Maryland Law Review

Volume 68 | Issue 4 Article 7

District of Columbia v. Heller: Failing to Establish a Standard for the Future

Lindsay Goldberg

Notes

DISTRICT OF COLUMBIA v. HELLER: FAILING TO ESTABLISH A STANDARD FOR THE FUTURE

LINDSAY GOLDBERG*

In *District of Columbia v. Heller*,[1] the Supreme Court of the United States considered whether the District of Columbia violated the Second Amendment of the United States Constitution by prohibiting residents from possessing usable handguns in their homes.[2] The Court held that the ban on handgun possession and the prohibition on operable firearm possession in the home violated the Second Amendment.[3] In so holding, the Court failed to specify strict scrutiny as the appropriate standard of review for regulations challenged under the Second Amendment and failed to effectively respond to Justice Breyer's interest-balancing approach.[4] Had the Court properly applied a strict scrutiny standard to the statutes at hand, it likely could have reached the same outcome and eliminated much of the uncertainty that resulted from both the majority and dissenting opinions.[5]

I. THE CASE

Historically, the District of Columbia ("District") generally prohibited possession of handguns.[6] Six residents of the District, wishing to possess either a handgun or another prohibited firearm in their homes for self-defense, filed suit in the United States District Court for the District of Columbia, asking the court to permanently enjoin

* Lindsay Goldberg is a second-year student at the University of Maryland School of Law where she is a staff member for the *Maryland Law Review*. The author would like to thank Professor Jana Singer and her Notes & Comments Editors for their guidance, insight, and support.

1. 128 S. Ct. 2783 (2008).

2. *Id.* at 2787–88. The Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

3. *Heller*, 128 S. Ct. at 2821–22.

4. *See infra* Part IV.A.

5. *See infra* Part IV.B.

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

various sections of the District's Code.[7] Specifically, the plaintiffs argued that section 7-2502.02(a)(4),[8] barring handgun registration, section 7-2507.02,[9] barring possession of loaded or assembled firearms within the home, and section 22-4504(a),[10] forbidding the unlicensed carrying of handguns within the home, violated the Second Amendment.[11] These sections of the District's Code violated the Second Amendment, the plaintiffs argued, because they interfered with the Amendment's establishment of a fundamental, individual right to bear arms.[12]

After examining *United States v. Miller*,[13] the last case in which the Supreme Court of the United States considered a direct Second Amendment challenge, and various federal appellate court decisions, the district court dismissed the plaintiffs' complaint.[14] Reasoning that *Miller* rejected an individual right to bear arms distinct from militia use and that none of the plaintiffs asserted membership in a militia, the district court ruled that the plaintiffs had no viable claim.[15]

The United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision.[16] First, the court decided that the Second Amendment protects an individual right to

7. Parker v. District of Columbia, 311 F. Supp. 2d 103, 103–04 (D.D.C. 2004). Only one of the residents, Dick Heller, had actually applied for a permit to possess a handgun and had been rejected. *Id.* at 103.

8. D.C. CODE § 7-2502.02(a)(4) (2001) ("A registration certificate shall not be issued for a . . . [p]istol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department."), *held unconstitutional by Heller*, 128 S. Ct. 2783.

9. D.C. CODE § 7-2507.02 (2001) ("Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia."), *held unconstitutional by Heller*, 128 S. Ct. 2783.

10. D.C. CODE § 22-4504(a) (2001) ("No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed.").

11. *Parker*, 311 F. Supp. 2d at 103–04.

12. *Id.*

13. 307 U.S. 174 (1939).

14. *Parker*, 311 F. Supp. 2d at 104–09.

15. *Id.* at 109.

16. Parker v. District of Columbia, 478 F.3d 370, 373 (D.C. Cir. 2007). Before reversing, the court concluded that special police officer Dick Heller had standing to bring suit because he had applied for a handgun permit and had been rejected. *Id.* at 376, 378. According to the Supreme Court, the appellate court did not invalidate the licensing requirement, but held only that the District of Columbia could "'not prevent [a handgun]

keep and bear arms, based on the specific words of the Amendment, placement of the Amendment in the Bill of Rights, and the historical setting at the time of the drafting.[17] In reaching this conclusion, the court noted that although no "unequivocal precedent" dictated the outcome of the case, *Miller* was instructive.[18] Because *Miller* implicitly assumed that the Second Amendment protects an individual right, the appellate court concluded that an individual's enjoyment of the right is not contingent upon enrollment in a militia.[19]

Second, the appellate court rejected the argument that the District is not subject to the Second Amendment because it is a purely federal entity.[20] The court explained that the Supreme Court "has unambiguously held that the Constitution and Bill of Rights are in effect in the District," and that the fact that the District militia is not a state militia is insignificant for purposes of the Second Amendment.[21]

Third, the appellate court rejected the argument that even if the Second Amendment protects an individual right and is in effect in the District, it does not bar the District's regulations.[22] The court concluded that not only does the Second Amendment cover possession of handguns, but also that the District's restrictions are unreasonable and therefore barred by the Second Amendment.[23] The Supreme Court granted certiorari to determine whether the District's prohibition on the possession of usable handguns in the home violated the Second Amendment.[24]

II. LEGAL BACKGROUND

Courts apply various standards of review when evaluating the constitutionality of a regulation, depending on the constitutional right that the regulation is alleged to have violated. Throughout the past

---

from being moved throughout one's house.'" District of Columbia v. Heller, 128 S. Ct. 2783, 2819 (2008) (alteration in original) (quoting *Parker*, 478 F.3d at 400).

17. *Parker*, 478 F.3d at 381–91.

18. *Id.* at 391.

19. *Id.* at 392, 395. The District of Columbia Circuit explained that the Supreme Court in *Miller* implicitly assumed the individual rights position by adopting the logic of the government's secondary argument, that certain firearms are not within the scope of the Second Amendment, rather than the government's primary argument, that the right secured by the Second Amendment does not extend to private purposes. *Id.* at 392–93.

20. *Id.* at 395.

21. *Id.* at 395–96.

22. *Id.* at 397.

23. *Id.* at 397, 399–401. The court admitted that the protections of the Second Amendment are subject to reasonable restrictions, as the right to keep and bear arms was subject to restrictions at common law. *Id.* at 399.

24. District of Columbia v. Heller, 128 S. Ct. 2783, 2787–88 (2008).

century, the Supreme Court has usually applied either a strict scrutiny, a rational basis, or an intermediate standard when evaluating challenged regulations.[25] While the Supreme Court had not had the opportunity to apply a specific standard of review to Second Amendment challenges until *Heller*, lower courts have typically applied standards resembling either strict scrutiny or rational basis review to such disputes.[26]

A. The Supreme Court Applies Various Standards of Review to Statutes Challenged on Constitutional Grounds

When a government-imposed regulation allegedly violates a constitutional right, the Supreme Court applies one of several standards of review to determine the constitutionality of the regulation. The Court traditionally applies a strict scrutiny standard to regulations involving suspect classifications or fundamental rights,[27] a rational basis standard to economic regulations or where deference to the legislature is warranted,[28] and an intermediate standard to regulations that allegedly violate equal protection, the First Amendment, or privacy rights.[29]

1. Strict Scrutiny Review

When the Court evaluates a regulation under a strict scrutiny standard, the regulation must be "narrowly tailored to serve a compelling governmental interest in order to survive."[30] Although the Court mentioned the term strict scrutiny and applied the standard as early as 1942,[31] the Court took several decades to refine the standard by applying it in cases concerning suspect class discrimination under the Fifth and Fourteenth Amendments; freedom of speech, religion, and association under the First Amendment; and other fundamental rights.

25. *See infra* Part II.A.
26. *See infra* Part II.B.
27. *See infra* Part II.A.1.
28. *See infra* Part II.A.2.
29. *See infra* Part II.A.3.
30. *E.g.*, Abrams v. Johnson, 521 U.S. 74, 91 (1997).
31. *See* Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (explaining that although deference was due Oklahoma's legislature, the legislation involved one of the basic civil rights of man and thus needed to be subjected to a strict scrutiny standard of review). A few years earlier, the Court hinted at some of the rights that it would consider under this heightened scrutiny. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

In 1944, in *Korematsu v. United States*,[32] the Court applied a heightened standard of review to a racial discrimination case.[33] The Court explained that the "most rigid scrutiny" was appropriate in such cases because "restrictions which curtail the civil rights of a single racial group are immediately suspect."[34] Despite application of this rigid scrutiny, the Court held that a military order issued during World War II that excluded all persons of Japanese ancestry from designated military areas was justified because of a "[p]ressing public necessity."[35]

Two decades later, in *McLaughlin v. Florida*,[36] the Court invalidated as unconstitutional a Florida statute that punished "'[a]ny negro man and white woman, or any white man and negro woman'" who habitually occupied the same room at nighttime.[37] The Court explained that even though there was a valid state interest, the statute was only constitutional under the Fourteenth Amendment if it was "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[38]

Twenty years after *McLaughlin*, the Court further clarified this heightened standard of review when it decided *Palmore v. Sidoti*,[39] explaining that a racial classification must be "justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment'" of that interest.[40] In *Palmore*, the Court decided that the state's duty to grant custody based on the best interests of the child did not support removing a child from its mother's custody, even though she had just remarried a person of another race.[41] The Court reasoned that the substantial government interest was insufficient to justify the racial classification, and therefore invalidated the state statute in question.[42] This strict scrutiny standard persists today in racial classification cases, requiring that the government have a compelling

32. 323 U.S. 214 (1944).

33. *Id.* at 216.

34. *Id.*; *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.").

35. *Korematsu*, 323 U.S. at 215–19, 223–24.

36. 379 U.S. 184 (1964).

37. *Id.* at 184, 196 (quoting FLA. STAT. § 798.05, repealed by Fla. Laws 1969, c. 69–195, § 1).

38. *Id.* at 196. The *McLaughlin* Court purported to apply the "'most rigid scrutiny'" as it had done in *Korematsu*. *Id.* at 192 (quoting *Korematsu*, 323 U.S. at 216).

39. 466 U.S. 429 (1984).

40. *Id.* at 432–33 (alteration in original) (quoting *McLaughlin*, 379 U.S. at 196).

41. *Id.* at 430, 433.

42. *Id.* at 433–34.

interest and that the classification be narrowly tailored to promote that interest.[43]

While the strict scrutiny standard was evolving in suspect class discrimination cases, it also began to appear in cases involving First Amendment rights.[44] For example, in 1943, in *Murdock v. Pennsylvania*,[45] the Court reversed petitioners' convictions under an ordinance that burdened petitioners' freedoms of press and religion because the ordinance was not "narrowly drawn."[46] More recently, with respect to freedom of speech, the Court has clarified that if a regulation restricts speech based on its content, it must satisfy strict scrutiny.[47] Thus, the regulation must be "narrowly tailored to promote a compelling [g]overnment interest,"[48] and if a less restrictive alternative is available, the legislature must use it.[49] For example, in *United States v. Playboy Entertainment Group, Inc.*,[50] the Court held a statute unconstitutional because requiring certain cable operators to fully scramble or block certain channels during particular hours of the day was not the least restrictive alternative.[51]

Regulations targeting the free exercise of religion also require a compelling governmental interest and narrow tailoring.[52] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[53] because the Court decided that the ordinances purportedly enacted to address religious

43. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[A]ll racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.") (citations and internal quotation marks omitted); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995) (imposing a strict scrutiny standard for race-based legislation).

44. The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

45. 319 U.S. 105 (1943).

46. *Id.* at 117.

47. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

48. *Id.* (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

49. *Id.*

50. 529 U.S. 803.

51. *Id.* at 806–07. Instead, the Court recognized, a regime where viewers could request that the channels be blocked on a household-by-household basis would just as effectively prevent children from watching channels that were primarily dedicated to sexually-oriented programming. *Id.* at 807.

52. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (stating that "if the object of a law is to infringe upon or restrict practices because of their religious motivation," the law must be "justified by a compelling interest" and must be "narrowly tailored to advance that interest").

53. 508 U.S. 520.

animal sacrifices were actually intended to suppress the central element of the Santeria religion, the Court invalidated the ordinances under the "most rigorous of scrutiny."[54] Although there are exceptions to this standard in cases involving generally applicable laws that only have the effect of burdening religious practices,[55] the Court has recently reiterated the "compelling interest test" as applied to the federal government.[56]

Likewise, in one of its earliest cases addressing the issue, the Court emphasized in *NAACP v. Alabama ex rel. Patterson*[57] that the interest of the state must be compelling to justify a deterrent effect on the free exercise of the right of association.[58] As a result, when the State of Alabama tried to obtain membership lists from the NAACP to determine whether it was conducting intrastate business in violation of an Alabama statute, the Court invalidated the state action under "the closest scrutiny."[59] A few years later, the Court clarified its approach and stated that before performing an investigation that would intrude on the rights of speech, press, association, and petition, the state would have to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[60]

In addition to rights under the First Amendment, other fundamental rights are also subject to a strict scrutiny standard of review. For example, the Court has deemed the right to vote fundamental

---

54. *Id.* at 527, 534, 546. Specifically, the Court invalidated the ordinances because the proffered objectives were not compelling and could have been achieved by narrower ordinances that burdened the religion less severely. *Id.* at 546–47.

55. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886 n.3 (1990); *see also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) (explaining that past cases "cannot imply that incidental effects of government programs . . . require government to bring forward a compelling justification for its otherwise lawful actions"). As a result of *Smith*, Congress enacted the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, to restore the compelling interest test as originally set forth in *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). City of Boerne v. Flores, 521 U.S. 507, 512, 515 (1997). However, the Court held the Act unconstitutional on the grounds that Congress never had the power to enact it. *Id.* at 511.

56. *See* Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (concluding that the lower courts did not err in requiring that the government demonstrate a compelling interest before barring the use of a particular drug in religious ceremonies).

57. 357 U.S. 449 (1958).

58. *Id.* at 463 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)).

59. *Id.* at 460–61, 464. The Court found that Alabama fell "short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate, which disclosure of the membership lists [wa]s likely to have." *Id.* at 466.

60. Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963).

because the right is "'preservative of all rights.'"[61] Thus, in *Harper v. Virginia Board of Elections*,[62] Virginia's poll tax needed to be "closely scrutinized" to determine its constitutionality.[63] In *Kramer v. Union Free School District No. 15*,[64] the Court further explained that a New York statute, which limited voting in certain school district elections to property owners or parents of children enrolled in district schools, needed to be "'meticulously scrutinized'"[65] to see if it was "necessary to promote a compelling state interest."[66]

The Court has also determined that statutory provisions invoking the "fundamental right of interstate movement" must be adjudicated by the stricter "compelling state interest" standard.[67] The Court has deemed other rights fundamental as well, such as the right of access to the courts,[68] and has reiterated that the Constitution limits a state's right to interfere with certain personal decisions about family and parenthood.[69]

2. Rational Basis Review

Under a rational basis standard, the Supreme Court upholds a challenged regulation if it has a "rational relationship" to a "legitimate governmental purpose."[70] Courts accord regulations this strong presumption of validity when a regulation is made in an area "neither involving fundamental rights nor proceeding along suspect lines," as

61. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

62. 383 U.S. 663.

63. *Id.* at 670.

64. 395 U.S. 621 (1969).

65. *Id.* at 622, 626 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

66. *Id.* at 627.

67. Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (emphasis omitted). Although the Court did not emphasize the narrowly tailored element of strict scrutiny, it stated that none of the classifications was tailored to serve the government's objective. *Id.* at 631. Recently, however, the Court has explained that two of the components contained in the right to travel are embedded in the Constitution, which also may explain why a heightened standard of review is applied to regulations allegedly violating that right. *See* Saenz v. Roe, 526 U.S. 489, 500–04 (1999) (explaining that the source of one of the components is Article IV, and the source of another is the Privileges and Immunities Clause of the Fourteenth Amendment).

68. *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (referring to the right of access to the courts as fundamental).

69. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (2002) (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)) (noting that the Constitution affords protection to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[M]arriage is one of the basic civil rights of man, fundamental to our very existence and survival." (citations and internal quotation marks omitted)).

70. *E.g.*, Heller v. Doe, 509 U.S. 312, 319–20 (1993).

it is unnecessary to have the judiciary judge the wisdom of the legislature.[71]

When regulations involve non-suspect classifications, the Court uses a rational basis standard to determine whether the regulations violate the Equal Protection Clause.[72] For example, in *City of Cleburne v. Cleburne Living Center, Inc.*,[73] the Court stated that because persons with mental retardation are not a suspect class, regulations affecting those persons only must be "rationally related to a legitimate governmental purpose."[74] Similarly, in *United States v. Carolene Products Co.*,[75] the Court explained that when a regulation affects ordinary commercial transactions, a court should not pronounce the regulation unconstitutional unless the facts preclude the assumption that the regulation "rests upon some rational basis within the knowledge and experience of the legislators."[76] Courts consistently apply this rational basis standard to economic regulations today, unless such regulations violate a fundamental right or are drawn upon a suspect class distinction, because states are accorded wide latitude in the regulation of their local economies under their police powers.[77]

3. Intermediate Review

When the Court evaluates a regulation under an intermediate standard, the applicable test depends on whether the regulation violates equal protection, the First Amendment, or privacy rights.[78] The Court often applies this standard when it determines that a particular category of regulations does not require a strict scrutiny review, but warrants some other heightened standard.[79]

In *Craig v. Boren*,[80] the Court stated that regulations that discriminate on the basis of gender "must serve important governmental

71. *Id.* at 319.

72. *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001) (explaining that because the state court erred in deeming a classification to be suspect, rational basis review was appropriate).

73. 473 U.S. 432 (1985).

74. *Id.* at 466.

75. 304 U.S. 144 (1938).

76. *Id.* at 152.

77. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations . . . .").

78. *See infra* notes 80–96 and accompanying text.

79. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (explaining that a strict scrutiny review was unnecessary); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) (same).

80. 429 U.S. 190 (1976).

objectives and must be substantially related to achievement of those objectives" in order to withstand a challenge under the Equal Protection Clause of the Fourteenth Amendment.[81] In a later case, the Court added that the party seeking to defend the government action must also demonstrate an "exceedingly persuasive justification for that action."[82] The Court created this standard to simultaneously respond to a history of sex discrimination and yet recognize the "[i]nherent differences between women and men."[83]

As articulated in *United States v. O'Brien*,[84] the Court also uses an intermediate standard of review to evaluate content-neutral restrictions on the freedom of speech.[85] If a regulation is content-neutral, a court will sustain it under the First Amendment if it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[86] The Court uses a similar test to determine the constitutionality of commercial speech regulations: Assuming the speech concerns lawful activity and is not misleading (and thus is covered by the First Amendment), a regulation must assert a substantial governmental interest, directly advance such interest, and not be more extensive than necessary to serve the interest.[87]

Some election regulations also fall under a standard more "flexible" than strict scrutiny because the Court recognizes that states retain the power to regulate their own elections.[88] In *Burdick v. Takushi*,[89] the Court articulated that if a regulation imposes a "severe" restriction on First and Fourteenth Amendment rights, "the regulation must be narrowly drawn to advance a state interest of compelling importance";

81. *Id.* at 197.

82. United States v. Virginia, 518 U.S. 515, 531 (1996) (citations and internal quotation marks omitted).

83. *Id.* at 531, 533 (internal quotation marks omitted).

84. 391 U.S. 367 (1968).

85. *Id.* at 377; Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

86. *Turner Broad. Sys.*, 520 U.S. at 189 (citing *O'Brien*, 391 U.S. at 377); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (explaining that a "regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests," which is satisfied if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation" (citations and internal quotation marks omitted)).

87. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (explaining that a four-part test has emerged in commercial speech cases); *see also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 368 (2002) (explaining that *Central Hudson* "provides an adequate basis for decision" in commercial speech cases (citations and internal quotation marks omitted)).

88. Burdick v. Takushi, 504 U.S. 428, 433–34 (1992).

89. 504 U.S. 428.

however, if the regulation imposes only "reasonable, nondiscriminatory restrictions" on those rights, "the State's important regulatory interests are generally sufficient to justify the restrictions."[90]

Last, although the Court likely concluded in *Roe v. Wade*[91] that the right to an abortion is fundamental and subject to strict scrutiny,[92] the Court has more recently decided that only regulations that impose an "undue burden on a woman's ability to make this decision" violate the right protected by the Due Process Clause of the Fourteenth Amendment.[93] Although it is unclear whether the Court changed the standard because it no longer deemed the right to an abortion fundamental[94] or because the strict scrutiny standard undervalued states' interest in a potential life,[95] it appears that the new standard is not as rigid as the old one.[96]

B. Lower Courts Apply Several Different Standards of Review to Statutes Challenged Under the Second Amendment

Because the Supreme Court has never explicitly established the standard of review that courts should apply to challenges under the Second Amendment,[97] federal appellate and state courts have applied various standards to determine the constitutionality of such regulations.[98]

1. Federal Appellate Courts Apply Various Standards of Review

Federal appellate courts that have found that the Second Amendment protects a collective right have applied a rational basis standard of review, while federal appellate courts that have found that the Second Amendment protects an individual right have applied a height-

90. *Id.* at 434 (citations and internal quotation marks omitted).

91. 410 U.S. 113 (1973).

92. *See id.* at 155 (explaining that where fundamental rights are involved, regulations must be narrowly drawn to a compelling state interest).

93. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

94. *See id.* at 954 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (explaining that the majority must have made such a determination).

95. *See id.* at 873 (majority opinion) (arguing that *Roe*'s trimester framework "misconceives the nature of the pregnant woman's interest[ ] and in practice it undervalues the States' interest in potential life").

96. *See id.* (explaining that the previous trimester framework should be abandoned "as a rigid prohibition on all previability regulation aimed at the protection of fetal life").

97. *See* United States v. Emerson, 270 F.3d 203, 221 (5th Cir. 2001) ("Only in [*Miller*] has the Supreme Court rendered any holding respecting the Second Amendment as applied to the federal government."); *see also* United States v. Miller, 307 U.S. 174, 178 (1939) (explaining that the Second Amendment could not be said to protect the right to keep and bear the particular shotgun involved).

98. *See infra* Part II.B.1–2.

ened standard of review. For example, in *Silveira v. Lockyer*,[99] the United States Court of Appeals for the Ninth Circuit held that the Second Amendment does not provide an individual right to own or possess guns or firearms.[100] On this basis, the court held that the Second Amendment does not limit California's ability to regulate the possession or use of firearms, including assault weapons, and that the plaintiffs lacked standing to assert a claim under the Second Amendment.[101] When evaluating plaintiffs' claim under the Equal Protection Clause of the Fourteenth Amendment, based on their claim that California's restrictions on assault weapons contained exceptions only for certain classes of people, the court explained that it would not apply a heightened scrutiny standard to the regulation, but rather a rational basis standard.[102]

The Seventh Circuit took a similar approach in *Gillespie v. City of Indianapolis*,[103] after concluding that a police officer had standing to challenge a regulation that prohibited firearm possession by persons convicted of domestic violence offenses.[104] However, because the court found that the right to keep and bear arms is a collective right, the court dismissed Gillespie's claim for failure to demonstrate a "'reasonable relationship' between his own inability to carry a firearm and 'the preservation or efficiency of a well regulated militia.'"[105] Then, like the Ninth Circuit in *Silveira*, the court stated that under the Equal Protection Clause, the statute needed only to survive a rational basis review because the right involved is not fundamental.[106]

Conversely, in *United States v. Emerson*,[107] the Fifth Circuit held that the Second Amendment protects an individual right to keep and

99. 312 F.3d 1052 (9th Cir. 2003).

100. *Id.* at 1066.

101. *Id.* at 1087.

102. *Id.* at 1087–88. Rather, the court concluded that the Second Amendment confers a "collective right" to "bear arms, guarantee[ing] the right of the people to maintain effective state militias." *Id.* at 1060 (internal quotation marks omitted).

103. 185 F.3d 693 (7th Cir. 1999).

104. *Id.* at 710.

105. *Id.* at 711 (quoting United States v. Miller, 307 U.S. 174, 178 (1939)). The court's use of *Miller*, however, is misplaced. *Miller* used the "reasonable relationship" test to conclude that the Second Amendment does not protect a particular firearm, not to determine whether the regulation would survive Second Amendment scrutiny. *See Miller*, 307 U.S. at 178 ("In the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." (internal quotation marks omitted)).

106. *Gillespie*, 185 F.3d at 709.

107. 270 F.3d 203 (5th Cir. 2001).

bear arms, after concluding that its sister circuits misinterpreted *Miller* and insufficiently examined the Second Amendment.[108] Despite this holding, the court decided that a regulation that prohibited the appellant from possessing a firearm because he was subject to a court order did not violate the Second Amendment.[109] The court reasoned that the appellant's Second Amendment right was properly subjected to "limited, narrowly tailored specific exceptions or restrictions . . . that [we]re reasonable and not inconsistent with the right [to keep and bear arms]."[110]

In *Parker v. District of Columbia*,[111] the District of Columbia Circuit took a similar approach when it decided that the Second Amendment protects an individual right to keep and bear arms.[112] Although the court did not specify the applicable standard of review, it noted that the Second Amendment's protection is subject to the same sort of "reasonable restrictions" that limit the First Amendment.[113]

2. State Courts Apply a Deferential Standard of Review

State courts generally apply either a rational basis standard or a similar reasonableness standard to regulations that allegedly violate the Second Amendment. For example, in *Rohrbaugh v. State*,[114] the Supreme Court of Appeals of West Virginia considered the constitutionality of a statute that prohibited any person convicted of a felony sexual offense from possessing a firearm.[115] Despite holding that both the West Virginia and United States Constitutions protect an individual right to keep and bear arms, the court ruled that the regulation was a proper exercise of the legislature's police power to impose reasonable limitations on the right.[116]

A Wisconsin court reached a similar result in *State v. Cole*,[117] although in *Cole* the regulation prohibiting the carrying of concealed weapons was not challenged under the Second Amendment but

108. *Id.* at 227, 260; *see also* Parker v. District of Columbia, 478 F.3d 370, 380 (D.C. Cir. 2007) ("Only the Fifth Circuit has interpreted the Second Amendment to protect an individual right.").

109. *Emerson*, 270 F.3d at 212–13, 264–65.

110. *Id.* at 261; *see also* United States v. Patterson, 431 F.3d. 832, 835–36 (5th Cir. 2005) (applying *Emerson*); United States v. Darrington, 351 F.3d 632, 633–34 (5th Cir. 2003) (same).

111. 478 F.3d 370.

112. *Id.* at 395.

113. *Id.* at 399.

114. 607 S.E.2d 404 (W. Va. 2004).

115. *Id.* at 412 (citing W. VA. CODE § 61-7-7(b) (2000)).

116. *Id.* at 412–14.

117. 665 N.W.2d 328 (Wis. 2003).

under a similar provision of the Wisconsin Constitution.[118] Despite the fact that the Wisconsin Constitution protects a fundamental individual right to keep and bear arms, the Supreme Court of Wisconsin declined to adopt a strict scrutiny standard of review, instead stating that the correct test was whether the statute was a "reasonable regulation in light of the state's police powers."[119]

In *Ex parte Perez*,[120] the Court of Appeals of Texas used a different approach to reach a similar result, concluding that the Second Amendment does not provide an individual right to keep and bear arms, and does not entitle the appellant, who had been charged with unlawfully carrying a handgun, to relief.[121] Thus, the court used a rational basis standard to review a section of the Texas Penal Code that prohibited the appellant from carrying a handgun, ruling that the section did not violate the appellant's substantive due process rights.[122]

III. THE COURT'S REASONING

In *District of Columbia v. Heller*, the Supreme Court of the United States held that because the Second Amendment confers an individual right to keep and bear arms, the District's ban on handgun possession and the prohibition on operable firearm possession in the home violated the Second Amendment.[123] Writing for the majority, Justice Scalia began by explaining the prefatory and operative clauses of the Second Amendment.[124] Looking at the operative clause first, the Court explained that the phrase "right of the people" strongly indicated an individual right because other constitutional provisions with similar terminology "unambiguously refer[ed] to individual rights."[125] Additionally, the Court explained, the phrase "keep and bear arms"

118. *Id.* at 330.

119. *Id.* at 336–37 (citations and internal quotation marks omitted). Although the court cautioned that this reasonableness test should not be mistaken for a rational basis test, as the right involved required something more than a rational basis, this test is still a relatively deferential type of review. *Id.* at 337–38.

120. No. 05-03-00363-CR, 2003 WL 21267247 (Tex. Ct. App. June 3, 2003).

121. *Id.* at *1, *3.

122. *Id.* at *1, *3, *4.

123. 128 S. Ct. 2783, 2814, 2821–22 (2008).

124. *Id.* at 2789–90. Justice Scalia noted that the Court was guided by the principle that the words and phrases in the Constitution are to be used in their "'normal and ordinary as distinguished from technical meaning.'" *Id.* at 2788 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)); *see also supra* note 2 (text of the Second Amendment).

125. *Heller*, 128 S. Ct. at 2790. The Court discussed the operative clause first because, apart from its "clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *Id.* at 2789. Other constitutional provisions with similar terminology are the First, Fourth, and Ninth Amendments. *Id.* at 2790.

guaranteed the right to possess and carry weapons in cases of confrontation because the phrase was not limited to military use.[126] The Court observed that this meaning was consistent with the historical background of the Second Amendment, which also explained the inclusion of a prefatory clause, and announced that the purpose of codifying the right was "to prevent elimination of the militia."[127]

The Court also considered whether precedent foreclosed the conclusion that the Second Amendment protects an individual right.[128] Principally, the Court explained that the Second Amendment was not implicated in *Miller* because the Second Amendment did not extend to the particular weapon at issue, not because the defendants were bearing arms for nonmilitary use.[129] The Court then concluded that *Miller* positively suggested that the Second Amendment confers an individual right to keep and bear arms.[130] The Court also explained that weapons within the meaning of the Second Amendment are those that law-abiding citizens typically possess for lawful purposes.[131]

Last, the Court conceded that the Second Amendment right to keep and bear arms is not without limits and that certain prohibitions on the possession of firearms are permissible.[132] However, the Court explained that the District's restrictions imposed an "absolute prohibition of handguns held and used for self-defense in the home," which differed from the permissible restrictive laws found in the colonial period.[133] Thus, the Court invalidated section 7-2502.02(a)(4), barring registration of handguns, and section 7-2507.02, barring possession of loaded or assembled firearms within the home.[134]

126. *Id.* at 2797.

127. *Id.* at 2797, 2801.

128. *Id.* at 2812.

129. *Id.* at 2814.

130. *Id.* This right, however, extends only to "arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.* (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).

131. *Id.* at 2815–16. In other words, the weapons protected by the Second Amendment are those "'in common use at the time.'" *Id.* at 2817 (quoting *Miller*, 307 U.S. at 179).

132. *Id.* at 2816–17. For example, the Court stated that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.*

133. *Id.* at 2819–22.

134. *Id.* at 2821–22. Because the appellate court upheld the licensing requirement and the respondent indicated that licensing was not a main concern, the Supreme Court did not address the requirement. *Id.* at 2819.

Justice Stevens dissented, arguing that the Second Amendment's text and history, coupled with the Court's decision in *Miller*, make it clear that the Second Amendment protects the right to keep and bear arms for military purposes only, and the Court should not interpret the Amendment to limit Congress's authority to regulate firearm use or possession for non-military purposes.[135]

Justice Breyer separately dissented, arguing that "the Second Amendment protects militia-related, not self-defense-related, interests."[136] However, Justice Breyer went a step further than Justice Stevens, arguing in the alternative that even if the Second Amendment protects an individual's interest in self-defense, the District's regulations are permissible, reasonable responses to a "serious" problem.[137] When evaluating a particular firearm regulation, Justice Breyer suggested, the Court should use an interest-balancing inquiry under which the Court would generally ask "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[138] Evaluating section 7-2502.02(a)(4) under this inquiry, Justice Breyer would have found the regulation to be a proportional response to compelling concerns.[139]

IV. ANALYSIS

In *District of Columbia v. Heller*, the Supreme Court of the United States held that the District's ban on handgun possession and the prohibition on operable firearm possession in the home violated the Second Amendment.[140] In so holding, the Court failed to specify strict scrutiny as the appropriate standard of review for regulations challenged under the Second Amendment and failed to effectively respond to Justice Breyer's proposed interest-balancing approach.[141] Had the Court applied a strict scrutiny analysis to the statutes at hand,

135. *Id.* at 2822–24 (Stevens, J., dissenting). Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent. *Id.* at 2822.

136. *Id.* at 2847 (Breyer, J., dissenting). Justices Stevens, Souter, and Ginsburg joined Justice Breyer's dissent. *Id.*

137. *Id.*

138. *Id.* at 2852.

139. *Id.* at 2853–54, 2870. Like the majority, Justice Breyer did not address the licensing requirement. *Id.* at 2853. Unlike the majority, Justice Breyer would not have addressed section 7-2507.02, barring possession of loaded or assembled firearms within the home, because he would have read a self-defense exception into the restriction. *Id.*

140. *Id.* at 2821–22 (majority opinion).

141. *See infra* Part IV.A.

the Court could have reached the same outcome while providing meaningful standards for lower courts and state legislatures.[142]

A. The Court Erred by Failing to Establish a Strict Scrutiny Standard for Second Amendment Challenges and by Failing to Effectively Address Justice Breyer's Dissent

The *Heller* Court failed to provide an adequate justification for not establishing a standard of review for regulations challenged under the Second Amendment. When Justice Breyer pointed out that the majority had not established a standard, the Court criticized his interest-balancing approach instead of explaining why it chose not to set a standard.[143] The Court then explained that it could not clarify the field any more than it had because this case represented the "first in-depth examination of the Second Amendment."[144] The Court should have avoided this criticism by stating that the governing standard of review was strict scrutiny, and it should have done so based on Justice Scalia's own language,[145] federal appellate court decisions involving the Second Amendment,[146] and a careful analysis of Justice Breyer's dissent.[147]

1. The Court's Language Implied that the Right to Keep and Bear Arms Is Fundamental

According to one scholar, the Court has never precisely defined what qualifies as a fundamental right.[148] However, the Court has explained that a fundamental right is one that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[149] As previously discussed, the Court has classified as fundamental the right to vote, the right to interstate travel, the right of access to the courts, and the right to certain decisions pertaining to the family and parenthood.[150] Additionally, the Court has long con-

142. *See infra* Part IV.B.

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

144. *Id.*

145. *See infra* Part IV.A.1.

146. *See infra* Part IV.A.2.

147. *See infra* Part IV.A.3.

148. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 697 (2007).

149. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations and internal quotation marks omitted).

150. *See supra* notes 61–69 and accompanying text.

sidered as fundamental the right to free speech, press, and assembly.[151]

Although the Court in *Heller* did not clarify whether the right to keep and bear arms is fundamental, its conclusion that the right is an individual right supports the view that it is a fundamental one. In analyzing the historical background of the case, the Court stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."[152] The Court later explained that this "inherent right of self-defense has been central to the Second Amendment right."[153]

Further, the Court recognized that as early as 1846, state courts had construed the Amendment as protecting the "'*natural* right of self-defence,'" a right that the Georgia Supreme Court described as "'originally belonging to our forefathers, trampled under foot by Charles I[ ] and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!'"[154] The *Heller* Court also favorably cited the Georgia court's description of this right as being "'necessary to the security of a free State.'"[155] The Court may not have explicitly stated that the right to keep and bear arms is fundamental; however, by implying that this right is deeply rooted in this nation's history and tradition, and perhaps even implicit in the concept of ordered liberty, it similarly implied that the right is fundamental.

Additionally, when analyzing whether the historical background confirms that this right is an individual one, the Court referenced William Blackstone's works, explaining that Blackstone "cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen."[156] Commentators have similarly used this historical background, including Blackstone's works, to conclude that the Second Amendment protects a fundamental right.[157] Because the *Heller*

151. De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

152. District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008).

153. *Id.* at 2817.

154. *Id.* at 2809 (quoting Nunn v. State, 1 Ga. 243, 251 (1846)).

155. *Id.* (quoting *Nunn*, 1 Ga. at 251). The Court explained that *Nunn* "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right." *Id.*

156. *Id.* at 2797–98 (citing 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136, 139–40 (1765)). The Court also mentioned that Blackstone's works "'constituted the preeminent authority on English law for the founding generation.'" *Id.* at 2798 (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

157. *See* Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 58–59

Court's analysis implied that the right to keep and bear arms is fundamental, the Court should have required that any infringement on that right be "'narrowly tailored to serve a compelling state interest.'"[158]

2. *Lower Courts Have Implied that a Strict Scrutiny Standard of Review Is Appropriate for Second Amendment Challenges*

As additional support for application of strict scrutiny to the regulations at issue in *Heller*, the Court should have placed greater emphasis on the fact that the federal appellate circuits applying a rational basis standard to firearm regulations did so only after concluding that the Second Amendment does not protect an individual right to keep and bear arms.[159] Although the Court is not bound by these decisions, both circuits that acknowledged an individual right either expressed or implied that a heightened standard of review should apply.[160] For example, although the Fifth Circuit did not mention the terms "strict scrutiny" or "fundamental" in *Emerson*, and its standard lacks the requirement of a "compelling governmental interest," the court's language appears to require at least some heightened form of scrutiny.[161] Similarly, in *Parker*, by basing its standard on a case that carved out certain instances where an intermediate standard would apply to a right traditionally subject to strict scrutiny,[162] the District of

(2007) (explaining that the Second Amendment satisfies the test of whether the right protected is fundamental, or in other words, "necessary to an Anglo-American regime of ordered liberty" (emphasis omitted) (citation and internal quotation marks omitted)); *see also* Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229, 248–50 (2008) (stating that the Second Amendment "protects the most fundamental of all natural rights" and is "deserving of robust judicial enforcement").

158. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

159. *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1066, 1088 (9th Cir. 2003) (explaining that the Second Amendment protects the right to keep and bear arms only for the purpose of maintaining an effective state militia, and that a rational basis standard would be applied to challenges to regulations under the Amendment).

160. Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007) (stating that the Second Amendment's protection is "subject to the same sort of reasonable restrictions" that courts have recognized when interpreting the First Amendment, and explaining that the government could "'impose reasonable restrictions on the time, place, or manner of protected speech'" under the First Amendment (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))); United States v. Emerson, 270 F.3d 203, 260–61 (5th Cir. 2001) (concluding that the Second Amendment protects an individual right, subject to "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right [to keep and bear arms]").

161. *See Emerson*, 270 F.3d. at 261 (explaining that the right could be subjected to limited, narrowly tailored exceptions); *see also supra* note 30 and accompanying text.

162. *Parker*, 478 F.3d at 399 (quoting *Ward*, 491 U.S. at 791); s*ee also supra* notes 47, 84–86 and accompanying text (explaining that in the context of First Amendment cases,

Columbia Circuit actually lent support to the argument that a heightened standard of review should apply.

Although state courts usually apply a rational basis or other deferential standard to regulations allegedly violating the right to keep and bear arms,[163] regardless of whether the right is classified as individual or collective, many of these cases deal with regulations that are inherently different than the severe restrictions at issue in *Heller*.[164] More importantly, these cases do not necessarily imply that courts should always apply a deferential standard. For example, in *Rohrbaugh v. State*,[165] the Supreme Court of Appeals of West Virginia classified the right to keep and bear arms as an individual right, yet said that the regulation prohibiting any person convicted of a felony sexual offense from possessing a firearm was a "reasonable" exercise of the West Virginia legislature's police powers.[166] However, the court clarified that it had recently found this statute constitutional because the legislature's method of achieving public safety had been "crafted narrowly."[167] Although the court likely applied this standard out of deference to the legislature, the court's language implied that the regulation would have survived strict scrutiny as well, as narrow tailoring is a component of strict scrutiny.[168] Additionally, in *State v. Cole*,[169] the Supreme Court of Wisconsin applied a deferential standard when it classified the right to keep and bears arms as a fundamental, individual right, and said that the regulation prohibiting the carrying of concealed weapons was "a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised."[170] However, this standard is in keeping with First Amendment jurisprudence, which subjects time, place, and manner restrictions to a review more

content-neutral restrictions are subject to an intermediate standard of review as opposed to a strict scrutiny standard of review).

163. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2853 (2008) (Breyer, J., dissenting) ("[State courts with] experience in these matters have uniformly taken an approach that treats empirically-based legislative judgment with a degree of deference.").

164. *See id.* at 2818 (majority opinion) ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban.").

165. 607 S.E.2d 404 (W. Va. 2004).

166. *Id.* at 412–14.

167. *Id.* at 413 (citation and internal quotation marks omitted).

168. *See id.* at 412 ("[I]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government . . . ." (citation and internal quotation marks omitted)).

169. 665 N.W.2d 328 (Wis. 2003).

170. *Id.* at 339.

deferential than strict scrutiny, but applies strict scrutiny to more restrictive regulations.[171]

Other state decisions that have applied a rational basis standard to Second Amendment claims have been based on outdated precedent. In *Ex parte Perez*,[172] for example, the Court of Appeals of Texas reviewed a section of the Texas Penal Code under a rational basis standard, despite the appellant's attempts to have the court reconsider the applicable standard in light of *Emerson*.[173] The court explained that it was bound by *United States v. Cruikshank*,[174] and held that the Second Amendment "'has no other effect than to restrict the powers of the National Government.'"[175] Additionally, because Texas courts had previously cited *Miller* as "holding that the Second Amendment does not grant a right to bear arms unrelated to a well-regulated militia," the court affirmed the trial court's order.[176] Because this court based its rational basis standard on an interpretation of *Miller* that has since been clarified, it and similar state cases are not instructive, despite Justice Breyer's claim to the contrary.[177]

Alternatively, even if all state cases supported a deferential standard of review, the Court appeared to explicitly rule out rational basis scrutiny as an appropriate standard for regulations challenged under the Second Amendment.[178] Although the reasonableness standard that many of the states advocate may be more strict than a rational basis standard,[179] both are relatively deferential standards that the Court inferentially ruled out.

---

171. *See supra* notes 47, 84–86 and accompanying text (explaining that in the context of First Amendment cases, content-neutral restrictions are subject to an intermediate standard of review as opposed to a strict scrutiny standard of review).

172. No. 05-03-00363-CR, 2003 WL 21267247 (Tex. Ct. App. June 3, 2003).

173. *Id.* at *2–*3.

174. 92 U.S. 542 (1875).

175. *Ex parte Perez*, 2003 WL 21267247 at *1 (quoting *Cruikshank*, 92 U.S. at 553). The court contrasted this with *Emerson*, which did not address this issue because the defendant was charged with violating a federal statute. *Id.* at *2 n.3.

176. *Id.* at *2, *4.

177. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2853 (2008) (Breyer, J., dissenting) (explaining that while not controlling, these state cases can be instructive).

178. *See id.* at 2817–18 n.27 (majority opinion) (explaining that a rational basis test "could not be used to evaluate the extent to which a legislature may regulate" the right to keep and bear arms).

179. *See, e.g.*, State v. Cole, 665 N.W.2d 328, 337–38 (Wis. 2003) (cautioning that the reasonableness test "should not be mistaken for a rational basis test," because the right involved clearly requires something more than a rational basis, yet explaining that the reasonableness test is still a relatively deferential standard of review).

3. Justice Breyer's Dissent Supports Application of Strict Scrutiny

As further support for applying a strict scrutiny standard of review, the majority should have properly responded to Justice Breyer's dissent and explained why the cases he cited might have better supported application of strict scrutiny.[180] Instead, the majority criticized his approach and stated that it knew of no other enumerated constitutional right that the Court had subjected to an interest-balancing approach.[181]

The Court should have looked at the cases cited in support of Justice Breyer's interest-balancing standard and pointed out that most carved out exceptions to a default strict scrutiny standard where the courts decided that an intermediate standard was more appropriate.[182] For example, in *Thompson v. Western States Medical Center*,[183] although the Court did not extensively analyze why the standard of review should be different in matters of commercial speech, the Court relied exclusively on the *Central Hudson* test,[184] where the Court identified "the common sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[185] Thus, although strict scrutiny applies generally to First Amendment challenges, it is unnecessary in instances involving commercial speech.[186]

Similarly, in *Burdick v. Takushi*,[187] the Court applied a standard more flexible than the default rule of strict scrutiny to certain election

180. *See infra* notes 182–189 and accompanying text.

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

182. In addition to cases that carved out an exception to a default strict scrutiny standard, Justice Breyer also referenced *United States v. Virginia*, 518 U.S. 515, 531–34 (1996), where an intermediate standard was applied to a gender classification. *Heller*, 128 S. Ct. at 2853. However, even if this exception was not carved out of a default strict scrutiny standard, gender classifications are unique, as the Court recognized the "'[i]nherent differences'" between women and men. *Virginia*, 518 U.S. at 533.

183. 535 U.S. 357 (2002).

184. *See id.* at 367–68 (explaining that *Central Hudson* "provides an adequate basis for decision" (citation and internal quotation marks omitted)).

185. Cent. Hudson Gas & Elec. Corp. v. Pub. Comm'n of N.Y., 447 U.S. 557, 562 (1980) (citation and internal quotation marks omitted).

186. See *id.* at 562–63 (explaining that because of the inherent distinction, the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"); *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (explaining that an intermediate standard would be applied to content-neutral restrictions on the freedom of speech). Although *Thompson* did not label the approach as an intermediate standard of review, the test was taken directly from *Central Hudson*, where the concurrence labeled it as an intermediate standard of review. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 573 (Blackmun, J., concurring) ("I agree with the Court that this level of intermediate scrutiny is appropriate . . . ."); *see also supra* note 184.

187. 504 U.S. 428 (1992).

regulations because the Court recognized that states retain the power to regulate their own elections.[188] To subject all regulations to strict scrutiny, including regulations concerning the structure of the election, "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[189] By citing cases where the Court carved out exceptions to a strict scrutiny standard, Justice Breyer more persuasively made a case for application of a strict scrutiny standard for most Second Amendment claims, with allowances for exceptions where a more deferential standard is appropriate.[190]

B. The Majority Did Not Implicitly Reject Strict Scrutiny and the Court Could Have Reached the Same Result by Applying a Strict Scrutiny Standard

Although the Court did not express that a strict scrutiny standard should apply to regulations challenged under the Second Amendment, it did not expressly or implicitly reject a strict scrutiny standard, despite Justice Breyer's argument to the contrary.[191] Further, although strict scrutiny is not always "strict in theory and fatal in fact,"[192] meaning that strict scrutiny is not always an impossible standard to meet, in this case the Court could have reached the same result and invalidated the District's statutes.[193]

1. The Majority Did Not Implicitly Reject a Strict Scrutiny Standard and It Is Not an Impossible Standard to Meet

According to Justice Breyer, the majority implicitly rejected a strict scrutiny standard by "approving" laws that prohibit concealed weapons and firearms in certain locales, deny criminals their Second Amendment right, and regulate commercial firearm sales.[194] In making this assertion, Justice Breyer assumed that these prohibitions

188. *Id.* at 433–34. The Constitution provides that states may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. 1, § 4, cl. 1.

189. *Burdick*, 504 U.S. at 433.

190. Although Justice Breyer may not have wanted to make this argument because he sought to uphold the regulations, the majority could nonetheless have noted this argument in support of a strict scrutiny standard. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2870 (2008) (Breyer, J., dissenting) (arguing that the District's measures were a proportionate response).

191. *See infra* Part IV.B.1.

192. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted).

193. *See infra* Part IV.B.2.

194. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting).

would not pass a strict scrutiny standard.[195] However, a review of post-*Emerson* Fifth Circuit decisions clarifies that regulations can pass such a heightened standard of review. In *United States v. Darrington*,[196] for example, the court held constitutional a statute making it an offense to be a felon in possession of a firearm, even though it applied *Emerson*'s standard.[197] Similarly, in *United States v. Patterson*,[198] the court held constitutional a statute making it an offense to be an unlawful user of a controlled substance in possession of a firearm, stating that this conclusion was consistent with the Second Amendment right as construed in *Emerson*.[199]

Even if the standard in *Emerson* is less rigid than a true strict scrutiny standard, as it lacks the compelling governmental interest requirement, Justice Breyer explained in his dissent that the Court has already deemed compelling "'concern for the safety and . . . lives of its citizens'" and "'interest in preventing crime.'"[200] Therefore, even if the Fifth Circuit had required a compelling governmental interest in addition to its limited, narrowly tailored specific exceptions, it is likely that the statutes in the above Fifth Circuit cases would have met this standard.[201]

Further, the Court has rejected the notion that a strict scrutiny standard is "strict in theory, but fatal in fact."[202] When a federal highway program was challenged for incentivizing general contractors to hire subcontractors controlled by "disadvantaged individuals," the Court explained that "when race-based action is necessary to further a compelling interest, [that] action is within constitutional constraints if it satisfies the narrow tailoring test."[203] Additionally, a recent empirical study conducted by Professor Adam Winkler, analyzing each strict scrutiny decision published by all federal courts between 1990 and 2003, concluded that a strict scrutiny standard was "far from the inevi-

195. *See id.* (stating that the constitutionality of these prohibitions would be "far from clear" under a strict scrutiny standard).

196. 351 F.3d 632 (5th Cir. 2003).

197. *Id.* at 633–34. In fact, the Court cited *Emerson* as recognizing that "'felons, infants and those of unsound mind may be prohibited from possessing firearms,'" as those prohibitions fall within permissible "'limited, narrowly tailored specific exceptions.'" *Id.* at 635 (quoting United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001)).

198. 431 F.3d 832 (5th Cir. 2005).

199. *Id.* at 835–36.

200. *Heller*, 128 S. Ct. at 2851 (quoting United States v. Salerno, 481 U.S. 739, 750, 755 (1987)).

201. *See id.* ("[T]he Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties.").

202. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (citation and internal quotation marks omitted).

203. *Id.* at 204, 237 (internal quotation marks omitted).

tably deadly test imagined" by many.[204] In fact, he concluded that thirty percent of all strict scrutiny analyses resulted in the court upholding the challenged law.[205]

2. *The Court Likely Could Have Reached the Same Result in* Heller *Applying a Strict Scrutiny Standard*

Even though a strict scrutiny standard is not always "strict in theory and fatal in fact," had the Court applied a strict scrutiny standard to the two remaining challenged District statutes, barring registration of handguns and possession of loaded or assembled firearms within the home, it likely would still have invalidated both statutes.

In addressing the statute barring registration of handguns, which completely banned from the home extraordinarily popular firearms, the Court stated that the ban would fail constitutional muster under any standard of review that it has applied to enumerated constitutional rights.[206] Although the Court did not make a similar statement with respect to the statute that required all firearms in the home to be kept inoperable, the Court seemed to indicate that the statute was not narrowly tailored.[207] Had the Court applied a strict scrutiny standard, it likely could have reached the same result without depriving the lower courts of a meaningful way to determine whether a particular firearm regulation is consistent with the Second Amendment.[208] Additionally, under such an approach, the Court could have later carved out exceptions to the strict scrutiny standard if it determined that there were instances in which a more deferential standard would be appropriate.[209]

---

204. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

205. *Id.* at 796.

206. *Heller*, 128 S. Ct. at 2817–18 (majority opinion). The Court then conceded that the statute would survive rational basis review; however, it claimed that a rational basis standard would not be used to evaluate a "specific, enumerated right." *Id.* at 2817–18 n.27.

207. *See id.* at 2818 ("This [statute] makes it impossible for citizens to use the[ ] [firearms] for the core lawful purpose of self-defense and is hence unconstitutional.").

208. *See id.* at 2850–51 (Breyer, J., dissenting) (asking several process-based questions as a result of the majority's opinion). Although one can argue that other courts would not be faced with this situation because *Heller* involved the District, some commentators have argued that "'there would be no analytical difficulty' in applying the Second Amendment's individual right" view to the states. Cameron Desmond, *From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1051 (2008) (quoting Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 296 (2000)).

209. *See* Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 186–87 (2008) (explaining that like the

V. CONCLUSION

In *District of Columbia v. Heller*, the Supreme Court of the United States considered whether the District of Columbia violated the Second Amendment by prohibiting District residents from possessing usable handguns in their homes.[210] The Court held that the ban on handgun possession and the prohibition on operable firearm possession in the home violated the Second Amendment.[211] In so holding, the Court erred by not specifying that strict scrutiny should be the default standard of review for regulations challenged under the Second Amendment, unless it later decides to carve out certain exceptions to which a more deferential standard should apply.[212] Had the Court explicitly applied a strict scrutiny standard to the statutes at hand, it likely could have reached the same outcome without leaving lower courts confused as to what standard to apply in the future.[213]

multi-level system of review used in free speech cases, different Second Amendment tests could be applied in different settings).

210. *Heller*, 128 S. Ct. at 2787–88 (majority opinion).

211. *Id.* at 2821–22.

212. *See supra* Part IV.A.

213. *See supra* Part IV.B.