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**GUN RIGHTS: THE SUPREME COURT QUESTION HOTTER THAN A TWO-DOLLAR PISTOL**

Adam P. Soloperto

Seton Hall University Law Review

## 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. The scores of British regulars, who descended upon the sleepy boroughs of Lexington and Concord, were ordered by King George III to destroy the ammunition stores of the colonial militia.<sup>1</sup> Some 400 Concord farmers armed themselves with all of the firepower they could muster, and prepared to make their stand against tyranny.<sup>2</sup> At the Old North Bridge in Concord Massachusetts, the “Shot Heard ‘Round the World”<sup>3</sup> pierced the early morning air. Today, the nation continues to hear the echo. Our freedoms, our physical integrity, our individual and collective self-defense are, in large part, inexorably tied to firearms.

The American people have a unique and complicated relationship with guns. One image of our national identity is the robust, courageous, colonial frontiersman, flintlock shouldered, forging and foraging through an unforgiving and brutal wilderness. This image is the bedrock of originalist Second Amendment interpretation. A more recent image emblazoned on 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.

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<sup>1</sup>Letter from Major John Pitcairn to General Gage, BOSTON CAMP, 26th April, 1775, *available at* [http://www.eastconn.org/tah/1112VV4\\_LexingtonConcordLesson.pdf](http://www.eastconn.org/tah/1112VV4_LexingtonConcordLesson.pdf)

<sup>2</sup> DAVID HACKETT FISCHER, PAUL REVERE’S RIDE, 209-212 (1994).

<sup>3</sup> Ralph Waldo Emerson, *Concord Hymn*, in COMPLETE WORKS OF RALPH WALDO EMERSON, 312 (Delphi Classics 2013).

On December 14, 2012, Adam Lanza shot and killed his mother with a with a .22-caliber Savage MK II-F bolt action rifle in the Newtown Connecticut home he shared with her.<sup>4</sup> Before leaving the residence, Lanza raided his mother's gun safe and acquired a Bushmaster Bushmaster XM15-E2S assault rifle, and two handguns.<sup>5</sup> Lanza proceeded to Sandy Hook Elementary School, where he shot through a plate glass window adjacent to the locked front entrance of the school.<sup>6</sup> Principal Dawn Lafferty Hochsprung, Vice Principal Natalie Hammond and School Psychologist Mary Sherlach overheard the shots and left their office to investigate. At 9:40 AM, Adam Lanza took the first lives in what would become the second-bloodiest school shooting in American history.<sup>7</sup> First, Lanza entered a classroom of kindergartners, taught by substitute Lauren Rousseau, and shot all 14 students and the teacher.<sup>8</sup> Next, Lanza made his way to a neighboring first grade classroom, taught by 27 year-old Victoria Soto, who had already moved the children to a corner of the classroom.<sup>9</sup> Lanza shot Soto, and then opened fire on the group of students, killing an additional six.<sup>10</sup> As law enforcement closed in, Lanza shot himself in the head.<sup>11</sup> When the children and teachers came out from their hiding places in broom closets, bathrooms and cupboards, twenty children and six adults lay slaughtered.<sup>12</sup>

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<sup>4</sup> Richard Esposito, Candice Smith & Christina Ng, *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>

<sup>5</sup> *Id.*

<sup>6</sup> Steve Almasy, *Newtown shooter's guns: What we know*, CNN, (Dec. 19, 2012, 10:11 AM), <http://www.cnn.com/2012/12/18/us/connecticut-lanza-guns/index.html>.

<sup>7</sup> Julie Zauzmer, *The worst school shootings in American history*, THE WASH. POST, (Oct. 1, 2015), <https://www.washingtonpost.com/news/local/wp/2015/10/01/the-worst-school-shootings-in-american-history/>.

<sup>8</sup> EDITORIAL, *Sandy Hook shooting: What happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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.<sup>13</sup> Armed with semi-automatic assault rifles and handguns, the pair rained bullets on the 80 holiday goers, killing fourteen and wounding twenty-two.<sup>14</sup> When law enforcement arrived on scene, they witnessed “unspeakable carnage,”<sup>15</sup> wrought on the scores of bodies. The couple, who had been radicalized by a terrorist organization prior to the shooting, acquired the weapons used from a friend, who purchased the weapons legally.<sup>16</sup>

The contour and meaning of the “right to bear arms” is debated against this bloody backdrop. The passion of Americans who wish to for an unfettered Second Amendment right, has reached fever-pitch during a time in which hyper-lethal firearms are readily available to virtually anyone. In a 2010 Gallop poll, 47 percent of Americans reported owning a gun.<sup>17</sup> There are an estimated 88 guns per 100 people in the United States.<sup>18</sup> In 2013, the Center For Disease Control reported 33,169 deaths from gun violence.<sup>19</sup> Of the 11,000 firearm homicides in the United States each year, 1, 671 are children.<sup>20</sup> The firearm homicide rate in the United States is only slightly lower than that of the Democratic Republic of the Congo and Iraq.<sup>21</sup> One who lives in a home where a firearm is kept is 90 percent more likely to die from a firearm-related

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<sup>13</sup> Greg Botelho, *San Bernadino Shooting: carnage was ‘unspeakable,’ police say*, CNN (Dec. 04, 2015, 11:02 AM), <http://www.cnn.com/2015/12/03/us/san-bernardino-shooting/>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 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>

<sup>18</sup> Simon Rogers, *Gun Homicides and Gun Ownership by Country*, THE GUARDIAN (July 22, 2012 at 8:01 PM), <http://www.theguardian.com/news/datablog/2012/jul/22/gun-homicides-ownership-world-list>.

<sup>19</sup> (aggregating suicides, homicides, and accidental deaths)

<sup>20</sup> *Key Violence Statistics*, THE BRADY CAMPAIGN, (2016), <http://www.bradycampaign.org/key-gun-violence-statistics>.

<sup>21</sup> Katie Leach-Kemon, *Visualizing Gun Deaths: Comparing the U.S. to the rest of the world*, HUMANOSPHERE, (Oct. 2, 2015), <http://www.humanosphere.org/science/2015/10/visualizing-gun-deaths-comparing-u-s-rest-world/>.

homicide.<sup>22</sup> Carrying a firearm makes one nearly five times more likely to be shot.<sup>23</sup> But, beyond the individual and direct consequences of gun violence lies additional societal costs.

The consequences of gun violence extend far beyond those intimately involved. In 2010, gun violence cost United States taxpayers approximately \$630 million in direct hospital care.<sup>24</sup> A single murder has an estimated cost of \$450,000.<sup>25</sup> Each day, taxpayers foot the bill for approximately 32 gun homicides.<sup>26</sup> 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.<sup>27</sup> The federal government has spent almost one billion dollars to bolster school security in public schools.<sup>28</sup> Collectively, the direct burden of gun violence on American taxpayers currently hovers around \$230 billion.<sup>29</sup> Despite the obvious consequences of gun violence, little is being done at the legislative and executive level to combat the problem. President Obama has been active in issuing executive orders aimed at correcting loopholes in the federal background check system.<sup>30</sup> But, Congress has yet to pass a single piece of gun control legislation in the years since the Sandy Hook massacre.<sup>31</sup> With the rash of recent gun violence,

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<sup>22</sup> Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 935 (2004).

<sup>23</sup> Ewen Callaway, *Carrying a Gun Increases Risk of Getting Shot and Killed*, NEWSIDENTIST.COM, (Oct. 6, 2009) <https://www.newscientist.com/article/dn17922-carrying-a-gun-increases-risk-of-getting-shot-and-killed/>.

<sup>24</sup> Embry M. Howell & Peter Abraham, *The Hospital Costs of Firearm Assaults*, URBAN INSTITUTE, at 4 (September 2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412894-The-Hospital-Costs-of-Firearm-Assaults.PDF>.

<sup>25</sup> Adele Peters, *The Staggering Costs Of Gun Violence In The U.S. Every Year*, FAST COMPANY (Jun. 29, 2015 at 8:17 AM), <http://www.fastcoexist.com/3047682/the-staggering-costs-of-gun-violence-in-the-us-every-year> (aggregating the cost of first responders, the judicial process, and housing the convicted party for a life).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 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/>.

<sup>31</sup> Alexandra Svokos, *Congress Has Not Passed a Single Gun Control Law Since Sandy Hook*, ELITE DAILY, (Dec. 14, 2015, 3:23 PM), <http://elitedaily.com/news/politics/congress-gun-control-sandy-hook/1319499/>.

Capitol Hill and state legislatures are the battlefields for Second Amendment proponents and the gun control left.

Representatives of the The National Rifle Association (NRA) are the most ardent and vocal opponents of additional gun-control measures.<sup>32</sup> Gun-control lobbyists counter NRA influence by capitalizing on the public shock and outrage that immediately follow national tragedies.<sup>33</sup> In January of 2013, only a month after the Sandy Hook tragedy, President Obama signed into law twenty-three executive orders that restrict firearm purchases.<sup>34</sup> One order instituted a universal background check on firearm sales, another provided for a categorical ban on fully automatic assault rifles, and a third limited magazine capacity.<sup>35</sup>

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.<sup>36</sup> Meanwhile, Constitutional historians, such as Michael Waldman, argue that Second Amendment rights have not, traditionally, been the function of some crystalline idea etched into the Constitutional fabric.<sup>37</sup> Instead, he asserts, Second Amendment rights are the result of a “push and pull” of political debate and public perception.<sup>38</sup>

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<sup>32</sup> Tom Watkins, *How the NRA wields its influence*, CNN (Jan. 10, 2013 at 7:35 AM), <http://www.cnn.com/2013/01/09/us/nra-gun-research/>.

<sup>33</sup> Bruce Rogers, *NRA winning the influence battle over gun control*, FORBES (Feb. 1, 2013 at 5:08 PM) (Those in favor of additional restrictions wield the most influence in the time immediately after a national tragedy.).

<sup>34</sup> Rick Ungar, *Here Are The 23 Executive Orders On Gun Safety Signed Today By The President*, FORBES (Jan. 16, 2013), <http://www.forbes.com/sites/rickungar/2013/01/16/here-are-the-23-executive-orders-on-gun-safety-signed-today-by-the-president/>.

<sup>35</sup> *Id.*

<sup>36</sup> Maureen Mackey, *Gun Control key, this sentence for clarity S*, FISCAL TIMES (June 8, 2014), <http://www.thefiscaltimes.com/Articles/2014/06/08/Gun-Control-New-Look-Second-Amendment>.

<sup>37</sup> MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY*, 13 (2015).

<sup>38</sup> *Id.*

Only within the last decade has the United States Supreme Court begun to define the exact scope of the Second Amendment.<sup>39</sup> The Court entered the fray for the first time in in *District of Columbia v. Heller*.<sup>40</sup> In the 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.”<sup>41</sup> The decision eroded longstanding Supreme Court precedent that guaranteed no individual right to bear arms.<sup>42</sup> *Heller* eviscerated a thirty year ban on handgun ownership in the District of Columbia.<sup>43</sup> Following *Heller*, the Supreme Court in *McDonald v. City of Chicago*<sup>44</sup> declared the right to bear arms “fundamental to our scheme of ordered liberty,”<sup>45</sup> and applied to state law through the Due Process and Equal Protection clauses of the Fourteenth Amendment.<sup>46</sup>

The *Heller* and *McDonald* Courts declared a constitutionally protected private right to keep and bear arms but left for future litigation the shape, contour, and boundary of that right.<sup>47</sup> The *Heller* Court declined to provide to state and lower federal courts the standard of review to be applied to legislation which burdens a nascent, constitutional right to keep and bear arms.<sup>48</sup> The Court ruled only that ‘rational basis’ scrutiny as an inappropriate standard of review for

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<sup>39</sup> Mackey, *supra* n. 36.

<sup>40</sup> 554 U.S. 570 (2008).

<sup>41</sup> *Id.* at 628.

<sup>42</sup> *Id.* at 639 (J. Stevens dissenting)(“ . . . respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself. . . would prevent most jurists from endorsing such a dramatic upheaval in the law.”).

<sup>43</sup> Andrea Noble, *Federal judge rules D.C. ban on handguns in public is unconstitutional*, WASHINGTON TIMES (Jul. 27, 2014), <http://www.washingtontimes.com/news/2014/jul/27/federal-judge-rules-dc-ban-handguns-public-unconst/>.

<sup>44</sup> 561 U.S. 742 (2010).

<sup>45</sup> *Id.* at 764.

<sup>46</sup> *Id.* at 791 (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

<sup>47</sup> Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC., at 1 (Oct. 2010) (writing that the Supreme Court failed to give the lower courts adequate guidance on how to resolve gun control controversies).

<sup>48</sup> *Id.*

Second Amendment challenges.<sup>49</sup> 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 an intermediate scrutiny to laws that categorically limit the Second Amendment right is inappropriate. Yet, after *Heller* and *McDonald*, the federal circuits adhere to a form of intermediate scrutiny for Second Amendment challenges to gun control legislation.<sup>50</sup> Each federal circuit has adopted its own variation of the standard. It was not until 2014 that a federal circuit court applied strict scrutiny to a federal gun control law.

In December, 2014, the Sixth Circuit Court of Appeal bucked this trend. In *Tyler v. Hillsdale County Sherriff's Department*,<sup>51</sup> the court held that 18 U.S.C. § 922(g)(4)<sup>52</sup>, 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 committed for less than thirty days.<sup>53</sup> The court, for the first time since the *Heller* decision, applied strict scrutiny review to a firearms ban.<sup>54</sup> *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 face Constitutional extinction.

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<sup>49</sup> *Heller*, 554 U.S. at 688 (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.”).

<sup>50</sup> 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/>.

<sup>51</sup> *Tyler v. Hillsdale County Sheriff's Department*, 775 F.3d 308 (6th Cir. 2014).

<sup>52</sup> 18 U.S.C. § 922(g)(4) (“It is unlawful for anyone 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.”).

<sup>53</sup> *Tyler*, *supra* n. 51, at 332.

<sup>54</sup> Denniston, *supra* note 37.

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 created a favorable political climate for the *Heller* Court to create the individual Second Amendment right to bear arms. *Heller*, and subsequently, *McDonald*, created an individual right to keep and bear arms under the Second Amendment. Section IV details these cases and highlights their significance to the state and lower federal court system. While these decisions were judicial turning points for the Court, they left much untended. Section V provides an overview of the Second Amendment left in *Heller's* wake, including the split in the Federal Circuit Courts of Appeals created by the *Tyler* holding. Section VI details various legislation that is endangered by a strict scrutiny standard of review. The 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*. Laws that only restrict the means by which one can assert the *Heller* right will be subject to some form of intermediate scrutiny. This new standard threatens many Congressional bans on firearm ownership, and will likely usher in a new era of gun control legislation.

## II. FIREARMS: FROM FLINTLOCK TO FULL-METAL JACKET

The history of gun ownership and possession rights in America has origin in 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 munition stores in the townships.<sup>55</sup> 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. This view cites historical records that indicate that firearms were used, almost exclusively, by colonial forces during battle and rarely for personal use. The opposing view advances that the right is both a personal and a collective one. This view focuses on the language to “keep and bear arms.”<sup>56</sup> This view is more expansive than that of its counterpart, as it permits firearms for hunting, defense or in service of a militia. However, the Amendment is interpreted, the founder’s original understanding of firearms rights must be considered. What follows is a brief history of firearm rights during the colonial era and early republic.

By the mid-seventeenth century, the flintlock rifle had revolutionized the utility of personal firearms.<sup>57</sup> The flintlock rifle remedied the major handicap of its predecessor, the matchlock rifle, by utilizing new mechanics in the gunpowder basin.<sup>58</sup> The flintlock’s fluid “hammer and pan” system drastically increased fire-rate, and would exist unchanged for the

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<sup>55</sup> FISCHER, *supra* n. 2, at 294.

<sup>56</sup> James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WILLIAM AND MARY LAW. REV. 1777, 1780.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (stating that the flintlock was faster and more reliable than the matchlock system that it replaced).

next 200 years.<sup>59</sup> The increased fire rate of the flintlock musket revolutionized personal protection. By the year 1750, dueling with rapiers had given way to dueling with flintlock pistols.<sup>60</sup> The dueling fad solidified the role of the flintlock in colonial society, which, in consequence, sparked the American affinity for personal firearms.

Probate records from the years immediately preceding the American Revolution indicate that 50 percent of wealth-owning colonists also owned a firearm.<sup>61</sup> Probate inventories, while an incomplete record, are still regarded by historians as a nonpareil source of the types of items that were considered valuable enough to pass by testate succession.<sup>62</sup> 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.<sup>63</sup> In a survey of 919 probate inventories from the year from 1774-1810 firearms are present in the assets of 63 percent of these estates.<sup>64</sup> Inventories from the most-wealthy 10 percent of estates revealed that 74 percent of these decedents owned a firearm, while only 4 percent of these estates reported knives or swords as assets.<sup>65</sup> In fact, guns were a more common estate asset than were many common household items.<sup>66</sup> These probate records indicate that many colonialists did own guns. These records 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

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WILLIAM AND MARY LAW. REV. 1777, 1780.

<sup>62</sup> *Id.* at 1780.

<sup>63</sup> *Id.* at 1782.

<sup>64</sup> *Id.* at 1780.

<sup>65</sup> *Id.* at 1784.

<sup>66</sup> Lindgren et al., *supra* n. 61, at 1784 (Tables appear in 50-64% of Virginia probate records from 1690-1715. Guns appear in 63-69% of these same records.).

Pennsylvania Constitution of 1776 contained such a declaration of rights.<sup>67</sup> The Pennsylvania Declaration created the obligation of citizens to bear arms in service of the state.<sup>68</sup> The Pennsylvania drafters stated that every member in society had 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.<sup>69</sup> In a subsequent provision, the Pennsylvania Declaration of Rights conferred an individual right to bear arms in defense of themselves and of the state.<sup>70</sup> This provision mentions the right to bear arms surrounded by allusions to military service, which is indicative that the framers understood the right to be a militant one. 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 inability for creditors 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, a modern militia force overthrowing the United States government is improbable, if not impossible. Yet, this doomsday scenario remains the fundamental to expansionist interpretation of the Second Amendment.

What the historical record does not indicate, however, is that colonial Americans kept weaponry for purposes outside of service to the militia. Other than dueling, which centered more

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<sup>67</sup> 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. LAW REV. 571, 578

<sup>68</sup> *Id.* at 580.

<sup>69</sup> *Id.* at 579.

<sup>70</sup> *Id.* at 580.

on pomp and circumstance than proficiency with the involved weaponry, colonialists rarely used firearms. The firearms of the period were minimally useful in hunting, trapping or in self-defense. The colonialists even went so far as to ban weapons that were extraordinarily dangerous. 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 tyranny and oppressive governance, then only military grade weaponry should be available. All civilians should have own drones, rocket propelled grenades, cruise missiles, and have an M-4 over the mantle. Imagining this scenario borders on the comedic. If explanation for *Heller's* expanded Second Amendment 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.<sup>71</sup> Internal schisms within the gun control movement render it significantly less influential than the NRA, which benefits from a single,

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<sup>71</sup> Bruce Rogers, *NRA Winning the Influence Battle over Gun Control*, FORBES (Feb. 1, 2013 at 5:08 PM) ("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."), <http://www.forbes.com/sites/brucerogers/2013/02/01/nra-winning-the-influence-battle-over-gun-control/>.

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and thundering voice.<sup>72</sup> Groups in favor of stricter gun laws find themselves outgunned by the significant resources of the NRA.<sup>73</sup> The NRA's ability to concentrate its influence so effectively affords it an overwhelming advantage in the legislative battle over Second Amendment rights.<sup>74</sup>

The NRA is an organization almost as old as the right it defends so vigorously.<sup>75</sup> 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 virtues of the National Firearms Act of 1934<sup>76</sup> prior to its passage.<sup>77</sup> NRA support for gun regulation was short-lived. Following passage of the Gun Control Act of 1968,<sup>78</sup> the NRA began to mobilize its political resources in opposition of further regulation.<sup>79</sup> 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<sup>80</sup> to support pro-gun legislative efforts.<sup>81</sup> In the years

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<sup>72</sup> Walter Hickey, *How the NRA Became the Most Powerful Special Interest Group in Washington*, BUSINESS INSIDER (Dec. 18, 2012 at 1:43 PM), <http://www.businessinsider.com/nra-lobbying-money-national-rifle-association-washington-2012-12>.

<sup>74</sup> *Id.*

<sup>75</sup> Steven Rosenfeld, *The Surprising Unknown History of the NRA*, ALTERNET (Jan. 13, 2013), <http://www.alternet.org/surprising-unknown-history-nra>.

<sup>76</sup> National Firearms Act, 48 Stat. 1236 (1934), as amended by Int. Rev. Code of 1954, §§ 5801-5872 (The Act imposed an excise tax on the manufacture and sale of firearms. The Act also created a registry system for certain types of firearms. Gangland crime during the prohibition era was the underlying impetus for the congressional action).

<sup>77</sup> Zaid Jilani, *For Most Of Its History, The NRA Actually Backed Sensible Gun Regulation*, BOLD PROGRESSIVES, (Jan. 17, 2013), <http://boldprogressives.org/2013/01/for-most-of-its-history-the-nra-actually-backed-sensible-gun-regulation/>.

<sup>78</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (The Act's purpose was the regulation of industry and firearms owners. The primary focus of the Act was the restriction of interstate transfers of firearms by unlicensed and unauthorized dealers. The Gun Control Act of 1968 is currently Title I of the U.S. federal firearms code).

<sup>79</sup> JOHN M. BRUCE & CLYDE WILCOX, *THE CHANGING POLITICS OF GUN CONTROL*, 158 (1998).

<sup>80</sup> In the United States, a Political Action Committee, or PAC, is an organization that pools contributions from members, which is then mobilized to support and oppose campaigns and legislature. The NRA's PAC, the Political Victory Fund, is ranked as one as the biggest spenders in congressional elections.

<sup>81</sup> *Id.*

that followed, the NRA and its members became increasingly focused on the Second Amendment.<sup>82</sup>

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.<sup>83</sup> By the late 1990's, the NRA was the most powerful lobbying organization in the country.<sup>84</sup> The influence of the NRA has not waned in recent years as, in 2010, an estimated 88 percent of Republican politicians received contribution from the NRA PAC.<sup>85</sup> In 2013, over half of active federal congressman were, at some point in their careers, the recipient of NRA funds.<sup>86</sup>

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.<sup>87</sup>

The NRA's most significant victory at the federal level was undoubtedly the passing of the Firearm Owner's Protections Act (FOPA).<sup>88</sup> FOPA, which was drafted with significant NRA

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<sup>82</sup> *Id.* at 163.

<sup>83</sup> Michael Waldman, *The Rise of The NRA*, MOYER & COMPANY (Jun. 12, 2014), <http://billmoyers.com/2014/06/12/the-rise-of-the-nra-2/>.

<sup>84</sup> Time Warner, FORTUNE Releases Annual Survey of Most Powerful Lobbying Organizations (Nov. 15, 1999), <http://www.timewarner.com/newsroom/press-releases/1999/11/15/fortune-releases-annual-survey-of-most-powerful-lobbying>.

<sup>85</sup> Lee Drutman, *NRAman, man, FORTUNE Releases Annual Survey* SUNLIGHT FOUNDATION (Dec. 18, 2012, 5:22 P.M.), <http://sunlightfoundation.com/blog/2012/12/18/nra-and-congress/>.

<sup>86</sup> *Id.*

<sup>87</sup> Editorial, *Break the NRA; consider rephrasingked Sensib*, BLOOMBERG VIEW (Apr. 21, 2015 9:00 AM), <http://www.bloombergvie.com/articles/2015-04-21/break-the-nra-s-ban-on-gun-violence-research>.

<sup>88</sup> An Act to amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes, enacted by the 99th Cong. (1986).

input, mad pro-gun revisions to many provisions of the Firearms Act of 1968.<sup>89</sup> FOPA limited many of those enumerated ATF powers. FOPA loosened restrictions on gun sales by reopening the interstate sale of long guns, legalizing ammunition shipments through the U.S. Postal Service, removing of the requirement for record keeping on sales of non-armor-piercing ammunition and, loosening federal transportation restrictions on firearms through states in which those firearms were illegal.<sup>90</sup> FOPA also clarified ambiguous language in categorical restrictions contained in the Firearms Act of 1968. FOPA created enumerated categories of individuals precluded from owning a firearm.<sup>91</sup> These enumerations, which were the main point of contention in *Tyler*, 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.<sup>92</sup> On 12 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 re-sale.<sup>93</sup> Among the numerous weapons sold by Bassier and his co-conspirators, more than 20 were fully automatic assault rifles.<sup>94</sup> On a recorded phone call, Bassier bragged to an ex-girlfriend about his ability to saunter through the streets of New York, armed to the teeth with automatic rifles and sub-machine guns.<sup>95</sup> Bassier's route from Georgia to the Northeast is so commonly traveled by

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<sup>89</sup> *Id.* (The Act amended 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).

<sup>90</sup> *Id.* (allows an interstate traveler, who is possessing a firearm, to pass through a state in which that particular firearm was illegal so long as the weapon and ammunition were not accessible to the driver, and the driver did not stop in a state with a firearm prohibition for an extended period of time).

<sup>91</sup> *Id.*

<sup>92</sup> Stephanie Clifford, *Brooklyn Prosecutor Says His Office Broke Up Gun Ring*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/nyregion/brooklyn-prosecutor-says-his-office-broke-up-gun-ring.html>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

illegal gun traffickers, that the route is dubbed the “Iron Pipeline.”<sup>96</sup> Lax gun laws in the south allow the transport of high-caliber weapons into the northern states.<sup>97</sup>

Bassier’s success in circumventing gun trafficking laws is due in part to FOPA’s repeal of the prohibition on interstate transport of weapons into states where those weapons would be illegal. As a result of FOPA, federal law is silent on the issue of interstate gun trafficking.<sup>98</sup> In New York, where the majority of Bassier’s illegal sales took place, over 90 percent of illegal firearms used in crimes are transported from out-of-state.<sup>99</sup> Bassier’s arrest marked the third long-term gun trafficking operation thwarted in by the New York Police Department in the last year alone.<sup>100</sup> Stories like Bassier’s strengthen the call for congress to place greater limitations on the interstate transport of firearms.<sup>101</sup> 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.<sup>102</sup> While the NRA’s influence the Federal Congress is significant, the organization is the most influential at the state level.

The NRA’s lobbying activities over the past two decades are responsible for 230 legislative victories at the state level.<sup>103</sup> The focus of NRA lobbying has been the expansion of hunting rights, emergency powers, and carry-conceal rights.<sup>104</sup> Amongst the most dangerous of

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Stephanie Clifford, *supra* n. 91.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Walter Hickey, *The NRA Has Been Outstandingly Successful Where It Really Counts*, BUSINESS INSIDER (Apr. 3, 2013, 11:25 PM), <http://www.businessinsider.com/state-laws-nra-right-to-carry-gun-control-2013-4>.

<sup>104</sup> *Id.*

NRA-backed legislation are those laws passed under the “Castle Doctrine.”<sup>105</sup> These laws are also known as “Make My Day” laws, for the enigmatic loose-cannon police officer “Dirty” Harry Callahan portrayed by Clint Eastwood.<sup>106</sup> The laws create a right of nearly unlimited force when one defends their home from intruders.<sup>107</sup> The NRA has successfully lobbied for Castle Doctrine laws in 12 states.<sup>108</sup> Proponents of these laws argue that they do not create a substantially lesser burden of proof than ‘justifiable homicide’ laws.<sup>109</sup> In reality, “Make my Day” laws create a much lower evidentiary bar to surpass than laws dealing with justifiable homicide.

Yoshihiro Hattori was a Japanese exchange student living in Baton Rouge, Louisiana, in 1992. 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. Hattori and a friend, walked to the front door of one Rodney Peairs and rang the doorbell. 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. Peairs, gun trained on Hattori, commanded the boy to freeze. Hattori, misunderstanding Peairs’ shouts, turned, and stepped back toward the house, believing Peairs to be associated with the party. Peairs, who waited until Hattori had reached point-blank range, fired one lethal round into Hattori’s chest. Peairs then retreated into his home. The large-bore .44 caliber round caused massive

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<sup>105</sup> *Id.*

<sup>106</sup> M.D. Creekmore, *States With Stand Your Ground And Castle Doctrine Laws*, SURVIVALIST BLOG (Jul. 17, 2013), <http://www.thesurvivalistblog.net/states-stand-ground-castle-doctrine-laws/>.

<sup>107</sup> *Id.*

<sup>108</sup> Hickey, *supra* note 103.

<sup>109</sup> Laws that allow justifiable homicide are purposed at situations in which there exists an actual honest and reasonable threat of lethal force. Justifiable homicide laws allow the use of lethal only in response to a threat of lethal force. Castle doctrine laws allow one to use lethal force under only a perceived threat of danger.

hemorrhage in Hattori's left lung.<sup>110</sup> Hattori took his final breath in an ambulance, only minutes after first-responders arrived on scene.<sup>111</sup>

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 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. After a seven-year trial, Peairs was acquitted of all charges.

The fight for legislative control over gun regulations tips overwhelmingly in favor of the NRA and its pro-gun constituency. In last quarter-century, the NRA tallied numerous legislative victories for those in favor of expanding Second Amendment rights. 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. The aftermath of Sandy Hook motivated Congress to pass zero new gun control bills.<sup>112</sup> Clearly, the political and financial maneuverings of the NRA is 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 meaning, and enumerated right, of the Second Amendment.

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<sup>110</sup> 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>.

<sup>111</sup> *Id.*

<sup>112</sup> Svokos, *supra* note 31.

#### IV. *Heller* and *McDonald* Expand the Second Amendment Right

##### A. District of Columbia v. Heller

*Heller* is undoubtedly the seminal case regarding Second Amendment rights. The case arose out of the District of Columbia's general prohibition on handguns. D.C. law made it illegal to own an unregistered firearm, while a separate provision made the registration of handguns illegal.<sup>113</sup> D.C. law allowed certain long-barrel weapons to be kept in the home, however the law required them to be rendered inoperable.<sup>114</sup> 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.<sup>115</sup> His application was denied. Heller sued the District in federal court, seeking to enjoin the enforcement of the laws prohibiting handguns. *Heller* claimed that the laws prohibiting 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.<sup>116</sup>

The majority decision held that the previous interpretation of the Second Amendment by the Court was too narrow.<sup>117</sup> The court cited the unique construction of the Second Amendment in support of this proposition.<sup>118</sup> The Second Amendment terminology indicates that the

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<sup>113</sup> District of Columbia v. Heller, 554 U.S. at 574 (stating that *Heller* was the culmination of a centuries-long judicial debate as to the scope of the Second Amendment.).

<sup>114</sup> *Id.* at 575 (The 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 and kept in an alternate location.).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 576.

<sup>117</sup> *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. The majority interpreted the Second Amendment to instead guarantee a right to bear arms in order to ensure that an effective militia could be raised in the event that it was needed.).

<sup>118</sup> *Id.* at 576 (stating that the framers of the constitution drafted the document so that it could be understood by all. 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.).

Amendment grants rights beyond merely allowing arms in instances where the militia is assembled. The Amendment refers expressly to a “right of the people.”<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup> The *Heller* court also hinted, albeit subtly, that the Second Amendment was a fundamental right that, perhaps, lay even beyond the review of the judicial branch.<sup>124</sup> The Court also stated that, while it was aware that gun violence needed to be curbed, the Constitution is supreme law, thus, the enumerated right conferred by the Second

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<sup>119</sup> *Heller*, 554 U.S. at 577.

<sup>120</sup> *Id.* (stating that the framers of the Constitution drafted the document so that it could be understood by all. So that it could be understood by the voters; “its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 579 (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.”).

<sup>123</sup> *Id.* at 593 (“We find that they guarantee the individual right to possess and carry guns 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.”).

<sup>124</sup> *District of Columbia v. Heller*, 554 U.S. at 634 (“The very enumeration of the right takes out of the hands of the government—even the Third Branch of Government—the power to decide on a case-by-case basis if the right is really worth *insisting upon*. A constitutional guarantee subject to a future judges assessments of its usefulness is no constitutional guarantee at all.”).

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.<sup>125</sup>

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.<sup>126</sup> The Court proffered only one limit on the Second Amendment right: that the right to keep and bear arms was not an unlimited one.<sup>127</sup> 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. One such limit was on unusual or extraordinarily dangerous weapons that were not commonly used in 1791.<sup>128</sup> The *Heller* court interpreted this to mean that modern Second Amendment rights do not protect a right to keep whatever weapons one desires.<sup>129</sup> The Supreme Court's historical analysis also found that Second Amendment rights applied only to "law-abiding, responsible citizens"<sup>130</sup> implying that certain groups of people may legitimately be disqualified or excluded from Second Amendment protection.<sup>131</sup>

### **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*,<sup>132</sup> 71 year-old Otis McDonald applied for a handgun license to

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<sup>125</sup> *Id.* at 636.

<sup>126</sup> *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. . .")

<sup>127</sup> *Id.* at 595 (holding that the right conferred by the Second Amend was not unlimited, just as rights under the First Amendment are not unlimited.)

<sup>128</sup> *Id.* at 627.

<sup>129</sup> *Id.*

<sup>130</sup> *Heller*, 554 U.S at 635.

<sup>131</sup> Tyler, *supra* n. 51, at 315.

<sup>132</sup> *McDonald v. City of Chicago*, 130 S. Ct. 742 (2010).

defend his home<sup>133</sup> Chicago, like the District of Columbia in *Heller*, required registration of all firearms. Chicago passed an ordinance in 1982 that disallowed the registration of handguns.<sup>134</sup>

Unable to register his handgun, the weapon most used for personal protection in the home, McDonald brought suit with three other similarly situated individuals.<sup>135</sup> The plaintiffs claimed that the handgun ban was overly broad in its complete prohibition on the assertion of the Second Amendment right.<sup>136</sup> The plaintiffs also claimed that the law requiring annual re-registration of the firearm for a fee, under penalty of permanently blacklisting the weapon, was unconstitutional.<sup>137</sup> McDonald argued that the Second Amendment applied to state and local governments via the Fourteenth Amendment's Due Process Clause.<sup>138</sup> The Supreme Court of the United States agreed, and incorporated the *Heller* ruling under the Fourteenth Amendment.<sup>139</sup> 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.<sup>140</sup> The Court in *Heller* also eliminated a "freestanding interest-balancing

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<sup>133</sup> *Id.* at 750 (Plaintiff made 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*).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *McDonald*, 130 S. Ct. at 805.

<sup>139</sup> *Id.*

<sup>140</sup> *District of Columbia v. Heller*, 554 U.S. at 628 (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.).

approach,” which would balance the burden on the individual right with the challenged law’s benefits.<sup>141</sup> 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. In other words, intermediate scrutiny *balances* the import of the government objective with the burden on the constitutional right imposed by laws that further the government purpose. It is clear from the *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. The Court in *McDonald* further expanded the Second Amendment right 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.<sup>142</sup> The Supreme Court’s reluctance to set a standard of review would have significant ramifications in the near future.

## V. THE STANDARDLESS SECOND AMENDMENT

The *Heller* and *McDonald* decisions left in their wake more questions than answers.<sup>143</sup> Since *Heller*, numerous courts of appeals have tried their hand in applying the expanded Second Amendment right to other situations.<sup>144</sup> For example, in *Kachalsky v. Cnty of Westchester*,<sup>145</sup> the Court of Appeals for the Second Circuit ruled that there must exist some Second Amendment right to keep and bear arms outside the home.<sup>146</sup> This court, however, failed to narrow that

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<sup>141</sup> *Id.* at 634-35.

<sup>142</sup> *Tyler v. Hillsdale County Sheriff’s Department*, 775 F.3d at 326.

<sup>143</sup> *Id.* at 315 (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.).

<sup>144</sup> *Id.* at 316 (“courts of appeals have opined whether the Second Amendment encompasses the right to carry a gun outside the home.”).

<sup>145</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012).

<sup>146</sup> *Id.* at 89.

holding any further. In *Drake v. Filco*,<sup>147</sup> the Court of Appeals for the Ninth Circuit declined to definitively hold that the right to keep and bear arms extended beyond the home.<sup>148</sup> 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.<sup>149</sup> Deciding the constitutionality of these laws fell primarily to lower courts at the federal and state level.<sup>150</sup> These courts struggled to apply *Heller* and *McDonald*, primarily because these decisions lacked a defined standard of review against which gun control laws should be tested.<sup>151</sup> Traditionally, the Supreme Court provides a concise framework to the lower courts for the review of laws that limit fundamental constitutional rights.<sup>152</sup> In the absence of this guidance, courts at the state and federal levels have adopted to numerous, and often incompatible, legal standards.<sup>153</sup> The marked divergence among the Federal Circuit Courts of Appeals leaves the Second Amendment doctrine alarmingly unsettled.<sup>154</sup> In the midst of such profound circuit confusion, federal courts are consistent only in their rulings on challenges brought under the Second Amendment.<sup>155</sup> What follows is a brief overview of the standards of review adhered to by each circuit.

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<sup>147</sup> *Drake v. Filco*, 724 F.3d 426 (3d Cir. 2013).

<sup>148</sup> *Id.* at 431.

<sup>149</sup> Mehr et al., *supra* n. 47, at 1.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1.

<sup>153</sup> *Id.* at 2.

<sup>154</sup> *Id.* at 1.

<sup>155</sup> Mehr et. al, *supra* n. 47, at 2.

The First Circuit decided on heightened scrutiny to a categorical ban on firearm ownership by a class of individuals in *United States v. Booker*.<sup>156</sup> For a categorical ban to pass constitutional muster under the First Circuit standard, the government must make a *strong* showing that necessitates a *substantial relationship* between the challenged law and an *important* governmental object.<sup>157</sup> The First Circuit standard is a basic form of intermediate scrutiny.<sup>158</sup>

The Second Circuit adopted a hybrid standard of review that exists somewhere between heightened and strict scrutiny.<sup>159</sup> The Second Circuit standard of review only applies to laws that do not burden “the core protection of self-defense within the home.”<sup>160</sup> 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 Amendment right for suspect classes of individuals.

In *Mazzarella*,<sup>161</sup> the Third Circuit adhered to a standard of intermediate scrutiny for laws that do not severely burden the possession of firearms.<sup>162</sup> The Third Circuit acknowledges that different challenges under the Second Amendment may require differing levels of scrutiny.<sup>163</sup> Much like the Second Circuit, the Third Circuit’s standard is flexible, and, in some

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<sup>156</sup> *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011).

<sup>157</sup> *Id.* at 25.

<sup>158</sup> Tyler, *supra* n.51, at 323 (citing *Clark v. Jeter*, 486 U.S. 456, 461 in which the Court held that intermediate scrutiny requires a challenged law be substantially related to an important government objective).

<sup>159</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93.

<sup>160</sup> *Id.* at 93--4 (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.”).

<sup>161</sup> *United States v. Marzzarella*, 614 F.3d at 89 n.4 (3d Cir. 2010).

<sup>162</sup> *Id.* at 89 n.4

<sup>163</sup> *Id.*

circumstances, a more rigorous standard of review than heightened scrutiny is appropriate.<sup>164</sup>

However, the Third Circuit has not yet defined what exactly constitutes a burden severe enough to warrant strict scrutiny.

The Fourth Circuit also recognizes that different levels of scrutiny apply to different laws prohibiting firearm ownership and possession.<sup>165</sup> The Fourth Circuit expressly stated that strict scrutiny will apply only to laws that limit the core right of the Second Amendment that protects self-defense inside the home.<sup>166</sup>

The Fifth Circuit adheres to a multi-tiered system of analysis for laws challenged under the Second Amendment. This approach requires the appropriate level of scrutiny be determined on a case-by-case basis, which accounts for the nature of the conduct being regulated, and the burden imposed by the law upon the Second Amendment right.<sup>167</sup> 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 with the panel that presides over the case.<sup>168</sup> Generally, this circuit requires something resembling strict scrutiny for laws that burden the core right of self-defense and applies intermediate scrutiny for laws regulating how one asserts their rights under the Second Amendment.<sup>169</sup> This circuit is rife with judicial dissent, and members of its

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<sup>164</sup> *Id.*

<sup>165</sup> *United States v. Masciandaro*, 638 F.3d 458, 470-71 (4th Cir. 2011) (holding that the Fourth Circuit uses a hybrid approach which applies intermediate scrutiny for laws limiting possession outside the home, and strict scrutiny for laws that limit possession inside the home).

<sup>166</sup> *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (holding that strict scrutiny will apply to laws burdening the core right of self-defense within the home).

<sup>167</sup> *NRA v. BATFE*, 700 F.3d 185, 195 (5th Cir. 2012).

<sup>168</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

<sup>169</sup> *Id.*

own panel exchange barbs for sending conflicting doctrinal signals that convolute the issue rather than clarify it.<sup>170</sup> Cases in the Seventh Circuit, much like those brought in the Fifth Circuit, are subject to inconsistent rulings as a result of internal judicial disagreement.

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, this 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.<sup>171</sup>

The Tenth Circuit approach is that intermediate scrutiny is appropriate only when a particular law does not serve as a categorical restriction on firearm ownership.<sup>172</sup> 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 Circuit for the District of Columbia adheres to a variable standard. This approach requires that laws burdening the core right of self-defense must be supported by a *strong* justification.<sup>173</sup> Under this approach, laws that pose a substantially less severe restriction Second Amendment rights are proportionally easier to justify.<sup>174</sup> Laws that do not pose a severe burden are subjected to intermediate scrutiny.

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<sup>170</sup> *Skoien*, 614 F.3d 638, 641 (Sykes, J dissenting.,) (arguing that the court sends doctrinal signals that confuse rather than clarify.).

<sup>171</sup> *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

<sup>172</sup> *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).

<sup>173</sup> *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1257 (D.C. Cir. 2011).

<sup>174</sup> *Id.*

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.<sup>175</sup> The second, that, despite circuit agreement on some variant of intermediate scrutiny as a standard of review, there is little uniformity in how it is applied.<sup>176</sup> An overview of the federal circuit reveals a need for a solitary voice. It clear that some laws will not be impediments on the Second Amendment right, and others will. So, some form of hybrid scrutiny should apply. This type of scrutiny allows 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. Tyler's application was denied on the grounds that Tyler's psychological history precluded firearm ownership under 18 U.S.C §922(g)(4). This statute prohibits firearm ownership for those adjudicated mentally ill, as well as, those who were *involuntarily committed for a period less than 30 days*. When Tyler was in his forties, he and his wife divorced under less-than amicable terms and Tyler's mental health suffered as a result.<sup>177</sup> Worried for his condition, his children had him committed for evaluation. Upon his release,

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<sup>175</sup> Deniston, *supra* n. 50.

<sup>176</sup> Tyler, *supra* n. 51, at 330.

<sup>177</sup> *Id.* at 314.

Tyler held a job for the next 20 years, made child support payments, and helped to raise his children. Tyler's medical records indicate that at no other time was he committed for psychological issues.<sup>178</sup>

§ 922(g)(4) provides, in part, that applicants denied under the provision may regain their rights under the Second Amendment pending a review process. Initially, this process was federally funded. In 1993, the federal government defunded the program. States had the option to adopt a re-certification program, which was supported by federal subsidies, however at the time Tyler brought suit, only half of the states were participants. Michigan was not one of these states.<sup>179</sup>

At trial, Tyler claimed that § 922 (g)(4), coupled with the absence of a state funded re-certification program, constituted a categorical prohibition on the assertion of Second Amendment rights.<sup>180</sup> The government argued that pursuant to *Heller*, intermediate scrutiny should govern review of the law.<sup>181</sup> The government stressed that intermediate scrutiny was the preferred standard of review for the other circuits in support of this argument.<sup>182</sup>

The court ruled that strict scrutiny applies to §922(g), and that the law was unconstitutional as it related to Tyler.<sup>183</sup> In the opinion, the court noted that it was the first federal court to adopt this standard.<sup>184</sup> The court was unpersuaded by the argument that intermediate scrutiny was appropriate simply because it was the chosen standard of review in other circuits. The court also held that Supreme Court silence on the issue of standard review

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<sup>178</sup> *Id.* at 314.

<sup>179</sup> *Id.* at 315.

<sup>180</sup> *Id.* at 320.

<sup>181</sup> *Id.* at 323 (The *Heller* court recognized that federal prohibitions on convicted felons and the mentally ill are still presumptively lawful).

<sup>182</sup> Tyler v. Hillsdale County Sheriff's Department, 775 F.3d at 324.

<sup>183</sup> *Id.* at 311.

<sup>184</sup> *Id.* at 329.

does not imply intermediate scrutiny, as in the past, the Court expressly articulates its reasoning for adhering to an intermediate scrutiny standard.<sup>185</sup> In applying strict scrutiny, the *Tyler* court noted that the Supreme Court implicitly created the strict scrutiny mandate in ruling *Heller* and *McDonald*.<sup>186</sup> The *Tyler* court rejected intermediate scrutiny because it “has no basis in the constitution.”<sup>187</sup> The strict scrutiny analysis rendered §922(g)(4) unconstitutional as it applied to those involuntarily committed to mental institutions for less than 30 days.<sup>188</sup> 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.<sup>189</sup> The court held that the lifetime ban potentially targeted a class of non-violent individuals, and was unconstitutional.<sup>190</sup>

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.<sup>191</sup> The *McDonald* Court held that the Second Amendment is enforceable against state action by way of the Fourteenth

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<sup>185</sup> *Id.* at 328.

<sup>186</sup> *Id.* at 330.

<sup>187</sup> *Id.* at 328.

<sup>188</sup> *Tyler v. Hillsdale County Sheriff’s Department*, 775 F.3d at 324.

<sup>189</sup> *Id.* at 334.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 905.

Amendment.<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> While the Court never expressly stated that strict scrutiny will govern challenges to laws under the Second Amendment, the Court implicitly, and repeatedly, endorsed this standard of review.<sup>195</sup>

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.<sup>196</sup> 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.<sup>197</sup>

More support for adopting a strict scrutiny standard of review lies the Court’s express rejection of alternative approaches and standards. In *Heller*, the Court expressly rejected rational basis as a standard of review.<sup>198</sup> If rational basis review governed Second Amendment challenges, there would be no need for written memorialization of the right, due to other

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<sup>192</sup> *Id.* at 806.

<sup>193</sup> *Id.*

<sup>194</sup> *District of Columbia v. Heller*, 554 U.S. at 634-35.

<sup>195</sup> *Id.* at 688 (stating that rational basis review is an inappropriate standard for Second Amendment challenges); *McDonald v. City of Chicago* (rejecting the interest balancing approach proposed by Justice Breyer).

<sup>196</sup> *Tyler v. Hillsdale County Sheriff’s Department*, 775 F.3d at 328.

<sup>197</sup> *Central Hudson Gas & Elec. Corp. v. Public Service Commr.*, 447 U.S. 547, 562-63 (1980).

<sup>198</sup> *District of Columbia v. Heller*, 554 U.S. at 688.

constitutional prohibitions on irrational laws.<sup>199</sup> The very enumeration of the right refuses a case-by-case analysis if the right is actually worth insisting upon.<sup>200</sup> The *McDonald* court expressly rejected an interest-balancing intermediate scrutiny approach.<sup>201</sup> 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.<sup>202</sup> The 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 of these alone 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

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<sup>199</sup> *Id.* at 628 (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).

<sup>200</sup> *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.”)

<sup>201</sup> *Id.*

<sup>202</sup> *Chovan*, 735 F.3d at 1145

compelling, and the law is narrowly tailored to serve that interest. 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 legislation 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* states only that some types of firearms be available for self-defense in the home. It is unlikely that 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.”<sup>203</sup> 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*, a great latitude is extended to legislative means of curbing gun violence.<sup>204</sup>

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

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<sup>203</sup> *Heller*, 554 U.S. at 625.

<sup>204</sup> *Id.* at 621.

analysis for restraints on the fundamental Second Amendment rights.<sup>205</sup> Intermediate scrutiny may still apply to these laws, but only if the court gives an express reason for downgrading the tier of review.<sup>206</sup> The *Tyler* court stated that the “intermediate scrutiny has no basis in the constitution.” More specifically, intermediate scrutiny’s foundation in Second Amendment law lies on unstable precedential grounds.<sup>207</sup> 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.<sup>208</sup>

## 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)<sup>209</sup> is quite similar to the challenged law in *Tyler*. This federal statute prohibits those who unlawfully use, or are addicted to, controlled substances from

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<sup>205</sup> Larissa Vaysman, Sixth Circuit Holds Ban on Gun Possession After Commitment to Mental Institution Violates Second Amendment, SIXTH CIRCUIT APPELLATE 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/>.

<sup>206</sup> *Tyler*, *supra* n. 196.

<sup>207</sup> *Id.* at 330 (stating that the the Seventh Circuit was the first circuit to apply an intermediate scrutiny standard of review, in *Skoien*. This decision has since been vacated.)

<sup>208</sup> *Id.*

<sup>209</sup> 18 U.S.C § 922(g)(3) (“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 interstate or foreign commerce.”).

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,<sup>210</sup> 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.<sup>211</sup> Yet, the Court ruled in *Robinson v. California*, that criminalizing drug addiction is a violation of the Eighth Amendment.<sup>212</sup> 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.<sup>213</sup> Courts ruling on this law point out that a drug addict may regain their rights simply by ending their 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.

§922 (g)(3) is over-broad because it abridges the rights of more citizens than necessary to achieve the stated purpose of reducing drug related firearms crimes.<sup>214</sup> 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.<sup>215</sup> If that is true, drug addiction is an immutable

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<sup>210</sup> *Id.* (one who is an *unlawful* user of... any controlled substance).

<sup>211</sup> *Tyler v. Hillsdale County Sheriff's Department*, 775 F.3d at 336.

<sup>212</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>213</sup> *Id.* at 667.

<sup>214</sup> In its categorical restriction, the law applies to potentially non-violent individuals who are not at risk for committing a gun-related crime. If the law ensnares more individuals than necessary for the government to achieve its purpose, the law is unlikely to pass strict scrutiny. (need an opening (in this cite)

<sup>215</sup> Maia Szalavitz, *Genetics: No more addictive personality*, 522 NATURE 7557,

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 *Tyler* court stated this provision would likely survive the adoption of strict scrutiny, because the categorical prohibition only applies *so long as one is addicted to drugs*.<sup>216</sup> The temporary nature of the ban appears to save it from constitutional extinction.

Courts acknowledge how difficult drug addiction is to recover from, which indicates that strict scrutiny may provide a greater obstacle than originally thought. The Diagnostic and Statistics Manual classifies drug addiction as a continuum, in which an individual feels physical and psychological dependence on a given substance.<sup>217</sup> Addiction is a chronic relapse of psychological disorders characterized by a compulsion to use drugs, which results in maladaptive and destructive outcomes.<sup>218</sup> Based on this definition, drug addiction is not something that one rids themselves of. ‘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.

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<sup>216</sup> *Tyler*, *supra* n. 51, at 341.

<sup>217</sup> Michael J Formica, *The Continuum of Addiction and the Addictive Personality*, PSYCHOLOGY TODAY, (Jun. 28, 2008), <https://www.psychologytoday.com/blog/enlightened-living/200806/the-continuum-addiction-and-the-addictive-personality>.

<sup>218</sup> *Id.*

What is clear is that this law will be more susceptible to challenge should a heightened standard of 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 the gun violence is a compelling government objective consistent with the first part of the strict scrutiny inquiry. Guns account for more than 32,000 deaths every year.<sup>219</sup> 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.<sup>220</sup> A law fails this requirement if it is over inclusive or under inclusive. A law is over broad if it affects more individuals than necessary to achieve the compelling government interest.<sup>221</sup> A law is under inclusive if individuals similarly situated to those affected by the law are not subject to the law's enforcement.<sup>222</sup> Categorical restrictions on

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<sup>219</sup> Dan Diamond, *More Young Americans Now Die From Guns Than Cars*, FORBES (Aug. 26, 2015 at 12:42 PM), <http://www.forbes.com/sites/dandiamond/2015/08/26/americas-gun-violence-problem-in-three-charts/>.

<sup>220</sup> See e.g., *Brown v. Board of Education*, 785 U.S. 981 (1954); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Romer v. Evans*, 380 U.S. 144 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>221</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (A law is "overbroad" if "[the proffered] interests could be achieved by narrower ordinances that burden [the right] to a far lesser degree.").

<sup>222</sup> *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.").

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. As it relates to convicted felons, this type of law can pass muster,<sup>223</sup> however justification is not always so conspicuous. For the mentally ill, drug addicted, or those who committed criminal acts as children, the analysis is not as transparent. Of these groups, a small minority are likely to contribute to the epidemic of gun violence. What follows is an analysis of some currently proposed firearm legislation.

### **B. Proposed Legislation**

H.R. 1552<sup>224</sup> 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.<sup>225</sup> This law would likely not pass the bar created by strict scrutiny because it is not narrowly tailored to achieve the compelling government purpose. A playground altercation in grade school could subject an adult to a lifetime ban on firearm ownership. The law provides no potential for rehabilitation and functions as a permanent abridgement of Second Amendment rights.<sup>226</sup> 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 crime as adults. Under the proposed law, there is no difference between one who commits an offense at age six or one who

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<sup>223</sup> Tyler, *supra* n. 51, at 317.

<sup>224</sup> H.R. 1552, 112<sup>th</sup> Cong. (2011).

<sup>225</sup> *Id.*

<sup>226</sup> John Richardson, *HR 1552 - The "Juveniles Can Never Be Rehabilitated Act,"* ONLY GUNS AND MONEY (Apr. 20, 2011), <http://onlygunsandmoney.blogspot.com/2011/04/hr-1552-juveniles-can-never-be.html>.

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.<sup>227</sup>

An alternate approach would be to create reapplication programs in which juvenile offender's 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 applicant satisfies the review criteria, their 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.<sup>228</sup> The names of people involuntarily committed would enter the National Instant Background Checks System (NIBCS). If the person was committed because they pose a danger to themselves 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.<sup>229</sup> While past language limits prohibition to those committed to inpatient care, the new rule would call on states to report to NIBCS the names of those committed involuntarily to outpatient psychiatric care as well.

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<sup>227</sup> Gary Scott, *Prison is Too Violent for Young Offenders*, NY TIMES, (Jun. 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>.

<sup>228</sup> Melissa Healy, *New federal rules to keep guns from potentially violent mentally ill*, LA TIMES (Jan. 3, 2013), <http://articles.latimes.com/2014/jan/03/science/la-sci-federal-guns-mental-illness-20140103>.

<sup>229</sup> *Id.*

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 types of mental illness with regards to propensity for violent behavior. An alternate approach would 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,<sup>230</sup> which would make the sale of a firearm to someone whom the seller has reasonable belief will use the firearm for unlawful purpose by up to 25 years in prison.<sup>231</sup> 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, it would be one step toward closing the porous background check system that has facilitated the gun violence epidemic. 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.

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<sup>230</sup> H.R. 2554, 112th Cong. (2011).

<sup>231</sup> *Id.*

To say that a Supreme Court adoption of the holding in *Tyler* would demand strict scrutiny for all firearms laws ignores the ruling set forth in *Heller*. The *Heller* court created a Second Amendment right in a very narrow set of circumstances.<sup>232</sup> The right exists only to protect one's self 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 the *Tyler* holding. Should the *Tyler* holding be adopted by the Supreme Court, only a small number of laws would be displaced by the new standard. Other laws, which limit only the means by which one may assert their 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.<sup>233</sup> The *Heller* right allows for one to defend themselves 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-defense, the *Heller* right would lay undisturbed. This would give the Federal 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 power firearms is an extremely important, if not compelling, government interest. Laws that limit access to such

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<sup>232</sup> *Heller*, *supra* n.40, at 628 (holding that the Second Amendment guaranteed only a right to own a firearm to protect one's self in the home. Federal courts have since struggled to apply this right to situations outside of the home).

<sup>233</sup> *Deniston*, *supra* n. 50.

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 dual 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, and thereby reduce the volume burden that is placed on the 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 available that can be purchased would limit the amount of damage accomplished by a mass shooter.

### **C. Recent Executive Action**

On January 8<sup>th</sup> 2016, in the wake of the San Bernadino shootings, a teary-eyed president Obama proposed a new plan for gun control in the United States.<sup>234</sup> Obama's proposal focuses on

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<sup>234</sup> 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>.

fortifying the dilapidated background check system. The plan increases the types of firearms transactions that are subject to a federal background check.<sup>235</sup> Currently, some private sales of firearms conducted over the internet are not subject to any kind of background check. The loophole created by internet sales facilitates the use of firearms for illegal purposes. The absence of the background check system in private sales allows individuals, who would be barred by statute from owning a weapon, to acquire guns on a secondary market.

Some believe Obama's actions are simply the latest in a long line of ineffective gun control mandates. Obama has consistently issued executive orders regarding gun control after each mass shooting. After Sandy Hook, the president issued 23 executive orders on gun control. Among these were a limit on magazine capacity and a ban on assault weapons.<sup>236</sup> 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.<sup>237</sup>

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 nigh powerless to stop the bloodshed.<sup>238</sup> 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

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<sup>235</sup> Aaron Smith, *What Obama wants to do about guns*, CNN (Jan. 13, 2016), <http://money.cnn.com/2016/01/12/news/state-of-the-union-2016-obama-guns/>

<sup>236</sup> 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/>.

<sup>237</sup> Richard Winton, *San Bernadino shooters tried to illegally modify rifle before rampage*, L.A. TIMES, (Dec. 4, 2015), <http://www.latimes.com/local/lanow/la-me-ln-san-bernardino-shooters-illegal-modify-rifle-20151204-story.html>

<sup>238</sup> Awr 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>.

attacks.<sup>239</sup> Obama also recognized that his proposed action does little to prevent criminals from obtaining firearms.<sup>240</sup>

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 to weapons. The federal 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.<sup>241</sup> Another restraint on executive power to limit the sale of firearms is that Congress gives the executive no express authority to do so. Because the executive has few constitutionally enumerated powers of its own, the executive normally acts with the express consent of Congress. When Congress and the Executive are acting in unison, the president acts with full constitutional force. 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. The reticence of Congress to pass meaningful gun control legislature leaves the executive with the power only to pass laws dealing with the enforcement of sparse congressional mandates. Because Congress shows a disinterest in disturbing Second Amendment rights, enforcement directives from the executive branch have no effect. 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

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Judge 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>.

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 one's self or one's home. This time around, the Court must select a tier of review. Supreme Court intervention cannot come swiftly enough, as inconsistency in the federal circuit in applying the *Heller* and *McDonald* rulings leaves Second Amendment doctrine largely unsettled. The Supreme Court will 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 laws are not total abridgments of Second Amendment protections, and function only as limitations on how one uses their 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 is quite limited in scope. This proposition logically reinforces the idea that only some firearms be available for that defensive purpose. 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 federal circuit applies intermediate scrutiny to gun challenges currently, 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, congressional 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 any decade prior. Yet, not all of these sales are made for legitimate purposes. Some 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.

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. These laws are those that completely prevent broad *categories of individuals* from bearing arms, to completely abridge the right created by *Heller* requires the highest of constitutional justifications. 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 allow citizens Second Amendment protections. Even if a law greatly limits the types of firearms available for sale, the *Heller* right still exists in entirety.

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 members of congress at the state and federal level. The pragmatist would advocate for the will of the people, that their voices will center the congressional compass. However, in the modern era

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of lavish political donation, those in favor of stricter gun laws are better served buying a megaphone.