

## In Search of a Standard: Gun Regulations After Heller and McDonald

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**IN SEARCH OF A STANDARD: GUN REGULATIONS  
AFTER *HELLER* AND *MCDONALD***

STEPHEN KIEHL\*

I. INTRODUCTION

On Christmas Eve of 2002, Raymond Woollard and his family were celebrating the holiday at their home in rural Maryland when someone shattered a window and entered their house.<sup>1</sup> Woollard retrieved his shotgun.<sup>2</sup> A fight ensued, and the intruder wrestled the gun away from him.<sup>3</sup> The two struggled until Woollard's son retrieved another gun and neutralized the intruder until police arrived.<sup>4</sup>

The intruder, who turned out to be Woollard's son-in-law,<sup>5</sup> was sentenced to three years probation and imprisoned after violating his probation.<sup>6</sup> Woollard, fearing for his and his family's safety upon his son-in-law's release,<sup>7</sup> applied for and received a state permit to wear, carry, and transport a handgun.<sup>8</sup> Maryland's Handgun Permit Review Board renewed the permit in 2005 but declined to renew the permit again in 2009, finding that Woollard had not documented any threats

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\* Stephen Kiehl is a second-year student at the University of Maryland School of Law, where he is a staff member of the *Maryland Law Review*. He wishes to thank Professor Richard Boldt for his guidance in writing this Comment; his editors, Stephanie Bignon, Anne Di Salvo, and Alexandra Millard, for their wisdom and patience; and his family and friends.

1. Complaint at 4, *Woollard v. Sheridan*, No. JFM-10-2068, 2010 WL 5463109 (D. Md. Dec. 29, 2010).

2. *Id.*

3. *Id.*

4. *Id.*

5. Memorandum of Law in Support of Motion to Dismiss at 2, *Woollard*, No. JFM-10-2068, 2010 WL 5463109.

6. Complaint, *supra* note 1, at 4. The intruder later violated the terms of his probation and ended up in prison. *Id.*

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7. Memorandum of Law in Support of Motion to Dismiss, *supra* note 5, at 3.

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8. Complaint, *supra* note 1, at 4. Maryland is one of eight states in which officials have discretion to approve or reject individual applications to carry a handgun outside of the home. Lindsey Craven, Note, *Where Do We Go from Here? Handgun Regulations in a Post-Heller World*, 18 WM. & MARY BILL RTS. J. 831, 845 & n.127 (2010). The remaining states are California, Delaware, Hawaii, Massachusetts, New Jersey, New York, and Rhode Island. *Id.* These states typically require an individual to show good cause for carrying a firearm. *Id.* at 845.

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beyond his residence that would require him to carry a gun.<sup>9</sup> Woolard filed suit in federal district court in 2010 asserting a violation of his Second Amendment right to keep and bear arms,<sup>10</sup> relying on the recent landmark cases of *District of Columbia v. Heller*<sup>11</sup> and *McDonald v. City of Chicago*.<sup>12</sup>

In *Heller* and *McDonald*, the Supreme Court of the United States held that the Second Amendment protects an individual's right to keep and bear arms in the home for self-defense,<sup>13</sup> and that the Second Amendment applies against the states through the Fourteenth Amendment.<sup>14</sup> The Court circumscribed the holdings in these cases by limiting the recognized right to the confines of the home,<sup>15</sup> and by offering assurances that many "longstanding"<sup>16</sup> and "presumptively lawful"<sup>17</sup> gun regulations will continue to be valid.<sup>18</sup> *Heller* cautioned, "Like most rights, the right secured by the Second Amendment is not unlimited."<sup>19</sup> Despite the Court's attempt to limit the holdings, *Heller* and *McDonald* unleashed a flood of litigation.<sup>20</sup> Lower courts have

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9. Complaint, *supra* note 1, at 4, 5. Maryland law allows the possession of guns in the home without a permit. MD. CODE ANN., CRIM. LAW § 4-203(b)(6) (West 2002 & Supp. 2010).

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10. Complaint, *supra* note 1, at 1, 6. 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." U.S. CONST. amend. II.

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11. 554 U.S. 570 (2008).

12. 130 S. Ct. 3020 (2010).

13. *Heller*, 554 U.S. at 636.

14. *McDonald*, 130 S. Ct. at 3026; *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment); *see also infra* note 81.

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15. *Heller* held that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. *McDonald* stated, "[T]he Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." 130 S. Ct. at 3050 (plurality opinion).

16. *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

17. *Heller*, 554 U.S. at 627 n.26.

18. The *Heller* Court stated,

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

*Id.* at 626–27. The Court added in a footnote, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

19. *Id.* at 626.

20. *See* Tina Mehr & Adam Winkler, Am. Constitution Soc'y, *The Standardless Second Amendment* 1 (Oct. 2010), <http://www.acslaw.org/files/Mehr%20and%20Winkler%20Standardless%20Second%20Amendment.pdf> (noting that state and federal courts have ruled on more than 200 Second Amendment challenges since *Heller* was decided in 2008).

easily upheld laws that fall within the “presumptively lawful” and “longstanding” regulatory measures condoned by *Heller* and *McDonald*, including laws prohibiting felons<sup>21</sup> and drug users<sup>22</sup> from possessing guns and laws prohibiting the carrying of guns in sensitive places such as airplanes<sup>23</sup> and parks.<sup>24</sup>

The first significant test of the impact of *Heller* and *McDonald* comes in cases such as the case filed in the United States District Court for the District of Maryland, *Woollard v. Sheridan*,<sup>25</sup> in which the challenged laws, such as prohibitions on carrying weapons, were not included in the Supreme Court’s laundry list of presumptively lawful regulations. This Comment will explore how courts have handled gun regulation challenges since *Heller* and how they have struggled to adopt a standard of review for Second Amendment cases.<sup>26</sup> This Comment will then argue that courts should apply intermediate scrutiny in evaluating gun regulations that are short of absolute bans on possession, and that prohibitions on carrying weapons do not implicate the core constitutional right identified in *Heller* and *McDonald* of possessing a gun in the home for self-defense.<sup>27</sup>

## II. LEGAL BACKGROUND

Before *District of Columbia v. Heller*, courts viewed the Second Amendment right to keep and bear arms as a collective right.<sup>28</sup> That changed with *Heller*, when the Supreme Court for the first time recognized an individual right to keep and bear arms.<sup>29</sup> This Part traces Second Amendment jurisprudence leading up to *Heller*, noting that while courts used various standards of review, gun regulations were almost always upheld.<sup>30</sup> This Part then examines the *Heller* and *McDonald* decisions, their reasoning, and the narrow nature of their

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21. *E.g.*, *United States v. Miller*, 604 F. Supp. 2d 1162, 1164 (W.D. Tenn. 2009).

22. *E.g.*, *United States v. Hendrix*, No. 09-cr-56-bbc, 2010 U.S. Dist. LEXIS 33756, at \*1 (W.D. Wis. Apr. 6, 2010).

23. *E.g.*, *United States v. Davis*, 304 F. App’x 473, 474 (9th Cir. 2008).

24. *E.g.*, *United States v. Masciandaro*, 648 F. Supp. 2d 779, 781 (E.D. Va. 2009), *aff’d*, No. 09-4839, 2011 U.S. App. LEXIS 5964 (4th Cir. Mar. 24, 2011).

25. No. JFM-10-2068, 2010 WL 5463109 (D. Md. Dec. 29, 2010).

26. *See infra* Part II.

27. *See infra* Part III.

28. *See, e.g.*, *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (“[T]he Second Amendment affords only a collective right to own or possess guns or other firearms . . .”), *abrogated by* *District of Columbia v. Heller*, 554 U.S. 570 (2008), *as recognized in* *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *Parker v. District of Columbia*, 478 F.3d 370, 380 (D.C. Cir. 2007) (“Federal appellate courts have largely adopted the collective right model.”), *aff’d sub nom. Heller*, 554 U.S. 570.

29. 554 U.S. at 595.

30. *See infra* Part II.A.

holdings.<sup>31</sup> Finally, this Part reviews how courts have handled Second Amendment cases in the wake of *Heller* and *McDonald*, finding that even as courts have not settled on a standard of review, they have continued to uphold a wide variety of gun regulations.<sup>32</sup> This suggests, as one scholar has observed, that “*Heller’s* bark is much worse than its right.”<sup>33</sup>

A. *The Second Amendment Before Heller: Protecting a Collective Right to Arms*

Throughout the nineteenth and twentieth centuries, state and federal courts largely took a collective rights view of the Second Amendment, holding that it guaranteed the rights of states to organize militias and of individuals to keep weapons connected to militia service.<sup>34</sup> For instance, the Supreme Court of Tennessee in 1840 interpreted the Second Amendment to have a military purpose and held that the state could prohibit the wearing and keeping of arms that did not “contribute to the common defence.”<sup>35</sup> A century later, in the 1939 case *United States v. Miller*,<sup>36</sup> the United States Supreme Court upheld a federal statute prohibiting the transport of short-barreled shotguns, finding that such guns are not protected by the Second Amendment because they have no “reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>37</sup> The *Miller* Court further stated that the “obvious purpose” of the Second Amendment was “to assure the continuation and render possible the effectiveness” of state militias.<sup>38</sup>

State and federal courts followed the Supreme Court’s lead in taking a collectivist approach to the Second Amendment right to keep and bear arms, upholding gun regulations in nearly all instances.<sup>39</sup>

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31. See *infra* Part II.B.

32. See *infra* Part II.C.

33. Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1553 (2009).

34. See, e.g., *Parker v. District of Columbia*, 478 F.3d 370, 380 & n.6 (D.C. Cir. 2007) (observing that while most appellate courts have taken the collective rights approach, state appellate courts “offer a more balanced picture,” with at least seven state appellate courts endorsing an individual right to bear arms and at least ten following the collective rights model), *aff’d sub nom. Heller*, 554 U.S. 570.

35. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 159 (1840).

36. 307 U.S. 174 (1939).

37. *Id.* at 178.

38. *Id.*

39. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 718 (2007) (noting that from World War II to 2007, state courts had invalidated only six of the hundreds, if not thousands, of gun control laws enacted in that period); see also *United States v. Cole*, 276 F. Supp. 2d 146, 149 (D.D.C. 2003) (“The *Miller* decision was the last time the Supreme Court considered the meaning of the Second Amendment, and for over six de-

The United States Court of Appeals for the Tenth Circuit, in affirming a federal statute that banned the possession of machineguns, held that “a federal criminal gun-control law does not violate the Second Amendment unless it impairs the state’s ability to maintain a well-regulated militia.”<sup>40</sup> Under the collectivist approach, courts also upheld gun control laws prohibiting felons<sup>41</sup> and individuals convicted of domestic violence misdemeanors<sup>42</sup> from possessing guns.

Concealed carry laws became prevalent in the early nineteenth century as states tried to control violence and limit public dueling, and the laws were upheld by the courts as important public safety measures.<sup>43</sup> Nor were the laws seen as violating the Second Amendment. The influential legal scholar John Norton Pomeroy, writing on the Second Amendment in 1879, stated, “[T]his constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner.”<sup>44</sup> Prior to 1840, the state legislatures of Kentucky, Louisiana, Indiana, Alabama, Georgia, Tennessee, Arkansas, and Virginia all passed laws prohibiting the concealed carrying of weapons.<sup>45</sup> State courts in Arkansas,<sup>46</sup> Georgia,<sup>47</sup> Kansas,<sup>48</sup> Tennessee,<sup>49</sup> and West Virginia<sup>50</sup> upheld these concealed carry laws. One exception was the Supreme Court of Vermont, which in 1903 held that under the Vermont

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cedes since, the lower federal courts have uniformly interpreted the decision as holding that the Amendment affords ‘a collective, rather than individual, right’ associated with the maintenance of a regulated militia.” (quoting *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995)).

40. *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001).

41. *E.g.*, *United States v. Johnson*, 497 F.2d 548, 549 (4th Cir. 1974) (per curiam).

42. *E.g.*, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 697 (7th Cir. 1999).

43. *Winkler*, *supra* note 39, at 1569. As the Supreme Court of West Virginia noted in *State v. Workman*, 14 S.E. 9 (W. Va. 1891),

The presumption which the law establishes, that every man who goes armed in the midst of a peaceable community is of vile character, and a criminal, is in consonance with the common law, and is a perfectly just and proper presumption, and one which ought to prevail in every community which aspires to be called civilized.

*Id.* at 11.

44. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152–53 (Boston, Houghton, Osgood and Co. 4th ed. 1879).

45. Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic 150–56* (May 1, 1998) (unpublished M.A. thesis, Sonoma State University) (on file with Ruben Salazar Library, Sonoma State University).

46. *Fife v. State*, 31 Ark. 455, 461 (1876).

47. *Nunn v. State*, 1 Ga. 243, 251 (1846).

48. *City of Salina v. Blaksley*, 83 P. 619, 621 (Kan. 1905).

49. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 161–62 (1840).

50. *State v. Workman*, 14 S.E. 9, 12 (W. Va. 1891).

Constitution, an individual has a right to carry a weapon, openly or concealed, for self-defense.<sup>51</sup>

In 1897, the Supreme Court indicated that concealed carry laws did not violate the Second Amendment. Justice Brown, writing for the Court in *Robertson v. Baldwin*,<sup>52</sup> stated, “[T]he right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons.”<sup>53</sup> State courts in New York,<sup>54</sup> North Carolina,<sup>55</sup> Maryland,<sup>56</sup> and elsewhere have upheld laws prohibiting the carrying of weapons in public. The Supreme Court of North Carolina, for instance, held that the right to bear arms is “subject to reasonable regulation,” including concealed carry prohibitions, in order to preserve public peace and safety.<sup>57</sup>

Courts in the nineteenth and twentieth centuries generally used rational basis review or a reasonableness test when evaluating gun regulations.<sup>58</sup> The reasonableness test asks “whether the challenged law

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51. *State v. Rosenthal*, 55 A. 610, 610 (Vt. 1903) (“The people of the state have a right to bear arms for the defense of themselves and the state.”).

52. 165 U.S. 275 (1897).

53. *Id.* at 281–82.

54. *Moore v. Gallup*, 267 A.D. 64, 68 (N.Y. App. Div. 1943), *aff'd*, 294 N.Y. 699 (1945).

55. *State v. Dawson*, 159 S.E.2d 1, 11–12 (N.C. 1968).

56. *Onderdonk v. Handgun Permit Review Bd.*, 44 Md. App. 132, 135, 407 A.2d 763, 764 (1979).

57. *Dawson*, 159 S.E.2d at 10.

58. See Lindsay Goldberg, Note, *District of Columbia v. Heller: Failing to Establish a Standard for the Future*, 68 Md. L. Rev. 889, 899–901 (2009) (reviewing the various standards courts have used in determining the constitutionality of gun regulations); see also *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 186 (D.D.C. 2010) [hereinafter *Heller II*] (“Prior to *Heller*, [the reasonableness test] was the test used almost uniformly by state courts.”).

Courts have traditionally used three standards of review in evaluating whether a law violates a constitutional right: rational basis review, intermediate scrutiny, and strict scrutiny. Rational basis is the most deferential standard of review, requiring that a law have “a rational relationship” to a “legitimate governmental purpose” to be valid. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Laws are almost always upheld under this standard of review, which the Court applies to economic and social legislation. Goldberg, *supra*, at 897. Intermediate scrutiny requires that legislation be “substantially related” to “important governmental objectives” to survive review. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Court applies intermediate scrutiny to gender classifications and content-neutral speech regulations. Goldberg, *supra*, at 897–98. Finally, the highest level of review is strict scrutiny, which requires that a law “be narrowly tailored to promote a compelling Government interest.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). The Court has applied strict scrutiny to racial classifications, content-based speech restrictions, and the free exercise of religion. Goldberg, *supra*, at 893–94.

For a thorough discussion of standards of review, see Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S.C. L. Rev. 547, 556–64 (2009), and Goldberg, *supra*, at 892–99.

is a reasonable method of regulating the right to bear arms.”<sup>59</sup> The Supreme Court of Wisconsin, for instance, upheld a concealed carry law as “a reasonable exercise of the state’s inherent police powers.”<sup>60</sup> The Supreme Court of Rhode Island in 2004 noted that even when state courts found the right to bear arms to be fundamental, “a strict scrutiny analysis has been rejected in favor of a reasonableness test.”<sup>61</sup> As long as it did not work an absolute ban on gun possession, a regulation almost always survived the reasonableness test.<sup>62</sup> The United States Supreme Court in 1980 applied rational basis review in upholding a statute that prohibited felons from possessing a firearm, noting that such a law is constitutional as long as “there is some rational basis for the statutory distinctions made . . . or . . . they have some relevance to the purpose for which the classification is made.”<sup>63</sup>

*B. Heller and McDonald Established an Individual Right to Keep and Bear Arms in the Home but Failed to Set a Standard*

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects the individual right to keep and bear arms in the home for the purpose of self-defense.<sup>64</sup> The Court applied this right to the states through the Fourteenth Amendment in *McDonald v. Chicago*.<sup>65</sup> In both cases, the Court hedged its holding by laying out a laundry list of presumptively lawful gun regulations.<sup>66</sup> Neither case, however, provided a standard of review to guide lower courts in analyzing existing gun regulations under the new individual Second Amendment right.<sup>67</sup>

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59. Winkler, *supra* note 39, at 717.

60. *State v. Cole*, 665 N.W.2d 328, 346 (Wis. 2003).

61. *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004).

62. *See* Winkler, *supra* note 39, at 718 (“Under the reasonable regulation standard, courts uphold all but the most arbitrary and excessive laws.”).

63. *Lewis v. United States*, 445 U.S. 55, 65 (1980) (alterations in original) (quoting *Marshall v. United States*, 414 U.S. 417, 422 (1974)) (internal quotation marks omitted).

64. 554 U.S. 570, 636 (2008).

65. 130 S. Ct. 3020, 3026 (2010); *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

66. *See id.* at 3047 (plurality opinion) (reiterating the assurances of *Heller*); *Heller*, 554 U.S. at 626–27 (explaining that “nothing in our opinion should . . . cast any 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”).

67. *See McDonald*, 130 S. Ct. at 3050 (plurality opinion) (rejecting Justice Breyer’s proposed interest-balancing test in *Heller* but not setting a standard of its own); *Heller*, 554 U.S. at 634–36 (discussing the dissent’s criticism that the majority did not set a standard of review and concluding that “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field”).

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*Heller* invalidated a District of Columbia law that effectively banned the possession of handguns in the home.<sup>68</sup> The ban was one of the most restrictive in the country.<sup>69</sup> Conducting a historical inquiry into the original understanding of the Second Amendment, the Court found that the Amendment “conferred an individual right to keep and bear arms”<sup>70</sup> and that this right “belongs to all Americans,” not just members of a militia.<sup>71</sup> The Court held that citizens must be permitted “to use [handguns] for the core lawful purpose of self-defense”<sup>72</sup> but limited its holding to the possession of guns in the home, stating that “whatever else [the holding] 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.”<sup>73</sup> The Court stated that the home is “where the need for defense of self, family, and property is most acute,”<sup>74</sup> and that “the absolute prohibition of handguns held and used for self-defense in the home” is not constitutional.<sup>75</sup>

*Heller* emphasized that its holding did not invalidate all gun regulations. The Court noted that the Second Amendment right is “not unlimited” and is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>76</sup> *Heller* attempted to sketch out some of the boundaries of permissible regulations and created what some scholars have called a “safe harbor” for certain gun laws.<sup>77</sup> The Court noted that the majority of nineteenth century courts that considered the prohibition of carrying concealed weapons held bans to be lawful under the Second Amendment or state constitutions.<sup>78</sup> The Court stated that prohibitions on carrying “dangerous and unusual weapons” would continue to be lawful, as would prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, and laws imposing condi-

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68. *Heller*, 554 U.S. at 635.

69. *See id.* at 629 (noting that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban”).

70. *Id.* at 595.

71. *Id.* at 581.

72. *Id.* at 630.

73. *Id.* at 635.

74. *Id.* at 628.

75. *Id.* at 636.

76. *Id.* at 626.

77. *See* Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 *HASTINGS L.J.* 1245, 1248 (2009) (internal quotation marks omitted).

78. *Heller*, 554 U.S. at 626.

tions and qualifications on the commercial sale of arms.<sup>79</sup> Further, the Court stated that this list of “presumptively lawful regulatory measures” was exemplary and not “exhaustive.”<sup>80</sup>

*McDonald v. Chicago* extended *Heller* to state regulation by holding that the individual right to possess a handgun in the home for self-defense applies against the states through the Fourteenth Amendment.<sup>81</sup> The plaintiffs in *McDonald* challenged a Chicago law that prohibited individuals from possessing a firearm unless they had a valid registration certificate.<sup>82</sup> The law further prohibited the registration of most handguns, effectively banning handgun possession in the city.<sup>83</sup> The plaintiffs also challenged an Oak Park, Illinois, law that made it “unlawful for any person to possess . . . any firearm.”<sup>84</sup> The *McDonald* Court affirmed *Heller’s* holding that the Second Amendment guarantees the rights of individuals to possess handguns in the home for self-defense and held that right to be “deeply rooted in this

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79. *Id.* at 626–27 (internal quotation marks omitted).

80. *Id.* at 627 n.26.

81. 130 S. Ct. 3020, 3050 (2010) (plurality opinion). While a majority of the Court agreed that the Second Amendment applies against the states, the Court could not agree on which provision of the Fourteenth Amendment applies the Second Amendment against the states. Justice Alito, writing for the plurality, stated that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment. *Id.* Justice Thomas concurred in the judgment, stating that he believed the Fourteenth Amendment’s Privileges or Immunities Clause made the right enforceable against the states through the Second Amendment. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment). In a concurrence, Justice Scalia defended the majority’s reliance on history to find the right to keep and bear arms to be fundamental, and he criticized the dissenting Justices for favoring “a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.” *Id.* at 3058 (Scalia, J., concurring).

Justice Stevens dissented, arguing that using a rigid historical test to determine fundamental rights was unfaithful to the Constitution. *Id.* at 3098 (Stevens, J., dissenting). He stated that the Framers assigned to future generations the task of giving concrete meaning to the term “liberty” and that liberty does not include the right to keep and bear arms. *Id.* at 3099, 3109. Justice Breyer, joined by Justice Ginsburg and Justice Sotomayor, also dissented, finding that *Heller’s* conclusion that self-defense was the central component of the Second Amendment right to keep and bear arms was based on a misreading of history. *Id.* at 3121 (Breyer, J., dissenting). Justice Breyer wrote that “the Framers did not write the Second Amendment in order to protect a private right of armed self-defense,” and there is no evidence that such an idea is deeply rooted in the nation’s history or tradition. *Id.* at 3136. Therefore, he wrote, the Second Amendment is not a fundamental right and ought not be incorporated. *Id.*

82. *Id.* at 3026 (plurality opinion) (citing CHICAGO, ILL., MUNICIPAL CODE § 8-20-040(a) (2009)).

83. *Id.* (citing CHICAGO, ILL., MUNICIPAL CODE § 8-20-050(c)).

84. *Id.* (quoting OAK PARK, ILL., MUNICIPAL CODE §§ 27-2-1 (2007); 27-1-1 (2009)) (internal quotation marks omitted).

Nation's history and tradition."<sup>85</sup> As such, according to the plurality, the right is fundamental and must be incorporated under the Fourteenth Amendment to apply against the states.<sup>86</sup>

Even in finding the right to keep and bear arms in the home to be fundamental, the *McDonald* plurality, like the *Heller* majority, cautioned that the right can be limited by the state.<sup>87</sup> The plurality assured that it was not casting doubt on the "longstanding regulatory measures" identified as lawful in *Heller* and stated that "incorporation does not imperil every law regulating firearms."<sup>88</sup> The plurality also allowed for state and local experimentation with "reasonable firearms regulations" to continue.<sup>89</sup> *McDonald*, like *Heller*, focused its discussion on the possession of handguns in the home. In its majority opinion, the *McDonald* Court described individual self-defense as "the central component of the Second Amendment right"<sup>90</sup> and noted the need to exercise this right is "most acute" in the home, to protect "self, family, and property."<sup>91</sup>

The *Heller* majority and *McDonald* plurality suggested that a historical inquiry could help determine the scope of the Second Amendment right. The *Heller* Court stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."<sup>92</sup> Specifically, *Heller* noted that in accordance "with the historical understanding of the scope of the right," the Second Amendment protects only weapons "typically possessed by law-abiding citizens for lawful purposes"<sup>93</sup> that were "in common use at the time"<sup>94</sup> of ratification, 1791.<sup>95</sup> Therefore, the Second Amendment does not protect short-barreled shotguns, for instance, because they were not in common use in 1791.<sup>96</sup>

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85. *Id.* at 3036 (majority opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

86. *Id.* at 3050 (plurality opinion).

87. *Id.* at 3046.

88. *Id.* at 3047.

89. *Id.* at 3046 (quoting Brief of the State of Texas et al. as Amici Curiae in Support of Petitioners at 23, *McDonald*, 130 S. Ct. 3020 (Nos. 08-1497 & 08-1521)) (internal quotation marks omitted).

90. *Id.* at 3036 (majority opinion) (internal quotation marks omitted).

91. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

92. *Heller*, 554 U.S. at 592.

93. *Id.* at 625.

94. *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (internal quotation marks omitted).

95. SOL BLOOM, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 62 (1941).

96. *Heller*, 554 U.S. at 625.

Despite establishing this historical inquiry, neither *Heller* nor *McDonald* identified which standard of review should be used to evaluate gun regulations of a more recent vintage that do not pass the historical test. Justice Scalia, writing for the Court in *Heller*, acknowledged that the District's handgun ban would pass rational basis review.<sup>97</sup> He stated, however, that rational basis, the lowest level of review, would be inappropriate for "a specific, enumerated right" such as the right to keep and bear arms.<sup>98</sup> He also rejected Justice Breyer's proposal for an "interest-balancing" test that would weigh an individual's right to keep and bear arms against the state's need to provide for public safety.<sup>99</sup> Justice Scalia wrote, "We know of no other enumerated constitutional right whose core protection has been subjected to a free-standing 'interest-balancing' approach."<sup>100</sup> Justice Scalia did not identify which form of heightened scrutiny should apply, however, leaving such a determination for future cases.<sup>101</sup>

*McDonald* did not clarify the standard of review debate. The *McDonald* plurality also rejected Justice Breyer's interest-balancing proposal but did not set forth a standard of its own.<sup>102</sup> The Court, however, did note that "reasonable" gun regulations would continue to be permissible.<sup>103</sup>

C. *Post-Heller: Courts Search for a Standard While Continuing to Uphold Gun Regulations*

Hundreds of challenges to gun regulations have been filed in the wake of *Heller* and *McDonald*, and lower courts have failed to settle on a standard of review. The emerging trend is toward intermediate scrutiny,<sup>104</sup> but courts have also used strict scrutiny, a reasonableness stan-

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97. *Id.* at 628 n.27.

98. *Id.*

99. *Id.* at 634.

100. *Id.*

101. *See id.* at 635 ("But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .").

102. *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010) (plurality opinion) ("[W]hile [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion."). Justice Stevens criticized *McDonald's* failure to establish a standard in his dissent, warning that the Court was inviting an avalanche of challenges to state and local gun laws that lower courts would have to decide "under a standard of review we have not even established." *Id.* at 3115 (Stevens, J., dissenting).

103. *Id.* at 3046 (plurality opinion) (quoting Brief of the State of Texas et al., *supra* note 89, at 23) (internal quotation marks omitted).

104. *See GeorgiaCarry.Org, Inc. v. Georgia*, No. 5:10-CV-302 (CAR), 2011 U.S. Dist. LEXIS 6370, at \*31 (M.D. Ga. Jan. 24, 2011) ("This Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case."); *Heller II*, 698 F. Supp. 2d 179, 186 (D.D.C. 2010) ("[T]his court joins numerous

dard, an undue burden standard, and a hybrid of strict and intermediate scrutiny.<sup>105</sup> As Judge Andre Davis of the Fourth Circuit noted, “*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations.”<sup>106</sup> Despite this confusion, commentators have noted, “[T]he only consistency in the lower court cases is in the results. Regardless of the test used, challenged gun laws almost always survive.”<sup>107</sup> Lower courts have not been eager to overturn existing gun control measures.<sup>108</sup> The Fourth Circuit in particular noted its reluctance to extend gun rights beyond those explicitly granted by *Heller*, pointing to the toll exacted by gun violence: “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”<sup>109</sup>

*1. Regulations That Fall into Heller’s “Safe Harbor” Have Been Upheld*

State and federal courts have easily upheld gun regulations that fall into *Heller*’s “safe harbor.”<sup>110</sup> *Heller* did not cast doubt on “long-standing prohibitions on the possession of firearms by felons and the mentally ill,” laws forbidding weapons “in sensitive places such as schools and government buildings,” and “laws imposing conditions and qualifications on the commercial sale of arms.”<sup>111</sup> *Heller* also approved of the “historical tradition of prohibiting the carrying of dangerous and unusual weapons.”<sup>112</sup>

Regulations that fall squarely under those exceptions have been upheld. A number of federal courts have upheld felon-in-possession bans.<sup>113</sup> One court that considered, and rejected, a challenge to the

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other courts in concluding that intermediate scrutiny is the appropriate standard of review.”).

105. Mehr & Winkler, *supra* note 20, at 2–7 (collecting cases); *see infra* Part II.C.2.

106. *United States v. Chester*, 628 F.3d 673, 688–89 (4th Cir. 2010) (Davis, J., concurring) (determining that intermediate scrutiny is the proper standard of review for a law banning gun possession for individuals convicted of domestic violence misdemeanors).

107. Mehr & Winkler, *supra* note 20.

108. *Id.*

109. *United States v. Masciandaro*, No. 09-4839, 2011 U.S. App. LEXIS 5964, at \*48 (4th Cir. Mar. 24, 2011).

110. Denning & Reynolds, *supra* note 77, at 1248 (internal quotation marks omitted).

111. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

112. *Id.* at 627 (internal quotation marks omitted).

113. *E.g.*, *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir.) (affirming the constitutionality of 18 U.S.C. § 922(g) in the context of a challenge to a felon-in-possession statute), *cert. denied*, 129 S. Ct. 2814 (2009); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. Sept. 11, 2008) (per curiam) (unpublished) (upholding a conviction under 18

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felon-in-possession ban stated, “There is no wiggle room to distinguish the present case from the Supreme Court’s blanket [presumptively lawful] statement.”<sup>114</sup> Bans on gun possession among the mentally ill have been upheld.<sup>115</sup> *Heller’s* statement approving bans on dangerous and unusual weapons has been used to uphold a ban on assault weapons.<sup>116</sup> Finally, *Heller’s* approval of gun bans in sensitive places has been cited to uphold laws banning gun possession on county property<sup>117</sup> and in national parks.<sup>118</sup> The Ninth Circuit, upholding a ban on guns on county property, noted the statute did “not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it.”<sup>119</sup> The Eastern District of Virginia, in upholding a ban on the carrying of loaded weapons in a vehicle in a national park, also noted that *Heller’s* holding was limited to the right to possess arms in the home,<sup>120</sup> stating, “*Heller’s dicta* makes pellucidly clear that the Supreme Court’s holding should not be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations.”<sup>121</sup>

Lower courts have upheld gun regulations not specifically mentioned in *Heller* by relying on a footnote in *Heller* stating that its list of “presumptively lawful regulatory measures” was only exemplary and not meant to be “exhaustive.”<sup>122</sup> Courts have used the footnote to uphold bans on gun possession by drug users and those subject to a protective order or convicted of domestic violence misdemeanors.

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U.S.C. § 922(g)(1)); *see also* United States v. Miller, 604 F. Supp. 2d 1162, 1168 (W.D. Tenn. 2009) (collecting cases).

114. United States v. Schultz, No. 1:08-CR-75-TS, 2009 U.S. Dist. LEXIS 234, at \*5 (N.D. Ind. Jan. 5, 2009).

115. *E.g.*, United States v. McRobie, 2009 U.S. App. LEXIS 617, at \*1 (4th Cir. Jan. 14, 2009) (per curiam) (unpublished) (upholding a conviction under 18 U.S.C. § 922(g)(4), which bans gun possession for people who have been committed to a mental institution).

116. *E.g.*, *Heller II*, 698 F. Supp. 2d 179, 181, 194–95 (D.D.C. 2010) (holding that the District of Columbia’s firearms registration procedure, prohibition of assault weapons, and prohibition on large capacity ammunition feeding devices were constitutional in the wake of *Heller*).

117. *E.g.*, *Nordyke v. King*, 563 F.3d 439, 459–60 (9th Cir. 2009) (finding that banning gun possession on county property falls within *Heller’s* sensitive places exception), *vacated en banc*, 611 F.3d 1015 (9th Cir. 2010) (remanding to the panel to reconsider in light of *McDonald v. Chicago*).

118. *E.g.*, United States v. Masciandaro, 648 F. Supp. 2d 779, 790–91 (E.D. Va. 2009) (upholding a conviction for possession of a loaded firearm in a motor vehicle in a national park by analogizing to *Heller’s* sensitive places exception), *aff’d*, No. 09-4839, 2011 U.S. App. LEXIS 5964 (4th Cir. Mar. 24, 2011).

119. *Nordyke*, 563 F.3d at 460.

120. *Masciandaro*, 648 F. Supp. 2d at 787–88.

121. *Id.* at 788.

122. *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

The Seventh, Eighth, and Tenth Circuits, along with federal district courts in Wisconsin and West Virginia, have upheld a federal statute prohibiting illegal drug users from possessing guns.<sup>123</sup> Indeed, drug users have received little sympathy from the courts on the question of gun possession. As the Southern District of Illinois noted, “Put simply, the Second Amendment does not protect one’s right to possess a firearm to deal illegal drugs.”<sup>124</sup>

Bans on gun possession among domestic violence misdemeanants have been upheld by the Seventh and Eleventh Circuits and by several federal district courts, often by analogy to the list of persons (felons and the mentally ill) prohibited from possessing guns under *Heller*.<sup>125</sup> Because domestic violence misdemeanants have been convicted of crimes of violence, one court held, they “must be added to the list of ‘felons and the mentally ill’ against whom the ‘longstanding prohibitions on the possession of firearms’ survive Second Amendment scrutiny.”<sup>126</sup> Courts have further held that even individuals subject to a protective order, who have not been convicted of any violent crimes, can be banned from possessing guns.<sup>127</sup>

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123. *United States v. Yancey*, 621 F.3d 681, 682 (7th Cir. 2010) (per curiam) (holding that 18 U.S.C. § 922(g)(3), which prohibits unlawful drug users from possessing guns, is constitutional); *United States v. Seay*, 620 F.3d 919, 920 (8th Cir.) (same), *cert. denied*, 131 S. Ct. 1027 (2010); *United States v. Richard*, 350 F. App’x 252, 260 (10th Cir. 2009) (unpublished) (same); *United States v. Hendrix*, No. 09-cr-56-bbc, 2010 U.S. Dist. LEXIS 33756, at \*8 (W.D. Wis. Apr. 6, 2010) (same); *United States v. Bumm*, No. 2:08-cr-00158, 2009 U.S. Dist. LEXIS 34264, at \*1 (S.D. W. Va. Apr. 17, 2009) (same).

124. *Dowdy v. Cross*, No. 10-cv-624-MJR, 2010 U.S. Dist. LEXIS 100810, at \*7 (S.D. Ill. Sept. 24, 2010) (emphasis omitted) (upholding a two-level sentence enhancement for defendant whose drug offense included the possession of a firearm).

125. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010); *United States v. Tooley*, 717 F. Supp. 2d 580, 598 (S.D. W. Va. 2010); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1228 (D. Utah 2009); *United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008).

126. *Booker*, 570 F. Supp. 2d at 164–65 (quoting *District of Columbia v. Heller*, 554 U.S. 550, 626 (2008)).

127. *E.g.*, *United States v. Reese*, 627 F.3d 792, 794 (10th Cir. 2010) (reversing the dismissal of an indictment charging the defendant with three counts of possessing firearms while subject to a domestic protection order); *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 U.S. Dist. LEXIS 78148 (N.D.N.Y. Oct. 6, 2008) (finding that *Heller* does not make 18 U.S.C. § 922(g)(8), which bans gun possession among those subject to a protection order, unconstitutional); *United States v. Montalvo*, No. 08-CR-004S, 2009 U.S. Dist. LEXIS 19559 (W.D.N.Y. Mar. 12, 2009) (upholding an indictment under 18 U.S.C. § 922(g)(8)).

## 2. *Lower Courts Struggle to Settle on a Level of Scrutiny for Gun Regulations*

Although lower courts have upheld virtually all gun regulations they have considered post-*Heller*, they have diverged on the standard of review to apply in such cases. Some courts have avoided the issue altogether, deciding the cases without setting a standard of review. The Seventh Circuit, in upholding a statute that prohibits gun possession among individuals convicted of domestic violence misdemeanors, applied intermediate review but explicitly declined to set a broad standard. The court stated, “[W]e need not get more deeply into the ‘levels of scrutiny’ quagmire.”<sup>128</sup> Other courts have been more bold, with several using strict scrutiny, some using a reasonableness test, and still others using an undue burden test.<sup>129</sup> The majority of courts to announce a standard of review have employed intermediate scrutiny, which is emerging as a clear favorite in the lower courts for Second Amendment challenges.<sup>130</sup>

The courts that have settled on intermediate scrutiny have generally done so for two reasons. First, these courts have argued that *Heller*’s list of presumptively lawful regulations is inconsistent with strict scrutiny.<sup>131</sup> The District Court for the District of Columbia stated that strict scrutiny “would not square” with *Heller*’s list of presumptively lawful regulatory measures<sup>132</sup> but noted that “some form of heightened scrutiny is necessary in light of the fact that the right at issue is a specific, constitutionally enumerated right.”<sup>133</sup> The court settled on intermediate scrutiny.<sup>134</sup> Second, courts have applied intermediate

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128. *Skoien*, 614 F.3d at 642.

129. See *infra* text accompanying notes 131–65.

130. See, e.g., *GeorgiaCarry.Org, Inc. v. Georgia*, No. 5:10-CV-302 (CAR), 2011 U.S. Dist. LEXIS 6370, at \*31 (M.D. Ga. Jan. 24, 2011) (upholding a Georgia law that banned the possession of weapons in places of worship and asserting that “[t]his Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case”); *Peruta v. County of San Diego*, No. 09CV2371-IEG (BGS), 2010 U.S. Dist. LEXIS 130878, at \*23–24 (S.D. Cal. Dec. 10, 2010) (noting that “a majority of cases citing to *McDonald* and employing some form of heightened scrutiny . . . have employed intermediate scrutiny”).

131. E.g., *GeorgiaCarry.Org*, 2011 U.S. Dist. LEXIS 6370, at \*31 (“[T]he Supreme Court’s description of a list of presumptively lawful regulatory measures is at least implicitly inconsistent with strict scrutiny”); *United States v. Marzzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (adopting intermediate scrutiny after observing that “the [*Heller*] Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review”), *aff’d*, 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

132. *Heller II*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010).

133. *Id.* at 186.

134. *Id.*



scrutiny in cases where the challenged regulation falls outside of the core right identified in *Heller*. One court, upholding a ban on carrying weapons in places of worship, noted, “[T]he burden imposed by this law falls at least one level outside the core right recognized in *Heller* for a law abiding individual to keep and carry a firearm for the purpose of self defense in the home.”<sup>135</sup>

Courts applying intermediate scrutiny have also relied on *Heller*’s statement that the Supreme Court “elevate[d] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>136</sup> Noting the Court’s emphasis on law-abiding citizens, lower courts applying intermediate scrutiny have upheld felon-in-possession bans,<sup>137</sup> domestic violence misdemeanor bans,<sup>138</sup> and laws banning gun possession by drug users<sup>139</sup>—all of which, by definition, target people who have broken a law.

Several courts, post-*Heller*, have applied strict scrutiny to gun regulations.<sup>140</sup> But, even under this highest level of scrutiny, the courts have upheld the challenged regulation in every instance. Two federal district courts upheld a statute prohibiting gun possession among individuals subject to a protective order.<sup>141</sup> The courts reasoned that the government interest in preventing domestic violence was compelling and that the statute was narrowly tailored in that it applied only to those who were subject to court-issued protective orders.<sup>142</sup> Another federal district court, considering a challenge to a federal statute prohibiting persons convicted of domestic violence misdemeanors from possessing guns, applied strict scrutiny because “the *Heller* Court described the right to keep and bear arms as a fundamental right,”

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135. *GeorgiaCarry.Org*, 2011 U.S. Dist. LEXIS 6370, at \*32.

136. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

137. *E.g.*, *United States v. Schultz*, No. 1:08-CR-75-TS, 2009 U.S. Dist. LEXIS 234, at \*7 (N.D. Ind. Jan. 5, 2009) (finding the federal felon-in-possession ban to be constitutional).

138. *E.g.*, *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010) (holding that domestic violence misdemeanants do not have a right to possess a gun in their home); *United States v. Skoien*, 614 F.3d 638, 640, 642 (7th Cir. 2010) (same), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011); *United States v. Tooley*, 717 F. Supp. 2d 580, 598 (S.D. W. Va. 2010) (same).

139. *E.g.*, *United States v. Chafin*, No. 2:08-00129, 2008 U.S. Dist. LEXIS 95809, at \*7 n.3 (S.D. W. Va. Nov. 18, 2008), *aff’d per curiam*, No. 09-4098, 2011 U.S. App. LEXIS 7713 (4th Cir. Apr. 13, 2011).

140. *E.g.*, *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 U.S. Dist. LEXIS 78148, at \*5–6 (N.D.N.Y. Oct. 6, 2008) (upholding a federal statute banning individuals subject to a protective order from possessing guns as “narrowly tailored” to serve the “compelling government interest” of reducing domestic violence); *United States v. Montalvo*, No. 08-CR-004S, 2009 WL 667229, at \*3 (W.D.N.Y. Mar. 12, 2009) (same).

141. *Erwin*, 2008 U.S. Dist. LEXIS 78148, at \*5–6; *Montalvo*, 2009 WL 667229, at \*3.

142. *Erwin*, 2008 U.S. Dist. LEXIS 78148, at \*5–6; *Montalvo*, 2009 WL 667229, at \*3.

and, according to the court, “where fundamental rights are at stake, strict scrutiny is to be applied.”<sup>143</sup> Applying strict scrutiny, the court found a compelling government interest in protecting domestic partners and children from gun violence.<sup>144</sup> The statute was narrowly tailored to further this interest because it affected only those who had been convicted of using, attempting to use, or threatening to use physical force on domestic partners or children.<sup>145</sup>

A Seventh Circuit panel, in an opinion later vacated, proposed using a hybrid of strict and intermediate scrutiny for gun regulations.<sup>146</sup> For laws that “severely burden the core Second Amendment right of armed defense” in the home, strict scrutiny should be applied.<sup>147</sup> For laws that do not burden that core right, however, that are “several steps removed from the core constitutional right identified in *Heller*,” intermediate scrutiny is appropriate.<sup>148</sup> In a move showing how fluid and unsettled the standard of review debate remains, the Seventh Circuit, en banc, vacated the panel’s hybrid approach and instead applied intermediate scrutiny to domestic violence misdemeanor cases, upholding the prohibition as substantially related to an important government objective, but declining to set a broad rule to be followed in other cases.<sup>149</sup>

The Fourth Circuit endorsed the Seventh Circuit’s original hybrid approach, even after it had been vacated.<sup>150</sup> The Fourth Circuit held that an individual convicted of a domestic violence misdemeanor falls outside of the protection of the core right identified in *Heller*—“the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense.”<sup>151</sup> Intermediate scrutiny is appropriate for domestic violence misdemeanants and “similarly situated persons,” the Fourth Circuit held, because such individuals are not “law-abiding” and thus fall outside of the core *Heller* right.<sup>152</sup> The court remanded the case, however, because it found the government had not

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143. *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009). *Heller*, in fact, did not describe the right as fundamental but as an “enumerated constitutional right.” *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

144. *Engstrum*, 609 F. Supp. at 1233.

145. *Id.* at 1235.

146. *United States v. Skoien*, 587 F.3d 803, 812–13 (7th Cir. 2009), *vacated en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011).

147. *Skoien*, 587 F.3d at 812.

148. *Id.* at 812–13.

149. *Skoien*, 614 F.3d at 642.

150. *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

151. *Id.* at 683.

152. *Id.*

met its burden of establishing a reasonable fit between the important goal of reducing domestic violence and the statute's "permanent disarmament of all domestic-violence misdemeanants."<sup>153</sup>

Several courts have used or suggested an "undue burden" test.<sup>154</sup> Such a test, based on the principle that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right,"<sup>155</sup> provides that a law is permissible so long as it does not have the purpose or "effect of placing a substantial obstacle in the path" of the person seeking to exercise his right.<sup>156</sup> The Ninth Circuit used an undue burden test in upholding a local ordinance prohibiting guns on government property, noting the statute did "not meaningfully impede the ability of individuals to defend themselves in their homes."<sup>157</sup> A California appellate court upheld a statute prohibiting the carrying of loaded guns in public places under the undue burden test, finding the statute "does not burden the core Second Amendment right announced in *Heller*—'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'—to any significant degree."<sup>158</sup>

Finally, some state courts interpreting state constitutional provisions regarding the right to bear arms have employed a "reasonable regulation" standard to evaluate gun laws post-*Heller*.<sup>159</sup> Such a standard "asks whether a law effectively destroys or nullifies the ability of law-abiding people to possess firearms for self-defense. If so, the law is unconstitutional; if not, the law is deemed to be only a regulation, not a prohibition."<sup>160</sup> Since the nineteenth century, state courts have traditionally used a reasonable regulation standard in evaluating gun laws under state constitutional provisions.<sup>161</sup> Several state courts have continued to use the standard post-*Heller* and have found, for in-

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153. *Id.*

154. *See, e.g.*, *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) (holding that a county ordinance banning carrying guns on county property "does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it"), *vacated en banc*, 611 F.3d 1015 (9th Cir. 2010) (instructing the panel to reconsider in light of *McDonald v. Chicago*); *People v. Flores*, 169 Cal. App. 4th 568, 577 n.5 (2008) (upholding a statute banning the carrying of loaded firearms in public places under "any conceivable articulation" of an undue burden standard), *cert. denied*, 2009 Cal. LEXIS 2979 (Mar. 18, 2009).

155. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992).

156. *Id.* at 877.

157. *Nordyke*, 563 F.3d at 460.

158. *Flores*, 169 Cal. App. 4th at 577 (emphasis omitted) (quoting District of Columbia v. *Heller*, 554 U.S. 570, 635 (2008)) (internal quotation marks omitted).

159. Mehr & Winkler, *supra* note 20, at 6–7.

160. *Id.* at 6–7.

161. *Id.*

stance, that a state felon-in-possession statute was “a reasonable regulation which is ‘fairly related to the preservation of public peace and safety.’”<sup>162</sup> But because the reasonable regulation standard has proven to be highly deferential to legislatures,<sup>163</sup> at least one federal judge stated that it could not be the standard intended by the *Heller* Court.<sup>164</sup> That judge, on the District Court for the District of Columbia, found that “the reasonableness test would subject the contested provisions to a more lenient measure of scrutiny than that envisioned by the *Heller* Court,” and so the reasonableness test could not be applied to firearm regulations in the post-*Heller* era.<sup>165</sup>

### 3. *Concealed Carry Laws Represent the Next Battleground in Gun Law Challenges*

While lower courts have fairly easily disposed of challenges to gun laws specifically mentioned in *Heller*'s laundry list of presumptively lawful regulations, they have struggled more with regulations not included in the *Heller* list or covered by its historical test. As one federal district court observed, “Challenges to other statutes [not mentioned in *Heller*] have proven more complicated.”<sup>166</sup> Statutes that fall outside of *Heller* include state bans on the concealed or open carrying of firearms<sup>167</sup> and federal bans on gun possession by individuals convicted of domestic violence misdemeanors<sup>168</sup> and among individuals who have been dishonorably discharged from the military.<sup>169</sup> Concealed carry laws present a challenge to courts because they affect all citizens, including the “law-abiding, responsible” citizen at the heart of the self-defense right recognized in *Heller*.<sup>170</sup>

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162. *State v. Whitaker*, 689 S.E.2d 395, 405 (N.C. Ct. App. 2009) (quoting *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2007)), *appeal dismissed and review denied*, 689 S.E.2d 395 (2009), *cert. denied*, 130 S. Ct. 3428, *aff'd*, 700 S.E.2d 215 (N.C. 2010); *see also* *Students for Concealed Carry on Campus, LLC v. Regents of the Univ. of Colo.*, No. 09CA1230, 2010 Colo. App. LEXIS 541, at \*29 (Apr. 15, 2010) (explaining that “the reasonable exercise test . . . not the rational basis test, is the appropriate test” for evaluating gun regulations under the Colorado Constitution).

163. *See* *Winkler*, *supra* note 39, at 719 (“Like rational basis, the reasonable regulation standard tends to be, more than anything else, shorthand for broad judicial deference.”).

164. *Heller II*, 698 F. Supp. 2d 179, 186 (D.D.C. 2010).

165. *Id.* at 181, 186 (upholding, under intermediate scrutiny, a firearms registration scheme, a prohibition on assault weapons, and a ban on large capacity ammunition feeding devices).

166. *United States v. Tooley*, 717 F. Supp. 2d 580, 585 (S.D. W. Va. 2010) (applying intermediate scrutiny to affirm the indictment of a domestic violence misdemeanant).

167. *E.g.*, MD. CODE ANN., CRIM. LAW § 4-203(b)(6) (West 2002 & Supp. 2010).

168. 18 U.S.C. § 922(g)(9) (2006).

169. *Id.* § 922(g)(6).

170. *District of Columbia v. Heller*, 554 U.S. 577, 635 (2008).

In the state and federal courts that have entertained challenges to concealed carry laws, the courts upheld the laws in every case. The courts have observed that *Heller* tacitly condoned concealed carry laws when it stated, in dicta, “[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”<sup>171</sup> The District Court for the District of Nebraska, for example, stated that “states can prohibit the carrying of a concealed weapon without violating the Second Amendment.”<sup>172</sup> A federal court in West Virginia similarly found that the state’s concealed carry prohibition “continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second Amendment.”<sup>173</sup>

Concealed and open carry prohibitions have also been upheld by state courts in California and Maryland. An intermediate appellate court in California used *Heller*’s concealed carry language to conclude, “[g]iven this implicit approval of concealed firearm prohibitions, we cannot read *Heller* to have altered the courts’ longstanding understanding that such prohibitions are constitutional.”<sup>174</sup> The California court also relied on the 1897 Supreme Court case *Robertson v. Baldwin*, which stated that concealed carry laws did not infringe the Second Amendment right to keep and bear arms.<sup>175</sup>

The Court of Appeals of Maryland upheld a state law that prohibited the wearing, carrying, or transporting of a handgun without a permit and when outside of one’s home.<sup>176</sup> The court held that because *Heller* and *McDonald* both focused on firearms in the home and the Maryland statute expressly permitted home possession, the statute was therefore “outside of the scope of the Second Amendment, as articulated in *Heller* and *McDonald*.”<sup>177</sup> The Maryland court firmly rejected the suggestion that *Heller* and *McDonald* had any application beyond the home, notwithstanding *McDonald*’s statement that the right to keep and bear arms is “most notably for self-defense within

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171. *Id.* at 626.

172. *Swait v. Univ. of Neb. at Omaha*, No. 8:08CV404, 2008 U.S. Dist. LEXIS 96665, at \*6–7 (D. Neb. Nov. 25, 2008) (emphasis omitted).

173. *United States v. Hall*, No. 2:08-00006, 2008 U.S. Dist. LEXIS 59641, at \*3 (S.D. W. Va. Aug. 4, 2008) (emphasis omitted), *aff’d per curiam*, 337 F. App’x 340 (4th Cir.), *cert. denied*, 130 S. Ct. 774 (2009).

174. *People v. Flores*, 169 Cal. App. 4th 568, 575 (2008), *cert. denied*, 2009 Cal. LEXIS 2979 (Mar. 18, 2009).

175. 165 U.S. 275, 281–82 (1897) (“[T]he right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons . . .”).

176. *Williams v. Maryland*, 417 Md. 479, 480, 10 A.3d 1167, 1169 (2011).

177. *Id.* at 496, 10 A.3d at 1178.

the home.”<sup>178</sup> The Maryland court observed: “[I]t is clear that prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.”<sup>179</sup> The court did not apply a standard of review because it did not find that the statute implicated the Second Amendment.<sup>180</sup> A concurring judge stated, however, that he would have upheld the statute not because it was outside the scope of the Second Amendment but because it placed a “reasonable restriction[ ]” on the right to bear arms.<sup>181</sup>

### III. ANALYSIS

*District of Columbia v. Heller* and *McDonald v. Chicago* were hailed as landmark decisions that reshaped the Second Amendment landscape.<sup>182</sup> In practice, however, their effect has been muted. Lower courts have been reluctant to read *Heller* and *McDonald* as inviting open season on gun regulations. The District Court for the Eastern District of Virginia summarized the prevailing view in stating, “*Heller’s dicta* makes pellucidly clear that the Supreme Court’s holding should not be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations.”<sup>183</sup> Courts have easily handled many of the challenges to gun laws by referring to *Heller’s* list of “presumptively lawful” regulations.<sup>184</sup> In some such cases, the courts have not even found it necessary to apply a standard of review.<sup>185</sup> As courts are confronted with challenges to regulations not mentioned

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178. *McDonald v. Chicago*, 130 S. Ct. 3020, 3044 (2010) (plurality opinion).

179. *Williams*, 471 Md. at 476, 10 A.3d at 1177.

180. *Id.* at 496, 10 A.3d at 1178.

181. *Id.* at 499, 10 A.3d at 1179 (Murphy, J., concurring).

182. See, e.g., Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1175 (2009) (“In *Heller*, the conservative majority on the Supreme Court did, indeed, make history by creating a new Constitutional right to be armed.”); Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J.L. & PUB. POL’Y 203, 216 (2010) (“*Heller* will have nationwide implications. That result is a big win for common sense. More important, that result is a big win for the Constitution.”).

183. *United States v. Masciandaro*, 648 F. Supp. 2d 779, 788 (E.D. Va. 2009), *aff’d*, No. 09-4839, 2011 U.S. App. LEXIS 5964 (4th Cir. Mar. 24, 2011).

184. See *supra* Part II.C.1.

185. See, e.g., *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (holding a ban on gun possession for domestic violence misdemeanants to be lawful under *Heller’s* “longstanding prohibition” exception, without stating a standard of review); *Swait v. Univ. of Neb. at Omaha*, No. 8:08CV404, 2008 U.S. Dist. LEXIS 96665, at \*6–7 (D. Neb. Nov. 25, 2008) (upholding a ban on carrying concealed weapons without stating a standard of review).

in *Heller*, however, they will find it necessary to establish a standard to govern such cases.

This Part will first explore the challenges presented by gun regulations that do not fall into *Heller*'s "safe harbor" or meet its historical test.<sup>186</sup> Next, it will show that intermediate scrutiny is the appropriate standard of review for regulations that do not impinge on the core right identified in *Heller* and *McDonald*.<sup>187</sup> Intermediate scrutiny provides the flexibility and room for local experimentation the Court envisioned but also recognizes that lower levels of scrutiny, such as rational basis or a reasonableness standard, are insufficient for a specific, enumerated right. Finally, this Part will propose a framework for analyzing gun regulations that respects the core Second Amendment right of possessing a gun in the home for self-defense while allowing the government space to craft reasonable regulations that affect possession outside the home.<sup>188</sup>

A. *Challenges Presented by Regulations Outside the Heller Safe Harbor*

Restrictions on carrying guns in public present unique challenges because the Supreme Court did not explicitly condone them in *Heller* or *McDonald*. *Heller* created a group of presumptively lawful regulations: bans on gun possession for felons and the mentally ill, laws forbidding weapons in sensitive places, laws imposing conditions and qualifications on the commercial sale of arms, and laws banning dangerous and unusual weapons.<sup>189</sup> *Heller* also made clear what regulations will not stand: absolute prohibitions on handgun possession in the home and laws that render guns inoperable in the home.<sup>190</sup> That leaves a sort of twilight zone of regulations that neither fall into the specifically enumerated safe harbor nor burden the core right of home possession.

Statutes that fall into this gray area include bans on the public carrying of firearms,<sup>191</sup> bans on gun possession among individuals convicted of domestic violence misdemeanors,<sup>192</sup> and bans on gun possession among individuals who have been dishonorably discharged from the military.<sup>193</sup> The latter two are categorical prohibitions that

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186. See *infra* Part III.A.

187. See *infra* Part III.B.

188. See *infra* Part III.C.

189. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

190. *Id.* at 628–29.

191. *E.g.*, MD. CODE ANN., CRIM. LAW § 4-203(b)(6) (West 2002 & Supp. 2010).

192. 18 U.S.C. § 922(g)(9) (2006).

193. *Id.* § 922(g)(6).

affect only a discrete group of people and can be analogized to *Heller's* approval of felon possession bans. Courts have extrapolated from *Heller's* endorsement of felon possession bans to hold lawful bans on possession by drug users,<sup>194</sup> illegal aliens,<sup>195</sup> and domestic violence misdemeanants.<sup>196</sup> All of those cases affected a discrete group of people who had violated a law. In so doing, those individuals placed themselves outside of mainstream society,<sup>197</sup> allowing courts to uphold regulations that deprive them of certain rights, such as the *Heller*-recognized right to possess guns in their homes.

Concealed carry laws, however, do not discriminate between groups or disproportionately affect a discrete group: by contrast, concealed carry laws affect everyone, including people who are law-abiding.<sup>198</sup> Concealed carry bans, therefore, cannot be sustained on the categorical exception basis. Nor can they be sustained on the basis of a historical inquiry. *Heller* explained that the Second Amendment “codified a *pre-existing* right.”<sup>199</sup> Regulations that were common at the time of ratification, 1791, do not fall within the ambit of the Amendment. Most gun regulations do not benefit from this historical inquiry, however, because they came into effect long after ratification.<sup>200</sup>

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194. *E.g.*, *United States v. Richard*, 350 F. App'x 252, 260 (10th Cir. 2009) (unpublished) (upholding as constitutional 18 U.S.C. § 922(g)(3), which makes it unlawful for drug users or addicts to possess a gun).

195. *E.g.*, *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 U.S. Dist. LEXIS 8166, at \*2–5 (D. Kan. Jan. 28, 2010) (upholding as constitutional 18 U.S.C. § 922(g)(5), which makes it unlawful for illegal aliens to possess guns).

196. *E.g.*, *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010) (upholding as constitutional 18 U.S.C. § 922(g)(9), which makes it unlawful for domestic violence misdemeanants to possess guns).

197. *See United States v. Chester*, 628 F.3d 673, 690 (4th Cir. 2010) (Davis, J., concurring) (“Undisputedly, those convicted for having committed violent assaults against cohabitants and family members in general, and Chester in particular, are not law-abiding, responsible citizens.”).

198. *See*, for example, title 4, section 4-203 of the Maryland Code, which applies to “persons” with exceptions for law enforcement and the military.

199. *Heller*, 554 U.S. at 592.

200. Winkler, *supra* note 33, at 1563. One scholar noted,

One thing the Founders did not do was impose any gun control laws obviously equivalent to those on the laundry list. They had no restrictions on the commercial sales of firearms as such. Licensing of gun dealers, mandatory background checks, and waiting periods on gun purchases first arose in the twentieth century. Nor did the Founders have bans on guns in schools, government buildings, or any other “sensitive place.” The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes. Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.

*Id.* (footnotes omitted).



Concealed carry laws, for instance, first appeared in the early nineteenth century.<sup>201</sup>

Post-*Heller*, few courts have seriously addressed the constitutionality of concealed or open carry laws. The state courts that have considered the issue have upheld the laws using either no standard of review<sup>202</sup> or the undue burden standard.<sup>203</sup> It is unlikely, however, that federal courts, which have moved toward an intermediate standard of review for gun regulations,<sup>204</sup> would be so lenient. One of the first federal courts to evaluate a concealed carry law under *Heller* upheld the law in a cursory unpublished opinion, without applying a standard of review.<sup>205</sup> Another district court, also ruling shortly after *Heller* was decided, upheld a concealed carry law in a four-page unpublished opinion, again without applying a standard.<sup>206</sup> In 2010, the only other federal court to issue a decision on a concealed carry law found the law valid under intermediate scrutiny.<sup>207</sup> But, that court, in finding that California's ban on carrying concealed handguns in public was reasonably related to the goal of reducing violence,<sup>208</sup> still warned that "not *all* concealed weapons bans are presumptively lawful."<sup>209</sup> In that case, the court was mollified by the fact that the California law at issue allowed carrying concealed weapons in public for immediate self-defense, a period during which danger has presented itself but before police have arrived.<sup>210</sup> Other states' carry laws, including Maryland's, do not have an exception for immediate self-defense.<sup>211</sup>

The challenge presented by gun regulations that fall outside the *Heller* core—that is, outside the home—recently divided a Fourth Cir-

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201. Cramer, *supra* note 45, at 150 (noting that the nation's first concealed weapon statute was enacted in Kentucky in 1813).

202. *E.g.*, Williams v. Maryland, 417 Md. 479, 10 A.3d 1167 (2011).

203. *E.g.*, People v. Flores, 169 Cal. App. 4th 568, 577 n.5 (2008), *cert. denied*, 2009 Cal. LEXIS 2979 (Mar. 18, 2009).

204. *See supra* Part II.C.2.

205. Swait v. Univ. of Neb. at Omaha, No. 8:08CV404, 2008 U.S. Dist. LEXIS 96665, at \*6 (D. Neb. Nov. 25, 2008).

206. United States v. Hall, No. 2:08-00006, 2008 U.S. Dist. LEXIS 59641, at \*3 (S.D. W. Va. Aug. 4, 2008) (emphasis omitted), *aff'd per curiam*, 337 F. App'x 340 (4th Cir.), *cert. denied*, 130 S. Ct. 774 (2009).

207. Peruta v. County of San Diego, No. 09CV2371-HEG (BGS), 2010 U.S. Dist. LEXIS 130878, at \*25-27 (S.D. Cal. Dec. 10, 2010).

208. *Id.* at \*27.

209. *Id.* at \*18.

210. *Id.* at \*19.

211. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 4-203 (West 2002 & Supp. 2010) (failing to specify an exception for immediate self-defense).

cuit panel.<sup>212</sup> The court, in affirming a district court ruling upholding a ban on possessing loaded weapons in motor vehicles on national parkland, split on whether the case implicated the Second Amendment.<sup>213</sup> Judge Wilkinson, writing for the court, found it was unnecessary to determine if the Second Amendment right recognized in *Heller* applies outside the home: “This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed core holding. On the question of *Heller*’s applicability outside the home environment, we think it prudent to await direction from the Court itself.”<sup>214</sup> But Judge Niemeyer, writing separately, found that the Second Amendment was implicated but agreed that the regulation was constitutional.<sup>215</sup> The dispute underlines the uncertainty faced by even seasoned appellate judges in how to interpret *Heller*.

*B. Intermediate Scrutiny Is the Appropriate Standard for Most Gun Regulations*

This Section will first eliminate rational basis and strict scrutiny as possible standards of review for Second Amendment challenges. It will also consider and reject the reasonableness and undue burden tests. This Section will then show that intermediate scrutiny is the appropriate standard for reviewing gun regulations.

*1. Rational Basis Review and the Reasonableness and Undue Burden Tests Are Too Lenient for a Fundamental Right*

Rational basis review is too deferential a standard to apply to regulations that infringe on what the Court has recognized as “a specific, enumerated right,” namely, the right to possess arms in the home for self-defense.<sup>216</sup> Writing for the Supreme Court in *Heller*, Justice Scalia ruled out the rational basis test for gun regulations: “Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”<sup>217</sup>

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212. *United States v. Masciandaro*, No. 09-4839, 2011 U.S. App. LEXIS 5964 (4th Cir. Mar. 24, 2011).

213. *Id.* at \*2–3.

214. *Id.* at \*45.

215. *Id.* at \*27 (Niemeyer, J., writing separately).

216. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

217. *Id.*

The reasonableness test also provides too lenient a standard of review for a right that has now been deemed “fundamental.”<sup>218</sup> The reasonableness test asks if the challenged law is “a reasonable method of regulating the right to bear arms.”<sup>219</sup> Rejecting the reasonableness for gun regulations, one federal district court judge noted, “The reasonableness test subjects firearms laws to only a marginally more heightened form of review than rational-basis review.”<sup>220</sup> When “nearly all laws survive the reasonable regulation standard,”<sup>221</sup> and it is largely similar to the rational basis test the Court has rejected, it is too deferential a standard to apply to “a specific, enumerated right.”<sup>222</sup>

Similarly, the undue burden standard, which permits laws so long as they do not place “a substantial obstacle in the path” of the individual exercising the protected right,<sup>223</sup> does not provide the effective form of heightened scrutiny for which *Heller* called. The undue burden test is similar to Justice Breyer’s “interest-balancing” approach, which was rejected by the *Heller* and *McDonald* Courts. Interest-balancing, as described by Justice Breyer in *Heller*, “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”<sup>224</sup> Noting the resemblance between interest-balancing and the undue burden test, one federal judge stated, “[T]his court strongly doubts that the *Heller* majority envisioned the undue burden standard when it left for another day a determination of the level of scrutiny to be applied to firearms laws.”<sup>225</sup>

## 2. *Strict Scrutiny Is Not the Appropriate Standard Because It Would Invalidate Heller’s “Presumptively Lawful” Regulations*

Strict scrutiny is too stringent a level of review for gun regulations because (1) *Heller* and *McDonald* gave examples of “presumptively lawful” gun laws that would most likely fail strict scrutiny; (2) the Second Amendment right to keep and bear arms is similar in its nature and language to other guarantees in the Bill of Rights that receive intermediate review, not strict scrutiny; and (3) the *McDonald* plurality

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218. *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010) (plurality opinion).

219. Winkler, *supra* note 39, at 717.

220. *Heller II*, 698 F. Supp. 2d 179, 186 (D.D.C. 2010).

221. Winkler, *supra* note 39, at 718 (finding that in thirty-six of the forty-two states with individual right-to-bear-arms guarantees, “no gun control measure has been invalidated in over half a century under” the reasonable regulation standard).

222. *Heller*, 554 U.S. at 628 n.27.

223. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

224. *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

225. *Heller II*, 698 F. Supp. 2d at 187.

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pledged that local experimentation with gun regulations would continue, an outcome at odds with strict scrutiny.

As previously discussed, *Heller* set forth a list of gun regulations that remain lawful even under the newly recognized individual right to keep and bear arms.<sup>226</sup> Courts and scholars have agreed that these presumptively lawful regulations—such as bans on possession of guns by felons and laws prohibiting guns in sensitive places such as schools—would likely fail a strict scrutiny test.<sup>227</sup> Such laws serve the compelling interest of protecting public safety,<sup>228</sup> but they would founder on strict scrutiny's narrowly tailored requirement. For instance, a law banning felons from possessing guns would fail for being overly broad. Not all felons are dangerous and have committed violent crimes.<sup>229</sup> Some have simply embezzled or committed fraud. Further, banning guns from schools may fail strict scrutiny because, for some college students, school is home. A ban on guns in schools would thus prevent those students from keeping a gun in their home.<sup>230</sup> Such a statute may also lack a tight means-end fit: at least

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226. *Heller*, 554 U.S. at 626–27.

227. *See id.* at 688 (Breyer, J., dissenting) (noting that under strict scrutiny, the constitutionality of *Heller*'s presumptively lawful regulations “would be far from clear”); *United States v. Skoien*, 587 F.3d 803, 811 (7th Cir. 2009) (noting that the court did “not see how the listed laws could be ‘presumptively’ constitutional if they were subject to strict scrutiny”), *vacated en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011); *United States v. Marzzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (observing that “the Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review”), *aff’d*, 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011); Henigan, *supra* note 182, at 1197–98 (stating that “the *Heller* majority . . . implicitly rejected strict scrutiny” by describing certain gun control measures as presumptively lawful); 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, 1379 (2009) (observing that “it is doctrinally impossible to conclude that strict scrutiny governs Second Amendment claims, while also upholding” the presumptively lawful exceptions specified in *Heller*).

228. *See United States v. Salerno*, 481 U.S. 739, 750–51 (1987) (explaining that “the Government’s general interest in preventing crime is compelling” and that it can sometimes outweigh “the individual’s strong interest in liberty”).

229. *See United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (noting that “most felons are nonviolent, but someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use”).

230. Craven, *supra* note 8, at 854. It has been noted,

By prohibiting gun ownership on campus, colleges have effectively removed any opportunity for students to own guns in their homes. Removing the option for having a firearm in the home eliminates the right of college students who live on campus to exercise their right to keep and bear arms in the same way that residents of Washington, D.C. were prevented from exercising their right. This indicates that banning gun ownership on campus is an unconstitutional restraint on the right to bear arms.

*Id.*

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one author has found there to be a lack of statistical proof that banning guns from campuses actually makes campuses safer.<sup>231</sup>

Although the *McDonald* plurality identified the right to keep and bear arms as “among those fundamental rights necessary to our system of ordered liberty,”<sup>232</sup> this classification does not automatically trigger strict scrutiny for infringements on the right. Indeed, most of the enumerated Bill of Rights guarantees do not trigger strict scrutiny.<sup>233</sup> The Supreme Court has determined that courts do not apply strict scrutiny to the Fourth Amendment prohibition on unreasonable searches and seizures,<sup>234</sup> the Fifth Amendment right against self-incrimination,<sup>235</sup> or the Sixth Amendment right to counsel.<sup>236</sup> Professor Adam Winkler concluded, “[S]trict scrutiny is quite rarely applied to laws burdening the textually guaranteed rights found in the Bill of Rights.”<sup>237</sup> Incorporation does not change the equation. As Professor Winkler noted, “All incorporated rights may be fundamental, but not all incorporated rights trigger strict scrutiny. . . . Strict scrutiny is only used in doctrines of two incorporated provisions of the Bill of Rights: the First and Fifth Amendments.”<sup>238</sup>

The Second Amendment right to keep and bear arms should be no exception to this general rule because in several ways it is more similar to the enumerated rights that receive intermediate scrutiny than to those that receive strict scrutiny. For instance, the text of both the Second and Fourth Amendments suggests a space for state restrictions. The Second Amendment calls for a “well regulated Militia.”<sup>239</sup> The Fourth Amendment, which does not receive strict scrutiny,<sup>240</sup> protects against “unreasonable searches and seizures” and, thus, allows for reasonable ones, such as those authorized by a warrant.<sup>241</sup>

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231. *Id.* at 851.

232. *McDonald v. Chicago*, 130 S. Ct. 3020, 3042 (2010) (majority opinion).

233. Mehr & Winkler, *supra* note 20, at 3–4 (noting that strict scrutiny only applies to certain doctrines arising under the First and Fifth Amendments and does not apply at all in cases arising under the Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Amendments).

234. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995).

235. *Hibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 189–91 (2004).

236. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that for a defendant to succeed on an ineffective assistance of counsel claim, the defendant must show that the counsel’s performance was deficient and that the defendant was prejudiced—a high bar that exceeds the relatively easy showing required for individuals challenging statutes evaluated under strict scrutiny).

237. Winkler, *supra* note 39, at 696.

238. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006).

239. U.S. CONST. amend. II.

240. Winkler, *supra* note 238.

241. U.S. CONST. amend IV.

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The First Amendment, on the other hand, contains the absolute language “Congress shall make no law.”<sup>242</sup> and receives strict scrutiny in some circumstances. Content-based speech regulations, which turn on the subject matter or viewpoint of the regulated speech, receive strict scrutiny review.<sup>243</sup> Content-neutral restrictions, however, which apply to all speech regardless of subject matter, receive a lesser standard of review, usually intermediate scrutiny.<sup>244</sup>

The Second Amendment is more similar to the Fourth Amendment than the First. It lacks the absolute language of the First Amendment. Indeed, *Heller* acknowledged the right to keep and bear arms “is not unlimited” and is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>245</sup> That language does not suggest the rigor of strict scrutiny.

Finally, *McDonald*'s endorsement of state and local experimentation further undermines the case for strict scrutiny. Justice Alito, writing for the plurality, approvingly quoted an amicus curiae brief filed by thirty-eight states, noting that, “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.”<sup>246</sup> Such a statement presupposes a flexible standard of review, such as intermediate scrutiny, rather than strict scrutiny's blunt force. Strict scrutiny, famously described as “strict in theory, but fatal in fact,”<sup>247</sup> could imperil a wide array of gun laws—an outcome at odds with the stated intentions of the *Heller* majority and *McDonald* plurality.<sup>248</sup> “[I]ncorporation,” the *McDonald* plurality declared, “does

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242. U.S. CONST. amend I.

243. *United States v. Grace*, 461 U.S. 171, 177 (1983) (“[R]estrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.”).

244. *See* *McTernan v. City of York*, 564 F.3d 636, 653 (3d Cir. 2009) (“[A] content-neutral restriction on the time, place, or manner of speech ordinarily receives intermediate scrutiny.”).

245. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

246. *McDonald v. Chicago*, 130 S. Ct. 3020, 3046 (2010) (plurality opinion) (alteration in original) (quoting Brief of the State of Texas et al., *supra* note 89, at 23) (internal quotation marks omitted).

247. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment). *But see* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

248. *See Heller*, 554 U.S. at 627 n.26 (stating, “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”); *McDonald*, 130 S. Ct. at 3047 (plurality opinion) (“[I]ncorporation does not imperil every law regulating firearms.”).

not imperil every law regulating firearms.”<sup>249</sup> Strict scrutiny, however, would do just that.<sup>250</sup>

3. *Intermediate Scrutiny Provides the Heightened Scrutiny Envisioned by the Court While Allowing for Public Safety Considerations*

Intermediate scrutiny is the proper standard of review for gun regulations because it comports with the understanding of a right that is fundamental but also subject to some amount of restriction, providing the heightened level of review envisioned by *Heller* without imperiling the universe of gun control laws. In rejecting rational basis review, the *Heller* Court made clear that some form of heightened scrutiny must apply to gun regulations. That form of heightened scrutiny must be able to account for the existing gun regulations that *Heller* deemed “presumptively lawful”<sup>251</sup> while respecting the core right identified by *Heller* of keeping and bearing arms for self-defense in the home.<sup>252</sup> Intermediate scrutiny, which “by definition, permits [legislative bodies] to paint with a broader brush than strict scrutiny,”<sup>253</sup> provides that proper fit.

As demonstrated above, the presumptively lawful regulations identified in *Heller* would likely fail a strict scrutiny test.<sup>254</sup> They would, however, meet an intermediate standard of review,<sup>255</sup> which requires a law to be substantially related to an important government interest.<sup>256</sup> The District Court for the District of Columbia found that regulations implicitly endorsed by *Heller*, such as registration schemes, survive intermediate review.<sup>257</sup> The court, considering a registration

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249. *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

250. See *United States v. Masciandaro*, No. 09-4839, 2011 U.S. App. LEXIS 5964, at \*34 (4th Cir. Mar. 24, 2011) (“Were we to require strict scrutiny in circumstances such as those presented here [a challenge to a federal law banning the possession of loaded weapons in motor vehicles in national parks], we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to ‘prevent[ ] armed mayhem’ in public places and depriving them of ‘a variety of tools for combating that problem.’” (alteration in original) (citations omitted)).

251. *Heller*, 554 U.S. at 627 n.26.

252. *Id.* at 636.

253. *Heller II*, 698 F. Supp. 2d 179, 191 (D.D.C. 2010) (alteration in original) (quoting *United States v. Miller*, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009)) (internal quotation marks omitted).

254. See *supra* Part III.B.2.

255. See *Heller II*, 698 F. Supp. 2d at 188 (stating that intermediate scrutiny “satisfies the *Heller* Court’s directive that courts apply an exacting measure of scrutiny to laws limiting the exercise of this specific, constitutionally enumerated right, while avoiding the inconsistencies that would arise were it to apply strict scrutiny” (citation omitted)).

256. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

257. *Heller II*, 698 F. Supp. 2d at 191.

requirement in Washington, D.C., noted that under intermediate scrutiny, “the degree of fit between the registration scheme in this case and the well-established goal of promoting public safety need not be perfect; it must only be substantial.”<sup>258</sup> The court found that to be the case, finding “a substantial nexus between the registration requirements and the important governmental interest” in promoting public safety.<sup>259</sup>

Outside the home, the Second Amendment right to gun possession comes into conflict with the state’s police powers to protect the public safety.<sup>260</sup> Intermediate scrutiny is the appropriate standard of review to balance these competing interests. As the Fourth Circuit recently noted, “[A]s we move outside the home, firearms rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”<sup>261</sup>

The Seventh Circuit, applying intermediate scrutiny, found that a law banning individuals convicted of domestic violence misdemeanors from possessing guns bore a “substantial relation” to the important government objective of “preventing armed mayhem.”<sup>262</sup> The court noted the high recidivism rate among those who commit domestic violence offenses and concluded, “[T]here are substantial benefits in keeping the most deadly weapons out of the hands of domestic abusers.”<sup>263</sup>

The *Heller* Court itself indicated intermediate scrutiny is the appropriate standard by suggesting that a number of appellate Second Amendment decisions remain valid. Justice Stevens, dissenting in *Heller*, lamented that the Court was overturning a line of cases built on *United States v. Miller*, the Court’s most thorough twentieth century exploration of the Second Amendment, where the Court adopted a collective rights view.<sup>264</sup> Since *Miller*, Justice Stevens wrote, “hundreds of judges have relied on the view of the Amendment we endorsed

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258. *Id.*

259. *Id.* at 192–93.

260. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”).

261. *United States v. Masciandaro*, No. 09-4839, 2011 U.S. App. LEXIS 5964, at \*33 (4th Cir. Mar. 24, 2011).

262. *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011).

263. *Id.* at 644.

264. 307 U.S. 174, 178 (1939) (upholding, under rational review, a federal statute banning the transport of short-barreled shotguns because such weapons were not reasonably related to militia service).



there,”<sup>265</sup> citing cases from each circuit court of appeals.<sup>266</sup> Justice Scalia, writing for the majority, responded that those judges may have read too much into *Miller*.<sup>267</sup> He also stated, however, “In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.”<sup>268</sup>

This extraordinary admission suggests that much of the twentieth century case law on gun regulations remains valid precedent, even under an individual rights interpretation of the Second Amendment. In the cases Justice Scalia referred to, the courts upheld regulations that ban the possession of machineguns made after 1986,<sup>269</sup> firearms by people subject to a domestic violence order,<sup>270</sup> pipe bombs<sup>271</sup> and sawed-off shotguns,<sup>272</sup> as well as regulations requiring the registration of guns,<sup>273</sup> requiring a permit to carry a concealed weapon,<sup>274</sup> and banning felons from possessing firearms.<sup>275</sup>

To be sure, Justice Scalia did not declare all those gun regulations to be lawful post-*Heller*, but his openness as to their validity suggests the Court is contemplating applying something less than strict scrutiny. The laws held constitutional in those appellate cases represent a wide range of regulations, not all of which would survive strict scrutiny’s narrowly tailored requirement.<sup>276</sup> They would, however, survive a lesser standard of review, as they promote an important government interest and can likely be shown to substantially relate to efforts to curb violence.<sup>277</sup>

Finally, the *McDonald* plurality’s endorsement of state and local gun control experimentation is an outcome best reached through the more flexible standard of intermediate scrutiny.<sup>278</sup> As previously

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265. *District of Columbia v. Heller*, 554 U.S. 570, 638 (2008) (Stevens, J., dissenting).

266. *Id.* at 638 n.2.

267. *Id.* at 624 n.24.

268. *Id.*

269. *United States v. Haney*, 264 F.3d 1161, 1168 (10th Cir. 2001).

270. *United States v. Napier*, 233 F.3d 394, 395–96 (6th Cir. 2000).

271. *United States v. Wright*, 117 F.3d 1265, 1272, 1274 (11th Cir. 1997).

272. *United States v. Johnson*, 441 F.2d 1134, 1135 (5th Cir. 1971).

273. *Wright*, 117 F.3d at 1274; *United States v. Hale*, 978 F.2d 1016, 1017 (8th Cir. 1992).

274. *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam).

275. *United States v. Johnson*, 497 F.2d 548, 549 (4th Cir. 1974) (per curiam).

276. Felon possession bans, for example, may fail for overinclusiveness because many felons have not committed violent crimes. See *supra* note 229 and accompanying text.

277. See, e.g., *Heller II*, 698 F. Supp. 2d 179, 191–92 (D.D.C. 2010) (holding that a gun registration requirement survives intermediate scrutiny because it accomplishes “important public safety goals”).

278. See *supra* text accompanying notes 246–50.

noted,<sup>279</sup> the plurality wanted to preserve some room for legislatures to maneuver to find the gun regulations that best meet their particular circumstances.<sup>280</sup> Strict scrutiny would not allow for such variation. Intermediate scrutiny, therefore, is the appropriate level of review for gun regulations.

### C. *A Framework for Evaluating Challenged Gun Regulations*

This Section will propose a three-step inquiry for evaluating challenges to gun regulations and then apply that test to concealed carry bans. The first step is to determine whether a gun regulation has a historical basis that indicates it was outside the scope of the Second Amendment at the time of ratification, in 1791. If a gun regulation was outside the scope of the Amendment, the regulation is valid because it is not implicated by the Amendment's guarantee. If, however, a historical basis does not exist for the regulation, step two of the inquiry calls for a determination of whether the challenged regulation burdens the core Second Amendment right, identified in *Heller*, of keeping and bearing arms in the home for self-defense. This determination requires the application of a means-end scrutiny test. If that core right is implicated, strict scrutiny should be applied because the Court in *Heller* and *McDonald* found bans on home possession to be practically per se unconstitutional.<sup>281</sup> But if the core right is not implicated, then intermediate scrutiny should be applied because the core *Heller* and *McDonald* right is not in play. The third step is to apply the appropriate level of scrutiny to the challenged regulation.

#### 1. *A Three-Step Inquiry for Gun Regulations*

The first step in the inquiry is to examine the historical nature of the challenged regulation. The Third and Fourth Circuits have endorsed a historical test.<sup>282</sup> The Fourth Circuit described the inquiry as follows:

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279. *See supra* Part III.B.2.

280. *McDonald v. Chicago*, 130 S. Ct. 3020, 3046 (2010) (plurality opinion) (“[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.” (alteration in original) (quoting Brief of the State of Texas et al., *supra* note 89, at 23) (internal quotation marks omitted)).

281. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.”); *McDonald v. Chicago*, 130 S. Ct. 3020, 3036 (2010) (majority opinion) (noting that “individual self-defense is ‘the central component’ of the Second Amendment right” (quoting *Heller*, 554 U.S. at 599)).

282. *United States v. Chester*, 628 F.3d 673, 678–79 (4th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 91 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid.<sup>283</sup>

The court reasoned that the Second Amendment codified a pre-existing right to bear arms—the right as it existed at the time of ratification. As the *Heller* Court noted, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”<sup>284</sup> Therefore, if certain firearms restrictions were in place at the time of ratification, they were understood by the people to be outside the scope of the Amendment and, accordingly, are valid restrictions. In that case, the inquiry ends. Most firearms restrictions in effect today were not common at ratification, however, and thus cannot be shown to be outside the scope of the Second Amendment.<sup>285</sup>

The second step is to ask if the challenged regulation burdens the core right protected by the Second Amendment. That right, identified in *Heller*, is the right to “use arms in defense of hearth and home.”<sup>286</sup> A regulation that amounts to an absolute ban of gun possession in the home, such as the District of Columbia's, is a burden on this core right. By the Court's own acknowledgement, few laws will work such a severe restriction that they burden the core Second Amendment right. Regarding the challenged law in *Heller*, the Court stated, “Few laws in the history of our nation have come close to the severe restriction of the District's handgun ban.”<sup>287</sup> In *McDonald*, the Court invalidated two other laws that were similar to the District's ban: the restrictions in Chicago and Oak Park, Illinois, that effectively banned handgun possession in the home.<sup>288</sup> Those laws were invalidated because they impinged on the core right recognized in *Heller*.<sup>289</sup> If a regulation burdens the core Second Amendment right to keep and bear arms in the home for self-defense, then strict scrutiny should be applied, and the law will likely be invalidated.

Restrictions that do not impinge on that core right, however, should receive a different, lower level of review—intermediate scru-

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283. *Chester*, 628 F.3d at 680 (citations omitted) (internal quotation marks omitted).

284. *Heller*, 554 U.S. at 634–35.

285. *See supra* note 200.

286. *Heller*, 554 U.S. at 635.

287. *Id.* at 629.

288. *McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010).

289. *See id.* at 3050 (plurality opinion).

tiny. A law that prohibits, for instance, carrying guns in places of worship or obliterating serial numbers from guns would not burden the core right of home possession.<sup>290</sup> There is precedent for this two-track approach in First Amendment jurisprudence. For example, content-based restrictions on speech in a public forum trigger strict scrutiny,<sup>291</sup> but others receive intermediate scrutiny<sup>292</sup> or no protection at all.<sup>293</sup> As the Third Circuit observed, “[T]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different.”<sup>294</sup> The Fourth Circuit cited the Third Circuit and came to a similar conclusion: “[W]e agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.”<sup>295</sup>

It follows that challenges to gun regulations can trigger differing levels of review depending on how severely the challenged regulation impacts the core *Heller*-recognized right of home possession. Since *Heller*, courts have largely confronted challenges to laws that are less restrictive than the absolute handgun possession ban at issue in *Heller*. Accordingly, the courts have used a standard of review lower than strict scrutiny to evaluate and uphold laws that do not burden the core *Heller* right. These decisions concern laws that ban domestic violence misdemeanants<sup>296</sup> and drug users<sup>297</sup> from possessing guns; laws that

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290. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (upholding a statute prohibiting the possession of guns with obliterated serial numbers because such a statute “does not come close to [the] level of infringement” of the Second Amendment right found in *Heller*), *cert. denied*, 131 S. Ct. 958 (2011); *GeorgiaCarry.org, Inc. v. Georgia*, No.5:10-CV-302 (CAR), 2011 U.S. Dist. LEXIS 6370, at \*32 (M.D. Ga. Jan. 24, 2011) (upholding a statute banning carrying weapons in places of worship as “one level outside the core right recognized in *Heller*”).

291. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 404 (1992) (White, J., concurring in the judgment) (noting that “the strict scrutiny standard applie[s] in a case involving a First Amendment challenge to a content-based statute”).

292. See *McTernan v. City of York*, 564 F.3d 636, 653 (3d Cir. 2009) (“[A] content-neutral restriction on the time, place, or manner of speech ordinarily receives intermediate scrutiny . . .”).

293. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting, “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” (footnote omitted)).

294. *Marzzarella*, 614 F.3d at 96–97 (citation omitted).

295. *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

296. *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011).

forbid obliterating the serial numbers on guns;<sup>298</sup> laws that ban assault weapons;<sup>299</sup> and laws that ban loaded guns in motor vehicles in national parks<sup>300</sup> and in post office parking lots.<sup>301</sup> As the Seventh Circuit noted, “Laws that restrict the right to bear arms are subject to meaningful review, but unless they severely burden the core Second Amendment right of armed defense, strict scrutiny is unwarranted.”<sup>302</sup>

The third and final step in the inquiry is to apply the appropriate level of heightened review—strict or intermediate scrutiny—depending on whether the challenged regulation burdens the core Second Amendment right. Absolute bans on home possession will almost certainly fail under strict scrutiny, as the bans in Chicago and Oak Park failed.<sup>303</sup> Regulations that operate outside the home or that target a defined group, however, will likely survive intermediate scrutiny as long as the government can show the laws are substantially related to preserving public safety.<sup>304</sup>

## 2. *Applying the Three-Step Inquiry to Concealed Carry Prohibitions*

Concealed carry laws represent a significant challenge to courts trying to interpret the *Heller* and *McDonald* opinions because (1) such laws were not listed among the presumptively lawful regulatory measures sanctioned by the Court and (2) the laws burden all members of society. For these reasons, they are a useful test of the three-step inquiry outlined above. The few courts that have considered concealed carry prohibitions have upheld them based on *Heller*'s apparent approval of such regulations.<sup>305</sup> The *Heller* Court stated that “[t]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”<sup>306</sup>

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297. *United States v. Bumm*, No. 2:08-cr-00158, 2009 U.S. Dist. LEXIS 34264, at \*8–9 (S.D. W. Va. Apr. 17, 2009); *United States v. Hendrix*, No. 09-cr-56-bbc, 2010 U.S. Dist. LEXIS 33756, at \*5–7 (W.D. Wis. Apr. 6, 2010).

298. *Marzarella*, 614 F.3d at 97.

299. *Heller II*, 698 F. Supp. 2d 179, 181, 186 (D.D.C. 2010).

300. *United States v. Masciandaro*, 648 F. Supp. 2d 779, 781, 789 (E.D. Va. 2009), *aff'd*, No. 09-4839, 2011 U.S. App. LEXIS 5964 (4th Cir. Mar. 24, 2011).

301. *United States v. Dorosan*, 350 F. App'x 874, 876 (5th Cir. 2009) (per curiam) (unpublished), *cert. denied*, 130 S. Ct. 1714 (2010).

302. *United States v. Skoien*, 587 F.3d 803, 812 (7th Cir. 2009), *vacated en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011).

303. *See McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010) (majority opinion) (invalidating Chicago and Oak Park, Ill., laws that were similar to the District of Columbia's ban on handgun possession in the home).

304. *See supra* Part III.B.3.

305. *See supra* text accompanying notes 171–73.

306. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

Lower courts, however, should be wary of reading too much into this statement. The two nineteenth century cases cited by *Heller* for its concealed carry pronouncement both permitted the open carrying of weapons in public, thereby providing citizens with a way to carry a gun for self-defense.<sup>307</sup> Today, many states that prohibit concealed carrying, such as Maryland, also prohibit open carrying.<sup>308</sup> Further, as one circuit judge has noted, “[W]e cannot read *Heller’s* dicta in a way that swallows its holdings.”<sup>309</sup> The Court’s cryptic statement on concealed carry bans cannot be taken as an endorsement of such bans or a reason to exempt them from any standard of review. Carry laws must be rigorously evaluated under the appropriate level of scrutiny to determine their constitutionality.

The first step in the analysis proposed here asks if a historical basis for the regulation would take it outside the ambit of the Second Amendment. As noted previously, concealed carry laws did not appear until the nineteenth century, so they cannot be exempt from the Second Amendment as it was understood upon ratification.<sup>310</sup>

The next step is to determine if concealed carry laws burden the core right identified in *Heller* and *McDonald*—the right to possess guns in the home for self-defense.<sup>311</sup> They do not. Concealed carry laws are public safety measures that concern the carrying of guns in *public*. As such, they do not affect the right to possess guns in the home. Maryland’s carry law, for instance, expressly permits wearing, carrying, or transporting a handgun in one’s home or business.<sup>312</sup> The question before the Court in *Heller* was whether a city could ban handgun possession in the home, and the Court limited its holding to that issue.<sup>313</sup> Concealed carry bans do not affect one’s ability to defend the hearth or home.<sup>314</sup> As such, they do not burden the core right recog-

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307. See *Nunn v. State*, 1 Ga. 243, 251 (1846) (holding that the state may ban the concealed carrying of weapons but bans on open carrying of weapons are “in conflict with the Constitution”); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (holding that a concealed weapons ban “interfered with no man’s right to carry arms . . . ‘in full open view’”).

308. See, e.g., MD. CODE ANN., CRIM. LAW § 4-203(a)(1)(i) (West 2002 & Supp. 2010) (stating that a person may not “wear, carry, or transport a handgun, whether concealed or open, on or about the person”).

309. *United States v. Skoien*, 614 F.3d 638, 654 (7th Cir. 2010) (Sykes, J., dissenting), *cert. denied*, No. 10-7005, 2011 U.S. LEXIS 2138 (U.S. Mar. 21, 2011).

310. Cramer, *supra* note 45, at 150.

311. *Heller*, 554 U.S. at 636; *McDonald v. Chicago*, 130 S. Ct. 3020, 3036 (2010).

312. MD. CODE ANN., CRIM. LAW § 4-203(b)(6) (West 2002 & Supp. 2010) (stating that the concealed carry ban does not prohibit “the wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases”).

313. *Heller*, 554 U.S. at 635.

314. See *supra* note 312.

nized in *Heller*. Concealed carry laws, therefore, should receive intermediate scrutiny.

The third and final step is to apply intermediate scrutiny to concealed carry laws to determine if they are substantially related to an important government objective. Certainly, promoting public safety and reducing violence are important government objectives.<sup>315</sup> The more challenging question is whether concealed carry laws are substantially related to that objective. Some studies have found it is not possible to determine if there is a link between concealed carry prohibitions and crime rates.<sup>316</sup> Other writers have suggested that carrying concealed weapons in public creates a risk of collateral damage to innocent bystanders<sup>317</sup> and leads to the possibility that arguments will escalate into violence.<sup>318</sup> Although the social science is not conclusive, it is instructive here because intermediate scrutiny only requires a substantial fit, not a perfect one.

Furthermore, in urban areas where gun violence is a particular problem, the substantial relationship between concealed carry bans and public safety may be easier to prove than it would be in rural areas.<sup>319</sup> Indeed, Justice Alito, writing for the plurality in *McDonald*, noted that incorporating the Second Amendment to apply against the states “*limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.”<sup>320</sup> Therefore, a Maryland court could find a substantial relationship between preventing violence and banning the carrying of concealed weapons within the state’s borders or in a particular urban area within the state, while a court in North Dakota could find that no such relationship exists. Such an outcome would be permissible under—and is even suggested by—Justice Alito’s reasoning.

In the end, applying intermediate scrutiny to concealed carry laws will involve considerations of local factors that will vary across the

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315. See *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.” (quoting *De Veau v. Braisted*, 363 U.S. 144, 155 (1960))).

316. See COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford et al. eds., 2005) (“[W]ith the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates.”).

317. Anderson, *supra* note 58, at 590.

318. Winkler, *supra* note 33, at 1572.

319. See, e.g., *Heller II*, 698 F. Supp. 2d 179, 192–93 (2010) (accepting the District of Columbia’s argument that rigorous firearms regulations meet an important government interest in protecting public safety “because the District is a densely populated, urban locale”).

320. *McDonald v. Chicago*, 130 S. Ct. 3020, 3046 (2010) (plurality opinion).

country. Some cities and states may be able to show that concealed carry prohibitions will help them keep their citizens safe, meeting the substantial fit required by intermediate scrutiny. Other cities and states may not be able to make such an argument, or even want to. Strict scrutiny would destroy such variance. Intermediate scrutiny permits it.

#### IV. CONCLUSION

*Heller* and *McDonald* represent a turning point in Second Amendment jurisprudence. In these cases, the Supreme Court recognized for the first time an individual right to keep and bear arms, and the Court detached the Second Amendment from its longstanding association with militia service.<sup>321</sup> Even as *Heller* and *McDonald* were landmark decisions, however, they were also cautious decisions. The Court took pains to note that it was recognizing only the right to keep and bear arms in the home for self-defense.<sup>322</sup> The Court declined to set a standard of review to guide lower courts but noted that some longstanding gun regulations—such as bans on gun possession among felons and the mentally ill, and bans on guns in sensitive places such as schools—continue to be lawful.<sup>323</sup> All other explorations of the newfound Second Amendment right would have to wait for another day.<sup>324</sup>

In many lower courts, that day has arrived.<sup>325</sup> Difficult Second Amendment cases, such as challenges to laws that prohibit the concealed carrying of guns, are now before state and federal judges.<sup>326</sup> This Comment has proposed a framework for evaluating those cases that considers the historical nature of the regulation and the burden it places on the core Second Amendment right to possess arms in the home for self-defense.<sup>327</sup> Regulations that burden the core right of self-defense in the home should receive strict scrutiny. Regulations that do not burden that core right should receive intermediate scru-

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321. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

322. *Id.* at 635–36; *McDonald*, 130 S. Ct. at 3044 (plurality opinion).

323. *Heller*, 554 U.S. at 626–27; *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

324. *Heller*, 554 U.S. at 635 (“But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .”).

325. See Mehr & Winkler, *supra* note 20 (noting that state and federal courts have decided more than 200 gun regulation challenges since *Heller* was decided).

326. *E.g.*, *Woollard v. Sheridan*, No. JFM-10-2068, 2010 WL 5463109 (D. Md. Dec. 29, 2010).

327. See *supra* Part III.C.1.



tiny because they implicate other interests, notably public safety. This framework finds common ground with the analysis used in First Amendment cases, where different types of speech receive different levels of review.<sup>328</sup>

Under this proposal, regulations that stop short of absolute bans on possession of guns in the home would likely pass constitutional muster so long as the regulations have a substantial relationship to improving public safety and preventing violence. Moreover, few regulations are so severe that they work an absolute ban on home possession.<sup>329</sup> Ultimately, then, *Heller* and *McDonald* may push courts—and America—toward a sensible medium: individuals may possess guns in the home for self-defense, but outside the home, states may restrict gun possession to promote public safety.

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328. See *supra* text accompanying notes 292–95.

329. *Heller*, 554 U.S. at 629 (“Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”).