

A STANDARD OF REVIEW FOR GUN RIGHTS: THE SECOND AMENDMENT QUESTION HOT AS A TWO-DOLLAR PISTOL

*Adam P. Soloperto**

I. INTRODUCTION

On April 19, 1775, a Boston silversmith slapped his horse to gallop, raced through the thickly wooded hollows of colonial Massachusetts, and warned residents of an impending attack. The British were coming.¹ Under order of General Thomas Gage, scores of British regulars descended upon the sleepy boroughs of Lexington and Concord to destroy the ammunition stores of the colonial militia.² Some 400 Concord farmers armed themselves with all of the firepower they could muster and prepared to make their stand against tyranny.³ At the Old North Bridge in Concord, Massachusetts, the “Shot Heard ‘Round the World”⁴ pierced the air. Today, the nation continues to hear the echo. The freedoms, physical integrity, individual and collective self-defense of Americans are, in large part, inexorably tied to firearms.

The American people have a unique and complicated relationship with guns. A powerful image of the national identity is the robust, courageous, colonial frontiersman, flintlock shouldered, forging and foraging through an unforgiving and brutal wilderness. The Second Amendment’s place in society at the moment of Constitutional ratification forms the bedrock of originalist Second Amendment interpretation.⁵ A more recent image emblazoned on

*J.D. Candidate, 2016, Seton Hall University School of Law; B.A., 2014, Wheaton College. I would like to thank Professor Ron Riccio, my comment editors Andrew Scott and Steph Ashley, and the Seton Hall University Law Review as a whole, for their brilliant guidance and insight during the publication process. Most of all, I thank my family and friends for their constant love and support in everything that I endeavor to do.

¹ DAVID HACKETT FISCHER, *PAUL REVERE’S RIDE* 146 (1994).

² ARTHUR BERNON TOURTELLOT, *LEXINGTON AND CONCORD: THE BEGINNING OF THE WAR OF THE AMERICAN REVOLUTION* 87–92 (2000).

³ FISCHER, *supra* note 1, at 209–12.

⁴ Ralph Waldo Emerson, *Concord Hymn*, in *COMPLETE WORKS OF RALPH WALDO EMERSON* 312 (2013).

⁵ Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56

America's national identity, however, is that of bewildered and terrified children, sprinting at fever's pace away from a grade school, and the carnage wrought by the heavily armed killers waiting inside.

On December 14, 2012, Adam Lanza shot and killed his mother with a .22-caliber Savage MK II-F bolt action rifle in the Newtown, Connecticut home he shared with her.⁶ He then left the residence, armed with a Bushmaster XM15-E2S assault rifle and two handguns.⁷ Lanza proceeded to Sandy Hook Elementary School, where he shot through a plate glass window adjacent to the locked front entrance of the school.⁸ Principal Dawn Lafferty Hochsprung, Vice Principal Natalie Hammond, and school psychologist Mary Sherlach overheard the shots and left their respective offices to investigate.⁹ At 9:40 AM, Adam Lanza took the first lives in what would become the second-bloodiest school shooting in American history.¹⁰ Lanza first entered a classroom of kindergartners, taught by substitute Lauren Rousseau, and shot all fourteen students and the teacher.¹¹ Next, Lanza made his way to a neighboring first grade classroom, taught by twenty-seven-year-old Victoria Soto, who had moved the children to a corner of the classroom.¹² Lanza shot Soto and then opened fired into the crowd of students, killing an additional six.¹³ Lanza shot himself as law enforcement closed in.¹⁴ When the children and teachers came out from their hiding places in broom closets, bathrooms, and cupboards, twenty children and six adults lay slaughtered.¹⁵ Following the shooting, President Obama became more active in supporting gun-

UCLA L. REV. 1343, 1353 (2009).

⁶ Richard Esposito et al., *20 Children Died in Newtown, Connecticut, School Massacre*, ABC NEWS (Dec. 14, 2012), <http://abcnews.go.com/US/twenty-children-died-newtown-connecticut-school-shooting/story?id=17973836>.

⁷ *Id.*

⁸ Sadie Gray, *Sandy Hook Gunman Adam Lanza shot his way through school door*, THE TIMES UK (Dec. 16, 2012, 4:05 PM), <http://www.thetimes.co.uk/tto/news/world/americas/article3632863.ece>.

⁹ Ian Simpson, *Becky Virgalla, Newtown Shooting Survivor, Says Principal, Others Saved Her In Sandy Hook Rampage*, HUFFINGTON POST (Feb. 23, 2013), http://www.huffingtonpost.com/2012/12/24/becky-virgalla-n_2357284.html.

¹⁰ Michelle McLoughlin, *Connecticut School Shooting is Second Worst in US History*, U.S. NEWS (Dec. 14, 2012, 12:31 PM), http://usnews.nbcnews.com/_news/2012/12/14/15909827-connecticut-school-shooting-is-second-worst-in-us-history.

¹¹ Editorial, *Connecticut Shooting Fast Facts*, CNN (Apr. 19, 2016, 4:11 PM), <http://www.cnn.com/2013/06/07/us/connecticut-shooting-fast-facts/>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

control measures.

When Dylan Roof opened fire on a bible study, a South Carolina church that played a significant role in the Civil Rights Movement became the target of one of the most disturbing racial crimes to occur in this country since the abolition of Jim Crow.¹⁶ The shooter, a radicalized white supremacist, drunkenly rambled to friends for months that he planned to incite a race war.¹⁷ Roof committed the atrocity with a Glock .45 handgun, which he purchased, legally, at a Charleston gun store with money he received for his birthday.¹⁸ The shooting was a new contemplation of violence for the American public, one that shocked the sensibilities, while raising all-too-familiar questions regarding the role of firearms in modern American society.

On December 4, 2015, at a holiday party hosted by the San Bernadino County Department of Health, Siyed Rizwan Farook and Tashfeen Malik, a married couple with a child, opened fire.¹⁹ Armed with semi-automatic assault rifles and handguns, the pair rained bullets on the eighty party-goers, killing fourteen and wounding twenty-one.²⁰ When law enforcement arrived on scene, they witnessed “unspeakable carnage”²¹ wrought on the scores of bodies. The couple, which had been radicalized by a terrorist organization prior to the shooting, acquired the weapons from a seller, who purchased the weapons legally.²²

Hysteria broke out again at a gay nightclub in Orlando, Florida when Omar Mateen, armed with an assault rifle and pistol, murdered 49 and wounded an additional 53.²³ Mateen had grown more radical in his anti-LGBTQ leanings prior to the shooting.²⁴ In the middle of his rampage, Mateen called the authorities to pledge his allegiance to

¹⁶ Greg Botelho & Ed Payne, *Charleston Church Shooter Hears Victim's Kin Say, 'I forgive you'*, CNN (June 19, 2015, 10:58 PM), <http://www.cnn.com/2015/06/19/us/charleston-church-shooting-main/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Greg Botelho, *San Bernadino Shooting: Carnage Was 'Unspeakable,' Police Say*, CNN (Dec. 4, 2015, 11:02 AM), <http://www.cnn.com/2015/12/03/us/san-bernardino-shooting/>.

²⁰ *Id.*

²¹ *Id.*

²² Dan Frosch & Ashby Jones, *San Bernadino Guns Bought Legally, Later Modified*, WALL ST. J. (Dec. 4, 2015, 1:39 PM), <http://www.wsj.com/articles/san-bernardino-guns-originally-bought-legally-later-modified-1449254384>.

²³ Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016, 11:05 AM), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/>.

²⁴ *Id.*

the terrorist group, ISIS.²⁵ San Bernadino and Orlando added a new dimension to the gun violence epidemic. In addition to facilitating a mass myriad of criminal activity within the United States, relaxed firearm regulations were now aiding foreign terrorist organizations in wreaking havoc within our borders.

The contour and meaning of the “right to bear arms” is debated against this bloody tapestry. The passion of Americans who wish for an unfettered Second Amendment right has reached a fever-pitch during a time in which hyper-lethal firearms are readily available to virtually anyone. In a 2010 Gallup poll, forty-seven percent of Americans reported owning a gun.²⁶ There are an estimated eighty-eight guns per one hundred people in the United States.²⁷ 33,000 people are killed each year with guns.²⁸ Of the 11,000 firearm homicides in the United States each year, 1,671 are committed against children.²⁹ The firearm homicide rate in the United States is only slightly lower than that of the Democratic Republic of Congo and Iraq.³⁰ Carrying a firearm makes an individual nearly five times more likely to be shot.³¹

But, beyond the individual and direct consequences of gun violence lie additional societal costs. In 2010, gun violence cost United States taxpayers approximately \$630 million in direct hospital care.³² A

²⁵ *Id.*

²⁶ Lydia Saad, *Self-Reported Gun Ownership in U.S. Is Highest Since 1993*, GALLUP (Oct. 26, 2011), <http://www.gallup.com/poll/150353/Self-Reported-Gun-Ownership-Highest-1993.aspx>.

²⁷ Simon Rogers, *Gun Homicides and Gun Ownership by Country*, THE GUARDIAN (Jul. 22, 2012, 8:01 PM), <https://www.theguardian.com/news/datablog/2012/jul/22/gun-homicides-ownership-world-list>.

²⁸ Bob J. Taylor, *Gun Death Totals Obscure the Truth*, THE REGISTER-GUARD (Apr. 21, 2016), <http://registerguard.com/rg/opinion/34293673-78/gun-death-totals-obscure-the-truth.html.csp> (stating that the official number of gun deaths each year “includes homicides, justifiable homicides, police justified homicides, accidental deaths and suicides”).

²⁹ *Key Gun Violence Statistics*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (2016), <http://www.bradycampaign.org/key-gun-violence-statistics>.

³⁰ Katie Leach-Kemon, *Visualizing Gun Deaths: Comparing the U.S. to Rest of the World*, HUMANOSPHERE (June 13, 2016), <http://www.humanosphere.org/science/2016/06/visualizing-gun-deaths-comparing-u-s-rest-world/>.

³¹ Ewen Callaway, *Carrying a Gun Increases Risk of Getting Shot and Killed*, NEW SCIENTIST (Oct. 6, 2009), <https://www.newscientist.com/article/dn17922-carrying-a-gun-increases-risk-of-getting-shot-and-killed/>.

³² Embry M. Howell & Peter Abraham, *The Hospital Costs of Firearm Assaults*, URBAN INST. 4 (Sept. 2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412894-The-Hospital-Costs-of-Firearm-Assaults.PDF>.

single murder has an estimated cost of \$450,000.³³ Each day, taxpayers foot the bill for approximately thirty-two gun homicides.³⁴ Mental health care for those who have experienced the trauma of gun violence accounts for \$410 million annually and would be higher if all who desired such care could afford it.³⁵ The federal government spent \$800 million to bolster school security in public schools.³⁶ Collectively, the direct burden of gun violence on American taxpayers currently hovers around \$230 billion.³⁷ Despite the obvious consequences of gun violence, little is being done in the legislative and executive arenas to combat the problem. President Obama has been active in issuing executive orders aimed at correcting loopholes in the federal background check system.³⁸ But Congress has yet to pass a single piece of gun control legislation in the years since the Sandy Hook massacre.³⁹ With the rash of recent gun violence, Capitol Hill and state legislatures are the battlefields for Second Amendment proponents and the gun-control left.

Representatives of the National Rifle Association (NRA) are the most ardent and vocal opponents of additional gun-control measures.⁴⁰ Gun-control lobbyists see an uptick in support as the escalation of gun violence continues to stir national outrage.⁴¹ In January of 2013, only a month after the Sandy Hook tragedy, President Obama signed into law twenty-three executive orders⁴² in an attempt to tighten the

³³ Adele Peters, *The Staggering Costs of Gun Violence In The U.S. Every Year*, FAST COMPANY (June 29, 2015, 8:17 AM), <http://www.fastcoexist.com/3047682/the-staggering-costs-of-gun-violence-in-the-us-every-year> (aggregating the costs of first responders, the judicial process, and housing the convicted party for a life term after homicide conviction).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Eric Bradner & Gregory Krieg, *Emotional Obama Calls For 'Sense of Urgency' to Fight Gun Violence*, CNN (Jan. 5, 2016, 8:17 PM), <http://www.cnn.com/2016/01/05/politics/obama-executive-action-gun-control/>.

³⁹ Nick Wing, *Here's A List Of All The Gun Control Laws Congress Has Passed Since Newtown*, HUFFINGTON POST (Dec. 14, 2015, 12:26 PM), http://www.huffingtonpost.com/entry/gun-control-congress_us_566ec8dce4b011b83a6bc0cd.

⁴⁰ See Tom Watkins, *How the NRA Wields Its Influence*, CNN (Jan. 10, 2013, 7:35 AM), <http://www.cnn.com/2013/01/09/us/nra-gun-research/>.

⁴¹ Bruce Rogers, *NRA Winning the Influence Battle Over Gun Control*, FORBES (Feb. 1, 2013, 5:08 PM), <http://www.forbes.com/sites/brucerogers/2013/02/01/nra-winning-the-influence-battle-over-gun-control/#1cfeab330dd3> (citing to an attached infographic showing those in favor of additional restrictions wield the most influence in the time immediately after the shootings at Sandy Hook).

⁴² See Rick Ungar, *Here Are The 23 Executive Orders On Gun Safety Signed Today By The*

dilapidated background check system for firearms sales.

The increasing number of laws limiting firearm possession and ownership are at odds with a judicially expanded Second Amendment right. Proponents of firearm ownership cite the language of the Second Amendment as incontrovertible proof that Americans are guaranteed the right to own guns.⁴³ Meanwhile, others argue that Second Amendment rights have not traditionally been the function of some crystalline idea etched into the Constitutional fabric, and our interpretation of the Amendment has changed over time.⁴⁴

The United States Supreme Court began to define the exact scope of the Second Amendment only within the last decade, when the Court entered the fray in *District of Columbia v. Heller*.⁴⁵ In a Second Amendment challenge to a District of Columbia firearms ban, the Court held that the Second Amendment confers upon an individual the right to keep and bear arms to defend “hearth and home.”⁴⁶ The decision eroded longstanding Supreme Court precedent that did not guarantee an individual right to bear arms.⁴⁷ *Heller* eviscerated a thirty-year ban on handgun ownership in the District of Columbia.⁴⁸ Following *Heller*, in *McDonald v. City of Chicago*⁴⁹ the Supreme Court declared the right to bear arms “fundamental to our scheme of ordered liberty”⁵⁰ and applicable to state law through the Due Process and Equal Protection clauses of the Fourteenth Amendment.⁵¹

The *Heller* and *McDonald* courts declared a constitutionally protected private right to keep and bear arms, but left for future

President, FORBES (Jan. 16, 2013, 12:47 PM), <http://www.forbes.com/sites/rickungar/2013/01/16/here-are-the-23-executive-orders-on-gun-safety-signed-today-by-the-president/>.

⁴³ Charles C.W. Cooke, *The Right to Bear Arms Isn't Up For Debate*, WASH. POST (Dec. 9, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/12/09/the-right-to-bear-arms-isnt-up-for-debate/?utm_term=.dbd31fe249b4.

⁴⁴ Maureen Mackey, *Gun Control—A New Look at the Second Amendment*, FISCAL TIMES (June 8, 2014), <http://www.thefiscaltimes.com/Articles/2014/06/08/Gun-Control-New-Look-Second-Amendment>.

⁴⁵ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴⁶ *Id.* at 635.

⁴⁷ *See id.* at 639.

⁴⁸ Andrea Noble, *Federal Judge Rules D.C. Ban On Handguns in Public is Unconstitutional*, WASH. TIMES (Jul. 27, 2014), <http://www.washingtontimes.com/news/2014/jul/27/federal-judge-rules-dc-ban-handguns-public-unconst/>.

⁴⁹ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

⁵⁰ *Id.* at 764 (emphasis added).

⁵¹ *Id.* at 791 (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

litigation the shape, contour, and boundary of that right.⁵² The *Heller* Court declined to provide lower courts with a standard of review for legislation challenged as an unconstitutional burden on a nascent right to keep and bear arms.⁵³ The Court's sole guidance was that "rational basis" scrutiny was an inappropriate standard of review for Second Amendment challenges.⁵⁴ The Supreme Court has left the application of the *McDonald* and *Heller* holdings, as well as what level of scrutiny will apply to federal circuit Courts of Appeal, for exploration.

Although *Heller* and *McDonald* remain silent on a standard of scrutiny, each implies that the application of intermediate scrutiny to laws that categorically limit the Second Amendment right is inappropriate.⁵⁵ Yet, after *Heller* and *McDonald*, federal circuits adhere to a form of intermediate scrutiny for Second Amendment challenges to gun control legislation.⁵⁶ Each federal circuit has adopted some variation of the heightened scrutiny standard.⁵⁷

In December 2014, the Sixth Circuit Court of Appeals bucked this trend. In *Tyler v. Hillsdale County Sheriff's Department*,⁵⁸ the court held that 18 U.S.C. § 922(g)(4),⁵⁹ a categorical prohibition of firearm ownership by anyone who had been adjudicated as mentally ill, was unconstitutional as applied to individuals who had been involuntarily

⁵² Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC'Y FOR LAW AND POL'Y 1 (2010) (writing that the Supreme Court failed to give the lower courts adequate guidance on how to resolve gun control controversies).

⁵³ *Id.* at 2 ("But while the Court did offer some guidance, the Court's unwillingness to articulate a generally applicable standard of review or set of guidelines poses a considerable challenge to the lower courts.").

⁵⁴ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (stating that if all that was required of gun control laws was a rational basis, "the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect").

⁵⁵ *Id.*

⁵⁶ Lyle Denniston, *Appeals Court: Gun Control Must Meet Toughest Test*, SCOTUSBLOG (Dec. 19, 2014, 8:25 PM), <http://www.scotusblog.com/2014/12/appeals-court-gun-control-must-meet-toughest-test/>.

⁵⁷ *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 324 (6th Cir. 2014) (stating that the strongest argument in favor of adopting intermediate scrutiny is that other circuits have done so in deciding Second Amendment challenges), *rev'd*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

⁵⁸ *Id.*

⁵⁹ 18 U.S.C. § 922(g)(4) (2012) ("It is unlawful for any person who has been . . . committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

committed for less than thirty days.⁶⁰ The court, for the first time since the *Heller* decision, applied strict scrutiny review to a firearms ban.⁶¹ *Tyler* created a circuit split that will force the Supreme Court to decide which standard of scrutiny applies to state and federal laws that limit firearm ownership. Should the Supreme Court adopt the *Tyler* holding, many absolute bans on firearm ownership will face Constitutional extinction.

If the Supreme Court accepts strict scrutiny as the standard for gun control laws, it will usher in a new era of gun-control lawmaking. Legislators will be forced to tailor laws narrowly to satisfy the purpose of stopping gun violence. Laws that refuse Second Amendment rights to categories of people will be subject to the highest level of scrutiny permitted by the Constitution, and will fail to hold water. Broad, categorical restrictions will no longer pass constitutional muster, making an alternate approach necessary.

This Comment will analyze the unique situation presented by *Tyler*. It is a chance for the Supreme Court to once again define the scope of the *Heller* ruling and clarify the jurisprudence of doubt surrounding the Second Amendment. Section II of this Comment will contextualize today's Second Amendment right by examining the history of firearms in the United States. Section III will detail how the NRA lubricated the political process to create the favorable political climate necessary for the *Heller* Court to create a private right to bear arms. Section IV details the *Heller* and *McDonald* decisions, and highlights their impact on decisions in the state and lower federal court system. While *Heller* and *McDonald* were judicial turning points for the Court, they left much untended. Section V provides an overview of the morass of Second Amendment jurisprudence left in *Heller's* wake, including the split in the United States Court of Appeals for the Federal Circuit created by the *Tyler* holding. The *Tyler* court called for a strict scrutiny standard of review for categorical bans on firearm ownership; Section VI details various pieces of legislation that are endangered by this standard.

This Comment advocates that a strict scrutiny standard of review be adopted for laws that completely abridge the core right of self-defense created by *Heller*. While it is true that adoption of this standard

⁶⁰ *Tyler*, 775 F.3d at 333–34 (“Congress has not just conceded that the previously institutionalized are not sufficiently dangerous, as a class, that it is necessary to deprive all class members of firearms; it has gone further and has actively encouraged a system in which dangerous class members are treated differently from non-dangerous members. . . .”).

⁶¹ Denniston, *supra* note 56.

would threaten many currently enforced laws, such a standard would act as a much needed judicial guidepost for legislators. Adoption of strict scrutiny would provide clarity and shape to the *Heller* right. If the Supreme Court were to embrace the idea that only the right of self-defense within the home is protected under the Second Amendment, this would allow legislators the broad latitude to limit the means by which that right is exercised. Laws that only restrict the means by which one can assert the *Heller* right will be subject to some form of intermediate scrutiny, as the Second Amendment right is undisturbed.

II. FIREARMS: FROM FLINTLOCK TO FULL-METAL JACKET

The history of gun ownership and possession rights in America is inexorably tied to the founding of the nation. The colonial militia fought the battles of Lexington and Concord because King George III ordered the dispatch troops to destroy colonial ammunition stores in the townships.⁶² Ironically, an act of gun control served as the catalyst for the American Revolution.

There are competing theories as to the place of the Second Amendment in modern American society. One view is that the Second Amendment is a collective right created to guarantee a well-regulated militia.⁶³ The opposing view, which relies on reading the Amendment as two distinct clauses, advances that the right is both a personal and a collective one.⁶⁴ The *Heller* court considered the role of firearms in society in 1791 as evidence of a privately held right to bear arms.⁶⁵ However the Amendment is interpreted, the founders' original understanding of firearms rights must be considered. Probate records from the colonial era offer some insight into how common firearms were in society at the time the Constitution was ratified. What follows is a brief foray into available historical records, which indicate firearms played a limited role in colonial society.

Probate inventories, while an incomplete record, are still

⁶² FISCHER, *supra* note 1, at 294.

⁶³ *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (internal citations omitted) (“The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service.”).

⁶⁴ *Id.* (“The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.”). *Id.* (internal citations omitted) (“Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”).

⁶⁵ *Id.* at 592–95.

regarded by historians as a nonpareil source of the types of items that were considered valuable enough to pass by testate succession.⁶⁶ Probate records from the years immediately preceding the American Revolution indicate that fifty percent of wealth-owning colonists also owned a firearm.⁶⁷ During this time period, men were required to supply their own firearms for use in service to the militia, so firearms were not an asset subject to collection by creditors.⁶⁸ In a survey of 919 probate inventories from the years 1774 to 1810, firearms are present in the assets of sixty-three percent of these estates.⁶⁹ Inventories from the wealthiest ten percent of estates revealed that seventy-four percent of these decedents owned a firearm, while only four percent of these estates reported knives or swords as assets.⁷⁰ In fact, guns were a more common estate asset than were many common household items.⁷¹ These probate records indicate that many colonialists did own guns, and they also prove how important military duty was to the colonial republic.

When America declared its independence from the British Empire, many of the newly sovereign colonies memorialized the rights afforded to citizens within their territory. The Pennsylvania Constitution of 1776 contained such a declaration of rights.⁷² The 1776 Constitution obligated citizens to bear arms in service of the state.⁷³ The Pennsylvania drafters stated that every member in society had the right to be protected from unlawful interference of his enjoyment of life, liberty, and property, and was thus bound in service to contribute his fair share to that defense.⁷⁴ In a subsequent provision, the

⁶⁶ James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1780 (2002).

⁶⁷ *Id.* at 1780–81.

⁶⁸ *Id.* at 1782.

⁶⁹ *Id.* at 1785.

⁷⁰ *Id.* at 1784.

⁷¹ *Id.* at 1784 (tables appear in fifty to sixty-four percent of Virginia probate records from 1690 to 1715; guns appear in sixty-three to sixty-nine percent of these same records).

⁷² PA. CONST. OF 1776, *Declaration of Rights*, reprinted in FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3082–84 (1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS]; Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 578 (2006).

⁷³ Cornell, *supra* note 72, at 580.

⁷⁴ THORPE, *supra* note 72, at 3083 (“That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his

document conferred its citizens an individual right to bear arms in defense of themselves and of the state.⁷⁵ This provision mentions the right to bear arms and is surrounded by allusions to military service, which indicates that the framers understood the right to be a militant one.⁷⁶ At the very least, the Pennsylvania framers contemplated a very limited right, anchored to military service.

What is clear from the historical record is that firearms played a significant role in the foundation of the republic. Military victory in the Revolutionary War depended on a well-armed militia. The colonialists took their civic-military responsibility very seriously, as evidenced by the creditors' inability to seize firearms during collection on debt. That firearms would pass so freely through will or division indicates that firearms, and by association, the obligation to serve in the militia, were considered cornerstones of the colonial existence. With innovation in technology and military tactic, it is improbable, if not impossible, for a modern militia force to overthrow the United States Government. Yet, this doomsday scenario remains fundamental to the expansionist interpretation of the Second Amendment.

What is not clear from the historical record, however, is whether colonial Americans kept weaponry for purposes outside of service to the militia.⁷⁷ While many owned guns as a means of fulfilling their statutory duty to the militia, there is little evidence of the almost fanatical relationship with firearms that exists in America today. Carrying weaponry of any kind in public was outlawed by some state legislatures.⁷⁸ In the early nineteenth century, it was illegal to discharge a weapon within the recorded limits of any Ohio town.⁷⁹ Laws that heavily regulated firearms usage were enforced during the colonial era, so it is likely that the founders understood firearm ownership to be within the purview of government regulation. The historical context of the Second Amendment supports the conclusion that firearms were used almost exclusively in the defense of one's land or state.

If the Second Amendment is interpreted based only on the role of guns in colonial America, the Amendment's scope seems a tad absurd. If civilians need weapons only to ensure a freedom from

personal service when necessary, or an equivalent thereto.”).

⁷⁵ Cornell, *supra* note 72, at 580.

⁷⁶ *Id.*

⁷⁷ Lindgren & Heather, *supra* note 66, at 1786.

⁷⁸ 1838 Va. Acts 76 (making it unlawful for any person to “habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind . . . hidden or concealed from common observation”).

⁷⁹ Cornell, *supra* note 72, at 515.

tyranny and oppressive governance, then only military grade weaponry should be available. All civilians should have their own drones, rocket propelled grenades, cruise missiles, and an M-4 over the mantle. Imagining this scenario borders on the comedic. If explanation for *Heller's* expanded Second Amendment interpretation is not supported by history, how can the Post-*Heller* expansion of firearms rights be reconciled?

III. KNIVES AT THE GUNFIGHT: THE FUTILITY OF THE GUN CONTROL LOBBY

Political heavyweights on both sides of the aisle have taken staunch positions regarding the place of the Second Amendment in today's America. Aside from the President, the NRA projects the loudest voice on either side of the debate.⁸⁰ The gun control movement is significantly less influential than the NRA, which benefits from a single, thundering voice.⁸¹ Groups in favor of stricter gun laws find themselves outgunned by the significant resources of the NRA.⁸² The NRA's ability to concentrate its influence so effectively affords it an overwhelming advantage in the legislative battle over Second Amendment rights.⁸³

The NRA is an organization almost as old as the right it defends so vigorously.⁸⁴ But the NRA was not always the political *tour de force* that it now is. Ironically, the NRA initially supported sensible gun regulation, going so far as to have its president, Karl Frederick, speak to the virtues of the National Firearms Act of 1934 prior to its passage.⁸⁵

⁸⁰ Bruce Rogers, *NRA Winning the Influence Battle over Gun Control*, FORBES (Feb. 1, 2013, 5:08 PM), <http://www.forbes.com/sites/brucerogers/2013/02/01/nra-winning-the-influence-battle-over-gun-control/#2e74b6f430dd> ("Forbes Insights and Appinions looked at the data for the week prior to the Sandy Hook tragedy and trended the data over the subsequent 5 weeks to determine the ebb and flow over the gun control debate. We found that the NRA and the pro-gun rights voices are winning the influence battle. . . . Barack Obama leads the pro-gun control voice with a net influence score of 268. LaPierre leads the anti-gun control side with a net influence score of 240.").

⁸¹ Walter Hickey, *How the NRA Became the Most Powerful Special Interest Group in Washington*, BUS. INSIDER (Dec. 18, 2012, 1:43 PM), <http://www.businessinsider.com/nra-lobbying-money-national-rifle-association-washington-2012-12>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Steven Rosenfeld, *The Surprising Unknown History of the NRA*, ALTERNET (Jan. 13, 2013), <http://www.alternet.org/surprising-unknown-history-nra>.

⁸⁵ National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236; Progressive Change Campaign Comm., *For Most Of Its History, The NRA Actually Backed Sensible Gun Regulation*, BOLD PROGRESSIVES (Jan. 17, 2013),

However, the NRA's support for gun regulation was short-lived. Following passage of the Gun Control Act of 1968,⁸⁶ the NRA began to mobilize its political resources in opposition of further regulation.⁸⁷ By 1975, the face of the NRA had changed drastically. The organization formalized its lobbying branch, the NRA-ILA, and created a Political Action Committee to support pro-gun legislative efforts.⁸⁸ In the years that followed, the NRA and its members became increasingly focused on the Second Amendment.⁸⁹

In the last half-century, the NRA's primary purpose has been to protect Second Amendment rights. Implicitly, the group accomplishes this goal by attacking firearm regulations and the groups that research gun violence statistics. The NRA entered into numerous conservative coalitions comprised mostly of Republican politicians.⁹⁰ By the late 1990s, the NRA was the most powerful lobbying organization in the country.⁹¹ The influence of the NRA has not waned in recent years as an estimated eighty-eight percent of Republican politicians received contributions from the NRA PAC at some point during their political careers.⁹² The NRA's influence continues to be pervasive, as forty-seven percent of the members of the new Federal Congress received political contribution from the group in the most recent election.⁹³

NRA contributions to the Republican Party allow the group to sow the seeds of political loyalty. The mobilization of political contributions confers on the NRA significant success in furthering a pro-gun agenda, as well as in hindering federal funding efforts for epidemiological research of gun violence.⁹⁴

<http://boldprogressives.org/2013/01/for-most-of-its-history-the-nra-actually-backed-sensible-gun-regulation/>.

⁸⁶ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

⁸⁷ JOHN M. BRUCE & CLYDE WILCOX, *THE CHANGING POLITICS OF GUN CONTROL* 158 (1998).

⁸⁸ *Id.*

⁸⁹ *Id.* at 163.

⁹⁰ Michael Waldman, *The Rise of the NRA*, MOYERS & COMPANY (June 12, 2014), <http://billmoyers.com/2014/06/12/the-rise-of-the-nra-2/>.

⁹¹ Editorial, *FORTUNE Releases Annual Survey of Most Powerful Lobbying Organizations*, TIME WARNER (Nov. 15, 1999), <http://www.timewarner.com/newsroom/press-releases/1999/11/15/fortune-releases-annual-survey-of-most-powerful-lobbying>.

⁹² Lee Drutman, *NRA's Allegiances Reach Deep into Congress*, SUNLIGHT FOUND. (Dec. 18, 2012, 5:22 PM), <http://sunlightfoundation.com/blog/2012/12/18/nra-and-congress/>.

⁹³ *Id.*

⁹⁴ Editorial, *Break the NRA's Ban on Gun Violence Research*, BLOOMBERG VIEW (Apr. 21, 2015, 9:00 AM), <http://www.bloomberg.com/view/articles/2015-04-21/break-the-nra-s-ban-on-gun-violence-research>.

The NRA's most significant victory at the federal level was undoubtedly the passing of the Firearm Owner's Protections Act of 1986 ("FOPA").⁹⁵ FOPA, which was drafted with significant NRA input, made pro-gun revisions to many provisions of the Firearms Act of 1968.⁹⁶ FOPA limited many of those enumerated ATF powers. FOPA additionally loosened restrictions on gun sales by reopening the interstate sale of long guns.⁹⁷ The act removed the record-keeping requirement for sales of non-armor-piercing ammunition, thereby permitting purchaser anonymity regardless of quantity of ammunition acquired.⁹⁸ FOPA also loosened federal transportation restrictions on firearms through states in which those firearms were illegal,⁹⁹ thereby creating a black market in the northern United States for illegally trafficked firearms of southern origin. Finally, the act created enumerated categories of individuals precluded from owning a firearm.¹⁰⁰ These enumerations, which constituted a main point of contention in *Tyler*,¹⁰¹ are still in effect today.

In October of 2015, Michael Bassier was arrested and charged under a 541-count federal indictment for the illegal interstate transport and sale of firearms in New York.¹⁰² On twelve occasions, Bassier and his cohorts acquired guns in states with looser restrictions on firearm purchases and then transported the guns into Brooklyn for black market resale.¹⁰³ Among the numerous weapons sold by Bassier and his co-conspirators, more than twenty were fully automatic assault rifles.¹⁰⁴ On a recorded phone call, Bassier bragged to an ex-girlfriend

⁹⁵ Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) [hereinafter FOPA].

⁹⁶ *Id.* (amending many provisions of Title 18 of the United States Code, with the most dramatic changes occurring in the enumeration of groups of individuals precluded from owning firearms under the Act).

⁹⁷ *Id.* (permitting the interstate sale of rifles and shotguns, provided that: the transferee and transferor meet in person to accomplish the transfer; and such sale complies with the laws of both States).

⁹⁸ *Id.* (repealing certain recordkeeping requirements for the sale of ammunition (but retaining such requirements for armor-piercing ammunition)).

⁹⁹ *Id.* (permitting the interstate transportation of unloaded firearms by any person not prohibited by Federal law from such transportation regardless of state law to the contrary).

¹⁰⁰ *Id.*

¹⁰¹ See *Tyler v. Hillsdale Cty. Sheriff's Dep't.*, 775 F.3d 308 (6th Cir. 2014), *rev'd*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

¹⁰² Christina Carrega-Woodby, *Gun Ring Busted for Running Weapons to Brooklyn from Other States Using Chinatown Buses: DA*, N.Y. DAILY NEWS (Oct. 14, 2015), <http://www.nydailynews.com/new-york/nyc-crime/gun-ring-busted-running-weapons-brooklyn-da-article-1.2397376>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

about his ability to saunter through the streets of New York, armed to the teeth with automatic rifles and sub-machine guns.¹⁰⁵

In New York, where the majority of Bassier's illegal sales took place, over ninety percent of illegal firearms used in crimes are transported from out-of-state.¹⁰⁶ Bassier's arrest marked the third long term gun trafficking operation thwarted by the New York Police Department in the last year alone.¹⁰⁷ Stories like Bassier's strengthen the call for Congress to place greater limitations on the interstate transport of firearms.¹⁰⁸ While the bust was a victory for law enforcement, it is a spit in the sea of illegal firearms that are transported into New York every year. Absent congressional action, law enforcement success will not prevent the continued amassing of bodies.¹⁰⁹ In the face of this call to action for a strengthened gun-control mandate, Congress has been notably silent. The congressional deadlock forced the NRA to focus on its support for state legislation that expands the Second Amendment right.

The NRA's lobbying activities over the past two decades are responsible for 230 legislative victories at the state level.¹¹⁰ The focus of NRA lobbying has been the expansion of hunting rights, emergency powers, and carry-conceal rights.¹¹¹ Amongst the most dangerous of NRA-backed legislation are those laws passed under the "Castle Doctrine."¹¹² These laws are also known as "Make My Day" laws, for the enigmatic loose-cannon police officer "Dirty" Harry Callahan portrayed by Clint Eastwood. The laws create a right of nearly unlimited force when one defends their home from intruders.¹¹³ The NRA has successfully lobbied for Castle Doctrine laws in twelve states.¹¹⁴ Proponents of these laws argue that they do not create a substantially lesser burden of proof than "justifiable homicide" laws.¹¹⁵ In reality,

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Carrega-Woodby, *supra* note 102.

¹⁰⁹ *Id.*

¹¹⁰ Walter Hickey, *The NRA Has Been Outstandingly Successful Where It Really Counts*, BUS. INSIDER (Apr. 3, 2013, 11:25 PM), <http://www.businessinsider.com/state-laws-nra-right-to-carry-gun-control-2013-4>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Hickey, *supra* note 110.

¹¹⁵ *See* *People v. Humphrey*, 921 P.2d 1, 6 (Cal. 1996) (holding that the California penal code excuses an intentional homicide where a defendant reasonably believed that they, or a third party, was in great danger of being killed or suffering serious bodily harm; the defendant reasonably believed the use of deadly force was necessary to

“Make My Day” laws create a much lower evidentiary bar to surpass than do laws dealing with justifiable homicide.

Yoshihiro Hattori was a Japanese exchange student living in Baton Rouge, Louisiana, in 1992.¹¹⁶ On the night of his death, he was on his way to a Halloween party. Hattori inadvertently approached the wrong home, mistaking it for the party’s location.¹¹⁷ He and a friend walked to the front door of Rodney Peairs and rang the doorbell.¹¹⁸ The doorbell startled Mrs. Peairs, who instructed her husband to retrieve his gun. When the doorbell went unanswered, the boys walked back to their car, away from the residence. The front door then swung open, and behind it stood Mr. Peairs, who wielded a loaded and cocked .44 magnum revolver.¹¹⁹ Peairs, with his gun trained on Hattori, commanded the boy to freeze.¹²⁰ Hattori, misunderstanding Peairs’ shouts, turned, and stepped back toward the house.¹²¹ Peairs, who waited until Hattori had reached point-blank range, fired one lethal round into Hattori’s chest, and then retreated into his home.¹²² The hole opened by the large-bore .44 caliber round proved fatal, and Hattori took his final breath in an ambulance, only minutes after first responders arrived on scene.¹²³

Initially, Peairs was quickly interrogated and released. The police found no reason to file charges as Louisiana was a Castle Doctrine state and Peairs believed Hattori was an intruder. Only after the governor of New Orleans, along with the Japanese Consulate, exerted pressure on the municipal government of Baton Rouge was Peairs charged with manslaughter.¹²⁴ Peairs was eventually found not guilty of manslaughter by a jury.¹²⁵

Castle Doctrine laws exist because the fight for legislative control

defend against that danger; and that the defendant did not use more harm than was reasonably necessary to defend against that danger).

¹¹⁶ Kuchikomi, *Louisiana ‘Freeze’ Shooting Tragedy Remembered 20 Years On*, JAPAN TODAY (Oct. 20, 2012, 6:37 AM JST), <https://www.japantoday.com/category/kuchikomi/view/louisiana-freeze-shooting-tragedy-remembered-20-years-on>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Kuchikomi, *supra* note 116.

¹²³ Editorial, *Defense Depicts Japanese Boy as ‘Scary,’* N.Y. TIMES (May 21, 1993), <http://www.nytimes.com/1993/05/21/us/defense-depicts-japanese-boy-as-scary.html>.

¹²⁴ Kuchikomi, *supra* note 116.

¹²⁵ *Id.*

over gun regulations tips overwhelmingly in favor of the NRA, and its pro-gun constituency.¹²⁶ In the last quarter-century, the NRA tallied numerous legislative victories for those in favor of expanding Second Amendment rights.¹²⁷ The NRA backed lawmaking that loosened restrictions on the core right of self-defense, as well as on the interstate commerce of firearms. Today, these laws facilitate gun violence. A steady flow of NRA funding to lawmakers assures that no new federal legislation disturbs the NRA's ability to expand the Second Amendment at the state level. For example, in the aftermath of Sandy Hook, Congress passed zero new gun control bills.¹²⁸ Clearly, the political and financial maneuverings of the NRA are paying dividends for the gun advocacy right. As the NRA successfully amassed political and popular support for its message, a simultaneous shift in Supreme Court jurisprudence further expanded the rights protected under the Second Amendment.

IV. *HELLER* AND *MCDONALD* EXPAND THE SECOND AMENDMENT RIGHT

A. *The Heller Right*

Heller is undoubtedly the seminal case regarding Second Amendment rights. The case arose out of the District of Columbia's general prohibition on handguns. District of Columbia ("D.C.") law made it illegal to own an unregistered firearm, while a separate provision made the registration of handguns illegal.¹²⁹ Thus, D.C. law allowed certain long-barrel weapons to be kept in the home; however, the law required them to be rendered inoperable.¹³⁰ Dick Heller, a member of the D.C. special police force, who was authorized to carry a gun while on duty, applied for a certificate to keep a handgun in his home for personal protection.¹³¹ His application was denied. Heller sued D.C. in federal court, seeking to enjoin the enforcement of the laws prohibiting handguns.¹³² *Heller* claimed that the laws prohibiting

¹²⁶ Erica Goode, *N.R.A.'s Influence Seen in Expansion of Self-Defense Laws*, N.Y. TIMES (April 12, 2012), http://www.nytimes.com/2012/04/13/us/nra-campaign-leads-to-expanded-self-defense-laws.html?_r=0.

¹²⁷ *Id.*

¹²⁸ Wing, *supra* note 39.

¹²⁹ *District of Columbia v. Heller*, 554 U.S. 570, 676 n.38 (2008) (stating that *Heller* was the culmination of a centuries-long judicial debate as to the scope of the Second Amendment).

¹³⁰ *Id.* at 575 (District of Columbia law allowing long barreled weapons to be kept in the home so long as certain mechanisms necessary for the weapon to fire were dismantled).

¹³¹ *Id.*

¹³² *Id.* at 575–76.

handgun possession, and the laws requiring other firearms to be rendered inoperable in order to be legally kept, infringed upon Heller's core right of self-defense under the Second Amendment.¹³³

The majority held that the previous interpretation of the Second Amendment by the Court was too narrow.¹³⁴ The Court cited the unique construction of the Second Amendment in support of this proposition.¹³⁵ The Second Amendment terminology indicates that the Amendment grants rights beyond merely allowing arms in instances where the militia is assembled. The Amendment refers expressly to a "right of the people."¹³⁶ The *Heller* court read this language to mean that the framers intended to extend Second Amendment protections to individuals who share in the national identity.¹³⁷ The Court contrasted this broad and seemingly inclusive definition with the word "militia," which, at the time of Constitutional ratification, referred only to able-bodied men within a certain age range.¹³⁸ The Court held that the two clauses of the Amendment cannot be reconciled, unless the enumerated "right of the people" to keep and bear arms was intended to exist independently from the right to bear arms in service of the militia.¹³⁹

The court concluded its analysis by combining the component clauses in order to read that the Second Amendment confers an individual right to possess and carry a weapon in service to the militia or to protect the home.¹⁴⁰ The *Heller* court also hinted, albeit subtly, that the Second Amendment was a fundamental right that, perhaps,

¹³³ *Id.* at 576.

¹³⁴ *Id.* at 583 (holding that the dissent, which interpreted the Second Amendment as guaranteeing a right to bear arms only in the event that a militia was raised, was incorrect, and that the Second Amendment instead guarantees a right to bear arms in order to ensure that an effective militia could be raised in the event that it was needed).

¹³⁵ *Heller*, 554 U.S. at 577–78 (stating that the framers of the Constitution drafted the document so that all could understand it. Accepting this proposition leads to the conclusion that the Constitution should be read in such a way as to lend utmost clarity to its provisions).

¹³⁶ *Id.* at 576.

¹³⁷ *Id.* (stating that the framers of the Constitution drafted the document to be understood by all, such that "words and phrases were used in their normal and ordinary as distinguished from technical meaning").

¹³⁸ *Id.* at 580.

¹³⁹ *Id.* at 579–81 (stating that the Second Amendment confers an individual right to bear arms; to hold only that the Second Amendment right guarantees firearm ownership only in service to the state militia is inconsistent with the operative clause's language that expressly confers a right to "the people").

¹⁴⁰ *Id.* at 592 ("We find that they guarantee the individual right to possess and carry weapons in case of confrontation It has always been understood that the Second Amendment . . . codified a pre-existing right . . . [one] not granted by the Constitution. Neither is it dependent upon that instrument for its existence.").

lay even beyond the review of the judicial branch.¹⁴¹ The Court also stated that, while it was aware that gun violence needed to be curbed, the Constitution is supreme law. Thus, the fundamentality of the right conferred by the Second Amendment excludes some legislative means of controlling firearms, especially those that serve as absolute prohibitions on asserting the right of defense of one's self or their home.¹⁴²

The Supreme Court acknowledged that *Heller* was the Court's first in-depth analysis of Second Amendment rights, and that they had left much undecided.¹⁴³ The Court proffered only one limit on the Second Amendment right: that the right to keep and bear arms was not an unlimited one.¹⁴⁴ In support of this, the court looked to the history of the right to keep and bear arms and ruled that, at the time of drafting, there were certain limitations on what kind of weapons could be kept.¹⁴⁵ One such limit was on unusual or extraordinarily dangerous weapons that were not commonly used in 1791.¹⁴⁶ The *Heller* court interpreted this to mean that modern Second Amendment rights do not protect a right to keep whatever weapons one desires.¹⁴⁷ The Supreme Court conferred the *Heller* right on "law-abiding, responsible citizens."¹⁴⁸ Such language implies that certain groups of people may legitimately be disqualified or excluded from Second Amendment protection in bearing arms for defensive purposes.

B. *McDonald v. City of Chicago*

Two years after the landmark decision in *Heller*, the Supreme Court of the United States was tasked with interpreting the scope of the expanded Second Amendment that it had created. In *McDonald v. City of Chicago*, seventy-one year-old Otis McDonald applied for a

¹⁴¹ *Heller*, 554 U.S. at 634 (emphasis added) ("The very enumeration of the right takes out of the hands of the government . . . the power to decide on a case-by-case basis whether the right is really worth *insisting upon*.").

¹⁴² *Id.* at 636.

¹⁴³ *Id.* at 635 ("[B]ut 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.").

¹⁴⁴ *Id.* at 595 (holding that the right conferred by the Second Amendment was not unlimited, just as rights under the First Amendment are not unlimited).

¹⁴⁵ *Id.* at 625.

¹⁴⁶ *Id.* at 627.

¹⁴⁷ *Heller*, 554 U.S. at 627.

¹⁴⁸ *Id.* at 635 ("And whatever else it [the *Heller* decision] 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.").

handgun license to defend his home.¹⁴⁹ Chicago, like D.C. in *Heller*, required registration of all firearms.¹⁵⁰ Chicago passed an ordinance in 1982 that disallowed the registration of handguns.¹⁵¹

Unable to register his handgun, the weapon most used for personal protection in the home, McDonald brought suit with three other similarly situated individuals.¹⁵² The plaintiffs claimed that the handgun ban was overly broad in its complete prohibition on the assertion of the Second Amendment right.¹⁵³ McDonald argued that the Second Amendment applied to state and local governments via the Fourteenth Amendment's Due Process Clause.¹⁵⁴ The Supreme Court of the United States agreed, and incorporated the *Heller* ruling under the Fourteenth Amendment.¹⁵⁵ The expanded Second Amendment right of *Heller* was fundamental and applied with equal force to state and federal gun-control laws.

The ruling in *Heller* expanded the rights conferred by the Second Amendment. At the same time, the Supreme Court was reluctant to define the standard of review for laws that were challenged as unconstitutional limits on the Second Amendment right. The majority in *Heller* eliminated rational basis as a standard of review for laws challenged under the Second Amendment.¹⁵⁶ The Court in *Heller* also eliminated a "freestanding interest-balancing approach," which would balance the burden on the individual right with the challenged law's benefits.¹⁵⁷ This standard of review is quite close to the intermediate scrutiny standard, which requires a nexus between an important government objective that is furthered by means substantially related to that objective. It is clear from *Heller* dicta that the Court considered rational basis and intermediate scrutiny inappropriate for challenges to laws that limit the *core protections* of the Second Amendment.¹⁵⁸ The Court in *McDonald* further expanded the Second Amendment right

¹⁴⁹ McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (noting that the plaintiff made a showing that his home had been broken into numerous times and that keeping a firearm for personal protection was both necessary, and permitted under the ruling in *Heller*).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 752.

¹⁵⁴ *Id.* at 742.

¹⁵⁵ *McDonald*, 561 U.S. at 746.

¹⁵⁶ *Heller*, 554 U.S. at 628 n.27 (stating that if all that were required of gun control laws was to pass rational basis scrutiny, the Second Amendment would be redundant in the context of other constitutional prohibitions on the making of irrational laws).

¹⁵⁷ *Id.* at 634–35.

¹⁵⁸ *Id.* at 629 n.27.

that was created in *Heller*. The federal circuit courts of appeals, then, were left to develop their own standards of review for Second Amendment challenges.¹⁵⁹ The Supreme Court's reluctance to set a standard of review would have significant ramifications in the near future.

V. THE SECOND AMENDMENT WITHOUT STANDARD

The *Heller* and *McDonald* decisions left in their wake more questions than answers.¹⁶⁰ Since *Heller*, numerous courts of appeals have tried their hand in applying the expanded Second Amendment right to other situations.¹⁶¹ For example, in *Kachalsky v. County of Westchester*,¹⁶² the United States Court of Appeals for the Second Circuit ruled that there must exist some Second Amendment right to keep and bear arms outside the home.¹⁶³ This court, however, failed to narrow that holding any further. In *Drake v. Filko*,¹⁶⁴ the United States Court of Appeals for the Third Circuit declined to definitively hold that the right to keep and bear arms extended beyond the home.¹⁶⁵ These two cases are but a small cross-section of a Second Amendment doctrine that is rife with inconsistencies.

A. *The Post-Heller Era: A Divergent Harmony*

Unsurprisingly, the decisions in *Heller* and *McDonald* triggered an onslaught of challenges to the estimated 20,000 gun control laws enforced in the United States.¹⁶⁶ Deciding the constitutionality of these laws fell primarily to lower courts at the federal and state level.¹⁶⁷ These courts struggled to apply *Heller* and *McDonald*, primarily because these

¹⁵⁹ See *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 326 (6th Cir. 2014), *rev'd*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

¹⁶⁰ *Id.* at 316 (stating that *Heller* did not define the full breadth of the Second Amendment, and that since the *Heller* decision, several courts of appeals have grappled with application of the right carved out by *Heller* to the keeping and bearing of arms outside of the home).

¹⁶¹ *Id.* (“[C]ourts of appeals have opined whether the Second Amendment encompasses the right to carry a gun outside the home.”).

¹⁶² *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012).

¹⁶³ *Id.* at 89 (stating that “the [Second] Amendment must have some application in the very different context of the public possession of firearms. Our analysis proceeds on this assumption”).

¹⁶⁴ *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

¹⁶⁵ *Id.* at 431 (declining to “definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the “core” of the right as identified by *Heller*”).

¹⁶⁶ Mehr & Winkler, *supra* note 52, at 1.

¹⁶⁷ *Id.*

decisions lacked a defined standard of review against which gun control laws should be tested.¹⁶⁸ Traditionally, the Supreme Court provides a concise framework to the lower courts for review of laws that limit fundamental constitutional rights.¹⁶⁹ In the absence of this guidance, courts at the state and federal levels have adopted numerous, often incompatible, legal standards.¹⁷⁰ The marked divergence among the federal circuit courts of appeal leaves the Second Amendment doctrine alarmingly unsettled.¹⁷¹ In the midst of such profound circuit confusion, federal courts are consistent only in their rulings on challenges brought under the Second Amendment.¹⁷² What follows is a brief overview of the standards of review adhered to by each circuit.

The First Circuit applied heightened scrutiny to a categorical ban on firearm ownership by a class of individuals in *United States v. Booker*.¹⁷³ For a categorical ban to pass constitutional muster under the First Circuit standard, the government must make a *strong* showing of “a *substantial relationship* between the challenged law and an *important* governmental objective.”¹⁷⁴ The First Circuit standard is a basic form of intermediate scrutiny.¹⁷⁵

The Second Circuit adopted a hybrid standard of review that exists somewhere between heightened and strict scrutiny.¹⁷⁶ The Second Circuit standard of review only applies to laws that do not burden “the core protection of self-defense within the home.”¹⁷⁷ This standard of review seemingly only applies strict scrutiny as a standard of review for laws impeding upon the core right of self-defense under the Second Amendment. While the Second Circuit standard concedes strict scrutiny will apply in some instances, many categorical bans on firearms are not in themselves specific restrictions on the core right of defense, but instead function as total prohibitions on the Second

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 3.

¹⁷¹ *Id.* at 1.

¹⁷² See Mehr & Winkler, *supra* note 52.

¹⁷³ *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011).

¹⁷⁴ *Id.*

¹⁷⁵ *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 326 (6th Cir. 2014) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)) (concluding that intermediate scrutiny requires a challenged law be substantially related to an important government objective), *rev'd*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

¹⁷⁶ *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012).

¹⁷⁷ *Id.* at 93–94 (stating the Second Circuit will adhere to “some form of heightened scrutiny . . . less than strict scrutiny” to laws not burdening the “‘core’ protection of self-defense in the home”).

Amendment right for suspect classes of individuals.

In *United States v. Marzzarella*,¹⁷⁸ the Third Circuit applied intermediate scrutiny for laws that do not severely burden the possession of firearms.¹⁷⁹ The Third Circuit acknowledged that different challenges under the Second Amendment may require different levels of scrutiny.¹⁸⁰ Much like the Second Circuit, the Third Circuit's standard is flexible, and recognizes that in some circumstances, a more rigorous standard of review than heightened scrutiny is appropriate.¹⁸¹ However, the Third Circuit has not yet defined what exactly constitutes a burden severe enough to warrant strict scrutiny.

The Fourth Circuit, in *United States v. Masciandaro*,¹⁸² held that strict scrutiny will apply only to laws that limit the core right created by *Heller*, that which protects self-defense inside the home.¹⁸³

The Fifth Circuit applies a multi-tiered system of analysis for laws challenged under the Second Amendment. This approach requires the appropriate level of scrutiny to be determined on a case-by-case basis, accounting for "the nature of the conduct being regulated" and the burden imposed by the law upon the Second Amendment right.¹⁸⁴ This approach contravenes the holdings in *Heller* and *McDonald*; specifically, if administrative variation in the judicial process across cases interferes with constitutional guarantees, that right is not guaranteed at all.

The Seventh Circuit cannot agree on an internal standard of review and historically differs in the level of scrutiny applied depending on the panel that presides over the case.¹⁸⁵ Generally, this Circuit requires something resembling strict scrutiny for laws that burden the core right of self-defense and requires intermediate scrutiny for laws regulating how one asserts their rights under the Second Amendment.¹⁸⁶ This Circuit is rife with judicial dissent, and

¹⁷⁸ *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

¹⁷⁹ *Id.* at 89.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011).

¹⁸³ *Id.* at 471 (internal citation omitted) ("While we find the application of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home we conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home.").

¹⁸⁴ *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012), *amended by* 2012 U.S. App. LEXIS 26949 (5th Cir. Oct. 25, 2012).

¹⁸⁵ *See Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

¹⁸⁶ *Id.*

members of its own panel exchange barbs for sending conflicting doctrinal signals that convolute the issue rather than clarify it.¹⁸⁷

The Ninth Circuit adheres to a variable approach, which creates a somewhat messy body of precedent. After volleying the issue of scrutiny back and forth over a series of cases, the Ninth Circuit adopted a standard of review that requires strict scrutiny for laws infringing upon the core protections of the Second Amendment. In the Ninth Circuit, intermediate scrutiny applies to laws regulating conduct protected under the Second Amendment that is not the core right of self-defense.¹⁸⁸

The Tenth Circuit's approach is that intermediate scrutiny is appropriate only when a particular law does not serve as a categorical restriction on firearm ownership.¹⁸⁹ The Tenth Circuit standard readily embraces the idea of strict scrutiny for broad categorical restrictions on firearm ownership. This circuit also recognizes that intermediate scrutiny is appropriate for laws that do not burden the *Heller* right. The standard of review incorporated by the Tenth Circuit closely mirrors the hybrid standard that the Supreme Court would adopt in affirming *Tyler*.

The United States Court of Appeals for the District of Columbia Circuit adheres to a variable standard. This approach requires that laws burdening the core right of self-defense must be supported by a *strong* justification.¹⁹⁰ Under this approach, laws that pose a substantially less severe restriction on Second Amendment rights are proportionally easier to justify.¹⁹¹ Laws that do not pose a severe burden are subjected to intermediate scrutiny.

This brief overview reveals a few common threads. First, every circuit adheres to some form of intermediate scrutiny as the default standard. An intermediate scrutiny standard of review demands that a law be substantially related to the furtherance of an important government interest.¹⁹² Second, despite circuit agreement on some variant of intermediate scrutiny as a standard of review, there is little

¹⁸⁷ *United States v. Skoien*, 614 F.3d 638, 647 (7th Cir. 2010) (Sykes, J., dissenting) (arguing that the court sends doctrinal signals on the Second Amendment that confuse rather than clarify).

¹⁸⁸ *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

¹⁸⁹ *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (holding that intermediate scrutiny applies to a federal firearms restriction that applies only to a narrow class of individuals instead of the public at large).

¹⁹⁰ *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

¹⁹¹ *Id.*

¹⁹² *Denniston*, *supra* note 56.

uniformity in how it is applied.¹⁹³ An overview of the federal circuit reveals a need for a solitary voice. It is clear that some laws will not impede the Second Amendment right, while others will. Some form of hybrid scrutiny should apply. This type of scrutiny allows for a relaxed standard of review depending on the nature of the burden on the Second Amendment right. A higher standard of review will govern laws restricting the core right of the Second Amendment as defined by *Heller*. The Supreme Court is likely to incorporate the *Tyler* ruling into this hybrid standard. Such a decision would clarify the standard of review while still permitting state and federal legislature great breadth in regulating firearms sales and commerce.

B. *Rebellion in the Sixth Circuit*

Charles Clifford Tyler, a 73 year-old Michigan inhabitant, applied for a license to own a firearm for personal protection.¹⁹⁴ Tyler's application was denied on the grounds that Tyler's psychological history precluded firearm ownership under 18 U.S.C. § 922(g)(4).¹⁹⁵ This statute prohibits firearm ownership for those adjudicated mentally ill, as well as those who have been committed to a mental institution.¹⁹⁶ The statute does not differentiate between *voluntary* and *involuntary* commitment. When Clifford Tyler was in his forties, he and his wife divorced under less-than amicable terms, and Tyler's mental health suffered as a result.¹⁹⁷ Concerned about his condition, his children had him committed for a forty-eight hour evaluation period.¹⁹⁸ Upon his release, Tyler held a job for the next twenty years, made child support payments, and helped to raise his children.¹⁹⁹ Tyler's medical records indicate that at no other time was he committed for psychological issues.²⁰⁰

Section 922(g)(4) provides, in part, that applicants denied under the provision may regain their rights under the Second Amendment

¹⁹³ Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 330 (6th Cir. 2014), *rev'd*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

¹⁹⁴ *Id.* at 314.

¹⁹⁵ *Id.* at 315.

¹⁹⁶ 18 U.S.C. § 922(g)(4) (2012) ("It shall be unlawful for any person who has been adjudicated as a mental defective or committed to a mental institution to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

¹⁹⁷ *Tyler*, 775 F.3d at 314.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

pending a review process.²⁰¹ Initially, this program received federal funding.²⁰² In 1993, the federal government defunded the program.²⁰³ States had the option to adopt a re-certification program, which was supported by federal subsidies;²⁰⁴ however, at the time Tyler brought suit, only half of the states were participants.²⁰⁵ Michigan was not one of these states.²⁰⁶

At trial, Tyler claimed that § 922(g)(4), coupled with the absence of a state funded re-certification program, constituted a categorical taking of his Second Amendment rights.²⁰⁷ The government argued that pursuant to *Heller*, intermediate scrutiny should govern review of the law.²⁰⁸ In support of this argument, the government stressed that intermediate scrutiny was the preferred standard of review for the other circuits.²⁰⁹

The court ruled that strict scrutiny applies to § 922(g) and that the law was unconstitutional as it related to Tyler.²¹⁰ In the opinion, the court noted that it was the first federal court to adopt this standard.²¹¹ The court did not accept the government's argument that intermediate scrutiny was appropriate simply because it was the chosen standard of review in other circuits. The *Tyler* court refused to hold that Supreme Court silence on a standard of review was a tacit endorsement of intermediate scrutiny.²¹² In applying strict scrutiny, the *Tyler* court noted that the Supreme Court implicitly created the strict scrutiny mandate in ruling *Heller* and *McDonald*.²¹³ The *Tyler* court rejected intermediate scrutiny because it "has no basis in the constitution."²¹⁴ In *Tyler*, the strict scrutiny analysis of the court rendered § 922(g)(4) unconstitutional as it applied to Tyler, who was

²⁰¹ 18 U.S.C. § 922(g)(4) (2012).

²⁰² *Tyler*, 775 F.3d at 312.

²⁰³ *Id.*

²⁰⁴ *Id.* at 313.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 315.

²⁰⁸ *Tyler*, 775 F.3d at 323 (stating that the *Heller* court recognized that federal prohibitions on convicted felons and the mentally ill are still presumptively lawful).

²⁰⁹ *Id.* at 324.

²¹⁰ *Id.* at 311.

²¹¹ *Id.* at 329.

²¹² *Id.* at 328 (stating that, in past cases dealing with fundamental constitutional rights, the Supreme Court has required an express justification for downgrading the standard of review from strict scrutiny).

²¹³ *Id.* at 326 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010); *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011)).

²¹⁴ *Tyler*, 775 F.3d at 328.

involuntarily committed to a mental institution for less than thirty days.²¹⁵ According to the court, the connection between the government purpose of keeping firearms out of the hands of the mentally ill bore too remote a connection to people who had been committed to mental institutions in the distant past.²¹⁶ The court held that the lifetime ban potentially targeted a class of non-violent individuals and was unconstitutional.²¹⁷

The *Tyler* decision is yet another deviation in a largely unsettled field of Second Amendment jurisprudence. The Sixth Circuit's dissent from the norm of intermediate scrutiny will finally force Supreme Court endorsement of a standard of review for Second Amendment challenges to firearm legislation.

C. *The Argument for Strict Scrutiny*

As articulated by the United States Supreme Court in *McDonald*, the right to keep and bear arms is *fundamental* to ordered liberty under the Constitution.²¹⁸ The *McDonald* Court held that the Second Amendment is enforceable against state action by way of the Fourteenth Amendment.²¹⁹ Supreme Court precedent holds that laws abridging rights fundamental to “our scheme of ordered liberty” are to be gazed upon with the utmost level of judicial scrutiny allowed by the Constitution.²²⁰ Applied to the fundamental right of self-protection created by *Heller* and *McDonald*, the mandate is clear. Both state and federal laws that abridge the core right under the Second Amendment are subject to a strict scrutiny standard of review. In past decisions, the Supreme Court rejected numerous alternative tests to the strict scrutiny standard.²²¹ While the Court never expressly stated that strict scrutiny will govern challenges to laws under the Second Amendment,

²¹⁵ *Id.* at 344 (“Tyler’s complaint validly states a claim for a violation of the Second Amendment. The government’s interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, of their constitutional rights.”).

²¹⁶ *Id.*

²¹⁷ *Id.* at 335 (“We have reviewed scores of opinions presenting post-Heller Second Amendment challenges, and we do not believe that any other court of appeals in a reasoned opinion has reviewed a firearm restriction as severe as this one—one that forever deprives a law-abiding, non-violent, non-felon of his Second Amendment rights.”).

²¹⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 746 (2010) (“The Court is correct in describing the Second Amendment right as “fundamental” to the American scheme of ordered liberty.”).

²¹⁹ *Id.* at 778.

²²⁰ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

²²¹ *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

the Court implicitly, and repeatedly, endorsed this standard of review.²²²

Supreme Court silence on an appropriate standard of review for challenges brought under the Second Amendment does not imply that intermediate scrutiny governs. When the Court applies intermediate scrutiny, it expressly indicates the reasons for downgrading the standard of review.²²³ For example, in the area of commercial speech, the Court applies intermediate scrutiny on the basis that a lower level of protection applies to commercial speech than to other, more fundamental, guarantees of expression.²²⁴

More support for adopting a strict scrutiny standard of review lies in the Court's express rejection of alternative approaches and standards. In *Heller*, the Court expressly rejected rational basis as a standard of review.²²⁵ If rational basis review governed Second Amendment challenges, there would be no need for written memorialization of the right, due to other constitutional prohibitions on irrational laws.²²⁶ The very enumeration of the right refuses a case-by-case analysis if the right is actually worth insisting upon.²²⁷ The *McDonald* court expressly rejected an interest balancing intermediate scrutiny approach.²²⁸ Supreme Court precedent overwhelmingly supports strict scrutiny as the standard of review for the core protection of the Second Amendment.

The conclusion drawn from the above analysis is that strict scrutiny should apply to laws that categorically restrict the core right of self-defense under the Second Amendment. Categorical abridgment of constitutional guarantees based on an individual's status demands more rigorous review than that under intermediate scrutiny.²²⁹ The

²²² See *id.* at 688 (stating that rational basis review is an inappropriate standard for Second Amendment challenges); *McDonald*, 561 U.S. at 806 (Thomas, J., concurring) (rejecting the interest balancing approach proposed by Justice Breyer).

²²³ *Tyler v. Hillsdale Cty. Sherriff's Dep't*, 775 F.3d 308, 328 (6th Cir. 2014), *rev'd*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

²²⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980).

²²⁵ *Heller*, 554 U.S. at 628 n.27.

²²⁶ *Id.* (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant given the separate constitutional prohibitions on irrational laws, and would have no effect.”).

²²⁷ *Id.* at 634–35. (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.”).

²²⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 792–93 (2010).

²²⁹ *United States v. Chovan*, 735 F.3d 1127, 1145–46 (9th Cir. 2013).

Second Amendment is a right contained in the Bill of Rights. The Second Amendment's core protection of self-defense was declared a fundamental right by the Court in *McDonald*. Either triggers a strict scrutiny standard of review for laws that limit core Second Amendment protections. Together, they all but obviate the need for analysis. If the Supreme Court holds with precedent when it hears *Tyler*, the application of strict scrutiny should be the standard of review. This standard endangers many categorical restrictions on the Second Amendment right, and could force the amendment of proposed legislation that affects gun ownership rights.

The application of strict scrutiny to laws that categorically inhibit the core right of self-defense under the Second Amendment is not necessarily a death knell for gun control legislation. A law abridging a fundamental right is constitutional if the underlying government interest is compelling, and the law is narrowly tailored to serve that interest.²³⁰ There is little question that the government has a compelling interest in protecting the lives and property of citizens from firearm violence. Because the stated government ends undisputedly satisfy the requirement of a compelling interest, the constitutionality of laws abridging Second Amendment rights turn heavily on the tailoring of the means used to achieve the compelling ends.

Not all firearms statutes face a strict scrutiny standard under a *Tyler* regime. Laws limiting the type of firearms available need only pass an intermediate scrutiny standard of review. The core right of self-defense under the Second Amendment created by *Heller* necessarily implies that only some types of firearms be available for self-defense in the home. It is unlikely that the right includes, for example, high caliber assault rifles or paramilitary weaponry. Such a standard is consistent with *Heller*, where the court stated, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."²³¹ A strict scrutiny standard still leaves legislators a broad range of methods through which they can limit the lethality of weapons. Theoretically, as long as only handguns, the most commonly purchased weapon for home defense, are available for purchase, the *Heller* right lays undisturbed. It is not to say that congressional limitations on firearm availability will push that far, but under *Heller*, great latitude is extended to legislative means of curbing gun violence.²³²

²³⁰ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

²³¹ *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

²³² *Id.* at 621.

A *Tyler* regime restricts laws that categorically prohibit Second Amendment rights. A strict scrutiny standard applies to laws classifying individuals for the purposes of wholly abridging their fundamental constitutional right. The *Tyler* ruling presumes a strict scrutiny analysis for restraints on the fundamental Second Amendment rights.²³³ Intermediate scrutiny may still apply to these laws, but only if the court gives an express reason for downgrading the tier of review.²³⁴ The *Tyler* court stated that the “intermediate scrutiny has no basis in the constitution.”²³⁵ More specifically, intermediate scrutiny’s foundation in Second Amendment law lies on unstable precedential grounds.²³⁶ Adoption of the *Tyler* holding by the Supreme Court would mean intermediate scrutiny will no longer apply to laws that abridge the fundamental right of the Second Amendment.²³⁷

VI. STRICT SCRUTINY ENDANGERS CATEGORICAL BANS ON SECOND AMENDMENT RIGHTS

A. Current legislation

18 U.S.C. § 922(g)(4) is not an isolated instance in which a gun control law raises a question of constitutional validity under a strict scrutiny standard of review. There are numerous prohibitions, at the state and the federal level, which categorically abridge the core protections of the Second Amendment. What follows are a few examples of firearms legislation that share § 922(g)(4)’s vulnerability to a heightened tier of review.

18 U.S.C. § 922(g)(3)²³⁸ is quite similar to the law challenged in

²³³ Larissa Vaysman, *Sixth Circuit Holds Ban on Gun Possession After Commitment to Mental Institution Violates Second Amendment*, SIXTH CIR. APP. BLOG (Dec. 18, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-holds-ban-on-gun-possession-after-commitment-to-mental-institution-violates-second-amendment/>.

²³⁴ *Tyler v. Hillsdale Cty. Sherriff’s Dep’t*, 775 F.3d 308, 327 (6th Cir. 2014) (“In those areas of constitutional law where the Supreme Court favors intermediate scrutiny, the Court has expressly indicated a reason for downgrading from strict scrutiny.”), *rev’d*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

²³⁵ *Id.*

²³⁶ *Id.* at 330 (stating that the Seventh Circuit was the first circuit to apply an intermediate scrutiny standard of review, in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), which has since been vacated.)

²³⁷ *Id.*

²³⁸ 18 U.S.C. § 922(g)(3) (2016) (“It shall be unlawful for any person— who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act . . .) . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in

Tyler. This federal statute prohibits those who unlawfully use, or are addicted to, controlled substances from possessing a firearm. The statute's construction, like that of § 922(g)(4), creates two distinct classes of individuals who are excluded from Second Amendment protections. This law provides ample reason for concern given that the law lacks narrow tailoring. A person subject to § 922(g)(3) may be an entirely non-violent and law abiding citizen. While it is true that the first part of the law deals with non-law abiding citizens,²³⁹ the second part of the law deals with drug addicts, a class of individuals who may be prohibited under the statute in the absence of volitional conduct to justify abridging a fundamental right.²⁴⁰ Yet, the Court ruled in *Robinson v. California*²⁴¹ that criminalizing drug addiction violates the Eighth Amendment.²⁴² While § 922(g)(3) is not a criminal statute, it abridges the Second Amendment right much in the same way that a criminal statute interferes with the Fourth Amendment right to be secure in person, papers, and effects. Yet, the law survives, mostly because of the temporary nature of the ban.²⁴³ Courts ruling on this law point out that a drug addict may regain his right simply by ending his drug use. While this is a fair sentiment, it provides little justification for the law that, like the prohibition challenged by *Tyler*, is both over and under inclusive.

Section 922(g)(3) is overbroad because it abridges the rights of more citizens than necessary to achieve the stated purpose of reducing drug related firearms crimes. Much like the ban on those who are mentally ill, drug addiction is a status much outside the control of the afflicted. Genetic research indicates that addiction is attributable to myriad factors independent of the decision to use a particular substance.²⁴⁴ If that is true, drug addiction is an immutable characteristic that the law then uses to classify individuals for the purposes of abridging their fundamental rights. Yet, federal courts hold this law sufficiently tailored to survive strict scrutiny review. The

interstate or foreign commerce.”).

²³⁹ The statute proscribes any “*unlawful user* of or addicted to any controlled substance” from owning a firearm. In drawing the line at criminal drug use and addiction, the law does not affect those who became addicted to drugs involuntarily, or through legal use. *Id.* (emphasis added).

²⁴⁰ *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 336 (6th Cir. 2014), *rev'd*, 2016 U.S. App. LEXIS 16880 (6th Cir. Sept. 15, 2016).

²⁴¹ *Robinson v. California*, 370 U.S. 660 (1962).

²⁴² *Id.* at 666.

²⁴³ *Id.* at 667.

²⁴⁴ Maia Szalavitz, *Genetics: No More Addictive Personality*, 522 NATURE 48, 48 (2015) (“[A]n enormous number of factors, ranging from early life trauma to genes that code for metabolic enzymes, have a role in how the genetics of addiction unfold.”).

Tyler court stated that this provision would likely survive the adoption of strict scrutiny because the categorical prohibition only applies *so long as one is addicted to drugs*.²⁴⁵ The temporary nature of the ban appears to save it from constitutional extinction.

Courts acknowledge how difficult it is to recover from drug addiction, which indicates that strict scrutiny may provide a greater obstacle than originally thought. The Diagnostic and Statistical Manual of Mental Disorders²⁴⁶ classifies drug addiction as a continuum, in which an individual feels physical and psychological dependence on a given substance.²⁴⁷ Addiction is a chronic relapse of psychological disorders characterized by a compulsion to use drugs, which results in maladaptive and destructive outcomes.²⁴⁸ Based on this definition, drug addiction is not something of which one may rid himself. “Curing” drug addiction is more akin to the remission of cancer, in that the threat of attack remains even after the immediate danger has subsided. The key to reinstatement of Second Amendment rights under § 922(g)(3) is whether or not the individual seeking reinstatement is no longer addicted to drugs. If drug addiction is a consistent state in which one has the distinct possibility of relapse, reinstatement under this provision is unlikely.

If the temporary ban enacted by § 922(g)(3) functions as a permanent ban because drug addiction is not necessarily a curable illness, the law would be subject to the same claims as those stated in *Tyler*. Whether § 922(g)(3) will survive strict scrutiny is mere prognostication. What is clear is that this law will be more susceptible to challenge should a heightened standard become the norm.

If the Supreme Court endorses *Tyler*'s strict scrutiny approach, laws currently on the House and Senate floors may need amendment to comport with the new judicial standard. There is little denying that protecting society from gun violence is a compelling government objective consistent with the first part of the strict scrutiny inquiry.

²⁴⁵ *Tyler*, 775 F.3d at 341.

²⁴⁶ The Diagnostic and Statistical Manual, which is published by the American Psychiatric Association, is considered the gold-standard in the diagnosis of mental disorders by clinicians, researchers, lawmakers and insurance companies. The DSM is currently in its fifth revision. *See generally*, Dr. Christopher L. Heffner, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*, ALLPSYCH, <http://allpsych.com/disorders/dsm/> (last visited Oct. 2, 2016).

²⁴⁷ Michael J Formica, *The Continuum of Addiction and the Addictive Personality*, PSYCHOLOGY TODAY (June 28, 2008), <https://www.psychologytoday.com/blog/enlightened-living/200806/the-continuum-addiction-and-the-addictive-personality>.

²⁴⁸ *Id.*

Guns account for more than 32,000 deaths every year.²⁴⁹ The illegal trafficking of firearms via interstate channels facilitates violent crime across the country. To control the illegal flow and use of guns would mean eliminating a significant portion of all reported violent crimes. Because gun control is a compelling government interest, whether a proposed law will pass the strict scrutiny analysis turns largely on whether that law is narrowly tailored to achieve the stated government purpose. Many proposed laws that would categorically prohibit certain groups of individuals would not satisfy this standard.

To satisfy the strict scrutiny standard of review, a law must be narrowly tailored to achieve a compelling government interest.²⁵⁰ A law fails this requirement if it is over or under inclusive. A law is overbroad if it affects more individuals than necessary to achieve the compelling government interest.²⁵¹ A law is under-inclusive if individuals similarly situated to those affected by the law are not subject to the law's enforcement.²⁵² Categorical restrictions on Second Amendment rights pose a potential problem with the narrow tailoring requirement, as it is difficult to constitutionally justify wholesale restrictions on fundamental rights based only upon a classification. What follows is an analysis of some currently proposed firearm legislation, and analysis of how these proposed laws would fare under a *Tyler* standard.

B. Proposed Legislation

H.R. 1552, the "Preventing Gun Violence Act of 2011,"²⁵³ would impose a categorical restriction on firearm ownership for any person who has been found guilty of an act as a juvenile, during which they threatened the use of force, and the act would be considered a felony if committed as an adult.²⁵⁴ This law would not likely pass the bar

²⁴⁹ Dan Diamond, *More Young Americans Now Die From Guns Than Cars*, FORBES (Aug. 26, 2015, 12:42 PM), <http://www.forbes.com/sites/dandiamond/2015/08/26/americas-gun-violence-problem-in-three-charts/#eed739458b70>.

²⁵⁰ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

²⁵¹ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (A law is "overbroad" if "[the proffered] interests could be achieved by narrower ordinances that burden[] [the right] to a far lesser degree").

²⁵² See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (A law is under-inclusive if "[a] person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present").

²⁵³ Preventing Gun Violence Act, H.R. 1552, 112th Cong. (2011).

²⁵⁴ *Id.*

created by strict scrutiny because it is not narrowly tailored to achieve the compelling government purpose.

Consider the following: two elementary schoolchildren get into an argument on the playground over who will next use the slide. Frustrated that he is not getting his way, one child grabs his schoolmate by the collar and pushes him off of the slide, causing the boy to fall a considerable distance. A teacher runs over, and brings both boys to the principal's office, where a report is filed. The aggressing child's conduct, if committed as an adult, would constitute an aggressive battery, he recklessly injured another. As an adult, he would be charged with a felony, during which he threatened the use of force. Tested against the H.R. 1552 standard, this child would forever lose their rights under the Second Amendment. The harsh standard of H.R. 1552 potentially turns a playground altercation in grade school into a lifetime ban on firearm ownership as an adult. The law is subject to arbitrary enforcement as record-keeping of childhood incidents may vary in quality depending on school district, which means the law would not apply equally to those the statute seeks to regulate. The law provides no potential for rehabilitation and functions as a permanent abridgement of Second Amendment rights.²⁵⁵ The challenged law in *Tyler* was struck down, in part, because there was no federal program to review and restore the rights of candidates who felt that they had been rehabilitated.

The law could be more narrowly tailored to achieve the purpose of reducing the probability that violent child offenders commit violent gun-related crimes as adults. Under the proposed law, there is no difference between one who commits an offense at age six or one who commits the same act in their late teenage years. Setting an age after which the prohibition would apply would tailor the law more narrowly. This approach would greater comport to what is known about the development of the brain during adolescence. Juvenile offenders can be more easily rehabilitated at younger ages.²⁵⁶

An alternate approach would be to create reapplication programs in which juvenile offenders' cases are reviewed when they are adults. Case-by-case review would allow the ban to function temporarily and would not result in a complete taking of constitutional rights. If the

²⁵⁵ John Richardson, *HR 1552 – The “Juveniles Can Never Be Rehabilitated Act”*, NO LAWS. – ONLY GUNS AND MONEY BLOG (Apr. 20, 2011, 4:31 PM), <http://onlygunsandmoney.blogspot.com/2011/04/hr-1552-juveniles-can-never-be.html>.

²⁵⁶ See Gary Scott, *Prison is Too Violent for Young Offenders*, N.Y. TIMES (June 5, 2012), <http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/prison-is-too-violent-for-young-offenders>.

2016]

COMMENT

259

applicant satisfies the review criteria, his Second Amendment rights are reinstated. Permanent categorical prohibitions on fundamental rights rarely pass strict scrutiny because they are a permanent deprivation of constitutional liberty and can only be justified by the most compelling of interests achieved through the narrowest of means. H.R. 1552 does not satisfy these criteria.

In 2014, the federal government proposed a new set of rules aimed at keeping individuals who had been involuntarily committed to mental institutions from owning firearms.²⁵⁷ The names of people involuntarily committed would enter the National Instant Criminal Background Check System (“NICS”).²⁵⁸ If the person was committed because he posed a danger to himself or others, a notification would alert the seller during the background check process, and the sale would be blocked as if the applicant were a felon or domestic violence perpetrator.²⁵⁹ While past legislation prohibits those committed to inpatient care, the new rule would call on states to report to NICS the names of those committed involuntarily to outpatient psychiatric care as well.

This set of laws would likely not pass the strict scrutiny test. Laws singling out the mentally ill are flawed in that they include many individuals who pose no risk of committing violent crimes. This law is exactly like the challenged law in *Tyler* and would be struck down for the same reason that it is both over and under-inclusive of those with mental illness that are at risk to commit an act of violence. Under these laws, for example, someone who was involuntarily committed for a short period following a bout of anxiety is treated the same as a paranoid schizophrenic person committed for threatening to commit a gruesome murder. This approach does not recognize the inherent differences in the different types of mental illness with regards to propensity for violent behavior. An alternate approach would be to ban sales to those who had been involuntarily committed for violent acts, or those who had made threats that were violent in nature. These laws encourage the ideology that all people with mental illness are dangerous. Laws that perpetuate discrimination have no place in the constitutional framework.

A bill consistent with this approach is H.R. 2554,²⁶⁰ the “Stop Gun

²⁵⁷ Melissa Healy, *New Federal Rules to Keep Guns from Potentially Violent Mentally Ill*, L.A. TIMES (Jan. 3, 2014), <http://articles.latimes.com/2014/jan/03/science/la-sci-federal-guns-mental-illness-20140103>.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011, H.R. 2554,

Trafficking and Strengthen Law Enforcement Act of 2011.” The bill would criminalize the sale of firearms to someone whom the seller reasonably believes will use the firearm for unlawful purpose with a punishment of up to 25 years in prison.²⁶¹ This law would further the purpose of reducing the amount of firearms in the hands of individuals who desire to use them for insidious purposes. If passed, this law would be one step toward closing the porous background check system that has facilitated the gun violence epidemic. The bill would apply with equal force to private and licensed sellers. Imposing criminal liability on private sellers would provide additional incentive to diligently screen buyers. H.R. 2554 is an example of a law that focuses on a tailored application of restrictions on Second Amendment rights. H.R. 2554 does not discriminate against a certain category of people, but applies equally to all who desire a firearm to further an unlawful act. Further, the bill does not propose to restrict the availability of weapons, but to create additional safeguards against gun violence.

To say that a Supreme Court adoption of the holding in *Tyler* would demand strict scrutiny for all firearm laws ignores the ruling set forth in *Heller*. The *Heller* court created a Second Amendment right in a very narrow set of circumstances.²⁶² The right exists only to protect oneself from lethal force inside the home. If the Court adopts *Tyler*, only laws that abridge the *Heller* right will be subject to a strict scrutiny standard of review. Only those laws that categorically prohibit certain groups of individuals from owning weapons for indefinite periods of time, with no possibility for reinstatement of Second Amendment rights, would be subject to the *Tyler* holding. A Supreme Court endorsement of *Tyler* would completely displace only a small number of laws. Other laws, which limit only the means by which one may assert his Second Amendment right, will be subject to intermediate scrutiny.

An intermediate scrutiny standard of review demands that a law be substantially related to the furtherance of an important government interest.²⁶³ The *Heller* right allows for one to defend oneself in the home with a firearm. This guarantee is not unlimited under the *Heller* ruling. So long as some firearms are legal for the purposes of self-

112th Cong. (2011).

²⁶¹ *Id.*

²⁶² *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (holding that the Second Amendment guaranteed only a right to own a firearm to protect oneself in the home).

²⁶³ *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (holding laws that discriminate based on gender must serve important government interests by means that are substantially related to those objectives).

defense, the *Heller* right would lay undisturbed. This would give Congress broad latitude in drafting legislation that limits the types of firearms that are available for sale. Laws that restrict magazine size, assault rifle ownership, and transportation of firearms across interstate lines would be subject to a more deferential intermediate scrutiny standard. These laws pass the lower bar created by intermediate scrutiny, as limiting mass violence committed with high-powered firearms is an extremely important, if not compelling, government interest. Laws that limit access to such weapons on the open marketplace allow the government to allocate additional resources to the trafficking of illegal firearms. Limiting access to certain types of weaponry, then, serves to further two purposes of the government: stopping gun violence and curbing illegal gun sales on the black market.

Unfortunately, much of the proposed legislation will not stop the gun violence epidemic. Laws that create additional seller obligations do not go far enough in remedying the Achillean flaws in the background check system. Legislators need to focus more on reducing the number and types of firearms available on the market, which would thereby reduce the burden placed on the federal background check system. The *Heller* ruling guarantees only that some type of firearm be available for self-defense in the home. This position would permit much greater limitation on the types of dangerous weapons that can be purchased on the open market. Prohibiting many of the hyper-lethal weapons that can be bought and sold legally would reduce the number of firearms that are subsequently sold illegally. In addition, limiting the firepower that can be purchased legally would limit the amount of damage accomplished by a mass shooter.

C. Recent Executive Action

On January 8, 2016, in the wake of the San Bernardino shootings, a teary-eyed President Obama proposed a new plan for gun control in the United States.²⁶⁴ Obama's proposal focuses on fortifying the porous background check system, by increasing the types of firearm transactions that are subject to a federal background check.²⁶⁵ Currently, private sales of firearms conducted over the internet are not

²⁶⁴ Maxwell Tani, *Obama Tears Up During Emotional Gun-Control Speech*, BUS. INSIDER (Jan. 5, 2016, 12:19 PM), <http://www.businessinsider.com/obama-gun-control-speech-cries-tear-2016-1?r=DE&IR=T>.

²⁶⁵ Aaron Smith, *State of the Union: What Obama Wants to Do About Guns*, CNN (Jan. 13, 2016, 7:37 AM), <http://money.cnn.com/2016/01/12/news/state-of-the-union-2016-obama-guns/>.

subject to any kind of background check.²⁶⁶ The loophole created by internet sales allows those prohibited by federal law to procure firearms.

Some believe Obama's actions will be ineffective in curbing gun violence.²⁶⁷ The Obama administration has consistently issued executive orders regarding gun control, but so far, there has been little change to show for the President's effort. After Sandy Hook, the President issued twenty-three executive orders on gun control.²⁶⁸ These measures were criticized for the lack of meaningful impact, as well. Limitations on magazine size do not adequately deal with the lethality of firearms, as one bullet can end a human life. Limiting automatic weapon sales is also ineffective, as one can buy a semi-automatic weapon and complete modifications to increase the fire rate.²⁶⁹

Despite a concerted effort from the executive branch to stop the crescendo of violence, little has changed. In fact, the executive branch acknowledges that it is powerless to stop the bloodshed.²⁷⁰ During the announcement of the new gun control proposal, Obama admitted that none of the measures he was seeking to implement would have stopped any of the most recent attacks.²⁷¹ Obama also recognized that his proposed action does little to prevent criminals from obtaining firearms.²⁷²

Recent executive action proves an ineffective management tool for the spread of gun violence. The President is greatly limited by constitutional authority to pass meaningful legislation to restrict access

²⁶⁶ Philip Rucker, *Study Finds Vast Online Marketplace For Guns Without Background Checks*, WASH. POST (Aug. 5, 2013), https://www.washingtonpost.com/politics/new-study-finds-vast-online-marketplace-for-guns-without-background-checks/2013/08/05/19809198-fd73-11e2-9711-3708310f6f4d_story.html.

²⁶⁷ Jennifer Agiesta, *Poll: Americans Supportive But Skeptical on Obama's Gun Action*, CNN (Jan. 8, 2016, 6:14 AM), <http://www.cnn.com/2016/01/07/politics/poll-obama-gun-action>.

²⁶⁸ See Eric Bradner, *Emotional Obama Calls for 'Sense of Urgency' to Fight Gun Violence*, CNN (Jan. 5, 2016, 8:17 PM), <http://www.cnn.com/2016/01/05/politics/obama-executive-action-gun-control/>.

²⁶⁹ Richard Winton, *San Bernardino Shooters Tried to Illegally Modify Rifle Before Rampage*, L.A. TIMES (Dec. 4, 2015, 4:37 PM), <http://www.latimes.com/local/lanow/la-me-ln-san-bernardino-shooters-illegal-modify-rifle-20151204-story.html>.

²⁷⁰ AWT Hawkins, *Rush Limbaugh Reveals Five Things Obama's Gun Control Will Not Stop*, BREITBART (Jan. 12, 2016), <http://www.breitbart.com/big-government/2016/01/12/rush-limbaugh-reveals-5-things-obamas-gun-control-wont-stop/>.

²⁷¹ *Id.*

²⁷² *Id.*

to weapons. Congress legislates the field of gun control so pervasively that there is no room for another coordinate branch in the discussion, despite its making little effort to wield this exclusive power.²⁷³ Another restraint on executive power to limit the sale of firearms is that Congressional law gives the executive no express authority limit firearm sales. Because the President has few constitutionally enumerated powers of his own, the executive branch normally acts with the express consent of Congress. When Congress and the President act in unison, presidential action is emboldened by constitutional mandate. The current legislative landscape, however, is quite the opposite. Political contributions from the NRA sway the electoral process heavily in favor of Second Amendment expansion. Congress' reticence to pass meaningful gun control legislation leaves the President with the power only to pass laws dealing with the enforcement of sparse congressional gun-control mandates. Because Congress shows a disinterest in disturbing Second Amendment rights, enforcement directives from the executive branch have a negligible effect on gun violence. The failure of executive orders to reign in the problem of gun violence indicates that the only meaningful change will originate in Congress.

VII. CONCLUSION

The Supreme Court will shortly be faced with another opportunity to leave its mark on the debate about Second Amendment rights. In selecting a standard of review, the Court will undoubtedly take into account the gun violence epidemic. The *Heller* and *McDonald* rulings will lay undisturbed when the Supreme Court decides on the issue in *Tyler*. In *Heller*, the Court interpreted the Second Amendment to confer an individual right to bear arms in defense of oneself or one's home. This time around, the Court must select a tier of review. Supreme Court intervention cannot come swiftly enough, as inconsistency among the federal circuit courts in applying the *Heller* and *McDonald* rulings leaves Second Amendment doctrine largely unsettled. The Supreme Court should hold that laws abridging the core protections of the Second Amendment, namely the right to own a firearm to protect the home, will be reviewed under a strict scrutiny standard of review. Lesser burdens on the Second Amendment right will still be subject to a heightened scrutiny standard of review. These

²⁷³ Andrew P. Napolitano, *Judge Napolitano: Why Obama's Executive Action on Guns is Unconstitutional*, FOX NEWS (Jan. 5, 2016), <http://www.foxnews.com/opinion/2016/01/05/judge-napolitano-why-obamas-executive-action-on-guns-is-unconstitutional.html>.

laws are not total abridgments of Second Amendment protections and function only as limitations on how one uses his Second Amendment right.

To say that, under a *Tyler* regime, strict scrutiny applies to all laws that restrict firearm ownership would ignore the limited scope of the right created by the Court in *Heller*. While it is true that *Heller* created a constitutional guarantee to bear arms in circumstances calling for self-defense, this right exists only in the home. This proposition logically reinforces the idea that only some firearms should be available for that defensive purpose. In a home defense situation, many firearms that are currently for sale as “recreational” items would be highly impractical, if not useless. An assault rifle, for example, could not be assembled and loaded in time to defend a home invasion. Alternately, an automatic rifle with high recoils, like the MAC-10, would result in massive collateral damage to property or others in the home. Handguns, however, are easily and quickly operated in emergency situations and are small enough to fit in a lockbox beneath a bed. They are the ideal home defense weapon. Therefore, to comport with the *Heller* mandate, Congress need only make handguns available for consumer purchase.

Laws dealing with what kinds of firearms a citizen can purchase are unlikely to impinge on the right created in *Heller*. These laws would be reviewed under an intermediate scrutiny standard of review. As it applies to the gun violence epidemic, intermediate scrutiny is quite favorable to lawmakers. Few would dare understate the severity of gun violence in America. Each day, the number of toe-tagged, bullet-riddled bodies grows. Laws that are aimed at curbing the societal blight of gun violence are likely to pass all forms of intermediate scrutiny. The United States Court of Appeals for the Federal Circuit currently applies intermediate scrutiny to gun challenges and would likely have little issue continuing to apply that standard.

The judicial directives created by these standards are meaningless if Congress does not act appropriately to stop the gun violence epidemic. In the post-*Heller* era, legislatures at the state and federal level successfully carved out an expanded Second Amendment right. The increased prominence of this right in American life has put more guns in the hands of Americans in the last ten years than in any prior decade. Yet, not all of these sales are made for legitimate purposes: some sales deal the arms to criminals, some sales are conducted over the internet in the absence of a background check, and some sales are for weapons simply too dangerous to rationally be considered self-defense weapons.

2016]

COMMENT

265

If Congress is to fully realize the mandate created by a Supreme Court adoption of *Tyler*, it must first embrace the limited scope of laws that would demand a strict scrutiny standard of review. Laws that proscribe *broad categories* of individuals will face the mightiest of judicial scrutiny. The remainder of laws, those that limit *the way in which one may bear arms*, need only pass muster under intermediate scrutiny. These laws still provide citizens Second Amendment protections. Even if a law greatly limits the types of firearms available for sale, the *Heller* right still exists in its entirety. The difference between these two types of firearms regulation is where the legislative “solution” to a *Tyler* regime lies. Under *Tyler*, only laws that regulate who may own firearms are potentially subject to strict scrutiny. Laws that regulate only what kinds of firearms are available do not implicate the Second Amendment. A Supreme Court adoption of *Tyler*, therefore, would permit aggressive Congressional action in limiting the type, and thereby lethality, of firearms available to the public.

The call for a greater Congressional response to gun violence must be loud enough to drown out the whispers of the NRA lobby. The organization wields a dominant influence of lawmakers at the state and federal levels. The pragmatist would advocate for the will of the people, that their voices would center the Congressional compass. However, in the modern era of lavish political donations, those in favor of stricter gun laws are better served by buying a megaphone.