeanor offenses of domestic violence.[166]

The court found it futile to "parse these passages of *Heller* as if they contained an answer to whether § 922(g)(9) is valid," and warned district courts "not to treat *Heller* as containing broader holdings than the Court set out to establish."[167] With this preface, the *Skoien* court noted that statutory prohibitions on some persons are proper, and focused on the legislative history behind the statute, finding that *Heller* did not require bans on the possession of firearms to reflect those that were in place when the Bill of Rights was passed.[168] While not performing an explicit balancing test as suggested in Justice Breyer's *Heller* dissent, the Seventh Circuit reasoned that the government was required to show a strong justification for the prohibition, but that the court would "not get more deeply into the 'levels of scrutiny' quagmire."[169] Pointing out that Skoien was a recidivist, and finding that public safety concerns justified the law, the court held that the statute did not violate the rights guaranteed by the Second Amendment.[170] While there is the potential to use public safety justifications to uphold *any* firearm

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[164] United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010).

[165] *See id.* at 639 (quoting and citing 18 U.S.C. § 922 (g)(9) (2012)) (alteration in original).

[166] *Id.*

[167] *Id.* at 640–41.

[168] *Id.*

[169] *Id.* at 641–42.

[170] *Id.* at 644–45.

regulation,[171] the Seventh Circuit appropriately addressed the specific facts of the case at issue, focusing on Skoien's status as a repeat offender of domestic violence and distinguishing the regulation's burden on lawful gun ownership.[172]

In *Skoien*, the Seventh Circuit declined to adopt a level of scrutiny analysis because of what it deemed to be precautionary language in *Heller*, and not a bright-line rule as to what the Second Amendment protects.[173] Because the "Justices have told us that the matters have been left open,"[174] the court deftly declined to ascribe a standard of review. Instead, the Seventh Circuit simply assessed the government interests of public safety in regulating firearms alongside the vague exceptions in *Heller* as applied to Skoien, and upheld the regulation.[175]

In response to *McDonald*, the City of Chicago replaced its laws prohibiting handgun possession with the Responsible Gun Owners Ordinance, requiring firing-range training as a precondition to lawful gun ownership, while also barring all firing ranges in the city.[176] In *Ezell v. City of Chicago*, plaintiffs sought an injunction prohibiting the enforcement of the new ordinance, contending that a total ban on firing ranges was unconstitutional as it effectively inhibited citizens' core right to self-defense by proscribing their ability to practice their marksmanship within city limits.[177] The city legislature passed the ordinance intending it to be a reasonable response to limit gun violence in light of the *Heller* and *McDonald* decisions.[178]

In reversing the lower court's decision to not grant the injunction, the Seventh Circuit performed a two-part test similar to the test utilized in *Marzzarella*.[179] First, the court decided that firing-range training did fall under the category of rights protected by the Second Amendment because practice and proficiency in the use of firearms are directly related to the self-defense right recognized in *Heller*.[180] Instead of defining a level of scrutiny to perform the second stage of analysis, the court performed a balancing test of the government's justification and the severity of the law's burden.[181] The Seventh Circuit strongly

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171 *See* Lauren Dwarika, *Analyzing Second Amendment Challenges: Getting Strict with Judges Court of Appeals of New York*, 31 TOURO L. REV. 723, 730–32 (2015).

172 *Skoien*, 614 F.3d at 645.

173 *Skoien*, 614 F.3d at 640–42.

174 *Id.*

175 *Id.* at 642.

176 Ezell v. City of Chicago, 651 F.3d 684, 689–90 (7th Cir. 2011).

177 *Id.* at 689.

178 *Id.*

179 *Id.* at 690, 704.

180 *Id.* at 704.

181 *Id.* at 709–11.

emphasized the regulation's impact on the ability of law-abiding citizens to effectively protect themselves and weighed it against the justification of public safety.[182]

While not ascribing to a level of scrutiny, the court did require a "form of strong showing" from the government in connecting the means and ends of the law, and ultimately held that, because the city could not demonstrate how civilian target practice at firing ranges created genuine risks to public safety, the ordinance violated the rights guaranteed by the Second Amendment.[183] The court remanded this case under the more pragmatic approach of interest-balancing.[184] The decision is a prime example of how a more flexible methodology, absent a defined level of scrutiny, does not mean that gun regulations will always be insurmountably upheld.

In *Friedman v. City of Highland Park, Illinois*, the Seventh Circuit advanced its analysis of firearms regulations further by completely disavowing a level of scrutiny analysis and what it deemed as versions of intermediate scrutiny:

> Instead of trying to decide what "level" of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have "some reasonable relationship to the preservation or efficiency of a well regulated militia," . . . and whether law-abiding citizens retain adequate means of self-defense.[185]

In *Friedman*, the Seventh Circuit instituted this new test when private gun owners and the Illinois State Rifle Association challenged an ordinance that prohibited the possession of assault weapons and large capacity ammunition magazines.[186] Plaintiffs sought to enjoin enforcement of the ordinance as a violation of their Second Amendment rights to bear arms for the purposes of self-defense.[187]

While the key to the *Heller* holding is its emphasis on self-defense, in *Friedman* the Seventh Circuit sought to reconcile that right alongside the limitations on "dangerous and unusual weapons" also mentioned in *Heller*.[188] In holding that prohibiting the possession, sale, or manufacture of semi-

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[182] *Id.* at 708–09.

[183] *Id.* (quoting United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010)).

[184] *Id.* at 711.

[185] Friedman v. City of Highland Park, Ill., 784 F.3d 406, 410 (7th Cir. 2015) (quoting District of Columbia v. Heller, 554 U.S. 622–25 (2008)) (internal citations omitted).

[186] *Id.* at 407.

[187] *Id.*

[188] *Id.* at 407–08 (quoting *Heller*, 554 U.S. 570, at 627).

automatic assault weapons and large capacity magazines did not violate the Second Amendment, the Seventh Circuit emphasized that because the Supreme Court had not specifically addressed the scope of the Second Amendment, much of the language in *Heller* outside the core focus on the right of individuals to possess a gun in the home for self-defense was precautionary, reflecting the Court's disposition rather than absolute law.[189] The Seventh Circuit declined to read more into *Heller's* holding than explicitly stated.[190] In doing this, the court provided a more effective test by focusing on what is necessary to maintain a militia, as well as preserving adequate means for self-defense for law-abiding citizens.[191]

The *Friedman* decision illustrates why courts should utilize a more flexible approach to reviewing firearm regulations than strict scrutiny while the scope of the Second Amendment remains ill-defined. Importantly, this approach allows for the democratic process to exercise *its* discretion in enacting reasonable firearm regulations for the goal of public safety, as opposed to judges creating law from the bench. In contrast to individual judges attempting to explain or assess a law under the stringent standards of strict scrutiny, "the best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate, not by parsing ambiguous passages in the Supreme Court's opinions . . . [and] when there is no definitive constitutional rule, matters are left to the legislative process."[192] There is no definitive constitutional rule outside of the individual right to a gun in the home for self-defense, and because issues involving firearm regulations inherently involve public policy and a range of personal opinions, the more flexible approach of intermediate scrutiny rather than strict scrutiny is better suited to address regulations influencing Second Amendment rights.

C. Jumping the Gun: The Arrival of Strict Scrutiny and Its Subsequent Rejection

The legislative process in Maryland produced the FSA in an effort to protect legal gun ownership, reduce the number of gun-related deaths, and prevent criminals from obtaining guns.[193] The FSA prohibits the possession, purchase, sale, or

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[189] *Id.* at 409–10.

[190] *Id.* at 410.

[191] *Id.* at 411–12.

[192] *Id.* at 412.

[193] Kolbe v. Hogan, 813 F.3d 160, 188 (4th Cir. 2016), *aff'd in part, vacated in part en banc* 849 F.3d 114 (4th Cir. 2017).

transfer of semi-automatic assault rifles and makes it illegal to have large capacity magazines (LCMs), or an ammunition magazine with a capacity larger than ten rounds.[194] In *Kolbe v. Hogan*, the Fourth Circuit found that the FSA burdened the core right of self-defense as expressed in *Heller*, remanding the case and instructing the district court to apply strict scrutiny in its review of the FSA.[195]

Plaintiff Stephen Kolbe owned a semi-automatic handgun but sought to purchase a semi-automatic assault rifle for home protection. He brought suit against the State of Maryland for declaratory and injunctive relief.[196] In granting summary judgment to the state, the district court applied intermediate scrutiny, finding that the FSA was a valid regulation under the Second Amendment and furthered Maryland's goal of public safety.[197]

In deciding the subsequent appeal, the Fourth Circuit expanded upon its holding in *Chester*, incorporating a two-part test.[198] Finding that the law did burden the individual right to a gun under the Second Amendment, the court also raised the issue of the specific type of weapon before moving to the test's second prong.[199] The court determined that semi-automatic rifles and LCM's are commonly possessed by law-abiding individuals and therefore not the sort of dangerous and unusual weapons warned of in *Heller*.[200] In addressing the FSA's prohibition on LCMs, the court acknowledged that there could be a capacity that exceeded common use, but tellingly declined to answer what the threshold would be.[201] The decision also focused on the operability of a gun and its need to have a functioning magazine of ammunition, but this did not address the issue of how many bullets in a magazine may be considered dangerous or unusual.[202] In focusing on operability as opposed to capacity, the panel opinion ducked the issue of what truly would be excessive and subject to greater regulation.

Moving to the second step in its analysis, the court then sought to determine an appropriate standard of review for the

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194 MD. CODE ANN., CRIM. LAW §§ 4–303(a), 4–305(b).

195 *Kolbe*, 813 F.3d at 181–82, 184.

196 *Id.* at 170–71.

197 *Id.* at 171.

198 *Id.* at 171–72.

199 *Id.* at 172–73.

200 *Id.* at 174.

201 *Id.* at 174–75.

202 *Id.* at 175 ("The Second Amendment protects 'arms,' 'weapons,' and 'firearms'; it does not explicitly protect ammunition. Nevertheless, without bullets, the right to bear arms would be meaningless." (quoting Jackson v. City & Cty. of S.F., 746 F.3d 953, 967 (9th Cir.2014)).

legislation, finding the FSA to be a substantial burden on the *fundamental* right of self-defense, and decided that strict scrutiny should apply.[203] The Fourth Circuit's discussion of semi-automatic rifles as an effective instrument for self-defense evinces the Supreme Court's lack of guidance in *Heller*. While the *Heller* decision stressed the handgun as the "quintessential self-defense weapon," listing numerous reasons why they would be preferred over other guns (e.g., easier to handle, store, etc.),[204] in *Kolbe* the Fourth Circuit panel opinion provided a litany of reasons why handguns are not preferable, such as inaccuracy.[205] Moreover, the court went as far as to state that handguns are difficult to handle—a complete retort to Justice Scalia's exhaustive list on the preferability of handguns in *Heller*.[206]

D. A Category of Weapons Beyond Second Amendment Protection

In its subsequent en banc decision in *Kolbe*, the Fourth Circuit reignited the discussion on what is necessary or preferred for self-defense, further elucidating the chasm of opinion as to this issue alongside public safety considerations.[207] In approaching the FSA specifically, and the larger question of an appropriate standard of review, the en banc decision cut through the morass of issues raised by *Heller*, focusing on *Heller's* "clear and dispositive pronouncement" that "[t]here is no Second Amendment protection for . . . 'weapons that are most useful in military service.'"[208]

While the initial *Kolbe* panel found that, due to their common use, the semi-automatic weapons targeted by the FSA were not dangerous and unusual,[209] the en banc decision instead focused extensively on their military features and purpose.[210] It revived Justice Breyer's dissent in *Heller*, pointing out the cyclical nature of the common use argument, and how in order

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[203] *Kolbe*, 813 F.3d at 175.

[204] District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

[205] *Kolbe*, 813 F.3d at 181.

[206] *Compare Heller*, 554 U.S. at 629 ("There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police."), *with Kolbe*, 813 F.3d at 181 (arguing that handguns are less accurate than rifles, and would therefore be less preferable during the split second intensity of a home invasion).

[207] Kolbe v. Hogan, 849 F.3d 114, 127–28 (4th Cir. 2017) (en banc) (quoting *Heller*, 554 U.S. at 627).

[208] *Id.* at 142 (quoting *Heller*, 554 U.S. at 627).

[209] *Kolbe*, 813 F.3d at 174.

[210] *Kolbe*, 849 F.3d at 124–27, 142–43.

for anything to be protected under this standard, a "new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection."[211] In this way, a plethora of missile launchers dumped onto the market could be considered protected under the Second Amendment as being in common use due to the sheer volume available.

In reference to the many open questions of the *Heller* decision's precise boundaries as to what is protected under the Second Amendment, the en banc decision clarified the inquiry to one ultimate question: "[a]re the banned assault weapons and large-capacity magazines 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?"[212] By answering in the affirmative,[213] the en banc decision took a significant step in developing Second Amendment jurisprudence by identifying a category of arms that are not constitutionally protected.

The dialogue between these decisions in just one circuit exhibits the range of opinions inherent in any discussion of gun violence and firearm regulation, and the high-profile role such issues have in society.[214] Because there is such a significant degree of debate over what types of weapons and what conduct is protected under the Second Amendment, courts should decline to adopt strict scrutiny for firearm regulations, and should not view the Fourth Circuit's experience in *Kolbe* as a starting point for the development of strict scrutiny for firearm regulations. When connected to the core right of self-defense recognized in *Heller*, there is a vast array of opinions in terms of what weapons people believe they need to protect themselves.[215] Whether it be a handgun or an assault rifle, it is debatable if "the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves."[216] Maryland's FSA was a policy product of the democratic process in response to mass shootings,[217] and, as the Fourth Circuit ultimately decided, the more pragmatic

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[211] *Id.* at 141–42.

[212] *Id.* at 136 (quoting *Heller*, 554 U.S. at 627).

[213] *Id.* (quoting *Heller*, 554 U.S. at 627).

[214] *See Kolbe*, 813 F.3d at 183–84; *District of Columbia v. Heller: One of the Supreme Court's most important Second Amendment decisions*, *supra* note 49.

[215] *See* B. Gil Horman, *Choosing a Home-Defense Gun*, NRA (Oct. 16, 2015), https://www.americanrifleman.org/articles/2015/10/16/choosing-a-home-defense-gun/ [https://perma.cc/DV3H-QFMQ].

[216] *Kolbe*, 813 F.3d at 198 (King, R., dissenting) (quoting N.Y. State. Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.2d 242, 260 (2d Cir. 2015)).

[217] *Id.* at 194.

intermediate standard of review should be utilized in reconciling Second Amendment rights with public safety.[218]

III. BACK TO THE FUTURE: RECONCILING THE RIGHT TO BEAR ARMS WITH REASONABLE FIREARM REGULATION

Courts should employ intermediate scrutiny in reviewing legislation impacting Second Amendment rights because of the uncertainty of what types of weapons are protected under the Second Amendment and the differences of opinion and approaches to firearm regulations and self-defense. A strict scrutiny analysis will disproportionately inhibit reasonable regulation aimed at promoting public safety.

A. Clarifying the Heller *Exceptions: What Is Common?*

Much of the confusion over Second Amendment jurisprudence arises from the indeterminate scope of the *Heller* decision and a lack of clarity as to what the exceptions in *Heller* mean.[219] Justice Scalia defined the lawful prohibition against "dangerous and unusual weapons" as those not in common use by law-abiding citizens.[220] Following this guidance, the Fourth Circuit panel opinion in *Kolbe* compared the volume of semi-automatic rifles to car sales in an effort to explain how such weapons are commonly used for self-defense, and therefore not dangerous and unusual.[221] Reasonable minds can and do differ as to whether this is an appropriate measure of what is common, indicating the need for further guidance on what is common, and if that should even be a standard for lawful regulatory measures.[222]

Instead of asking what is common, courts should decide if the regulation at issue substantially burdens the effective maintenance of a militia or the ability to protect one's self at home. Even if the result is a prohibition on a class of weapons, as long as there is individual access to a handgun as commanded by *Heller*,[223] legislatures should be permitted to regulate weapons considered a threat to public safety. Such regulation should be permitted because *Heller*'s holding was premised on

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[218] *See* Sarah Perkins, District of Columbia v. Heller: *The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1096–97 (2010).

[219] *See* United States v. Chester, 628 F.3d 673, 681 (4th Cir. 2010); Larson, *supra* note 40, at 1371–72.

[220] District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (quoting 4 BLACKSTONE 148–49 (1769)).

[221] *Kolbe*, 813 F.3d at 174.

[222] *See* Charles, *supra* note 106, at 1183.

[223] *Heller*, 554 U.S. at 635.

the right of self-defense,[224] and there is too great a range of opinion as to what is necessary for this prerogative.[225] Therefore legislatures, not courts, should make these policy decisions, and not be inhibited by the prospect of a reviewing court employing strict scrutiny and striking down reasonable regulation. Under this approach, the individual right to a handgun for self-defense will not be obliterated and *Heller's* holding can be reconciled with reasonable regulation.

The common use test advanced by *Heller* is also ineffectual because it ignores the current proliferation of firearms, and fails to provide an accurate picture of what is "common." The idea of common use does not address whether the focus should be on the number of owners of weapons or the actual number of weapons.[226] For example, does an individual owner possessing multiple firearms make those weapons more common in society in general? Or should the focus be on the number of people who actually possess certain weapons?

Courts should abandon the common use test, employ an interest-balancing approach under intermediate scrutiny, and determine whether a weapon is most useful in military service. If a court finds the weapon most useful in military service, it should thus find that its possession by an individual separate from a military context falls outside the Second Amendment's scope. As a practical effect of such analysis there will be a determination on the strength of each side of the constitutional issue, with one typically proving to be stronger.[227] There are numerous examples prior to the *Heller* decision of state constitutions incorporating explicit individual right to bear arms provisions that were reconciled with more deferential reasonable regulation standards in cases challenging firearm regulations.[228]

B. The Right to Bear Arms Is Not Absolute: First Amendment Comparisons and Categorical Exclusions

One possible solution is that courts evaluate Second Amendment challenges using First Amendment jurisprudence. Just as commercial speech is not protected as rigorously as

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[224] *Id.*

[225] *See Kolbe*, 813 F.3d at 172–73; Horman, *supra* note 215.

[226] *See* Kolbe v. Hogan, 849 F.3d 114, 136 (4th Cir. 2017).

[227] *Heller*, 554 U.S. at 690–91 (Breyer, J., dissenting).

[228] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 711 (2007) (explaining how courts in forty two states with constitutional provisions protecting the individual right to bear arms employed a deferential "reasonable regulation" standard as opposed to strict scrutiny or any form of heightened scrutiny).

individual speech,[229] so too can courts advance a similar approach to firearm regulations. The First Amendment's protection does not extend to certain categories of speech, like "obscenity, defamation, immediate incitement of crime," etc.; similarly, limits on the possession of firearms are acceptable and not restricted to those acknowledged when the Bill of Rights was approved in 1791.[230] Courts should recognize the out-of-home versus in-home distinction highlighted by *Heller's* acknowledgement of an individual right to a handgun in the home for self-defense.

Justice Scalia recognized this analogy in the *Heller* decision, when he described how, just like the First Amendment, the Second Amendment's protection is not unlimited.[231] At the same time, however, Justice Scalia resisted a case-by-case analysis approach by describing the Second Amendment as the product of an interest-balancing at the time it was drafted.[232] But this characterization as the product of interest-balancing when the Second Amendment was adopted in 1791[233] does not reflect historical changes and how those interests have shifted over time. And while the elevation of the individual right to a handgun in the home "takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon,"[234] because overall gun ownership is more widespread and varied than handguns kept in a home for self-defense, a more pragmatic approach is to treat firearm regulations on a case-by-case basis. This approach is akin to the Court's well-established precedent that acknowledges the myriad of different speech protected, or not, by the First Amendment.

A more variable and scaled approach to issues affecting Second Amendment rights under intermediate scrutiny will be more effective than a rigid one-size-fits all method to gun regulations under a strict scrutiny analysis.[235] Content-neutral speech is subject to a form of intermediate scrutiny, while political speech is protected under strict scrutiny.[236] But because

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[229] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770–71 (1976).

[230] United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (citing United States v. Stevens, 559 U.S. 460, 468–69 (2010)).

[231] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[232] *See id.* at 634–35.

[233] U.S. CONST. amend II; *The New United States of America Adopted the Bill of Rights: December 15, 1791*, AMERICA'S LIBRARY, http://www.americaslibrary.gov/jb/nation/jb_nation_bofright_1.html [https://perma.cc/4887-R4P5].

[234] *Heller*, 554 U.S. at 634 (emphasis in original).

[235] *See* United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010); Roy G. Spece, Jr., & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 288 (2015).

[236] *Chester*, 628 F.3d at 682.

the scope of the Second Amendment is ill-defined,[237] its language is ambiguous, and the rights protected are not clear,[238] strict scrutiny should not automatically apply to *all* firearm regulations. A regulation banning automatic rifles should not mechanically be equated and scrutinized in the same manner as laws affecting handgun possession. Intermediate scrutiny is better suited to address gun control measures, as the standard of review can balance interests behind the regulation, while preserving the individual right to a handgun in the home.[239]

The comparison to varying degrees of protection under the First Amendment is appropriate, and regulations outside of the home should be addressed on a case-by-case basis. A regulation outside the home should be given less judicial deference than a law inhibiting the central right of self-defense by law-abiding citizens in the home.[240] Commercial speech receives First Amendment protection if it involves "lawful activity" and is not deceptive.[241] If the contested speech falls within this sphere of First Amendment protection, a court looks to the substantiality of the government interest in regulating such speech, and asks whether the regulation promotes that interest, and if the regulation is limited to the interest it is meant to serve.[242] Laws regulating firearms outside of the home should be addressed in a similar fashion. As long as there is individual access to a handgun in the home, courts should weigh the substantial government interest of public safety, ask if the regulation promotes this interest, and then question whether there are other methods to achieve the desired legislative intention.

The *Heller* decision resisted a case-by-case analysis,[243] but also emphasized that Second Amendment rights are not unlimited.[244] Without clearly defining Second Amendment limitations, the practical effect is that courts will end up performing a case-by-case analysis,[245] balancing the interests of the government's public safety concerns with the rights protected under the Second Amendment. Strict scrutiny is too restrictive on the government's compelling interest of public

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[237] *See* Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011).

[238] *See* United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010).

[239] *Heller*, 554 U.S. at 635.

[240] Kolbe v. Hogan, 813 F.3d 160, 181–82 (4th Cir. 2016), *aff'd in part, vacated in part en banc* 849 F.3d 114 (4th Cir. 2017).

[241] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).

[242] *Id.*

[243] District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

[244] *Id.* at 626.

[245] *Id.* at 689 (Breyer, J., dissenting).

safety,[246] while intermediate scrutiny is more appropriate for weighing that interest with the limited scope of the Second Amendment right to a handgun in the home for self-defense. Similar to distinctions drawn between commercial and non-commercial speech in the First Amendment context,[247] a case-by-case analysis can be utilized in addressing the personal right to a gun in the home and limitations on the right to a gun outside the home, with more latitude given to those regulations focused outside the home. Strict scrutiny will compromise the analysis of the government's public safety interests,[248] and because Second Amendment jurisprudence is still developing and the scope of the right is not exactly clear,[249] courts should employ a balancing of interests under intermediate scrutiny.

C. The Democratic Process and the Implausibility of Amending the Second Amendment

The Second Amendment states, "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."[250] *Heller* highlighted the vast range of opinion as to what the language of the Second Amendment means, with petitioners arguing that it protected possession of firearms solely in connection with militia service, and respondents claiming an individual right to a gun—distinct from militia service.[251] In agreeing with the latter, the *Heller* decision split the language of the Second Amendment into two parts: the operative and prefatory clauses.[252] Justice Scalia skillfully connected the prefatory clause, "A well regulated Militia, being necessary to the security of a free state," with the operative clause, "the right of the people to keep and bear Arms, shall not be infringed," as stating a purpose and a command for the Amendment as a whole.[253] In dissecting the historical understanding of bearing arms and its meaning in state constitutions throughout U.S. history, the *Heller* decision codified the language of the Second Amendment as an individual right for the purpose of self-defense and the maintenance of a militia.[254]

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[246] *Id.*

[247] *See* Ezell v. City of Chicago, 651 F.3d 684, 707–08 (7th Cir. 2011).

[248] *Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

[249] United States v. Marzzarella, 614 F.3d 85, 101 (3rd Cir. 2010).

[250] U.S. CONST. amend. II.

[251] *Heller*, 554 U.S. at 577.

[252] *Id.*

[253] *Id.* at 577–78 (quoting J. TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW 394 (1867)).

[254] *Id.* at 598–602.

This understanding is still greatly contested with many people believing steadfastly that the language of the Second Amendment only pertains to the maintenance of a militia as a collective right, as opposed to an individual right.[255] But in light of *Heller*, it is necessary for gun control advocates to accept that there is an individual right to a gun[256]—at least a handgun—for defense of home. To clarify the scope of the Second Amendment and the exceptions *Heller* espoused, Congress could modify the Second Amendment to include, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *in defense of home*, shall not be infringed."

Because *Heller* only acknowledged a handgun in the home for self-defense, this modification would both satisfy *Heller's* holding as well as allow for constitutionally permissible firearm regulations outside the home. It is debatable what is necessary for home defense, and because *Heller* focused on handgun possession, the judicial deliberation should end there. If legislatures seek to enact firearm legislation regulating certain weapons outside of the scope of handguns in the home, they should be able to do so. *Heller* stated that it did "not clarify the entire field" of Second Amendment jurisprudence,[257] and Congress should attempt that initiative by defining the Second Amendment as a private right to self-defense in the home. With this clarification of the Second Amendment's purpose, legislatures will be better able to draft reasonable regulation that balances defense of home with overall public safety concerns.

The Constitution was written to be a firm basis of law for the United States, but also with the understanding that it be amenable to change through the democratic process so as to avoid violent conflict.[258] The procedure for changing the Constitution, however, is extremely difficult, with any alteration requiring substantial majorities in both houses of Congress or conventions of three-quarters of the states.[259] Because of the highly debatable nature of the Second Amendment, and the rigorous process of amending the Constitution, a rewriting of the

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[255] *See id.* at 679–80 (Stevens, J., dissenting); *see also* French, *supra* note 2; Samuels, *supra* note 2.

[256] Zimmer, *supra* note 64, at 220–21.

[257] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[258] Mary Frances Berry, *AMENDING THE CONSTITUTION; How Hard It Is To Change*, N.Y. TIMES, (Sept. 13, 1987), http://www.nytimes.com/1987/09/13/magazine/amending-the-constitution-how-hard-it-is-to-change.html?pagewanted=all [https://perma.cc/8JQM-A99B].

[259] *Id.*

Second Amendment is likely not politically feasible.[260] In the absence of such a modification clarifying the Second Amendment as a private right based on self-defense of the home, courts should not employ strict scrutiny in addressing firearm regulations because the goal of public safety will be disproportionately inhibited by the ambiguous scope of an individual right to bear arms.[261]

Deference to legislatures in enacting reasonable gun regulation should outweigh judicial intervention in addressing the scope of the Second Amendment, and the uniform adoption of strict scrutiny for firearm regulations will frustrate this purpose. There are strong regional differences regarding firearm regulations for the goal of public safety, and a strict scrutiny approach does not respect reasonable legislative decisions[262]—in most instances strongly supported by the public.[263] It is clear that the constitutional right to a handgun in the home is fundamental.[264] Outside of that immediate right, however, the Second Amendment's boundaries are not certain.[265] As long as there is a self-defense component to the analysis, and until Congress or the Supreme Court clearly defines the scope of the constitutional right, courts should not uniformly adopt strict scrutiny.

Friedman and *Kolbe* provide prime examples of these regional differences. Both cases involved restrictions on semi-automatic rifles, but the *Kolbe* court initially remanded the case with instructions to use strict scrutiny, while the *Friedman* court upheld the restriction as a constitutionally permissible regulation.[266] If the Fourth Circuit had not issued its subsequent en banc decision rejecting strict scrutiny, the FSA may have potentially been struck down under that standard of review. With the absence of clarity from *Heller*, and the potential development of strict scrutiny for firearm regulations, restrictions such as those upheld in *Friedman*, and other future

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[260] Zachary Elkins, *Rewrite the Second Amendment*, N.Y. TIMES, (Apr. 4, 2013), http://www.nytimes.com/2013/04/05/opinion/rewrite-the-second-amendment.html [https://perma.cc/MVN7-E5GW].

[261] *Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

[262] McDonald v. City of Chicago, Ill., 561 U.S. 742, 902 (2010) (Stevens, J., dissenting).

[263] *See generally* Carl Bialik, *Most Americans Agree With Obama That More Gun Buyers Should Get Background* Checks, FIVETHIRTYEIGHT (Jan. 5, 2016, 8:25 AM), http://fivethirtyeight.com/features/most-americans-agree-with-obama-that-more-gun-buyers-should-get-background-checks/ [https://perma.cc/768C-D5LH]; Elkins, *supra* note 260.

[264] *See McDonald*, 561 U.S. at 767.

[265] *See* United States v. Chester, 628 F.3d 673, 676 (4th Cir. 2010).

[266] *See* discussion *supra* Sections II.B–C.

regulations, may not survive.[267] The Supreme Court denied the petition for writ of certiorari and thus did not hear *Friedman*, and the dissent in the initial *Kolbe* panel opinion emphasized this in arguing against explicitly adopting strict scrutiny, pointing to the lack of clarity as to Second Amendment rights and the fact that no other circuit court took it upon themselves to employ strict scrutiny to firearm regulations.[268]

Strict scrutiny should not be adopted under the vague shadow of what is and is not permissible under the Second Amendment, and courts should not be making these decisions under the rigid guidelines of strict scrutiny. While protecting the right to a handgun in the home, legislatures should be responsible for making policy decisions on regulating firearms in general, and the adoption of strict scrutiny threatens the survival of future regulatory schemes.[269]

Due to the political impracticality of modifying the Second Amendment,[270] and short of a congressional action clarifying Second Amendment rights, the important arena for development of Second Amendment doctrine is the states. Local laws and initiatives to either restrict or expand Second Amendment rights are where change is likely to be seen. States' legislatures are the playing ground for the future development of Second Amendment doctrine.[271] New regulations, and challenges to those regulations, will work their way through the courts, building the framework for constitutionally permissible firearm laws. Strict scrutiny threatens the development of these state initiatives and the survival of reasonable regulation. Because the scope of the Second Amendment is ambiguous, courts should apply intermediate scrutiny as opposed to strict scrutiny in addressing future state initiatives on firearm regulations.

CONCLUSION

Courts should not apply strict scrutiny to firearm regulations and must not view the Fourth Circuit's decision in *Kolbe v. Hogan* as an initial step toward the adoption of strict scrutiny. Because the scope of the Second Amendment right is not clearly defined and open to a drastic range of interpretations,

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[267] Henderson, *supra* note 91, at 465.

[268] Kolbe v. Hogan, 813 F.3d 160, 195–96 (4th Cir. 2016) (King, J., dissenting), *aff'd in part, vacated in part en banc* 849 F.3d 114 (4th Cir. 2017).

[269] Henderson, *supra* note 91, at 465.

[270] Elkins, *supra* note 260.

[271] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.").

courts should employ intermediate scrutiny. Since Congressional modification and explanation of the Second Amendment is not likely, the Supreme Court must clarify the specific rights guaranteed by the Second Amendment, incorporating *Heller's* acknowledgement of the individual right to a handgun in the home, while explaining what is subject to government regulation beyond that immediate right. The maintenance of a militia, the individual right to a handgun for self-defense, and reasonable regulation can all be reconciled under intermediate scrutiny. The fate of reasonable regulation is uncertain under a strict scrutiny standard of review because of the range of opinions as to what is necessary for self-defense and the ambiguous scope of the Second Amendment. Until the Supreme Court clarifies the scope of the Second Amendment and the appropriate standard of review, courts should view *Kolbe v. Hogan* as a warning against strict scrutiny, not an invitation for its application to firearm regulations.[272]

Andrew Kimball[†]

[272] As this note was going to print, the Supreme Court, on November 27, 2017, denied Kolbe's petition for writ of certiorari, thereby rejecting an opportunity to provide needed to clarity to the scope of the Second Amendment. Kolbe v. Hogan, No. 17–127, 2017 WL 3173130 (Nov 27, 2017).

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