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**UNDER THE GUN: WILL STATES' ONE-GUN-PER-MONTH LAWS PASS CONSTITUTIONAL
MUSTER AFTER *HELLER* AND *MCDONALD*?**

By Caroline Moran

INTRODUCTION

In the early morning hours of December 12, 2011, New York City police officers responded to a reported robbery taking place in a Brooklyn basement.¹ Unbeknownst to the officers, the robbers were still in the basement, hiding in the shadows behind them.² The robbers, attempting to evade the officers, tried to slip away unnoticed through a back door.³ They were met, however, by two other police officers at the door who had just arrived to provide backup support to the officers at the scene.⁴ Surprised at the sight of the two additional officers, one the robbers took out his gun and shot Officer Peter Figoski in the face.⁵ Officer Figoski later died in the hospital.⁶ The gunman, Lamont Pride, had used an illegal gun that police later traced back to Virginia.⁷

This is not at all uncommon in New York City, where 85% of the guns used in crimes come from out-of-state, and 90% of those guns are illegal.⁸ According to the office of Mayor Michael Bloomberg, Virginia is the number one exporter of guns that are used in commission of crimes in New York City, and one of the “top suppliers nationally.”⁹ Thus, it was distressing to many, including Mayor Bloomberg, when Governor Bob McDonnell of Virginia announced that the

¹ Michael Wilson, *In Dark Brooklyn Doorway, Officer Confronts Gunman, and Dies*, N.Y. TIMES, Dec. 13, 2011, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Tina Moore & Bill Hutchinson, *Mayor Bloomberg criticizes Virginia repeal of 20-year-old gun law*, N.Y. DAILY NEWS (Mar. 1, 2012), <http://www.nydailynews.com/new-york/mayor-bloomberg-criticizes-virginia-repeal-20-year-old-gun-law-article-1.1031149>.

⁸ Kirsten Gillibrand, *End the Flow of Illegal Guns*, HUFFINGTON POST (Jan. 9, 2013), http://www.huffingtonpost.com/rep-kirsten-gillibrand/end-the-flow-of-illegal-g_b_2440791.html.

⁹ Moore and Hutchinson, *supra* note 7.

state was repealing its one-gun-per-month law in March of 2012.¹⁰ One-gun-per-month laws seek to prevent the export of guns from states with weaker firearms regulations to states with stricter firearms regulations through the means of a “straw” purchaser who buys guns in bulk and then resells them on the street.¹¹ The law does so by limiting the number of guns that an individual may purchase to one every thirty days.¹²

Though Virginia has repealed its one-gun-per-month law, legislatures in Maryland,¹³ California,¹⁴ and, most recently, New Jersey have enacted their own versions of one-gun-per-month laws in order to combat the illegal transfer of firearms.¹⁵ Studies indicate that one-gun-per-month laws, where implemented, have been successful in reducing interstate firearms trafficking.¹⁶ Governor McDonnell and other gun rights advocates, however, argue that these laws unconstitutionally burden citizens’ Second Amendment right to bear arms, a right which was recently reaffirmed by the Supreme Court in *District of Columbia v. Heller*¹⁷ in 2008 and *McDonald v. City of Chicago* in 2010.¹⁸ As a result of *Heller* and *McDonald*, much of the existing state gun control legislation in the United States has been called into question.¹⁹ Lower courts have upheld a wide variety of gun control laws, such as felon-in-possession bans and bans

¹⁰ *Id.*

¹¹ Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, JAMA 1759, 1759-60 (1996).

¹² *Id.*

¹³ MD. CODE ANN., PUB. SAFETY § 5-128(b) (LexisNexis 2011).

¹⁴ CAL. PENAL CODE §§ 26835(f), 27535(a) (West 2012).

¹⁵ N.J. STAT. ANN. §§ 2C:58-2, 2C:58-3 (West 2011).

¹⁶ Weil & Knox, *supra* note 11, at 1759-61; Christopher S. Koper, *Crime Gun Risks Factors: Buyer, Seller, Firearm, and the Transaction Characteristics Associated with Gun Trafficking and Criminal Gun Use: Report to the National Institute of Justice*, Philadelphia, PA: Jerry Lee Center of Criminology (2007): 1-96, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221074.pdf>.

¹⁷ 554 U.S. 570 (2008).

¹⁸ 130 S. Ct. 3020 (2010).

¹⁹ Adam Winkler, *The New Second Amendment: A Bark Worse Than Its Right*, THE HUFFINGTON POST, Jan. 2, 2009, http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment_b_154783.html.

on carrying weapons in sensitive places, without much difficulty.²⁰ However, neither *Heller* nor *McDonald* provided guidance to lower courts on how they should evaluate gun control laws, and so the future of gun control legislation remains unclear until the Supreme Court articulates a standard of review for implementing the Second Amendment.

After a brief examination of the history of Second Amendment jurisprudence in the United States in Part I, Part II of this Note will address the Supreme Court decisions in *Heller* and *McDonald*. In Part III, this Note will analyze how lower courts have addressed constitutional claims against gun control laws in the wake of *Heller* and *McDonald* and in the absence of guidance from the Supreme Court on what standard of review to apply. Finally, in Part IV this Note will conclude that intermediate scrutiny is the proper standard under which Second Amendment challenges to gun control laws should be reviewed, and, under this standard, one-gun-per-month laws pass constitutional muster.

PART I: HISTORY OF SECOND AMENDMENT JURISPRUDENCE PRIOR TO *HELLER* AND *MCDONALD*: AN INDIVIDUAL OR COLLECTIVE RIGHT?

The recent push for passage of gun control laws as a response to increasing concern over gun-related violence, coupled with the backlash from gun right advocates, has pushed the disagreement about the scope of the Second Amendment to the fore where, today, it is a source of particular contention that can hardly be ignored.²¹ However, it was not always the case that the Second Amendment was a source of hotly contested debate.²² Indeed, prior to the *Heller* and

²⁰ See, e.g., *United States v. Miller*, 604 F. Supp. 2d 1162, 1168 (W.D. Tenn. 2009); *United States v. Masciandro*, 638 F.3d 458 (4th Cir. 2011).

²¹ *Id.*

²² *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002).

McDonald era, the Second Amendment was a “relatively obscure constitutional provision” that “attracted little judicial or scholarly attention.”²³

The debate surrounding the Second Amendment has historically focused on whether it protects an individual right to “keep and bear arms,” or whether it merely protects a collective right of state militia to maintain firearms “free from federal interference.”²⁴ Three basic schools of thought have emerged: (1) the “traditional individual right” model, (2) the “limited individual right” model, and (3) the “collective right” model.²⁵ Proponents of the “traditional individual right” model contend that the Second Amendment guarantees individual private citizens a fundamental right to keep and bear arms for any purpose.²⁶ The second view holds that individuals have a constitutional right to possess firearms when it is “reasonably related” to militia service.²⁷ The third approach asserts that the Second Amendment right to bear arms guarantees only the right of the people to maintain state militias, and does not confer any individual right to keep and maintain firearms.²⁸ Prior to the decision handed down by the Supreme Court in *Heller*, the dominant view of the Second Amendment, and the one most widely accepted by lower courts, was the “collective right” model, and it was not until recently that this view came under increasing attack by advocates of the individual right theory.²⁹ There was, however, no Supreme Court-endorsed view of the Second Amendment, and the lower courts were left to themselves to determine the scope of the right to bear arms.³⁰

²³ *Id.*

²⁴ Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 684 (2007).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Silveira*, 312 F.3d at 1060.

²⁹ *Id.*

³⁰ *Id.*

In the nineteenth century, the Supreme Court limited its analysis of the Second Amendment simply to say that it was not applicable to state or local governments.³¹ In *United States v. Cruikshank*, the Court dismissed criminal charges brought against two men who allegedly denied their fellow citizens their right to “bear[] arms for a lawful purpose.”³² More importantly, the Court announced that the Second Amendment “means no more than it shall not be infringed by Congress, [and] has no other effect than to restrict the power of the national government.”³³ Then, eleven years later in *Presser v. Illinois*, the Supreme Court affirmed its decision in *Cruikshank*, and upheld an Illinois ban against citizen participation in an “unauthorized militia.”³⁴ Not until 1939 did the Second Amendment receive any extensive treatment by the Supreme Court, and still it was nothing more than a “cryptic discussion” of the scope of the right to bear arms.³⁵ In *United States v. Miller*, the Court considered a Second Amendment challenge to the National Firearms Act of 1934, which prohibited the transportation of unregistered short-barreled shotguns over state lines.³⁶ Because there was no evidence that the short-barreled shotgun was “any part of the ordinary military equipment or that its use could contribute to the common defense,” the Second Amendment did not guarantee the right to possess such a firearm.³⁷ In so holding, the Supreme Court went on to conclude that the right to bear arms must have “some reasonable relationship to the preservation or efficiency of a well regulated militia,” with the “obvious purpose to assure the continuation and render possible the

³¹ *United States v. Cruikshank*, 92 U.S. 542 (1875).

³² *Id.* at 542, 556-67.

³³ *Id.* at 542.

³⁴ 116 U.S. 252, 264-65 (1886). The Court also noted that the ban would not have violated the Second Amendment even if it did apply to the states. *Id.*

³⁵ *Silveira*, 312 F.3d at 1060.

³⁶ 307 U.S. 174, 175-76 (1939).

³⁷ *Id.* at 178.

effectiveness” of the power of Congress to raise a militia.³⁸ The Second Amendment, the Court said, “must be interpreted and applied with that end in view.”³⁹ Thus, in the years that followed *Miller*, a majority of lower courts used the decision to support the collective right view of the Second Amendment and uphold various gun control measures.⁴⁰

The Supreme Court did not reference the scope of the Second Amendment again until 1980 in *Lewis v. United States*, where it noted, in a footnote dismissing a Second Amendment challenge to the federal felon-in-possession ban, that federal gun control laws such as the one at issue, did not “trench upon any constitutionally protected liberties,” and it cited *Miller* to support its view.⁴¹ The Court summarized *Miller*’s holding as protecting “no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well-regulated militia.’”⁴² Thus, similar to its decision in *Miller*, the Supreme Court in *Lewis* implicitly rejected the traditional individual right model in favor of the collective right view.⁴³

It was not until the second half of the twentieth century that the collective right view was called into question. A new wave of academic scholarship emerged that supported the individual right view of the Second Amendment, and it began to hold sway in a few lower courts.⁴⁴ In 2001, the Fifth Circuit explicitly adopted the traditional individual right approach, the first circuit court

³⁸ *Id.*; accord U.S. CONST. art. 1, § 8, cl. 15 (“The Congress shall have the Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions”)

³⁹ *Miller*, 307 U.S. at 178.

⁴⁰ See, e.g., *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001) (citing *Miller* to support its holding that a “federal criminal gun-control law does not violate the Second Amendment unless it impairs the state’s ability to maintain a well-regulated militia”); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (noting that “*Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia”); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (declaring that “the *Miller* Court . . . demanded a reasonable relationship between [a weapon’s] ‘possession or use’ and militia-related activity” (quoting *Miller*, 307 U.S. at 178)).

⁴¹ 445 U.S. 55, 65 n.8 (1980).

⁴² *Id.* (quoting *Miller*, 307 U.S. at 178).

⁴³ *Silveira*, 312 F.3d at 1061-62.

⁴⁴ *Id.*; see also Winkler, *supra* note 24, at 684 (noting that a number of influential legal scholars have criticized the collective right view and endorsed the individual right theory).

to do so.⁴⁵ In *United States v. Emerson*, the Fifth Circuit Court of Appeals declared that the Second Amendment protects an individual’s right to keep and bear arms for personal use.⁴⁶ It held that “[t]he plain meaning of the right to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service.”⁴⁷ Following the lead of the Fifth Circuit, the District of Columbia Circuit Court struck down a gun control law because it violated the Second Amendment, finding that the Amendment conferred an individual right to bear arms in *Parker v. District of Columbia* (renamed *District of Columbia v. Heller* upon appeal to the Supreme Court).⁴⁸ This case would later prove to be the impetus that drove the Supreme Court to deal with the Second Amendment directly and formally announce its view of the scope of the Amendment.

PART II: *HELLER* AND *MCDONALD* ESTABLISH AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS IN THE HOME FOR SELF-DEFENSE

Like the District of Columbia Circuit Court below, the Supreme Court adopted the individual right approach when it struck down the District of Columbia gun regulation in *Heller*.⁴⁹ The law was one that, in the Court’s words, “totally ban[ne]d handgun possession. . . . [and] amount[ed] to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense],” which is an “inherent right. . . . central to the Second Amendment”⁵⁰ To be sure, the law was one of the most restrictive gun

⁴⁵ *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

⁴⁶ *Id.* at 259-60. It should be noted that the court nevertheless upheld the gun control law at issue, a ban on possession by domestic violence misdemeanants.

⁴⁷ *Id.* at 232.

⁴⁸ *Parker v. District of Columbia*, 478 F.3d 370, 391 (D.C. Cir. 2007), *aff’d sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴⁹ 554 U.S. at 635.

⁵⁰ *Id.* at 626-27.

control measures in the country.⁵¹ It banned possession of handguns and required all other firearms to be kept in the home where they had to be trigger-locked or disassembled.⁵² The Supreme Court, after conducting a lengthy inquiry into the construction of the text of the Second Amendment and its historical context, concluded that it “conferred an individual right to keep and bear arms,”⁵³ and this right extends to “all Americans,” not just members of a militia.⁵⁴ Therefore, the Court held, all citizens must be able to keep and use firearms “for the core lawful purpose of self-defense.”⁵⁵ Because the home is “where the need for defense of self, family, and property is most acute,” the District of Columbia’s “absolute prohibition of handguns held and used for self-defense in the home” was unconstitutional.⁵⁶ With this, the Supreme Court explicitly endorsed the individual right view of the Second Amendment.

Nevertheless, the Court was careful to clarify that its holding in *Heller* did not invalidate the numerous gun control laws already in place.⁵⁷ The Second Amendment, the Court emphasized, is “not unlimited” and is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵⁸ The Court provided a list of various gun control regulations—called by some scholars the “*Heller* safe harbor”—that do not infringe on the Second Amendment right to bear arms.⁵⁹ Taking a historical approach, the Court noted that most nineteenth century courts held concealed carry laws valid under the Second Amendment or

⁵¹ *Id.* at 629 (commenting that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban”).

⁵² *Id.* at 635.

⁵³ *Id.* at 595.

⁵⁴ *Id.* at 581.

⁵⁵ *Heller*, 554 U.S. at 630.

⁵⁶ *Id.* at 636.

⁵⁷ *Id.* at 626.

⁵⁸ *Id.*

⁵⁹ Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1248 (2009) (internal quotation marks omitted).

state constitutions.⁶⁰ Those holdings would not be called into question because of the Court’s decision in *Heller*.⁶¹ Similarly, the “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms” were all presumptively lawful under the Second Amendment.⁶² The Court further qualified this list of exceptions by asserting that it merely provided “examples” of permissible regulations, and it was not meant to be “exhaustive.”⁶³

Two years later in *McDonald*, the Supreme Court again held that the Second Amendment guaranteed the individual’s right to keep and bear arms in the home for self-defense, and it further extended this right by applying it to the states by virtue of the Due Process Clause of the Fourteenth Amendment.⁶⁴ In *McDonald*, plaintiffs challenged a Chicago municipal law that banned individuals from possessing firearms unless they had a valid registration certificate.⁶⁵ The law prohibited the registration of most handguns, effectively banning handguns in the city.⁶⁶ The plaintiffs also challenged an Oak Park, Illinois, ban that held it “unlawful for any person to possess . . . any firearm.”⁶⁷ The Supreme Court affirmed its holding in *Heller* that the Second Amendment is an individual right to keep and bear arms in the home for self-defense purposes.⁶⁸ The Court held that self-defense is a “basic right” recognized by our legal system, and self-defense is the “central component” of the Second Amendment.⁶⁹ The right to bear arms, the

⁶⁰ *Heller*, 554 U.S. at 626.

⁶¹ *Id.*

⁶² *Id.* at 626-27.

⁶³ *Id.* at 627 n.26.

⁶⁴ 130 S. Ct. at 3026.

⁶⁵ *Id.*

⁶⁶ *Id.* (citing Chicago, Ill. Municipal Code § 8-20-050(c)).

⁶⁷ *Id.* (quoting Oak Park, Ill. Municipal Code § 27-2-1 (2007); 27-1-1 (2009)) (internal quotation marks omitted).

⁶⁸ *Id.* at 3036.

⁶⁹ *Id.*

Court reasoned, is “deeply rooted in this Nation’s history and traditions,”⁷⁰ and is one that the Founding Fathers deemed important enough to warrant constitutional protection.⁷¹ Thus, a plurality of the Supreme Court concluded that the Second Amendment right is a “fundamental” one, and, as such, the Amendment should be incorporated under the Fourteenth Amendment Due Process Clause and made applicable to the states.⁷²

However, the *McDonald* plurality, like the *Heller* majority, found that the Second Amendment is not unlimited, and its decision did not “cast doubt” on the constitutionality of the “longstanding regulatory measures” highlighted in *Heller*.⁷³ Moreover, the plurality made clear that incorporation “does not imperil every law regulating firearms.”⁷⁴ The plurality further noted that state and local experimentation with “reasonable firearms regulations” should continue.⁷⁵ Like *Heller*, *McDonald* focused on the right of handgun possession in the home. The *McDonald* Court noted that self-defense is “the central component of the Second Amendment right,” and it stressed that the need to exercise that right is “most acute” in the home to protect “self, family, and property.”⁷⁶

Perhaps just as important as what the Supreme Court said in *Heller* and *McDonald* is what it did *not* say. Although the Court finally adopted the individual right approach to the Second Amendment when it affirmed the individual’s right to keep and bear arms in the home

⁷⁰ *McDonald*, 130 S. Ct. at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

⁷¹ *Id.* at 3036-37.

⁷² *Id.* at 3050 (plurality opinion). Though a majority of the Supreme Court agreed that the Second Amendment applied to the states, the Court could not agree on which provision of the Fourteenth Amendment incorporated it. Justice Alito, writing for the plurality, held that the Due Process Clause incorporated the Second Amendment. *Id.* Justice Thomas, concurring in the judgment, held that the Fourteenth Amendment’s Privileges or Immunities Clause made the Second Amendment applicable to the states. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

⁷³ *Id.* at 3047.

⁷⁴ *Id.*

⁷⁵ *Id.* at 3046.

⁷⁶ *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 628).

for self-defense purposes, it did little more than that.⁷⁷ Neither *Heller* nor *McDonald* endorsed a standard of review that lower courts should use in evaluating gun control legislation.⁷⁸ In the *Heller* majority opinion, Justice Scalia said only what level of scrutiny would not apply: rational basis review.⁷⁹ Such a lenient standard, Justice Scalia noted, would be wholly inappropriate for a “specific, enumerated right” like the right to bear arms.⁸⁰ Justice Scalia similarly rejected an “interest balancing” approach as inappropriate, an approach advocated by Justice Breyer in his dissent, which would weigh the individual’s right to bear arms with the state’s interest in promoting public safety.⁸¹ Instead, Justice Scalia simply stated that future challenges to gun control legislation will determine the scope of the Second Amendment and the standard of review that ought to apply.⁸² Similarly, in *McDonald*, the plurality rejected Justice Breyer’s “interest balancing” approach, but did not identify which standard of review ought to be used.⁸³ It said only that “reasonable” gun control legislation would be permissible.⁸⁴

Nevertheless, the impact of *Heller* and *McDonald* should not be underestimated. These cases have spawned an overwhelming number of Second Amendment lawsuits and legal claims since the Supreme Court handed them down, and the constitutionality of gun control laws remains far from clear without a Supreme Court-endorsed standard of review.⁸⁵

⁷⁷ See *id.* at 3050 (plurality opinion) (rejecting an interest-balancing approach advocated by Justice Breyer in *Heller*, but declining to propose an alternative standard for reviewing gun control regulations); see also *Heller*, 554 U.S. at 634-36 (recognizing the dissent’s criticism that the majority did not settle on a standard of review for gun control regulations, but concluding that “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.”).

⁷⁸ *Heller*, 554 U.S. at 634-36.

⁷⁹ *Id.* at 628.

⁸⁰ *Id.*

⁸¹ *Id.* at 689-90 (Breyer, J., dissenting); *id.* at 634 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

⁸² *Id.* at 635.

⁸³ *Id.*

⁸⁴ *Id.* at 3046.

⁸⁵ Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1199-1200 (2009).

PART III: JUDICIAL REVIEW OF GUN CONTROL LEGISLATION POST-*HELLER* AND *MCDONALD*

As noted above, gun advocates have initiated hundreds of lawsuits since *Heller* and *McDonald*, and lower courts have yet to settle on which standard of review is proper in reviewing Second Amendment challenges.⁸⁶ While most courts have applied intermediate scrutiny,⁸⁷ other courts have used strict scrutiny, a reasonableness standard, or even a hybrid of strict and intermediate scrutiny.⁸⁸ However, while the review of gun control legislation has been inconsistent, the result has been the same: challenged gun control laws have almost always survived constitutional scrutiny, regardless of the test applied.⁸⁹

A. *Gun Control Legislation in the Heller “Safe Harbor”*

The Supreme Court in *Heller* made clear that its decision did not call into question “longstanding prohibitions” on gun possession, such as those on the possession of firearms by felons and the mentally ill, laws banning guns in sensitive places such as schools and government buildings, and laws imposing conditions and qualifications on the commercial sale of firearms.⁹⁰ *Heller* also explicitly approved of the “historical tradition of prohibiting the carrying of dangerous and unusual weapons.”⁹¹ As a result, challenges to the gun control laws that fit into Justice Scalia’s list of *Heller* exceptions have been easily dismissed by lower court judges, sometimes “with gusto.”⁹² For instance, a number of federal courts have upheld felon-in-

⁸⁶ See *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (noting that “*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations”).

⁸⁷ See, e.g., *GeorgiaCarry.Org, Inc. v. Georgia*, No. 5:10-CV-302 (CAR), 2011 U.S. Dist. LEXIS 6370, at *31 (M.D. Ga. Jan. 24, 2011) (“This Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case.”); see also *Heller II*, 698 F. Supp. 2d 179, 186 (D.D.C. 2010).

⁸⁸ Tina Mehr & Adam Winkler, Am. Constitution Soc’y, *The Standardless Second Amendment*, 2-7 (Oct. 2010), <http://www.acslaw.org/files/Mehr%20and%20Winkler%20Standardless%20Second%20Amednment.pdf>.

⁸⁹ *Id.*

⁹⁰ *Heller*, 554 U.S. at 626-27.

⁹¹ *Id.* at 627 (internal quotation marks omitted).

⁹² Denning & Reynolds, *supra* note 59, at 1248.

possession bans in the wake of *Heller*.⁹³ As one court that considered a challenge to the ban noted, “[t]here is no wiggle room to distinguish the present case from the Supreme Court’s blanket [presumptively lawful] statement.”⁹⁴ Similarly, bans on possession by the mentally ill have survived Second Amendment challenges.⁹⁵ The *Heller* Court’s approval of the tradition of prohibiting dangerous and unusual weapons has been cited when upholding a ban on assault weapons as well.⁹⁶ So too has the Court’s endorsement of bans of firearms in “sensitive places” led lower courts to reject challenges to the Gun Free School Zone Act (“GFSZA”)⁹⁷ and bans on possession of firearms at post offices.⁹⁸ Recently, lower courts have expanded this “sensitive place” category beyond schools and government buildings to include county property,⁹⁹ national parks,¹⁰⁰ and airports.¹⁰¹

Lower courts have also upheld gun control measures not specifically mentioned in *Heller*, relying on a footnote in Justice Scalia’s majority opinion that cautions that his list of “presumptively lawful regulatory gun measures” was not meant to be “exhaustive,” but merely to provide examples of the types of laws that do not pose a challenge to the Second Amendment.¹⁰² Courts have, for example, upheld bans on gun possession by illegal drug users because such bans

⁹³ See, e.g., *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir.), *cert. denied*, 129 S. Ct. 2814 (2009); *United States v. Bronson*, 292 F. App’x 259, 261 (4th Cir. 2008) (per curiam) (unpublished); *United States v. Miller*, 604 F. Supp. 2d 1162, 1168 (W.D. Tenn. 2009).

⁹⁴ *United States v. Schultz*, No. 10:08-Cr-75-TS, 2009 Dist. LEXIS 234, at *5 (N.D. Ind. Jan. 5, 2009).

⁹⁵ See, e.g., *United States v. McRobie*, 2009 U.S. App. LEXIS 617, at *1 (4th Cir. Jan. 14, 2009) (per curiam) (rejecting a challenge to 18 U.S.C. § 922(g)(4), which bans possession of firearms by individuals who have been committed to a mental institution).

⁹⁶ See *Heller II*, 698 F. Supp. 2d at 194-95 (holding that the District of Columbia’s firearms registration process, prohibition of assault weapons, and prohibition of large capacity ammunition feeding devices was constitutional following the majority’s opinion in *Heller*).

⁹⁷ 18 U.S.C. § 922(q)(2)(A) (2006); *Denning & Reynolds*, *supra* note 59, at 1252 (citing *United States v. Lewis*, No. 2008-45, 2008 WL 5412012, at *2 (D.V.I. Dec. 24, 2008) (where the court stated that “*Heller* unambiguously forecloses a Second Amendment challenge to the [GFSZA] under any level of scrutiny”).

⁹⁸ *Id.* (citing *United States v. Dorosan*, No. 08-042, 2008 WL 2622996, at *6 (E.D. La. June 30, 2008)).

⁹⁹ *Nordyke v. King*, 563 F.3d 439, 459-60 (9th Cir. 2009).

¹⁰⁰ *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790-91 (E.D. Va. 2009), *aff’d*, No. 09-4839, 2011 U.S. App. LEXIS 5964 (4th Cir. Mar. 24, 2011).

¹⁰¹ *New York v. Ferguson*, No. 2008QN036911, 2008 WL 4694552, at *4 (N.Y. Crim. Ct. Oct. 24, 2008).

¹⁰² *Heller*, 554 U.S. at 627 n.26.

are the functional equivalent of felon-in-possession bans, which were explicitly mentioned in *Heller* as permissible.¹⁰³ Other courts have found bans on possession by domestic violence misdemeanants constitutional, again reasoning that these individuals are analogous to felons, and so such bans are in line with the examples of “presumptively lawful” regulations in *Heller*.¹⁰⁴

B. Lower Courts Search for the Proper Standard of Review for Gun Control Legislation

The line of cases above indicates that lower courts have overwhelmingly upheld gun control legislation. However, they have done so by employing different standards of review.¹⁰⁵ A few courts, such as the Seventh Circuit, have analyzed (and upheld) gun control laws without employing or endorsing any of the traditional constitutional standards of review.¹⁰⁶ Nevertheless, most courts reviewing regulations have chosen to explicitly endorse a standard of review, but with varying results. Some have adopted strict scrutiny;¹⁰⁷ a few others have applied a less conventional hybrid of strict and intermediate scrutiny review or a reasonableness test.¹⁰⁸ The

¹⁰³ See, e.g., *United States v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010) (per curiam) (finding that 18 U.S.C. § 922(g)(3), prohibiting unlawful drug users from possessing guns, is constitutional); *United States v. Seay*, 620 F.3d 919, 920 (8th Cir.) (same), *cert. denied*, 131 S. Ct. 1027 (2010).

¹⁰⁴ See, e.g., *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2009), vacated *en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (2011); *United States v. Booker*, 570 F. Supp. 2d 161, 164-65 (D. Me. 2008) (holding that because domestic violence misdemeanants have been convicted of violent crimes, they ought to be added to the list of “felons and mentally ill” against whom “the longstanding prohibitions on the possession of firearms” survives Second Amendment scrutiny” (quoting *Heller*, 554 U.S. at 626)).

¹⁰⁵ *Denning & Reynolds*, *supra* note 59, at 1253-54 (citing *United States v. Marzzarella*, 595 F. Supp. 2d 596, 597 (W.D. Pa. 2009), *aff’d* 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 958 (2011) (ban on purchasing weapons with obliterated serial numbers); *LaRoche v. United States*, Nos. CV407-54, CR402-234, 2008 WL 4222081, at *2 (S.D. Ga. Sept. 15, 2008); *United States v. Bledsoe*, No. 8A-08-CR-13(2), 2008 WL 3538717, at *4 (W.D. Tex. Aug. 8, 2008) (rejecting a challenge to a straw-purchase ban); *Mullinex v. Bureau of Alcohol Tobacco, Firearms and Explosives*, No. 5:07-CV-154, 2008 WL 262017, at *2 (E.D.N.C. July 2, 2008) (rejecting a challenge on an import restriction applied to a plaintiff’s attempt to import a German machine gun)).

¹⁰⁶ *Skoien*, 587 F.3d at 812-13 (stating that the court “need not get more deeply into the ‘levels of scrutiny’ quagmire,” but ultimately applying intermediate scrutiny to review a ban on possession of firearms by individuals convicted of domestic violence misdemeanors).

¹⁰⁷ See, e.g., *United States v. Mantalvo*, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009) (upholding a federal law banning individuals subject to a protective order from possessing guns as “narrowly tailored” to serve the “compelling government interest” of reducing domestic violence); *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 U.S. Dist. LEXIS 78148, at *5-6 (N.D.N.Y. Oct. 6, 2008) (same).

¹⁰⁸ See, e.g., *Skoien*, 614 F.3d at 642 (holding that for laws that “severely burden the core Second Amendment right of armed defense” in the home, strict scrutiny should be applied, but for laws that do not infringe on that core right, “intermediate scrutiny is appropriate”); *Chester*, 628 F.3d at 680; *Peruta v. County of San Diego*, No. 09CV2371-

majority of courts, however, have used intermediate scrutiny in evaluating gun control regulations.¹⁰⁹

A few courts have adopted strict scrutiny to review gun control regulations,¹¹⁰ but even these courts have upheld gun control legislation in every case.¹¹¹ For instance, a federal district court faced with a challenge to a statute banning domestic violence misdemeanants from possessing guns employed strict scrutiny because “the *Heller* Court described the right to keep and bear arms as a fundamental right,” and “where fundamental rights are at stake, strict scrutiny is to be applied.”¹¹² However, when it applied strict scrutiny, the court found a compelling government interest in the protection of domestic partners and children from gun violence.¹¹³ Further, the ban was narrowly tailored to serve this interest because it covers only those individuals who had been “convicted of using or attempting to use physical force or threatening to use deadly force against present and past domestic partners and children” and because “various safeguards are established to ensure due process.”¹¹⁴

A smaller number of courts have offered a hybrid of strict and intermediate scrutiny as the proper approach.¹¹⁵ A Seventh Circuit panel, in a decision later vacated, held that with

IEG (BGS), 2010 U.S. Dist. LEXIS 130878, at *23-24 (S.D. Cal. Dec. 10, 2010) (finding that “a majority of cases citing to *McDonald* and employing some form of heightened scrutiny . . . have employed intermediate scrutiny”); *Marzzarella*, 595 F. Supp. 2d at 604.

¹⁰⁹ See, e.g., *GeorgiaCarry.Org*, 2011 U.S. Dist. LEXIS 6370, at *31 (upholding a Georgia ban on possession of weapons in places of worship and stating that “[t]his Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case”); *Peruta v. County of San Diego*, No. 09CV2371-IEG (BGS), 2010 U.S. Dist. LEXIS 130878, at *23-24 (S.D. Cal. Dec. 10, 2010) (noting that “a majority of cases citing to *McDonald* and employing some form of heightened scrutiny . . . have employed intermediate scrutiny”).

¹¹⁰ See, e.g., *Erwin*, 2008 U.S. Dist. LEXIS 78148, at *5-6 (holding a federal statute that banned individuals subject to a protective order from possessing guns was “narrowly tailored” to serve the “compelling government interest” of reducing domestic violence).

¹¹¹ See *Erwin*, 2008 U.S. Dist. LEXIS 78148, at *5-6; *Montalvo*, 2009 WL 667229, at *3; *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009).

¹¹² *Engstrum*, 609 F. Supp. 2d at 1231.

¹¹³ *Id.* at 1233.

¹¹⁴ *Id.* at 1235.

¹¹⁵ *Chester*, 628 F.3d at 680.

regulations that “severely burden the core Second Amendment right of armed defense” in the home, strict scrutiny is proper.¹¹⁶ But, for laws that do not burden this core right, intermediate scrutiny ought to be applied.¹¹⁷ The Fourth Circuit subsequently adopted this hybrid approach after the Seventh Circuit vacated its decision, holding in *United States v. Chester* that a domestic violence misdemeanor is not included in the protection of the “core right” in *Heller* because they are not “law-abiding citizens,” and so intermediate scrutiny ought to be applied to review the statute (which it ultimately upheld).¹¹⁸

Still other courts have used a “reasonable regulation” standard to analyze gun control laws after *Heller*.¹¹⁹ These courts ask whether a law “effectively destroys or nullifies the ability of law-abiding people to possess a firearm for self-defense. If so, the law is unconstitutional; if not, the law is deemed to be only a regulation, not a prohibition.”¹²⁰ However, at least one federal judge noted that because this standard is so deferential to legislatures, it could not be the standard intended by the *Heller* Court.¹²¹ A reasonableness test, according to that judge, “would subject the contested provisions to a more lenient measure of scrutiny than that envisioned by the *Heller* court,” and thus could not be applied post-*Heller*.¹²²

Though there is some variation, a majority of lower courts have employed intermediate scrutiny in evaluating challenges to gun control legislation, ruling out rational basis review and

¹¹⁶ *Skoien*, 587 F.3d at 812.

¹¹⁷ *Id.* at 812-13. The Seventh Circuit, sitting *en banc*, vacated this decision to use a hybrid approach and instead used intermediate scrutiny to uphold a ban on possession by domestic violence misdemeanants as substantially related to an important government interest. *Id.* at 642.

¹¹⁸ *Chester*, 628 F.3d at 683.

¹¹⁹ Mehr & Winkler, *supra* note 88, at 6-7.

¹²⁰ *Id.*

¹²¹ *Heller II*, 698 F. Supp. 2d at 186.

¹²² *Id.* (upholding a firearms registration scheme, a ban on assault weapons, and a ban on large capacity ammunition feeding devices under intermediate scrutiny).

strict scrutiny review.¹²³ Strict scrutiny is improper, they reason, because the list of presumptively lawful regulations outlined in *Heller* is not consistent with strict scrutiny review.¹²⁴ The District Court for the District of Columbia, for example, stated that strict scrutiny “would not square” with *Heller*’s list of “presumptively lawful regulatory measures.”¹²⁵ Using this logic, the court in that case upheld the city’s firearms registration scheme.¹²⁶ At the same time, these courts have also found rational basis review is improper because it is too lenient a standard for a right that a plurality of the Supreme Court has deemed a “fundamental” one. As the Court of Appeals for the Fourth Circuit held, “some form of heightened scrutiny is necessary in light of the fact that the right at issue is a specific, constitutionally enumerated right.”¹²⁷ The court reasoned that intermediate scrutiny struck the proper balance between the individual’s and the government’s interests, and using that standard of review it upheld a ban on possession of firearms in national parks.¹²⁸ A large number of other courts have followed the reasoning of these judges, settling on intermediate scrutiny to evaluate gun control laws.¹²⁹

C. One-Gun-Per-Month Laws Pose a Unique Challenge to Courts

¹²³ See *GeorgiaCarry.Org*, 2011 U.S. Dist. LEXIS 6370, at *31 (upholding a Georgia ban on possession of weapons in places of worship and stating that “[t]his Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case”).

¹²⁴ See, e.g., *Heller II*, 698 F. Supp. at 187; see also *GeorgiaCarry.Org*, 2011 U.S. Dist. LEXIS 6370, at *31 (“[T]he Supreme Court’s description of a list of presumptively valid regulatory measures is at least implicitly inconsistent with strict scrutiny”); *Marzzarella*, 595 F. Supp. 2d at 604 (finding that “the [Heller] Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review” and adopting intermediate scrutiny in reviewing the constitutionality of a ban on purchasing guns with obliterated serial numbers).

¹²⁵ *Heller II*, 698 F. Supp. 2d at 187 (In upholding the ban, the court noted, “as we move outside the home, firearms rights have always been more limited, because public safety interests outweigh individual interests in self-defense.”).

¹²⁶ *Id.* at 191.

¹²⁷ *Id.*

¹²⁸ *Masciandaro*, 2011 U.S. App. LEXIS 5964, at *34.

¹²⁹ *Peruta*, 2010 U.S. Dist. LEXIS 130878, at *23-24 (noting that “a majority of cases citing to *McDonald* and employing some form of heightened scrutiny...have employed intermediate scrutiny”).

One-gun-per-month laws pose a significant challenge to lower courts attempting to analyze them under *Heller* and *McDonald* because they place a substantial restriction on the individual's ability to exercise his right to bear arms by restricting the frequency with which he may lawfully purchase handguns. Nevertheless, an increasing number of states are enacting such laws. The first state to enact a law restricting the legal purchase of a handgun to one every thirty days was South Carolina in 1976 (which later repealed in 2004).¹³⁰ Since then, four other states have passed similar laws: Virginia in 1993,¹³¹ Maryland in 1996,¹³² California in 2000,¹³³ and New Jersey in 2010.¹³⁴ Most recently, in 2009, Massachusetts Governor Deval Patrick introduced a one-gun-per-month law that would require a thirty-day waiting period for handgun purchases, but he extended it to include a waiting period for the purchase of rifles, shotguns, firearms, machine guns, large capacity weapons, and large capacity feeding devices as well.¹³⁵ The bill, however, failed to pass in the legislature before session's end in July 2010.¹³⁶

As noted in the Introduction, state legislatures have enacted one-gun-per-month laws to prevent the flow of guns from states with weaker firearms regulations to states with stricter firearms regulations.¹³⁷ That is, the law seeks to target the “straw” purchaser who buys guns in bulk and then resells them illegally to individuals who otherwise could not purchase a gun legally under state law, such as criminals and minors. Opponents of one-gun-per-month laws, however, argue that they infringe on individuals' Second Amendment right to bear arms by arbitrarily restricting the number of guns that they may purchase, by means that are otherwise

¹³⁰ Act of May 19, 2004, 2004 S.C. Sess. Laws Act 242 (2004).

¹³¹ VA. CODE ANN. § 18.2-308.2:2(P) (2009); 2012 Va. Acts ch. 37.

¹³² MD. CODE ANN., PUB. SAFETY § 5-128(b) (LexisNexis 2011).

¹³³ CAL. PENAL CODE §§ 26835(f), 27535(a) (West 2012).

¹³⁴ N.J. STAT. ANN. §§ 2C:58-2, 2C:58-3 (West 2011).

¹³⁵ H.B. 4102 at § 7, 186th Gen. Court, 1st Ann. Sess. (Mass. 2009).

¹³⁶ See H.B. 2012, Rule 12A, at 25, 186th Gen. Ct., 1st Ann. Sess. (Mass. 2009) (requiring that “all formal business of the second annual session...be concluded no later than the last day of July of that calendar year”).

¹³⁷ Weil & Knox, *supra* note 11, at 1759-60.

legal, in a thirty-day period.¹³⁸ Just last year, the Virginia state legislature voted to repeal its own one-gun-per-month law, though it was one of the first states to enact such a law.¹³⁹ Although one-gun-per-month laws have not been challenged in court, the constitutionality of these laws is an issue that is ripe for review in the wake of *Heller* and *McDonald*, and one that is likely to be raised in the coming years by litigants who ascribe broad meaning to the Supreme Court's recent decisions.

PART III: ANALYSIS

Gun right advocates championed *Heller* and *McDonald* as landmark decisions that, once and for all, firmly entrenched the individual right to keep and bear arms in American jurisprudence. However, the effect of these decisions has been far more subdued. Lower courts have been wary to read *Heller* and *McDonald* so broadly as to invalidate much existing gun control legislation. Instead, lower court judges have cited to *Heller*'s list of "presumptively lawful" regulations and upheld challenged gun control laws without much difficulty.¹⁴⁰ As courts are faced with challenges to regulations not mentioned in *Heller*'s safe harbor, however, they will be forced to establish a constitutional standard of review to adjudicate such cases.

This Part will first show that intermediate scrutiny is the proper standard of review for gun control laws that do not infringe on the "core right" of the individual to keep and bear arms, as recognized in *Heller* and *McDonald*.¹⁴¹ Intermediate scrutiny provides the flexibility and ability for local experimentation that the Supreme Court envisioned for such laws, but it also acknowledges that mere rational basis review is insufficient for a specific, enumerated right.

¹³⁸ See, e.g., Laura Vozzella, *McDonnell signs bill lifting one-handgun-per-month limit*, THE WASHINGTON POST, February 28, 2012, http://www.washingtonpost.com/blogs/virginia-politics/post/mcdonnell-signs-bill-lifting-one-handgun-per-month-limit/2012/02/28/gIQAtT0kgR_blog.html.

¹³⁹ VA. CODE ANN. § 18.2-308.2:2(P) (2009); 2012 Va. Acts ch. 37.

¹⁴⁰ See discussion *supra* Part II.

¹⁴¹ See *infra* Part III.A.

Then, this Part will evaluate one-gun-per-month laws under intermediate scrutiny and determine that these laws pass constitutional muster under this heightened standard of review.¹⁴²

A. Intermediate Scrutiny is the Proper Standard of Review for Gun Control Legislation

Rational basis review is too lenient a standard to apply to restrictions that impinge on a right that the Supreme Court recognizes not only to be a “specific, enumerated right,” but a “fundamental” one.¹⁴³ Justice Scalia explicitly ruled out the rational basis approach to Second Amendment cases in the *Heller* majority opinion: “[o]bviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”¹⁴⁴ Thus, it does not provide the heightened standard of scrutiny that *Heller* appears to require. As one federal judge noted, it is doubtful that the *Heller* majority “envisioned [such a lenient standard] when it left for another day a determination of the level of scrutiny to be applied to firearms laws.”¹⁴⁵

Similarly, strict scrutiny is also inadequate standard for evaluating Second Amendment challenges. It is true that in *Heller* and *McDonald*, the Supreme Court did not explicitly rule out strict scrutiny as the proper standard of review like it did rational basis review.¹⁴⁶ However, the Court seems to have at least implicitly ruled out strict scrutiny as the proper approach to these laws for a number of reasons. For one, the “presumptively lawful” gun control regulations in the *Heller* “safe harbor” would likely be found unconstitutional if a court were to apply strict scrutiny, which requires not only that the law in question serves a “compelling government

¹⁴² See *infra* Part III.B.

¹⁴³ *Heller*, 554 U.S. at 628 n.27; *McDonald*, 130 S. Ct. at 3050 (plurality opinion).

¹⁴⁴ *Id.*

¹⁴⁵ *Heller II*, 698 F. Supp.2d at 187.

¹⁴⁶ See discussion *infra* Part II.

interest,” but also that the law is “narrowly tailored” to that interest.¹⁴⁷ These regulations undoubtedly seek to preserve public safety, an interest that the Supreme Court has found “compelling.”¹⁴⁸ However, a court would likely find that they do not satisfy the narrow tailoring requirement of the strict scrutiny test. For instance, at least one federal judge noted that felon-in-possession bans are “wildly overinclusive” because they include both violent and non-violent felons.¹⁴⁹ Yet, felon-in-possession bans are a category of regulations that *Heller* explicitly named to be presumptively lawful.¹⁵⁰

It is also important to note that in both *Heller* and *McDonald*, the Supreme Court indicated not only that its holdings were not meant to disturb longstanding gun control regulations, but that it did not wish to hinder the ability of lawmakers to create other reasonable regulations.¹⁵¹ In the past, the Supreme Court has described strict scrutiny as “strict in theory, but fatal in fact” to laws analyzed under the standard.¹⁵² This would seem to suggest that the Supreme Court meant for gun control regulations to be scrutinized under a more flexible standard of review in order to keep with its statement that its holdings in *Heller* and *McDonald* “[do] not imperil every law regulating firearms.”¹⁵³ Indeed, the Fourth Circuit noted, “[w]ere we to require strict scrutiny in circumstances such as those presented here [a challenge to a law banning possession of loaded guns in cars in national parks], we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to ‘prevent []

¹⁴⁷ *Heller*, 554 U.S. at 688 (Breyer, J., dissenting) (stating that under strict scrutiny, the constitutionality of *Heller*’s presumptively lawful regulations “would be far from clear”); *Marzzarella*, 595 F. Supp. 2d at 604 (noting that “the Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of strict scrutiny standard of review”); Henigan, *supra* note 25, at 1197-98 (2009) (stating that “the *Heller* majority . . . implicitly rejected strict scrutiny” when it described gun control regulations that are presumptively lawful).

¹⁴⁸ See *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (stating that “the Government’s general interest in preventing crime is compelling” and may outweigh “the individual’s strong interest in liberty”).

¹⁴⁹ *Yancey*, 621 F.3d at 685.

¹⁵⁰ See discussion *infra* Part II.

¹⁵¹ *Heller*, 554 U.S. at 626-27; *McDonald*, 130 S. Ct. at 3047.

¹⁵² *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

¹⁵³ *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

armed mayhem’ in public places and depriving them of ‘a variety of tools for combating that problem.’”¹⁵⁴ In these circumstances, intermediate scrutiny provides a better fit.

Lastly, the Court in *Heller* determined that the right to bear arms is an “enumerated right,” and most other “enumerated” rights are not analyzed under strict scrutiny.¹⁵⁵ As Professor Adam Winkler notes, “strict scrutiny is quite rarely applied to laws burdening the textually guaranteed rights found in the Bill of Rights.”¹⁵⁶ It matters not that the *McDonald* plurality referred to the right to bear arms as “fundamental” when it incorporated it, for although “all incorporated rights may be fundamental . . . not all incorporated rights trigger strict scrutiny Strict scrutiny is only used in doctrines of two incorporated provisions of the Bill of Rights: the First and Fifth Amendments.”¹⁵⁷ Strict scrutiny is not employed, for example, when analyzing claims under the Fourth Amendment prohibition of unreasonable searches and seizures¹⁵⁸ or the Sixth Amendment right to counsel.¹⁵⁹ In addition, the Second Amendment lacks the absolute language that we find in the First Amendment, which does employ strict scrutiny in certain circumstances: “Congress shall make no law. . . .”¹⁶⁰ Instead, the Court in *Heller* made clear that the right to bear arms “is not unlimited,” and it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose.”¹⁶¹ Thus, it seems unlikely that the Second Amendment requires strict scrutiny analysis where there is no “strict” language like that found in the First Amendment.

In sum, intermediate scrutiny provides the heightened level of review for such a fundamental right, as required by *Heller*, but it is not so restrictive as to invalidate those

¹⁵⁴ *Masciandaro*, 2011 U.S. App. LEXIS 5964, at *34 (citations omitted).

¹⁵⁵ Winkler, *supra* note 24, at 696.

¹⁵⁶ *Id.*

¹⁵⁷ Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006).

¹⁵⁸ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995).

¹⁵⁹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹⁶⁰ U.S. CONST. amend. I.

¹⁶¹ 554 U.S. at 626.

“presumptively lawful” regulations that *Heller* expressly endorses. These presumptively lawful regulations would likely survive intermediate scrutiny. Promoting public safety is undoubtedly an important government interest (indeed, as noted above, the Supreme Court has found it to be a “compelling” interest),¹⁶² and courts will likely find regulations like those in the *Heller* safe harbor to be “substantially” related to the efforts to protect safety and to reduce gun-related violence.¹⁶³

B. *Applying Intermediate Scrutiny, One-Gun-Per-Month Laws Pass Constitutional Muster*

State legislatures have enacted one-gun-per-month laws to reduce the number of guns that enter the illegal firearms market and, more generally, to restrict the flow of interstate firearms trafficking.¹⁶⁴ Much of the legislation aimed at illegal firearms trafficking has focused on handguns, like one-gun-per-month laws.¹⁶⁵ Illegal firearms trafficking across state lines is a serious problem in the United States, in part because firearms sales are regulated at the state level; there is no federal law that limits the number of handguns that an individual may purchase at one time.¹⁶⁶ States that have weaker firearms laws attract traffickers, who may make multiple purchases of guns and then resell them in states with stricter firearms laws.¹⁶⁷ Multiple gun sales are of particular concern, for studies have shown that handguns sold in multiple sales to a single purchaser are the type of weapon most frequently used in the commission of crimes.¹⁶⁸

¹⁶² *Salerno*, 481 U.S. at 750-51.

¹⁶³ *Heller II*, 698 F. Supp. 2d at 191 (noting that under intermediate scrutiny, “the degree of fit between [the gun control regulation] in this case and the well-established goal of promoting public safety need not be perfect; it must only be substantial.”).

¹⁶⁴ *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State, and Selected Local Gun Laws*, LAW CENTER TO PREVENT GUN VIOLENCE 139 (2008), available at <http://smartgunlaws.org/wp-content/uploads/2008/01/RegGens.entire.report.pdf>.

¹⁶⁵ *Regulating Guns in America*, *supra* note 161, at 139.

¹⁶⁶ Weil & Knox, *supra* note 11, at 1759-60.

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., Bureau of Alcohol, Tobacco and Firearms, U.S. Dep’t of the Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports (2000) National Report* 50 (July 2002); Bureau of Alcohol, Tobacco and

Furthermore, the federal Bureau of Alcohol, Tobacco and Firearms found in 2000 that 20% of all retail handguns recovered in crimes were purchased as part of a multiple sale.¹⁶⁹ Thus, one-gun-per-month laws seek to rectify a real problem that contributes to gun-related violence nationwide.

In the wake of *Heller* and *McDonald*, it is unclear what level of scrutiny judges ought to apply should one-gun-per-month laws be challenged in court. The Supreme Court, as noted above, has made clear that mere rational basis review would be inappropriate for such legislation.¹⁷⁰ In order for one-gun-per-month laws to pass constitutional muster, then, they must, at a minimum, serve an important government interest and be substantially related to achieving that interest. It is unlikely that one-gun-per-month laws, like the other presumptively lawful gun control regulations, would survive strict scrutiny.¹⁷¹ A court would most likely find, using strict scrutiny analysis, that although these laws seek to serve a compelling government interest (that is, protecting public safety), they fail the “narrow tailoring” requirement.

However, as this Note has indicated, strict scrutiny is not the proper standard to apply to gun control legislation like one-gun-per-month laws. Instead, courts faced with challenges to the constitutionality of one-gun-per-month laws should use intermediate scrutiny analysis. That is, these laws need only serve an important government interest and to be substantially related to that interest.¹⁷² There are certainly a number of important government interests associated with limiting the right to bear arms, the most substantial of which is the interest in preserving public

Firearms, U.S. Dep’t of the Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports (1999) National Report* 40 (Nov. 2000).

¹⁶⁹ *Id.* at 50.

¹⁷⁰ *Heller*, 554 U.S. at 628 n.27.

¹⁷¹ *See id.* at 688 (Breyer, J., dissenting) (finding that under strict scrutiny, the constitutionality of *Heller*’s “safe harbor” regulations “would be far from clear”).

¹⁷² *See, e.g.,* *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (“To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective.”).

safety and preventing violence.¹⁷³ Studies have shown that gun violence is indeed a major problem in the United States—in 2010, it was estimated that someone dies by gun violence every seventeen minutes and over 70,000 Americans are shot non-fatally every year.¹⁷⁴ One-gun-per-month laws seek to remedy this problem by stemming the illegal flow of handguns into the hands of potential criminals. A court would therefore have little trouble finding that one-gun-per-month laws serve an important government interest.

It is the next step of the inquiry—whether the laws are substantially related to that government interest—that requires a bit more analysis. Research shows that one-gun-per-month laws have been effective where enacted.¹⁷⁵ Though now repealed, Virginia’s one-gun-per-month law provides a useful case study: the state adopted its one-gun-per-month law in 1993 after studies indicated that it was a “primary source” of guns recovered from crime scenes in the northeastern United States.¹⁷⁶ After the law was adopted, the number of guns traced to Virginia dealers dropped by 71% in New York, 72% in Massachusetts, and 66% in New Jersey, New York, Connecticut, Rhode Island, and Massachusetts combined.¹⁷⁷ To be sure, such research is not conclusive, but intermediate scrutiny only requires that the law substantially achieve its intended goal, not that it is a perfect fit.

Furthermore, it is important to note that in states with more urban areas where gun violence is a significant problem, the “substantial” relationship between one-gun-per-month laws

¹⁷³ See, e.g., *id.* at 693 (“In this case, the government’s stated objective is to keep firearms out of the hands of violent felons, who the government believes are often those most likely to misuse firearms.”).

¹⁷⁴ National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *Overall Firearm Gunshot Nonfatal Injuries and Rates per 100,000* (2010), available at <http://webappa.cdc.gov/cgi-bin/broker.exe>.

¹⁷⁵ Weil & Knox, *supra* note 11, at 1759-61; Christopher S. Koper, *Crime Gun Risk Factors: Buyer, Seller, Firearm, and the Transaction Characteristics Associated with Gun Trafficking and Criminal Gun Use: Report to the National Institute of Justice*, Philadelphia, PA: Jerry Lee Center of Criminology (2007): 1-96, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221074.pdf>.

¹⁷⁶ *Id.*

¹⁷⁷ Douglas S. Weil & Rebecca Knox, *Evaluating the Impact of Virginia’s One-Gun-A-Month Law*, The Center to Prevent Handgun Violence 1, 4-6 (Aug. 1995). Virginia repealed its one-gun-per-month law this year due in large part to heavy lobbying efforts by the firearms industry and the National Rifle Association.

and promoting public safety may be more readily clear than in states with fewer urban areas. Thus, a New Jersey court could find that such a relationship exists, whereas an Alaska court may not. Justice Alito, writing for the plurality in *McDonald*, encouraged consideration of “local needs and values” when evaluating state and local gun control laws.¹⁷⁸ Intermediate scrutiny provides the flexibility to allow courts to consider these local factors in order to determine whether one-gun-per-month laws provide the substantial fit needed to serve the interest in preventing gun violence in the particular jurisdiction.

PART IV: CONCLUSION

For nearly 200 hundred years, the right to bear arms was one that was ill defined and on which the Supreme Court had failed to take an affirmative stance. At long last, with the *Heller* and *McDonald* decisions in 2008 and 2010, the Court took an affirmative stance and defined the Second Amendment: the right of an individual to keep and bear arms in the home for self-defense purposes. Initially, gun rights advocates heralded *Heller* and *McDonald* as “landmark” decisions. However, because the Court cautioned that the Second Amendment is “not unlimited” and refused to invalidate “longstanding” and “presumptively lawful” gun control regulations, it is unclear how far this right to keep and bear arms extends. Since *Heller* and *McDonald*, hundreds of cases have been brought at the state and federal level to challenge gun control legislation, and there has been no consensus on how the courts ought to evaluate these laws.

This Note proposes that intermediate scrutiny should be the standard that guides courts in reviewing gun control laws that regulate the right to keep and bear arms. Rational basis is too lenient a standard for a right that the Supreme Court has named to be an enumerated,

¹⁷⁸ *McDonald*, 130 S. Ct. at 3046 (plurality opinion) (noting that incorporating the Second Amendment to apply to the states “limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values”).

fundamental right. On the other hand, strict scrutiny is inappropriate for a right that the Supreme Court has also said is “not unlimited” and not immune to regulation by federal and state gun control laws. Intermediate scrutiny strikes the proper balance: it provides the heightened level of review that is necessary to protect individuals’ interests in this fundamental right, but it also allows the government to protect its own interest in promoting public safety and reducing gun-related violence. Under intermediate scrutiny, many gun control regulations that seek to promote these government interests, such as one-gun-per-month laws, would pass constitutional muster. When the Supreme Court does decide to address the difficult issue of which standard of review to apply to Second Amendment questions, it should keep in mind not only the interests of the individuals who wish to keep and bear arms, but the interests of the government in promoting public safety as well.

In the coming years, lower courts are likely to continue to disagree on what level of scrutiny ought to be applied in Second Amendment cases. Though litigation will help to refine the scope and limits of the Second Amendment right to bear arms, until the Supreme Court decides to rule definitively on it, the fate of gun control regulations in the United States remains unclear.