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## Regulating the Militia Well: Evaluating Choices for State and Municipal Regulators Post-*Heller*

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## **REGULATING THE MILITIA WELL: EVALUATING CHOICES FOR STATE AND MUNICIPAL REGULATORS POST-HELLER**

*Benjamin H. Weissman\**

*Until its 2008 decision in District of Columbia v. Heller, the U.S. Supreme Court had never struck down any firearm restrictions as violating the Second Amendment of the U.S. Constitution. In Heller, the majority held that the Second Amendment's text and original public meaning protect an individual's right to keep and bear arms for self-defense in the home. Both proponents and opponents of gun control regulation saw the Heller decision as ushering in a new era of Second Amendment jurisprudence.*

*On the one hand, Justice Antonin Scalia's opinion for the majority in Heller was seen as a vindication of an inherent natural right that had been obscured for too long. On the other hand, many see the Heller decision as having few consequences (besides at the margins) for "America's already weak gun control regime." Until the Supreme Court offers more guidance on how far the Second Amendment right extends outside the home for self-defense, it is the lower courts that will ultimately decide how and to what extent that right may be restricted by government regulation. According to several commentators, in the years since Heller and McDonald v. City of Chicago, lower courts have shied away from invalidating any current restrictions besides total bans similar to the ones at issue in those decisions.*

*This Note will examine how the Supreme Court's decisions in Heller and McDonald have affected state and municipal attempts to regulate the possession and use of firearms. In the wake of those decisions, lower courts have developed several loose frameworks for evaluating challenges to firearm restrictions. Given this confusing judicial landscape, scholars and commentators offer competing views of what that landscape means for the choices that state and local regulators can and should make. This Note will ultimately evaluate these views in light of the developments and trends in recent case law.*

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## TABLE OF CONTENTS

INTRODUCTION.....	3483
I. THE SECOND AMENDMENT: HISTORY UP THROUGH <i>HELLER</i> .....	3486
A. <i>The Second Amendment: History and Interpretation</i> .....	3486
1. Constitutional Convention and the Bill of Rights .....	3487
2. Individual Right Theory Versus Collective Right Theory .....	3492
B. <i>The Decisions in Heller and McDonald</i> .....	3494
C. <i>Limiting the Right To Keep and Bear Arms</i> .....	3497
1. Categories of Regulatory Choices.....	3497
a. “Who” Restrictions .....	3498
b. Device Restrictions.....	3499
c. Time, Place, and Manner Restrictions .....	3499
d. Frictional Restrictions .....	3500
2. Categories of Justifications for Restrictions .....	3501
a. Scope .....	3502
b. Burden .....	3502
c. Danger Reduction.....	3503
d. Government As Proprietor .....	3503
II. A ROCKY ROAD AFTER <i>HELLER</i> .....	3504
A. <i>What Has Happened Since Heller in the         Lower Courts?</i> .....	3504
1. Two-Pronged Approach or One-Pronged Approach? .....	3505
2. Which Restrictions Have Survived Judicial Scrutiny? .....	3507
B. <i>Competing Accounts of the Post-Heller Landscape</i> .....	3510
1. Judicial Restraint, Intermediate Scrutiny, and Deference .....	3510
2. The “Common Use” Standard .....	3515
III. EVALUATING POST- <i>HELLER</i> ACCOUNTS .....	3516
CONCLUSION .....	3518

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>1</sup>

“Our thoughts and prayers are with the students and families impacted by yesterday’s terrible tragedy in Centennial, Colorado, and with every one of the 90 families that lose loved ones in our nation every day to gun violence. We will continue to fight for the solutions we know exist to make this the safer nation we all want and deserve, on behalf of every

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1. U.S. CONST. amend. II.

victim and every American who knows that, when it comes to protecting our children, we can do better than this.”<sup>2</sup>

“Dec. 14 is the anniversary of the horrendous Newtown shooting, but despite the best efforts of opportunistic politicians, Americans show little sympathy for proposals to tighten restrictions on guns.”<sup>3</sup>

#### INTRODUCTION

Since at least the eighteenth century, state and local governments have placed restrictions on the possession and use of firearms.<sup>4</sup> Until its decision in *District of Columbia v. Heller*<sup>5</sup> in 2008, the U.S. Supreme Court had never struck down any of these restrictions as violating the Second Amendment of the U.S. Constitution.<sup>6</sup> In fact, for most of the twentieth century, courts had consistently held that the Second Amendment only protected a right to keep and bear arms in connection with a state militia,<sup>7</sup> and that the Second Amendment only circumscribed federal rather than state conduct.<sup>8</sup> In *Heller*, the majority held that the Second Amendment’s text and original public meaning protect an individual’s right to keep and bear arms for self-defense.<sup>9</sup> Two years later, the Court held in *McDonald v. City of Chicago*<sup>10</sup> that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment right against the states, so that states and local governments were also barred from infringing the right to keep and bear arms.<sup>11</sup> Both proponents and opponents of gun control regulation saw the *Heller* decision as ushering in a new era of Second Amendment jurisprudence.<sup>12</sup>

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2. Dan Gross, *Brady Campaign Statement on One Year After Newtown, Colorado School Shooting*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Dec. 14, 2013), <http://www.bradycampaign.org/?q=brady-campaign-statement-on-one-year-after-newtown-colorado-school-shooting>.

3. *Americans Simply Not Interested in Gun Control*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION (Dec. 16, 2013), <http://www.nra.org/news-issues/in-the-news/2013/12/americans-simply-not-interested-in-gun-control.aspx>.

4. See *infra* Part I.C.

5. 554 U.S. 570 (2008).

6. See Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1412–13 (2009).

7. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 708 (2012).

8. See *infra* note 110 and accompanying text. Most courts had held that the Second Amendment was not incorporated against the states through either the Privileges and Immunities Clause or the Due Process Clause of the Fourteenth Amendment.

9. See 554 U.S. at 628–29.

10. 130 S. Ct. 3020 (2010).

11. See *id.* at 3050. The Due Process Clause of the Fourteenth Amendment provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1.

12. Compare Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <http://www.newrepublic.com/article/books/defense-looseness> (“[*Heller*] was the most noteworthy of the Court’s recent term. It is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.”), with Randy E. Barnett, *News Flash: The*

On one hand, Justice Antonin Scalia's opinion for the majority in *Heller* was seen as a vindication of an inherent natural right that had been obscured for too long.<sup>13</sup> Before the decision, only the Fifth Circuit had held that the Second Amendment guaranteed an individual the right to keep and bear arms unconnected to militia service.<sup>14</sup> Most other courts agreed that the Second Amendment guaranteed only a so-called "collective" right to keep and bear arms in connection with militia service.<sup>15</sup> Thus, the *Heller* decision can be seen as the culmination of decades of scholarly and political persuasion to revise courts' notions of the contours of the Second Amendment.<sup>16</sup>

On the other hand, many see the *Heller* decision as having few consequences (besides at the margins) for "America's already weak gun control regime."<sup>17</sup> Until the Supreme Court offers more guidance on how far the Second Amendment right extends outside the home for self-defense, the lower courts will ultimately decide how and to what extent that right may be restricted by government regulation.<sup>18</sup> According to several commentators, in the years since *Heller* and *McDonald*, lower courts have shied away from invalidating any current restrictions besides total bans similar to the ones at issue in those decisions.<sup>19</sup>

While lower courts and academics debate the scope of this constitutional right, the problem of gun violence remains.<sup>20</sup> There is a wealth of scholarly

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*Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (applauding the *Heller* decision as "historic in its implications and exemplary in its reasoning").

13. See David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235, 235–36 (2008) (applauding the *Heller* decision for affirming that the Second Amendment merely "codified a pre-existing right" to keep and bear arms for self-defense).

14. See Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2037 (2008) (citing *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)).

15. See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) ("[T]he Second Amendment affords only a collective right to own or possess guns or other firearms . . ."), *abrogated by Heller*, 554 U.S. 570; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710–11 (7th Cir. 1999) (same), *abrogated by Heller*, 554 U.S. 570.

16. See Rostron, *supra* note 7, at 708 (describing how courts began to "take notice" of the "large outpouring of scholarly literature").

17. Saul Cornell & Nathan Kozuskanich, *The Scholarly Landscape Since Heller*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 383, 389 (Saul Cornell & Nathan Kozuskanich eds., 2013) (citing Adam Winkler, *The Second Amendment and the Right to Bear Arms After D.C. v. Heller: Heller's Catch-22*, 56 UCLA L. REV. 1551, 1553 (2009)).

18. See Rostron, *supra* note 7, at 706 ("It is in the application of [*Heller* and *McDonald*] that 'the Second Amendment rubber meets the road' and the actual impact of these constitutional issues on Americans' lives will be determined." (quoting *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring))).

19. See Rostron, *supra* note 7, at 706–07 ("The lower courts, frustrated by the indeterminacy of historical inquiry and puzzled by the categorizations suggested by Justice Scalia, have . . . effectively embraced the sort of interest-balancing approach . . . in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.").

20. See generally *About Gun Violence*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/?q=about-gun-violence> (last visited Apr. 26, 2014) ("On

analysis on how courts should proceed with challenges brought under the newly incorporated Second Amendment.<sup>21</sup> There is, however, much less of a focus on the opportunities and challenges that this new jurisprudence has wrought for state and local regulators seeking to combat gun violence in their jurisdictions.<sup>22</sup>

This Note will examine how the Supreme Court's decisions in *Heller* and *McDonald* have affected state and municipal attempts to regulate the possession and use of firearms. In the wake of those decisions, lower courts have developed several loose frameworks for evaluating challenges to firearm restrictions.<sup>23</sup> Given this confusing judicial landscape, scholars and commentators offer competing views of what that landscape means for the choices that state and local regulators can and should make. This Note evaluates these views in light of how case law has developed recently.

This Note begins by examining the Second Amendment's history and the recent Supreme Court decisions. Part I describes generally the history of the Second Amendment and its adoption as part of the Bill of Rights. This Part next examines Second Amendment jurisprudence and different interpretations of the scope and content of the protections it affords individual citizens. It then provides an overview of the decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Part I concludes by presenting a framework based primarily on the work of Eugene Volokh for analyzing and categorizing different regulatory choices for restricting possession and ownership of firearms.

Part II provides an overview of how lower courts have evaluated challenges to firearm restrictions in the wake of *Heller* and *McDonald*. Next it identifies and explains competing characterizations of this landscape. In particular, Part II focuses on Allen Rostron's argument that courts are engaging in interest balancing that effectively defers to the government and, Nicholas Johnson's argument that the "common use" standard from *Heller* is particularly vulnerable to manipulation by courts to uphold questionable restrictions.

Part III evaluates the competing accounts against recent case law. This Part identifies where each of the accounts has proven most accurate. Part III ultimately concludes that while Johnson's "common use" standard is

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average, 32 Americans are murdered with guns every day . . . 140 are treated for a gun assault in an emergency room . . . 51 people kill themselves with a firearm, and 45 people are shot or killed in an accident with a gun.").

21. See generally Cornell & Kozuskanich, *supra* note 17 (surveying the academic landscape since *Heller* and *McDonald*).

22. See, e.g., Louis M. Wasserman, *Gun Control on College and University Campuses in the Wake of District of Columbia v. Heller and McDonald v. City of Chicago*, 19 VA. J. SOC. POL'Y & L. 1 (2011) (discussing how public colleges and universities can navigate the post-*Heller* landscape to best fashion constitutional gun control policies on their campuses); see also Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 412–17 (2009) (arguing that *Heller*, by removing the option of total bans from gun regulators' arsenal of policy choices, may actually make it easier to pass gun control laws that fall short of a total ban).

23. See *infra* Part II.

being applied by simple restrictions against clearly dangerous and unusual weapons, courts engage in interest balancing once the challenge is less easily decided.

### I. THE SECOND AMENDMENT: HISTORY UP THROUGH *HELLER*

This Part begins by providing a brief history of the adoption of the Second Amendment as part of the Bill of Rights during the first Congress. This Part then briefly describes the main competing views of the protections afforded to individuals by the Second Amendment. Next, this Part discusses the Supreme Court's recent decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, which provided an answer to the question of whether the Second Amendment confers an individual right to firearms. This Part concludes by providing a framework for analysis of regulatory choices that focuses both on the type of restriction and the legal justification for the government's authority to effect that restriction.

#### A. *The Second Amendment: History and Interpretation*

This section attempts to provide a brief history of the enactment of the Second Amendment. Because the majority opinion in *Heller* placed so much emphasis on a historical inquiry into the purpose and understanding of the Second Amendment at the time of its enactment,<sup>24</sup> this section provides a basic background narrative. It is important to note, however, that the history of the right to keep and bear arms in the United States is far from settled.

First, many disagree as to the utility of the search for a clear and comprehensive narrative of how the Second Amendment was understood at the time of its adoption. Some, like Justice Scalia, find clear answers from certain texts and historical sources.<sup>25</sup> Yet others struggle with the value and implications of the various conflicting historical accounts.<sup>26</sup>

Second, assuming there is one overarching story to be found in the Amendment's history, the content of that story has been hotly debated for

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24. See *infra* Part I.B.

25. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 584–85 (2008) (finding that “[i]t is clear . . . that ‘bear arms’ did not refer only to carrying a weapon in an organized military unit,” based on, inter alia, “[n]ine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to ‘bear arms in defense of themselves and the state’ or ‘bear arms in defense of himself and the state’”); BRIAN DOHERTY, *GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT 2* (2008) (“If Madison, a leading Federalist, openly explained that one of the reasons Anti-Federalists had little reason to fear the new government created by the Constitution was Americans’ unaltered right to possess guns, it’s hard to see how anyone could deny that that liberty was an understood natural possession of Americans among the people who wrote and ratified the Second Amendment.”).

26. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) (acknowledging that while the Court’s historical analysis in *Heller* is binding, conclusions from historical evidence about the scope of the right are at least “debatable”); Rostron, *supra* note 7, at 732 (discussing the history of excluding convicted felons from the right to keep and bear arms and finding that “[t]he historical evidence simply is too easy to spin in either direction”).

several decades.<sup>27</sup> Some find that the political and legal history of the Amendment's enactment clearly indicate that it protected only the states' right to maintain and arm their militias.<sup>28</sup> Others find that the Amendment's history clearly points in the opposite direction, asserting that the Bill of Rights and its Second Amendment guaranteed individual private citizens protection from being disarmed by the federal government.<sup>29</sup>

These competing accounts shape how the Second Amendment is now understood in courts and in legislatures and, notwithstanding their disparate implications, are essential for understanding the scope of authority of state and local governments to regulate that right.

### 1. Constitutional Convention and the Bill of Rights

Concerns about external and internal threats to the new republic dominated the Constitutional Convention in Philadelphia.<sup>30</sup> Many political leaders feared that unrest would lead different groups to rebel, causing the United States to descend into anarchy.<sup>31</sup> Delegates also perceived external threats from Native American attacks, British troops on the frontier, and Spanish troops along the Mississippi River.<sup>32</sup> These threats to the fledgling nation placed the questions of control over the state militias and creation of a standing army at the forefront of the constitutional debate.<sup>33</sup>

Many delegates embraced the new nationalist ideal of a strong and centralized standing army as the primary national defense.<sup>34</sup> Rather than relying solely on the well-regulated state militias that had struggled against the British army in the U.S. Revolutionary War, these delegates advocated for some combination of a standing national army, increased federal control over state militias, or the creation of an "elite" militia drawn from the state militias.<sup>35</sup>

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27. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, in *THE SECOND AMENDMENT IN LAW AND HISTORY* 1, 1–2 (Carl T. Bogus ed., 2000) (pointing out that the first scholarly article to champion the "individual rights" position did not appear until 1960).

28. See, e.g., Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, in *THE SECOND AMENDMENT IN LAW AND HISTORY*, *supra* note 27, at 117, 146 ("The Amendment was not a suicide clause allowing revolutionaries to create private militias with which to overthrow [sic] the national government or even to impede the faithful execution of the law; it prevented Congress from abolishing the organized, well-regulated militias of the states.").

29. See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 57 (2013) ("In 1791, the American federal Bill of Rights was ratified, in part, as a formal recognition that private individuals would never be disarmed.").

30. See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 39–41 (2006).

31. See *id.* at 39. Shays' Rebellion, led by "debt-ridden farmers," was fresh in the minds of many delegates, as was the perceived threat to order from slaves in the South. See *id.*

32. See *id.*

33. See *id.* at 40.

34. See *id.*

35. See *id.*; see also *id.* at 48 (discussing the Federalist argument during ratification that "it was unwise to put too great a reliance on the militia, a misplaced faith that nearly 'lost us our independence'").

A minority of delegates, however, feared the implications of this nationalist agenda.<sup>36</sup> These Anti-Federalists argued that state control over the militias was essential for keeping the national government from growing too strong.<sup>37</sup> The creation of a national standing army would necessarily threaten the states' ability to protect their citizens' individual liberties.<sup>38</sup>

Though dominated by Federalists pushing for stronger national control, the convention ultimately compromised and gave the federal government the authority to organize, arm, discipline, and "call forth the aid" of the militia, while reserving for the states control over the training and leadership of their militias.<sup>39</sup> Some delegates, including Virginia's George Mason, advocated adding a declaration of rights to the framework of the Constitution.<sup>40</sup> This declaration was rejected, at least in part because a majority of delegates felt that a national government of limited, enumerated powers made it redundant and unnecessary to protect rights that the national government of limited powers could not infringe in the first place.<sup>41</sup>

The convention sent its proposed Constitution to the Continental Congress, who approved it without amendment and sent it to the states for ratification.<sup>42</sup> Opposition to ratification centered mainly around the failure to include a bill of enumerated rights and the lack of a ban on creation of a national standing army.<sup>43</sup> The Federalist response to these criticisms was simple: "The people and the states retained all powers not delegated to the new government" including any to be included in a bill of rights, and a standing army was necessary for national defense and would be controlled by a fully representative government.<sup>44</sup> The Anti-Federalists tied the importance of the militias to concerns about federalism: without sufficient control over their militias, states would be subject to the control of an

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36. *See id.* at 40.

37. *See id.* ("Opponents of the nationalist agenda feared that if state authority over the militia were undermined and the federal government were given the ability to raise a standing army, there would be no way to check the designs of ambitious and corrupt rulers.")

38. *See id.* ("If history had taught any lesson to these Americans, it was that if power was unchecked, it inevitably led to despotism.")

39. *See id.* at 43. "In so doing, the convention made the militia a creature of both the states and the new national government." *Id.*

40. *See id.*

41. *See id.* at 43–44. Cornell also suggests that because the Constitution could always be amended in the future, the addition of a declaration of rights was not seen as crucial at this stage. *See id.* at 44 ("Others may have been too worn out to take up the issue and were confident the document could easily be amended at a future date if necessary."). Finkelman, however, argues that the rights to be protected in Mason's proposal were rejected by the Federalist majority as attempts to limit the national government described in the original document rather than simply declaring protected individual liberties. *See Finkelman, supra* note 28, at 143–44.

42. *See CORNELL, supra* note 30, at 44.

43. *See id.* at 45.

44. *Id.*

oppressive national government.<sup>45</sup> The persistence and popularity of Anti-Federalist concerns forced Federalists to refine their conception of the role of the militias in the United States, eventually conceding the importance of the militia as the “bulwark against tyranny.”<sup>46</sup>

After ratification of the new Constitution in 1789, the Anti-Federalists began to push instead for amendments to the Constitution as a way of limiting the power of the new federal government.<sup>47</sup> The Bill of Rights that James Madison eventually proposed to the first Congress, however, included none of the structural changes that the Anti-Federalists hoped would restrict the federal government’s newly ratified power.<sup>48</sup> Madison’s proposed amendments concerned those individual rights and civil liberties most commonly associated with a modern understanding of the Bill of Rights.<sup>49</sup>

The Second Amendment, along with the other first ten amendments, arose out of this conflict between the Federalists and the Anti-Federalists over the nature of the nascent federal government.<sup>50</sup> Where before, the right to keep and bear arms was tied to the exercise of militia service, the Constitutional Convention placed the right squarely in the center of a larger debate about federalism and state rights.<sup>51</sup>

In crafting the Constitution, the Framers divided the responsibility for military protection among the president, Congress, and state governments.<sup>52</sup> The provisions in Article I and Article II provided for two layers of military protection, a national army governed and executed by Congress and the president, and state militias organized under state law but ultimately subject

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45. *See id.* at 46 (“Without their militias to protect them, the states would be at the mercy of a strong government, which would soon consolidate all power within its orbit.”).

46. *Id.* at 47.

47. *See* CORNELL, *supra* note 30, at 51 (“Still seething over their defeat, the Anti-Federalist minority resolved to take their appeal directly to the people.”); Finkelman, *supra* note 28, at 120. *But see* HALBROOK, *supra* note 29, at 82 (describing the Bill of Rights as an “acknowledgement of the conditions under which the state conventions ratified the Constitution, and in response to popular demand for a written declaration of individual freedoms”).

48. *See* Finkelman, *supra* note 28, at 121. Finkelman points out that [t]he fact that the majority of anti-Federalist proposals were structural, rather than libertarian, underscores the fact that the most prominent anti-Federalists were only marginally interested in a bill of rights. . . . Once the Constitution was ratified, . . . they were no longer interested in a bill of rights and instead wanted a wholesale restructuring of the Constitution.

*Id.* at 123. *But see* HALBROOK, *supra* note 29, at 70 (“[T]he Federalist[s] argued] that a Bill of Rights was unnecessary because the proposed government had no positive grant of power to deprive individuals of rights, and the anti-Federalist[s] conten[ded] that a formal declaration would enhance protection of those rights.”).

49. *See* Finkelman, *supra* note 28, at 121–22.

50. *See id.* at 124–25.

51. *See* CORNELL, *supra* note 30, at 41 (“The debate over the federal constitution would change [the model of the right to bear arms] as the arguments over [its] meaning . . . became embroiled in the larger dispute over federalism.”).

52. *See* Finkelman, *supra* note 28, at 124.

to regulation by Congress and the president.<sup>53</sup> The Anti-Federalists were most concerned about the potential for a standing national army to threaten the people's liberty.<sup>54</sup> The Federalist-dominated convention ultimately rejected Anti-Federalist proposals that would have weakened federal authority over military protection.<sup>55</sup> The Anti-Federalists instead published their *Reasons of Dissent* that contained fourteen proposed amendments to the newly ratified Constitution.<sup>56</sup> The seventh proposed amendment would have protected an individual's right to keep and bear arms for self-defense and hunting and not to be disarmed unless dangerous to others or convicted of a crime, and would have prevented Congress from maintaining a standing army during peace time.<sup>57</sup> The eighth proposed amendment would have protected an individual's right to hunt and fish on his property and all other unenclosed lands.<sup>58</sup> The eleventh proposed amendment provided that states would retain the power of organizing, arming, and disciplining the militia and that Congress could only call to action state militias with the state's consent.<sup>59</sup>

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53. *See id.* (“[T]he defense of the United States would rely on both the state militias and the standing army.”).

54. *See id.* at 125 (“According to the traditional Whig and Republican ideology of the period, a ‘standing army’ threatened the liberties of a free people. This argument was rooted in English history, where the army was traditionally a remote mercenary force, disconnected from the people, and under the direct control of a hereditary monarch.”).

55. *See id.*

56. *See id.* at 126. Finkelman argues that because many of these proposed amendments were eventually adopted almost verbatim, the changes that Madison and the Federalists made to the right to keep and bear arms are significant. *See id.* (“It is of utmost significance, . . . that unlike other aspects of the Pennsylvania proposals that had been incorporated into the Bill of Rights, on [the issues of the army, the militia, the right to bear arms, and the right to hunt,] Madison and his colleagues in the First Congress emphatically rejected the goals and the language of the Pennsylvania anti-Federalists.”).

57. *See id.* The seventh proposed amendment read:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.

*Id.*

58. *See id.* at 127. The eighth proposed amendment read:

The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by the laws to be passed by the legislature of the United States.

*Id.*

59. *See id.* The eleventh proposed amendment read, in two separate paragraphs:

That the power of organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time only as such state shall agree.

....

Taken together, these proposed amendments would have significantly weakened the federal government's ability to respond to rebellion and invasion.<sup>60</sup> On the other hand, the Anti-Federalists believed that the creation of a standing army without these protections would allow the federal government to disarm the state militias, which would significantly endanger individual liberty.<sup>61</sup>

The Bill of Rights that Madison ultimately proposed to Congress preserved the structure and power of the federal government as contemplated by the Constitution.<sup>62</sup> The rights enumerated and protected in the Bill of Rights, then, can be seen as “clarifying the meaning of the Constitution and not fundamentally changing its nature.”<sup>63</sup> Especially given Shays' Rebellion and the fear of other armed insurrections, Madison and the Federalists who dominated Congress would have been loathe to diminish the power of the federal government by adopting such a broad right to keep and bear arms as proposed by the Anti-Federalists.<sup>64</sup> The Anti-Federalists, for their part, feared that the federal government would nationalize the state militias to infringe upon individual liberties or that the federal government would disband them altogether.<sup>65</sup>

The debates in Congress over the Second Amendment began with Madison's first proposed text:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.<sup>66</sup>

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That the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction, and right which is not by this constitution expressly delegated to the United States in Congress assembled.

*Id.* Finkelman argues that reading these two paragraphs together “underscores the connection many anti-Federalists saw between state sovereignty and the control of the state militia.” *Id.*

60. *See id.* Finkelman notes that one of the primary reasons for calling the Constitutional Convention was the fear that without a stronger central government the new nation would be unstable, militarily weak, and might not survive . . . . The kind of amendments the Pennsylvania minority wanted would have undermined these powers and the new government itself.

*Id.*

61. *See HALBROOK, supra* note 29, at 74.

62. *See* Finkelman, *supra* note 28, at 130.

63. *Id.*

64. *See id.* at 131 (“[I]t would have been out of character for the [First] Congress, dominated as it was by supporters of the new Constitution, to cripple the new government's ability to control dangerous, musket-toting elements of the population like Daniel Shays.”). *But see* HALBROOK, *supra* note 29, at 80 (arguing that the Second Amendment was adopted to allay fears about federal control over a standing army *and* the militias, by guaranteeing “the revolutionary ideal” that every man be armed with a gun).

65. *See* Finkelman, *supra* note 28, at 137–39.

66. *Id.* at 139.

Debates in the House of Representatives focused mainly on the last clause that provided a religious exemption from militia service.<sup>67</sup> Nevertheless, the House passed an amendment very close to Madison's original proposal, adding only the words "in person" at the end of the last clause.<sup>68</sup> The Senate, however, rejected many proposed amendments that resembled the proposed amendments to the Constitution in the *Reasons for Dissent* that would prevent Congress from maintaining a standing army and significantly weaken the federal government's control over state militias.<sup>69</sup> Before adopting the final text as it would be included in the final Bill of Rights, the Senate removed the clauses that provided for a religious exemption from militia service and the definition of the militia as the "body of the people."<sup>70</sup>

## 2. Individual Right Theory Versus Collective Right Theory

This section provides a brief overview of the competing theories about the kind of right guaranteed by the Second Amendment: the "individual right" theory as opposed to the "collective right" theory. The different theories' names are somewhat misleading; as Justice John Paul Stevens explains, though the Second Amendment clearly guarantees some sort of

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67. *See id.* at 139; *see also* HALBROOK, *supra* note 29, at 84–86 (discussing congressional debate over the religious exemption clause of the proposed amendment). Finkelman notes, however, that the Senate kept no written records of its debates and the House did not spend much time debating this amendment at all. *See* Finkelman, *supra* note 28, at 139.

68. *See* HALBROOK, *supra* note 29, at 86.

69. *See id.* at 88. Halbrook notes that "attempts to strengthen recognition of state rights over militias and to proscribe standing armies would fail." *See id.* Halbrook also observes, "Amendments mandating avoidance of standing armies were rejected." *See id.* As was a proposal "[t]hat each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 126 (New York, Thomas Greenleaf, 1789); *see also* HALBROOK, *supra* note 29, at 88.

70. *See* HALBROOK, *supra* note 29, at 88 (explaining that some clauses were removed to eliminate redundancy, while the religious exemption might have been left out "to preclude any constitutional authority of the government to 'compel' individuals (even those without religious scruples) to bear arms for any purpose"); *see also* JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra* note 69, at 104 (recording the fifth proposed Amendment presented to the House on August 24, 1789, to read, "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person"). Halbrook argues

The Senate's deletion of the well-recognized definition of 'militia' as 'the body of the people' implied nothing more than its wish to be concise. But its rejection of the proposal to limit the amendment's recognition of the right to bear arms 'for the common defence' meant to preclude any limitation on the individual right to have arms, for example, for self-defense or hunting.

HALBROOK, *supra* note 29, at 88–89 (citations omitted).

right that can be *enforced* by individuals, it is the scope of that right that is controversial.<sup>71</sup>

According to the individual rights theory, the prefatory clause,<sup>72</sup> or preamble, means that (1) a militia would better protect individual liberties than a standing army and (2) the people had a right to keep and bear arms for many purposes, including participation in such a militia.<sup>73</sup> This perspective argues that the militia was seen by the Founders as “the ultimate democratic check on foreign policy, ensuring that only defensive wars will be fought.”<sup>74</sup>

The First and Fourth Amendments similarly refer to “the people,” and those amendments have long been thought to confer *individual* rights.<sup>75</sup> Patrick Charles concedes “it would be a textual farce to interpret ‘people’ having one meaning in the First and Fourth Amendments and another in the Second Amendment.”<sup>76</sup> If the Amendment were read only to confer the right to participate in a well-regulated militia, then Article I, Section 8 would effectively place the control of militias in the hands of the federal government, exactly what the militias were meant to protect against.<sup>77</sup> The collective rights theorist would reply that the Second Amendment was meant to counter Congress’ Article I, Section 8 power.<sup>78</sup> Thus, under the collective rights theory, the right is better understood as restricting the power of Congress by providing for a well-regulated militia of the people.<sup>79</sup> The collective rights theorist would add that the Second Amendment was meant to be a restriction on Congress rather than on the states and their militias, evidenced by its placement in the Bill of Rights next to the First Amendment.<sup>80</sup>

71. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting). *But see* Bogus, *supra* note 27, at 5 (describing how early court cases held that individuals were not able to enforce the Second Amendment right).

72. The text of the Second Amendment is usually separated into two clauses: the prefatory and the operative clause. See PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 5 (2009).

73. See DOHERTY, *supra* note 25, at 9.

74. *Id.*

75. *See id.*

76. CHARLES, *supra* note 72, at 17.

77. See DOHERTY, *supra* note 25, at 10. Article I, Section 8 provides in pertinent part:

The Congress shall have Power . . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8, cl. 16.

78. See CHARLES, *supra* note 72, at 23–24 & n.50.

79. *See id.*

80. *See id.* at 15–16 (explaining that because “the First Amendment reads ‘Congress shall make no law . . .,’ the [Second Amendment] was initially intended to be a restriction on Congress, not an individual right” (quoting U.S. CONST. amend. I) (emphasis added)). The First and Second Amendments were originally the Third and Fourth Articles, and the First and Second Articles also placed limits on Congress. *See id.* at 16. “Thus, both individual right and collective right theorists have a legitimate argument that the amendment’s placement in the Bill of Rights supports their stance.” *Id.* at 17.

Discussing the interpretation of “bear arms,” Charles points out that eighteenth century colonial laws used the word “carry” to refer to civilian possession of arms, while “bear arms” referred to possession as part of military service, which “reinforce[s] an intended distinction between the words ‘bear’ and ‘carry.’”<sup>81</sup> Further, reading the phrase “bear arms” in conjunction with the prefatory clause’s reference to a “well regulated militia” makes clear for the collective rights theorists that the phrase referred to military service. This is especially so given that the Constitution was drafted by “America’s best legal and legislative minds,” meaning that the choice of “bear” and not “carry” is meaningful.<sup>82</sup> Charles also argues that in the militia context, to “keep” is better understood to mean maintain rather than to own or possess.<sup>83</sup>

Proponents of the individual rights theory point to nineteenth-century state court decisions and state legislative actions, in which the individual rights interpretation dominates.<sup>84</sup> These decisions, the individual rights theorist would argue, conclusively show how the common understanding of the Second Amendment protected an individual’s right to keep and bear arms.<sup>85</sup>

Before *Heller*, the Supreme Court had not reached a Second Amendment issue since its 1939 ruling in *United States v. Miller*.<sup>86</sup> There, the Court asked whether the weapon at issue “has some reasonable relationship to the preservation or efficiency of a well regulated militia,” and concluded that because it did not, its regulation was not protected by the Second Amendment.<sup>87</sup> The Court would not reach another Second Amendment challenge until 2008, nearly seventy years later.

### B. *The Decisions in Heller and McDonald*

In *District of Columbia v. Heller*, the Court held the District of Columbia’s prohibition on handgun possession to be an unconstitutional infringement on an individual’s Second Amendment right to keep and bear arms.<sup>88</sup> Writing for the majority, Justice Scalia held that the Amendment’s text and subsequent treatment by courts and legislatures confirmed that it

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81. *See id.* at 17–30.

82. *See id.* at 23.

83. *See id.* at 28.

84. *See* DOHERTY, *supra* note 25, at 11–13 (citing *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91–92 (1822) (“[W]hatever restrains . . . the full and complete exercise of [the right to bear arms in defense of the citizens and the state], though not an entire destruction of it, is forbidden by the explicit language of the [Kentucky] constitution.”)).

85. *See id.*

86. 307 U.S. 174 (1939). *But see* David B. Kopel, *The Supreme Court’s Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 99 (1999) (examining Supreme Court decisions between *Miller* and *Heller* and concluding that the Court has indeed considered the right to keep and bear arms and found it to be an individual one).

87. *Miller*, 307 U.S. at 178. *But see* Kopel, *supra* note 86 (arguing that *Miller* has been misunderstood and misapplied since it was decided).

88. *See* *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008).

protects an individual's right to keep and bear arms.<sup>89</sup> In so holding, Justice Scalia rejected the "collective right" notion that the Second Amendment only protected the right to keep and bear arms as part of militia service.<sup>90</sup> The Court held that the Amendment's prefatory clause merely "announces the purpose for which the right was codified: to prevent elimination of the militia."<sup>91</sup> The prefatory clause does not, however, limit the scope of the right by "suggest[ing] that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."<sup>92</sup> In this way, Justice Scalia's interpretation of the operative clause to "guarantee the individual right to possess and carry weapons in case of confrontation"<sup>93</sup> is confirmed and supported by the prefatory clause.<sup>94</sup>

The District of Columbia's firearm code had several provisions at issue. First, it effectively banned handgun possession anywhere in the District of Columbia.<sup>95</sup> Second, the code required individuals to keep other lawfully owned firearms "unloaded and disassembled or bound by a trigger lock or similar device" while in the home.<sup>96</sup> Finally, the code prohibited carrying a handgun without a permit issued by the chief of police.<sup>97</sup>

Ultimately, the Court held that the District of Columbia's total ban on handgun possession was invalid because it prevented an individual from using "the most popular weapon chosen by Americans for self-defense in the home,"<sup>98</sup> a place "where the need for defense of self, family, and property is most acute."<sup>99</sup> Likewise, the Court held unconstitutional the code's requirement that other guns be kept disassembled and unloaded in the home, because it "makes it impossible for citizens to use them for the core lawful purpose of self-defense."<sup>100</sup> Despite the District of Columbia's argument that that requirement implicitly excepted use for self-defense, the Court found the statute's language to preclude such an interpretation.<sup>101</sup> The Court did not reach analysis of the licensing requirement, as respondent *Heller* would presumably be eligible to license his handgun if the ban was struck down.<sup>102</sup>

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89. *See id.* at 595.

90. *See id.* at 577–81.

91. *Id.* at 599.

92. *Id.*

93. *Id.* at 592.

94. *See id.* at 598.

95. *Id.* at 574–75 (characterizing the District of Columbia's law as "generally prohibit[ing] the possession of handguns"); *see also* D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).

96. *See Heller*, 554 U.S. at 575 (quoting D.C. CODE § 7-2507.02).

97. *See* D.C. CODE §§ 22-4504(a), -4506.

98. *Heller*, 554 U.S. at 629.

99. *Id.* at 628.

100. *Id.* at 630.

101. *See id.*

102. *See id.* at 630–31.

The Court made clear that the right to keep and bear arms is neither unlimited nor unqualified.<sup>103</sup> Justice Scalia noted the continuing validity of many restrictions and prohibitions on the possession of firearms.<sup>104</sup> In listing certain types of “longstanding prohibitions,” Justice Scalia made clear that the Court was only providing examples of lawful regulatory measures rather than a comprehensive list.<sup>105</sup> The Court interpreted its 1939 holding in *United States v. Miller* to be consistent with its *Heller* holding, insofar as the *Miller* decision upheld a lawful limitation on the right to keep and bear arms not “in common use at the time.”<sup>106</sup> Justice Scalia found that limitation to be “fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.”<sup>107</sup>

In *McDonald v. City of Chicago*, the Court held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment’s protections against action by states and municipalities.<sup>108</sup> Relying in large part on its exploration of the history of the right to keep and bear arms in *Heller* two years earlier, the Court found that the right was so fundamental as to warrant incorporation by the Due Process Clause.<sup>109</sup>

Until the Court’s decision in *McDonald*, the majority of lower courts had held the Second Amendment’s protections inapplicable to the states.<sup>110</sup>

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103. *See id.* at 626–27.

104. *See id.* (“[N]othing in [the Court’s] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

105. *See id.* at 627 & n.26.

106. *See id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). For a critique of the potential application of the “common use standard” by post-*Heller* courts, see Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263 (2010) [hereinafter Johnson, *Administering*] and Nicholas J. Johnson, *The Second Amendment in the States and the Limits of the Common Use Standard*, (Fordham Law Legal Studies, Research Paper No. 1722955, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1722955](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722955) [hereinafter Johnson, *Common Use*].

107. *Heller*, 554 U.S. at 627 (internal quotation marks omitted); *see also* DOHERTY, *supra* note 25, at 109 (“The *Miller* precedent was about the type of weapon, not the people to whom the right accrued.”).

108. *See McDonald v. City of Chi.*, 130 S. Ct. 3020, 3050 (2010).

109. *See id.* at 3042 (“[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

110. *See, e.g.*, *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005) (“[T]he Second Amendment’s ‘right to keep and bear arms’ imposes a limitation on only federal, not state, legislative efforts.”), *abrogated by McDonald*, 130 S. Ct. 3020; *Edwards v. City of Goldsboro*, 178 F.3d 231, 252 (4th Cir. 1999) (“[T]he law is settled in our circuit that the Second Amendment does not apply to the States.”), *abrogated by McDonald*, 130 S. Ct. 3020; *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 731 (9th Cir. 1992) (“Until such time as *Cruikshank* and *Presser* are overturned, the Second Amendment limits only federal action, and . . . stays the hand of the National Government only.” (internal quotation marks omitted)), *abrogated by McDonald*, 130 S. Ct. 3020. *But see Nordyke v. King*, 563 F.3d 439, 448, 457 (9th Cir. 2009) (holding that although *Fresno Rifle* held that the Second Amendment was not incorporated to the states through the Privileges and Immunities Clause, “the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments”).

These lower courts relied in part on the precedents of *Presser v. Illinois*<sup>111</sup> and *United States v. Cruikshank*,<sup>112</sup> which held that the Privileges and Immunities Clause of the Fourteenth Amendment did not incorporate the Second Amendment to the states or municipalities.<sup>113</sup> Thus, lower courts did not often have occasion to analyze the scope of Second Amendment protections as applied to state and municipal gun regulations.<sup>114</sup>

### C. Limiting the Right To Keep and Bear Arms

In noting that *Heller* should not be read to invalidate certain “longstanding prohibitions,”<sup>115</sup> Justice Scalia acknowledged the substantial history of state and municipal gun regulations since the eighteenth century. Justice Scalia’s opinion in *Heller* discusses nineteenth century state court cases describing the individual right conferred by the Second Amendment, but in the context of restrictions placed on the exercise of that right or the people to whom the right extends.<sup>116</sup> This section examines characteristics of firearm restrictions today and provides a framework for categorizing and analyzing those restrictions.

#### 1. Categories of Regulatory Choices

To better understand courts’ distinct challenges and treatment of different kinds of regulatory choices, it is helpful to separate these choices into categories to compare lower court decisions across similar regulatory choices. It is important to remember, however, that these categories often overlap. Similarly, courts are not often transparent or explicit in their characterization of the challenged restriction or how that characterization ultimately influences the court’s analysis. Nonetheless, it is valuable to

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111. 116 U.S. 252 (1886).

112. 92 U.S. 542 (1875).

113. See DOHERTY, *supra* note 25, at 14–15.

114. See, e.g., *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (“Since we hold that the second amendment does not apply to the states, we need not consider the scope of its guarantee of the right to bear arms. For the sake of completeness, however, . . . we briefly comment on what we believe to be the scope of the second amendment.”), *abrogated by McDonald*, 130 S. Ct. 3020. Lower courts did, however, have occasion to examine the scope of Second Amendment protections when deciding whether *federal* gun regulations infringed that right. See, e.g., *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (“[The Second Amendment] protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . . that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.”).

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

116. See *id.* at 611–14 (citing *Waters v. State*, 1 Gill 302, 309 (Md. 1843) (discussing free blacks as a “dangerous population” who cannot lawfully bear arms); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840) (holding that the Tennessee state constitutional right to bear arms did not preclude a ban on concealed weapons); *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829) (discussing the right to keep and bear arms as not “granted by the constitution for an unlawful or unjustifiable purpose”); *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824) (holding that certain constitutional rights, including the right to bear arms, did not extend to free blacks).

separate different restrictions because their interactions with the Second Amendment's core protections should lead to different analyses.

Restrictions can be placed in the following general categories: (1) prohibitions based on an individual's characteristics;<sup>117</sup> (2) prohibitions of specific devices; (3) "time, place, and manner"<sup>118</sup> restrictions on possession; and (4) "frictional" regulations that add time, cost, or difficulty to the process of obtaining and keeping a firearm.<sup>119</sup> Lower courts treat regulations in different categories differently, depending in part on the extent to which the "core" of the Second Amendment protections is burdened.<sup>120</sup> Whether the Second Amendment's protections extend outside the home or to purposes beyond self-defense is an open question for most courts,<sup>121</sup> as is the question of the extent to which those protections diminish as they move further from the "core" protections discussed in *Heller*.

*a. "Who" Restrictions*

Governments often restrict who is allowed to purchase, register, and possess a firearm. The *Heller* decision noted the examples of prohibitions on possession of firearms by felons and the mentally ill, cautioning that these restrictions should still be "presumptively lawful."<sup>122</sup> Through membership in a certain group or by exhibiting a certain characteristic, an individual can be seen either as forfeiting the right or never accruing the right in the first place.

Sitting en banc, the Seventh Circuit upheld a federal law making it a crime for individuals convicted of domestic violence misdemeanors to carry

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117. See, e.g., *United States v. Skoien*, 614 F.3d 638, 639–45 (7th Cir. 2010) (en banc) (explaining that "some categorical limits are proper," and upholding a federal statute prohibiting those convicted of domestic violence misdemeanors from carrying firearms).

118. Jeff Golimowski, Note, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post-Heller World*, 49 AM. CRIM. L. REV. 1599, 1616–18 (2012).

119. See Johnson, *Administering*, *supra* note 106, at 1273.

120. See *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011) ("[A]ny law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."). *But see Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) ("A blanket prohibition on carrying gun[s] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment . . .").

121. See *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("What we know from [*Heller* and *McDonald*] is that the Second Amendment guarantees are at their zenith within the home. What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government." (citation omitted)), *cert. denied*, 133 S. Ct. 1806 (2013). *But see Moore*, 702 F.3d at 942 ("The Supreme Court has decided that the [Second A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside.").

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

arms.<sup>123</sup> In doing so, the court discussed “categorical limits on the possession of firearms” and interpreted *Heller* to support some such limits generally, especially in the context of “persons who have been shown to be untrustworthy with weapons.”<sup>124</sup> Another common example of “who” restrictions are state licensing schemes that exclude nonresidents from the licensing process.<sup>125</sup>

*b. Device Restrictions*

Device restrictions seek to prohibit the possession or ownership of certain firearms, ammunition, or parts of firearms based on different characteristics.<sup>126</sup> This category is exemplified by assault weapons bans in many states that outlaw certain types of firearms based on shared characteristics.<sup>127</sup> One common criticism of device bans is that they tend to prohibit firearms with certain characteristics unrelated to their actual or potential dangerousness.<sup>128</sup>

*c. Time, Place, and Manner Restrictions*

Time, place, and manner restrictions place limits on the possession or use of firearms in certain locations and during certain situations. This category is drawn from the Court’s First Amendment jurisprudence<sup>129</sup> and is often

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123. See *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc); see also 18 U.S.C. § 922(g)(9) (“It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess any firearm or ammunition.”).

124. *Skoien*, 614 F.3d at 641. The *Skoien* court went on to say that “*Heller* did not suggest that disqualifications would be effective only if the statute’s benefits are first established by admissible evidence.” *Id.* Instead, categorical limits on certain classes of people could be upheld under *Heller* as substantially related to the government’s objective in preventing public harm. See *id.* at 641–42.

125. See, e.g., COLO. REV. STAT. § 18-12-203(1)(a) (2013) (stating that permits for concealed carry of handguns are only available for legal Colorado residents); N.Y. PENAL LAW § 400.00(3)(a) (McKinney 2014) (excluding nonresidents without in-state employment from application process).

126. See generally Johnson, *Common Use*, *supra* note 106, at 5 (discussing problems with applying *Heller*’s “common use” standard to “functionally common” subcategories of firearm characteristics of ballistics, ammunition feeding, dimensions, and ammunition type).

127. See, e.g., *People v. Zondorak*, 163 Cal. Rptr. 3d 491, 493 (Ct. App. 2013) (rejecting a challenge to California’s Assault Weapons Control Act, codified at CAL. PENAL CODE § 30605 (2011)).

128. See Johnson, *Administering*, *supra* note 106, at 1266–67.

129. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

referred to explicitly by lower courts when deciding Second Amendment challenges.<sup>130</sup>

In *Doe v. Wilmington Housing Authority*, the district court upheld a challenge to a restriction on possession of firearms in common areas of certain public housing complexes.<sup>131</sup> There, the regulation at issue prohibited displaying or carrying a firearm in common areas, but provided an exception for the transport of a firearm to or from a resident's unit.<sup>132</sup>

#### d. Frictional Restrictions

"Frictional" restrictions add time, cost, or difficulty to the process of obtaining and keeping a firearm.<sup>133</sup> This category commonly includes mandatory waiting-periods,<sup>134</sup> licensing and application schemes,<sup>135</sup> and fees for registration or licensing.<sup>136</sup> In *Kwong v. Bloomberg*, for example,

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130. See, e.g., *United States v. Decastro*, 682 F.3d 160, 165 (2d Cir. 2012) (explaining that although the Supreme Court did not provide reasoning for why certain longstanding restrictions were permissible, "the natural explanation is that time, place and manner restrictions may not significantly impair the right to possess a firearm for self-defense, and may impose no appreciable burden on Second Amendment rights"), *cert. denied*, 133 S. Ct. 838 (2013); *Pineiro v. Gemme*, 937 F. Supp. 2d 161, 174 (D. Mass. 2013) (analogizing a Massachusetts state licensing decision that restricted an individual's permit for sport and hunting uses to a time, place, and manner restriction for permits for public gathering in the First Amendment context). *But see* *Teixeira v. Cnty. of Alameda*, No. 12-cv-03288-WHO, 2013 U.S. Dist. LEXIS 128435, at \*25–26 (N.D. Cal. Sept. 9, 2013) (declining to apply First Amendment concepts such as time, place, and manner jurisprudence in the context of a gun store that "does not have the expressive characteristics that allow for this sort of content-based analysis").

131. See *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513, 535–37 (D. Del. 2012), *appeal docketed*, No. 12-3433 (3d Cir. Aug. 27, 2012). This case is currently on appeal to the Third Circuit. Before deciding the appeal, the Third Circuit certified a question to the Delaware Supreme Court regarding the proper scope of the Delaware Constitution's protections of the right to keep and bear arms. See *Order Requesting Certification of State Law to Supreme Court, Wilmington Hous. Auth.*, No. 12-3433 (3d Cir. July 18, 2013). Just recently, the Delaware Supreme Court held that the Delaware Constitution offers broader protections than the Second Amendment and that the restriction on possession in common areas could not survive intermediate scrutiny. *Doe v. Wilmington Hous. Auth.*, No. 403, 2014 Del. LEXIS 122, at \*22–24, \*29–33 (Mar. 18, 2014). The Delaware Supreme Court explained that "the scope of the protections [the Delaware Constitution] provides are not limited to the home" and that the restriction at issue "severely burdens the right by functionally disallowing armed self-defense in areas that [r]esidents, their families, and guests may occupy as part of their living space." *Id.* at \*22, \*33.

132. See *Wilmington Hous. Auth.*, 880 F. Supp. 2d at 519–20.

133. See *Johnson, Administering*, *supra* note 106, at 1273.

134. See, e.g., *Silvester v. Harris*, No. 1:11-CV-2137, 2013 U.S. Dist. LEXIS 172946, at \*5–10 (E.D. Cal. Dec. 9, 2013) (denying the defendant California's motion for summary judgment, because a California law that imposed at least a ten-day waiting period between purchase and delivery of a firearm would pass rational basis review but was not likely to pass intermediate scrutiny).

135. See, e.g., N.Y. PENAL LAW § 400.00(1), (3)(a) (McKinney 2014) (requiring an applicant for a license to carry a pistol or revolver to demonstrate, among other things, residency, citizenship, and good moral character). In addition, § 400.00(4) provides that an applicant must undergo an investigation by the local police authorities of the accuracy of his application. All of these requirements add time and cost to the process of applying for a firearm license.

136. See, e.g., *Kwong v. Bloomberg*, 723 F.3d 160, 161 (2d Cir. 2013).

the Second Circuit upheld a New York City law, which required residents to pay a \$340 licensing fee for a three-year license to possess a handgun.<sup>137</sup> Frictional restrictions may be analyzed similarly to time, place, and manner restrictions, but they can be differentiated because they typically add time or cost to possession regardless of location or manner of use.<sup>138</sup>

## 2. Categories of Justifications for Restrictions

This section will discuss four categories of justifications for restrictions. Eugene Volokh argues that courts should separate challenged restrictions into categories based on the government's justification for such a restriction, rather than applying one level of scrutiny indiscriminately.<sup>139</sup> State and local governments' justifications for firearms restrictions generally fall into one or more of four categories: (1) the restricted conduct is not within the *scope* of the Second Amendment's protections; (2) the restriction does not *burden* the right to keep and bear arms enough to rise to the level of infringement; (3) even if the restriction imposes a significant burden on the exercise of that right, it is justified by a significant *reduction in harm* to the public; and (4) the government is acting in its *proprietary* capacity as a landlord or employer, rather than as a sovereign, and its authority is greater to regulate conduct.<sup>140</sup> These categories are analytically useful because it is inappropriate, for example, to apply the same level of exacting scrutiny to a restriction that only slightly burdens the right as to a restriction that severely burdens that right.<sup>141</sup> In addition, these categories help to analogize between restrictions across different cases.<sup>142</sup>

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137. *Id.* New York sets a \$3 to \$10 range for such a fee elsewhere in the state, but allows New York City and Nassau County to set their own fees outside of this range. N.Y. PENAL LAW § 400.00(14). The Second Circuit upheld this provision against an Equal Protection challenge as well. *See Kwong*, 723 F.3d at 169–72.

138. *But see* United States v. Gonzalez, 2011 U.S. Dist. LEXIS 127121, at \*23 (D. Utah Nov. 2, 2011) (describing a \$200 tax on firearm registration as a time, place, and manner restriction that did not impose a significant burden on the exercise of Second Amendment rights).

139. Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1446 (2009).

140. *Id.* at 1446–47.

141. *See id.* at 1447.

142. *See id.* A prohibition on possession by minors could be justified by a scope argument, as constitutional rights have historically been limited when extended to minors. A prohibition on possession by eighteen- to twenty-year-olds, however, *would* fall within the scope of the right, but could be justified because restricting that population's ownership would reduce public harm. Thus, even though both of these prohibitions are age-based restrictions on who can own firearms, their justifications are very different and it may not be helpful to analogize between the two. If, however, the ban on possession by minors is also justified by its reduction of public harm, then its argument would be more broadly applicable. *See id.* at 1447, 1512.

*a. Scope*

A restriction may be justified because it restricts behavior or individuals that are not covered by the protected right as understood by “the constitutional text, the original meaning, or our understanding of background constitutional norms.”<sup>143</sup> The scope of the Second Amendment right is, of course, contested,<sup>144</sup> but some arguments are easier to make than others. “Who” restrictions, for example, are often justified because they restrict individuals to whom the constitutional right is not commonly thought to extend,<sup>145</sup> or individuals who are seen to have forfeited the right.<sup>146</sup>

*b. Burden*

According to Volokh, the majority opinion in *Heller* can be seen as invalidating the District of Columbia’s ban because it was an impermissibly harsh burden on the exercise of the core Second Amendment right.<sup>147</sup> Because Americans overwhelmingly choose handguns as their weapon for self-defense, a total ban on handguns is an unconstitutional burden on the right to keep and bear arms for self-defense in the home, even if the possession of other firearms remains legal.<sup>148</sup>

For example, the Second Circuit analyzed a challenge to a licensing fee in terms of the burden it imposed on an individual’s exercise of the Second Amendment right.<sup>149</sup> Because the court found that the licensing fee did not impose a substantial burden as applied to the plaintiffs, it applied intermediate scrutiny to decide whether the burden imposed was constitutional.<sup>150</sup>

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143. *Id.* at 1449.

144. *See supra* Part I.A.

145. *See* Volokh, *supra* note 139, at 1453 (discussing, for example, minors who have limited constitutional rights to sexual autonomy, the right to marry, or the right to abortion).

146. *See* Golimowski, *supra* note 118, at 1615–16 (discussing how felons are subject to forfeiture of certain constitutional rights, including even the right to vote); *see also* Volokh, *supra* note 139, at 1452 (discussing prisoners, for example, who forfeit many constitutional rights including many First and Fourth Amendment rights).

147. *See* Volokh, *supra* note 139, at 1456–57.

148. *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (“[B]anning from the home the most preferred firearm in the nation to keep and use for protection of one’s home and family . . . fail[s] constitutional muster.” (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007))).

149. *See* Kwong v. Bloomberg, 723 F.3d 160, 167–69 (2d Cir. 2013).

150. *See id.* at 167–68 (“[H]eighted scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes) . . . . [T]he fact that the licensing regime [in this case] makes the exercise of one’s Second Amendment rights more expensive does not necessarily mean that it ‘substantially burdens’ that right.” (quoting United States v. Decastro, 682 F.3d 160, 166 (2d Cir. 2012))).

*c. Danger Reduction*

Even when the restriction at issue falls within the scope of the Second Amendment's protections, governments can justify a burden on the right to keep and bear arms by showing that it is aimed at reducing some public harm.<sup>151</sup> In this category, courts often use traditional levels of scrutiny to evaluate whether the restriction properly serves the goal of reducing some danger to the public.<sup>152</sup> In *Osterweil v. Bartlett*,<sup>153</sup> for example, the court applied intermediate scrutiny to a New York licensing scheme that excluded nonresidents.<sup>154</sup> In doing so, the court noted that New York state could better ensure the public safety of its citizens "[b]y limiting handgun licenses to those people who have the greatest contacts with New York."<sup>155</sup>

*d. Government As Proprietor*

Some restrictions may be justified because the government is acting in a different role, not as a sovereign but as a proprietor.<sup>156</sup> Rather than using its sovereign power to regulate private conduct, the government may act as a landowner or an employer, for example.<sup>157</sup> This distinction is more fully developed in other contexts,<sup>158</sup> but it may still prove useful in the context of firearm regulations. Volokh points out that this distinction often makes sense to "give the government more power when it comes to accomplishing its democratically determined goals on its property and with its wage payments, and to keep this power from bleeding over to controls of private citizens' behavior on private property."<sup>159</sup> Volokh goes on to argue, however, that some government property, such as parks or public housing, might not warrant increased deference to government-as-proprietor restrictions.<sup>160</sup>

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151. See Volokh, *supra* note 139, at 1461 ("The real inquiry is into whether and when a right may be substantially burdened in order to materially reduce the danger flowing from the exercise of the right, and into what sort of proof must be given to show that the substantial restriction will indeed reduce the danger.")

152. See *id.* ("Courts sometimes . . . say[] that a constitutional right may be restricted when the restriction is necessary to serve a compelling government interest, or is substantially related to an important government interest.")

153. 819 F. Supp. 2d 72 (N.D.N.Y. 2011).

154. See *id.* at 84–86.

155. See *id.* at 85 ("[T]he law allows the government to monitor its licensees more closely and better ensure the public safety."). But see Volokh, *supra* note 139, at 1514–15 (arguing that the distinction between citizens and aliens is better understood as a scope justification, since it stems from an interpretation of "the people" as including noncitizens).

156. See Volokh, *supra* note 139, at 1473.

157. See *id.*

158. See *id.* at 1473–74 (discussing examples where the government can more significantly regulate the private behavior of its employees, tenants, or people entering government-owned land, especially in the First Amendment context).

159. See *id.* at 1474.

160. See *id.* at 1475.

II. A ROCKY ROAD AFTER *HELLER*

This Part explores recent case law deciding challenges to firearm restrictions. It describes several loose frameworks of analysis applied by courts in the wake of *Heller* and *McDonald* and offers an overview of the kinds of restrictions that have been upheld. It then summarizes several competing and sometimes contradictory accounts of the post-*Heller* regulatory landscape.

A. *What Has Happened Since Heller in the Lower Courts?*

This section provides an overview of the lower court cases that have heard challenges to state and local gun regulations since *McDonald* made *Heller* applicable to the states. Since *Heller* and *McDonald*, many courts have struggled to apply the holding in *Heller* to firearms regulations that might not rise to the level of the total ban seen in the District of Columbia and in Chicago.<sup>161</sup> Beyond the narrow scope of *Heller*'s holding, lower courts and regulators encounter a *terra incognita* as to how far the Second Amendment's protections extend beyond the home and beyond the self-defense context and as to what burdens will be upheld as constitutional exercises of government power.<sup>162</sup> In the past several years, there has been a flood of literature concerning these questions.<sup>163</sup> Some of the literature and lower court decisions have incorporated aspects of First Amendment jurisprudence into their analysis.<sup>164</sup>

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161. See, e.g., *Osterweil v. Bartlett*, 819 F. Supp. 2d 72, 81–82 (N.D.N.Y. 2011) (“The Supreme Court . . . identified a non-exclusive, illustrative list of constitutionally permissible restrictions on the Second Amendment, but declined to clarify the class of appropriate restrictions other than ‘longstanding prohibitions’ on the right to keep and bear arms. This uncertainty has led to a deluge of litigation concerning the intersection of the individual right to keep and bear arms as defined by *Heller* and various firearms restrictions.”). But see *Ezell v. City of Chi.*, 651 F.3d 684, 700 (7th Cir. 2011) (noting that although *Heller* did not answer every question, courts are not “without a framework for how to proceed”).

162. See *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (discussing the “dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed core holding” and concluding that “[t]he whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree”).

163. See, e.g., Michael C. Dorf, *Does Heller Protect a Right To Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008); Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 18 (2013); Andrew R. Gould, Note, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535 (2009); Michael J. Habib, Note, *The Future of Gun Control Laws Post-McDonald and Heller and the Death of One-Gun-Per-Month Legislation*, 44 CONN. L. REV. 1339 (2012).

164. See *United States v. Marzarella*, 614 F.3d 85, 96–97 (3d Cir. 2010) (“[T]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different.” (citation omitted)); *Justice v. Town of Cicero*, 827 F. Supp. 2d 835, 842–43 (N.D. Ill. 2011) (discussing the Supreme Court's First Amendment fee jurisprudence in upholding a firearms registration fee, because the fee was designed to defray costs), *aff'd*, 468 F. App'x 642 (7th Cir. 2012); see also Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller's “Schools” and “Government Buildings,”* 92 NEB. L. REV. (forthcoming 2014).

### 1. Two-Pronged Approach or One-Pronged Approach?

Analyzing challenges to firearms restrictions, many lower courts have adopted a two-pronged approach.<sup>165</sup> First, a court will “ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”<sup>166</sup> Second, if the law does impose a burden within the scope of the right, the court will apply some level of means-ends scrutiny.<sup>167</sup>

Most courts agree that the appropriate degree of scrutiny should depend “on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”<sup>168</sup> Restrictions that burden the core of the Second Amendment right as described in *Heller* receive strict scrutiny, while restrictions that do not impinge on the core but nonetheless burden the right receive more lenient scrutiny.<sup>169</sup> The first prong of the approach looks most like an inquiry into whether the restriction falls within the scope of the Second Amendment right.<sup>170</sup> Although courts may use language that suggests a burden inquiry,<sup>171</sup> the first prong asks whether the restriction “regulates conduct that falls within the scope of the Second Amendment.”<sup>172</sup> Courts have struggled with this first inquiry, as it requires them to formulate some boundaries of the right deliberately left unclear in *Heller*.<sup>173</sup> Different courts have emphasized different approaches to navigating this as yet uncharted territory.<sup>174</sup>

In formulating the two-pronged approach, the court in *United States v. Marzzarella* read *Heller*’s list of restrictions to be “presumptively lawful” because they fell outside the scope of the Second Amendment guarantee.<sup>175</sup> In *Marzzarella*, the court upheld a federal prohibition on firearms with

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165. See, e.g., *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 197 (5th Cir. 2012) (adopting the two-step inquiry because it “comports with the language of *Heller*”), *cert. denied*, No. 13-137, 2014 U.S. LEXIS 1558 (Feb. 24, 2014).

166. *Marzzarella*, 614 F.3d at 89.

167. See *id.*

168. *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); accord *Nat’l Rifle Ass’n*, 700 F.3d at 195.

169. See, e.g., *Nat’l Rifle Ass’n*, 700 F.3d at 195.

170. See *supra* Part I.C.2.a.

171. See, e.g., *Powell v. Tompkins*, 926 F. Supp. 2d 367, 387 (D. Mass. 2013).

172. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

173. See, e.g., *id.* at 92 (“*Heller* did not purport to fully define all the contours of the Second Amendment, and accordingly, much of the scope of the right remains unsettled. While the Second Amendment clearly protects possession for certain lawful purposes, it is not the case that all possession for these purposes is protected conduct.” (citation omitted)).

174. See *Nat’l Rifle Ass’n*, 700 F.3d at 194 (“To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee.”). But see *United States v. Skoien*, 614 F.3d 638, 650 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (“The better approach is to acknowledge the limits of the scope inquiry in a more straightforward way: The historical evidence is inconclusive at best.”).

175. See *Marzzarella*, 614 F.3d at 91 (discussing an alternative reading of the *Heller* list as suggesting that those restrictions were presumptively lawful because they would satisfy some sort of means-ends scrutiny, but ultimately finding the scope reading a better one).

obliterated serial numbers.<sup>176</sup> Applying the first prong, the court inquired as to whether the restriction regulated conduct protected by the Second Amendment. In so doing, the court read *Heller*'s list of presumptively lawful regulations "to leave intact additional classes of restrictions."<sup>177</sup> The court reasoned that although *Heller* listed historical prohibitions, "it is not clear that pre-ratification presence is the only avenue to a categorical exception."<sup>178</sup> The court found unconvincing the argument that firearms without serial numbers were a categorically protected type of weapon because serial numbers were not contemplated during the Founding era.<sup>179</sup> The court acknowledged, however, that although firearms without serial numbers do not receive categorical protection, the restriction at issue might still place a burden on the core of the Second Amendment right—the right to self-defense in the home.<sup>180</sup>

The *Marzzarella* court was ultimately reluctant to decide whether the restriction fell within the scope of the Second Amendment and found that because it passed intermediate or strict scrutiny, it was nonetheless constitutional.<sup>181</sup> Analogizing to the First Amendment context, the court explained that enumerated rights are subject to different levels of scrutiny depending on the type of restriction and the type of conduct being burdened.<sup>182</sup> The court proceeded to apply intermediate scrutiny,<sup>183</sup> concluding that the restriction at issue was far less restrictive than the handgun ban struck down in *Heller* and only sought to regulate "the manner in which persons may lawfully exercise their Second Amendment rights."<sup>184</sup> Applying intermediate scrutiny to the prohibition on firearms without original serial numbers, the court first found that the government's asserted interest in assisting law enforcement in tracking weapons used in crimes to be a substantial or important interest.<sup>185</sup> Next, the court found a

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176. *See id.* at 101.

177. *Id.* at 92–93.

178. *Id.* at 93.

179. *Id.* at 93–94 ("It would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms.").

180. *Id.* at 94.

181. *See id.* at 95.

182. *See id.* at 96–97 ("[T]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different." (citation omitted)).

183. The *Marzzarella* court described intermediate scrutiny as requiring that the asserted governmental interest be "either significant, substantial, or important," and "the fit between the challenged regulation and the asserted objective be reasonable, not perfect." *Id.* at 98 (internal quotation marks omitted). Strict scrutiny, on the other hand, requires an asserted government interest that is "compelling" and a restriction that is "narrowly tailored" to achieve that compelling interest. *Id.* at 99. "Narrow tailoring requires that the regulation actually advance the compelling interest it is designed to serve. The law must be the least-restrictive method of serving that interest, and the burdening of a significant amount of protected conduct not implicating the interest is evidence the regulation is insufficiently tailored." *Id.* at 100 (citation omitted).

184. *Id.* at 97.

185. *See id.* at 98.

close fit between the restriction and the asserted interest because the statute *only* restricted possession of unmarked firearms.<sup>186</sup>

Other courts have similarly declined to answer the first prong's question of whether the burdened conduct falls within the scope of the Second Amendment's guarantee. In *United States v. Decastro*, the Second Circuit bypassed this inquiry altogether and held that heightened scrutiny is only appropriate for restrictions that substantially burden the exercise of the Second Amendment right.<sup>187</sup> Because *Heller* emphasized just how burdensome the District of Columbia's restrictions were throughout the decision, the Second Circuit reasoned that it is the degree of burden that should trigger the different levels of scrutiny.<sup>188</sup> Under this rationale, the Second Circuit held that *Heller* does not "mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny."<sup>189</sup> Instead, only those restrictions that place a substantial burden on that right should receive heightened scrutiny.<sup>190</sup> The Second Circuit in *Decastro* found general support for this approach in several cases that applied the two-pronged approach more formally.<sup>191</sup>

## 2. Which Restrictions Have Survived Judicial Scrutiny?

Many challenges to firearm restrictions have argued that the *Heller* decision offers protections for "the sorts of weapons protected . . . 'in common use at the time.'"<sup>192</sup> In deciding whether this phrase offers categorical protection to some firearms, courts have taken several different approaches. In *United States v. Chester*, for example, the Fourth Circuit interpreted this phrase to support a broader proposition that the scope of the Second Amendment was limited by its historical understandings.<sup>193</sup> A district court similarly read the common use passage to support the general proposition that the Second Amendment does not protect possession in

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186. *See id.* at 99. The court went on to explain that though it chose to apply intermediate scrutiny, the restriction at issue would pass strict scrutiny as well. *See id.* The court found that the government's interest in tracing firearm serial numbers was compelling because it helped law enforcement to prevent crime and collect "vital criminology statistics." *Id.* at 99–100. The court also found that the restriction was narrowly tailored to achieve that end, as it "restricts possession only of weapons which have been made less susceptible to tracing." *Id.* at 100–01.

187. *See United States v. Decastro*, 682 F.3d 160, 164–65 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013).

188. *See id.* at 165–68.

189. *Id.* at 166.

190. *See id.*

191. *See id.* (citing *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 94–95 (3d Cir. 2010)). *But see Silvester v. Harris*, No. 1:11-CV-2137, 2013 U.S. Dist. LEXIS 172946, at \*6, \*13–14 (E.D. Cal. Dec. 6, 2013) (distinguishing the Second Circuit's "substantial burden test" from the two-pronged approach, which the Ninth Circuit and a majority of other circuits had adopted).

192. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

193. *See United States v. Chester*, 628 F.3d 673, 676, 678–79 (4th Cir. 2010).

certain places, by certain people, or of certain weapons.<sup>194</sup> In *Marzzarella*, the Third Circuit found unconvincing an argument that because firearms without serial numbers were “of the kind in common use” in 1791, they should be protected by the Second Amendment guarantee.<sup>195</sup> The court did point out, however, that any categorical protections that firearms might enjoy under a concept of “common use” would be based on their functional characteristics.<sup>196</sup> Even where a court indicated that the weapons at issue might be in common use, it upheld the restrictions because they would pass intermediate scrutiny even if within the Second Amendment’s scope.<sup>197</sup>

Some courts have used the “common use” language to hold certain unusual and dangerous weapons outside the scope of the Second Amendment’s protections. The Eighth Circuit, for example, took a more literal approach in holding that the Second Amendment did not protect possession of a machine gun.<sup>198</sup> There, the court reasoned that because machine guns are not commonly used by law-abiding citizens for lawful purposes, they fall outside the scope of the Second Amendment guarantee.<sup>199</sup>

Lower courts have upheld state licensing schemes that tend to place a certain amount of discretion in the hands of the local law enforcement and judiciary. In New Jersey, for example, a person must generally have a permit in order to carry a handgun in public.<sup>200</sup> In order to acquire a permit, a person must demonstrate to local law enforcement that he or she (1) is not subject to any disqualifications such as mental illness or criminal

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194. See *Richardson v. United States*, No. 3:08-1146, 2009 U.S. Dist. LEXIS 25644, at \*6-7 (M.D. Tenn. Mar. 27, 2009) (“Thus, the *Heller* Court made clear that the Second Amendment right it recognized does not include possession of certain types of weapons, possession of weapons in certain places, or possession of weapons by certain categories of individuals, such as convicted felons.”).

195. *Marzzarella*, 614 F.3d at 93 (quoting *Heller*, 554 U.S. at 624).

196. See *id.* at 94 (“[I]t also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. *Heller* distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality.”).

197. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use,’ . . . . Nevertheless . . . we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms.”).

198. See *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008).

199. *Id.*; accord *United States v. McCartney*, 357 F. App’x 73, 76 (9th Cir. 2009) (holding that the Second Amendment does not protect the possession of machine guns, silencers, grenades, or directional mines because they are not in common use and are dangerous and unusual); *United States v. Tagg*, 572 F.3d 1320, 1326-27 (11th Cir. 2009) (holding that pipe bombs are not protected under the Second Amendment because they are not in common use); *United States v. Perkins*, No. 4:08CR 3064, 2008 U.S. Dist. LEXIS 72892, at \*9-10 (D. Neb. Sept. 12, 2008) (holding that silencers or suppressors were similarly unprotected by the Second Amendment because they are not in common use by law-abiding citizens for lawful purposes).

200. N.J. STAT. ANN. § 2C:39-5(b) (West 2013).

history, (2) is familiar with safe handling of firearms, and (3) can demonstrate a “justifiable need” to carry a handgun in public.<sup>201</sup> “Justifiable need” is defined as “the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant’s life that cannot be avoided by means other than by issuance of a permit to carry a handgun.”<sup>202</sup>

In *Drake v. Filko*, the Third Circuit applied the two-pronged approach from *Marzzarella* to uphold the “justifiable need” requirement of the licensing scheme.<sup>203</sup> The *Drake* court found that the justifiable need requirement fell outside the scope of the Second Amendment, because it is a “presumptively lawful” and “longstanding” restriction on firearm possession.<sup>204</sup> Building on *Marzzarella*’s analysis, the *Drake* court reasoned first that New Jersey had required some sort of showing of need for a handgun license beginning in 1924.<sup>205</sup> On a more general level, the court referred to *Heller*’s exceptions for longstanding regulations of concealed carry throughout the country’s history.<sup>206</sup>

Though the court found it unnecessary to apply any level of means-ends scrutiny, it concluded that even if the justifiable need requirement fell within the scope of the Second Amendment, it would satisfy intermediate scrutiny.<sup>207</sup> In *Kachalsky v. County of Westchester*, the Second Circuit upheld a similar permitting scheme, where permits were issued only when an applicant can demonstrate (among other things) “proper cause.”<sup>208</sup>

Lower courts have also consistently upheld age restrictions on the possession of firearms. In *Powell v. Tompkins*, the court upheld a Massachusetts state licensing scheme that made it a crime to carry a firearm without a license and only issued licenses to persons over the age of twenty-one.<sup>209</sup> There, the court established that classification-based restrictions on firearms possession have enjoyed a long history, even predating the Founding era.<sup>210</sup> The court found that age-based restrictions like the Massachusetts one at issue fell within that history.<sup>211</sup> Applying the two-pronged approach, the court thus held that the prohibition on possession by eighteen to twenty-one-year-olds imposed no burden within the scope of the Second Amendment’s protections.<sup>212</sup>

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201. *Id.* § 2C:58-4(c).

202. N.J. ADMIN. CODE 13:54-2.4(d)(1) (2014).

203. *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013).

204. *Id.*

205. *See id.* at 432.

206. *See id.* at 432–33.

207. *See id.* at 430.

208. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 83–84 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

209. *Powell v. Tompkins*, 926 F. Supp. 2d 367, 387–88 (D. Mass. 2013).

210. *See id.* at 387.

211. *See id.* (“The facts evinced from this quick jaunt through history establish that certain access-limiting conditions were and may lawfully be imposed upon individuals seeking to own and use firearms. Age-based restrictions, enacted for reasons of public safety, are among those lawful impositions.”).

212. *See id.*

The Fifth Circuit came to a similar conclusion in *National Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*.<sup>213</sup> There, the court found that a federal restriction on access to and purchase of certain firearms by persons under the age of twenty-one most likely fell outside the scope of the Second Amendment guarantee, but even if it did not, it should be upheld under step two of the inquiry.<sup>214</sup> Before proceeding to step two, however, the court analyzed Founding-era attitudes, concluding that minors (under the age of twenty-one) were understood to be excluded from the protections of the right to keep and bear arms, so the public would have supported a restriction on that population's possession and access to firearms.<sup>215</sup> The court proceeded to analyze nineteenth-century court decisions, legislative records, and commentators, again concluding that restricting access of persons under the age of twenty-one comports with a "longstanding, historical tradition."<sup>216</sup> According to the court, this longstanding tradition suggests that its proscriptions regulate conduct outside of the scope of the Second Amendment's protections.<sup>217</sup>

### B. Competing Accounts of the Post-Heller Landscape

This section explores competing accounts of post-*Heller* decisions. Many see *Heller* as an opportunity for courts to better define the Second Amendment right and the framework of scrutiny to apply to challenges.<sup>218</sup> Other commentators, however, argue that *Heller* has actually opened the door for lower courts to enter into the gun control debate, which had been populated largely by academics and special interest groups. Now that lower courts have a platform from which to analyze firearms regulations, deference to state and local legislative bodies may actually *increase*.

#### 1. Judicial Restraint, Intermediate Scrutiny, and Deference

Allen Rostron argues that Justice Stephen Breyer's suggested approach in his *Heller* dissent is actually a better description of how lower courts have treated challenges to gun regulations since that decision.<sup>219</sup> While courts have had little trouble applying some parts of Justice Scalia's majority opinion, other instructions have proved more difficult, leaving lower courts to proceed in a Breyer-like fashion. First, Rostron points out that lower courts have consistently applied the majority's instructions that the right to

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213. 700 F.3d 185, 204 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364 (2014).

214. *See id.*

215. *See id.* at 202.

216. *Id.* at 203. The court explained that the restriction at issue was consistent with that tradition both at a high level of generality, "targeting select groups' ability to access and to use arms for the sake of public safety," and more specifically with a history of "age- and safety-based restrictions." *Id.*

217. *See id.*

218. *See Reynolds & Denning, supra* note 14, at 2043 ("Subsequent litigation offers an opportunity . . . to educate lower courts about the choices they have and to offer the guidance the Court declined to provide about crafting rules that implement the guarantee *Heller* recognized.").

219. *See generally* Rostron, *supra* note 7.

keep and bear arms only protects those who use them for legitimate, lawful purposes.<sup>220</sup> Second, Rostron argues that lower courts have also had little trouble applying the majority's instructions that the Second Amendment only protects those firearms in "common use" to restrictions on certain types of firearms.<sup>221</sup>

Lower courts have run into more difficulty, however, in applying the majority's identification of several examples of "presumptively lawful regulatory measures."<sup>222</sup> Rostron explains that immediately after *Heller*, many challenges were brought to the federal ban on firearm possession for felons and were upheld because that prohibition was included in Justice Scalia's "list" of presumptively lawful restrictions.<sup>223</sup> In 2009, however, a Tenth Circuit judge pointed out that prohibiting felons from possessing firearms might originate in the twentieth century, and therefore not be so clearly "longstanding."<sup>224</sup> After this discussion, lower courts began to inquire more deeply into the historical tradition of felon-in-possession restrictions and into the specific characteristics of the felon seeking to possess a firearm.<sup>225</sup> Rostron contends that because such historical inquiries inevitably produce unclear results, "courts ultimately decide what to do . . . based on assessments about sound public policy for modern-day America."<sup>226</sup>

Analyzing the Fourth Circuit's decision in *United States v. Masciandaro*, for example, Rostron finds that the court discussed extensively the presumptively lawful regulations discussed in *Heller* and how that decision should apply to the restriction possessing firearms in cars on national park property.<sup>227</sup> Nonetheless, Rostron argues, the court ultimately upheld the conviction because "the government had sound reasons for regulating guns in 'a national park area where large numbers of people, including children,

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220. *See id.* Rostron discusses how courts have consistently upheld statutes "prohibiting the use of firearms in furtherance of violent crimes or drug trafficking offenses" and sentencing enhancements for crimes committed with guns. *See id.* at 726. These decisions are based in large part, Rostron argues, on the Court's instruction that "the Second Amendment does not protect those weapons not typically possessed by *law-abiding citizens for lawful purposes.*" *See id.* at 711 (emphasis added) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008)) (internal quotation marks omitted).

221. *See id.* at 726–29. Justice Scalia discussed "another important limitation on the right to keep and carry arms," namely that the right only protects those firearms "in common use at the time." *Heller*, 554 U.S. at 627 (citation omitted). Rostron argues that lower courts have followed these instructions by upholding restrictions on machine guns and short-barreled shotguns, for example, though the courts often give little discussion as to what constitutes a firearm "in common use." *See* Rostron, *supra* note 7, at 726–27.

222. *Heller*, 554 U.S. at 626–27 n.26.

223. *See* Rostron, *supra* note 7, at 729. Although these decisions deal with a federal statute, the shift in analysis and treatment that Rostron identifies exists in the context of challenged state and municipal restrictions as well.

224. *See id.* (discussing *United States v. McCane*, 573 F.3d 1037, 1047–48 (10th Cir. 2009) (Tymkovich, J., concurring)).

225. *See id.* at 731–32.

226. *Id.* at 732. Rostron notes that each challenge to the felon-in-possession statute has failed. *See id.* at 733.

227. *See id.* at 735–36 (discussing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011)).

congregate for recreation.”<sup>228</sup> The approach in *Masciandaro*, Rostron argues, is repeated across other jurisdictions and is indicative of the approach of most courts after *Heller*.<sup>229</sup>

Lower courts find the *Heller* decision even more difficult to apply in practice when faced with challenges to restrictions not explicitly mentioned in Justice Scalia’s opinion.<sup>230</sup> First, Rostron notes that many state courts have decided to uphold any restriction not unequivocally invalidated by *Heller* and *McDonald*.<sup>231</sup> This admittedly narrow reading of *Heller* and *McDonald* certainly makes evaluating gun restrictions short of the total bans in the District of Columbia and Chicago much simpler.

According to Rostron, federal courts have been more reluctant to apply *Heller*’s holding so narrowly.<sup>232</sup> He sees an evolution in courts’ treatment of challenges, beginning with the approach in *United States v. Booker*.<sup>233</sup> There, the district court upheld the federal statute prohibiting domestic violence misdemeanants from firearm possession, reasoning that it was analogous to the “longstanding” restriction on felon possession mentioned in *Heller*.<sup>234</sup> If the justification for *Heller*’s list of presumptively valid restrictions is that they are good public policy because of their reduction of public harm,<sup>235</sup> then the *Booker* court’s reasoning makes sense.<sup>236</sup>

If *Heller* suggests, however, that those “longstanding” restrictions are justified because they are traditional limitations on the right to keep and bear arms, then lower courts should be engaging in a historical analysis rather than evaluating current public policy choices.<sup>237</sup> Rostron argues that even the lower court decisions that purport to engage in such a historical

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228. *Id.* at 736 (quoting *Masciandaro*, 638 F.3d at 473).

229. *See id.*

230. *See id.* at 736–37 (“[T]he Supreme Court provided an intriguing stew of different signals, rather than a single clear recipe, for lower courts taking on the work of implementing the right to keep and bear arms.”).

231. *See id.* at 737–38; *see also, e.g.,* *People v. Williams*, 962 N.E.2d 1148, 1152 (Ill. App. Ct. 2011) (“[T]he rulings in both *Heller* and *McDonald* made clear that the only type of firearms possession they were declaring to be protected under the second amendment was the right to possess handguns in the home for self-defense purposes.”); *State v. Knight*, 241 P.3d 120, 133 (Kan. Ct. App. 2010) (“It is clear that the Court was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes. [The] . . . argument, that *Heller* conferred on an individual the right to carry a concealed firearm, is unpersuasive.”); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) (“If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly.”). Rostron points out that California, Illinois, Kansas, Maryland, Massachusetts, New Jersey, New York, “with the exception of Kansas, . . . are deeply ‘blue’ (i.e., liberal) states that rank in the top ten on lists of states with the strictest gun laws and the lowest rates of firearm ownership.” Rostron, *supra* note 7, at 738–39.

232. *See* Rostron, *supra* note 7, at 739.

233. 570 F. Supp. 2d 161 (D. Me. 2008), *aff’d*, 644 F.3d 12 (1st Cir. 2011); Rostron, *supra* note 7, at 739–40.

234. *See Booker*, 570 F. Supp. 2d at 163.

235. *See supra* Part I.C.2.c.

236. *See* Rostron, *supra* note 7, at 740.

237. *See id.* at 741.

analysis<sup>238</sup> “ultimately . . . illustrat[e] how historical evidence is often indeterminate.”<sup>239</sup> In challenges to prohibitions on possession by felons and certain misdemeanants, for example, Rostron points out that because felonies in the Founding era “were typically punishable by death and imprisonment for such offenses was rare” courts are reluctant to rely too heavily on historical and originalist arguments to analyze contemporary policy choices about felon possession of firearms.<sup>240</sup> Courts confront similarly inconclusive historical evidence when analyzing challenges to other types of contemporary restrictions, and Rostron argues that in the end, most courts apply some type of balancing approach that is similar to intermediate scrutiny.<sup>241</sup>

Thus, Rostron argues, most courts have instead applied the more familiar framework of tiers of scrutiny applied in other constitutional rights contexts.<sup>242</sup> Chief Judge Frank Easterbrook’s en banc decision in *United States v. Skoien* exemplifies this approach, ultimately upholding the federal statute banning possession by domestic violence misdemeanants.<sup>243</sup> Lower courts using this familiar framework, according to Rostron, share several important features that ultimately grant more deference to the legislative branches in their public policy determinations.

First, how judges evaluate the government’s empirical claims of the effects of the firearms restrictions determines in large part how demanding the intermediate scrutiny will be.<sup>244</sup> According to Volokh, if courts were to require “substantial scientific proof” for the government’s claims of danger reduction, courts would be striking down gun control laws left and right.<sup>245</sup> Such proof simply does not exist.<sup>246</sup> Instead, Rostron argues that lower courts have followed Chief Judge Easterbrook’s lead and only require a

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238. See, e.g., *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009). Rostron describes *Rene E.* as a “quintessential example” of a lower court that engaged in a “strictly historical analysis” to find “a longstanding tradition supporting” a restriction on juvenile handgun access, thus upholding the restriction. Rostron, *supra* note 7, at 741.

239. Rostron, *supra* note 7, at 743.

[T]he answers that one derives from this sort of historical inquiry depends greatly on the level of generality of the questions asked. If history proves that the Founding Fathers accepted the general idea of age restrictions on access to guns, perhaps that is all that should really matter, and the Founders’ more specific beliefs about an appropriate age limit should be ignored because times have changed since the eighteenth century.

*Id.* at 742.

240. *Id.* at 750–51 (quoting *United States v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010)). “In a time when a felony conviction was essentially a death sentence, the issue of whether a felon should have the right to keep and bear arms was nonsensical.” *Id.* at 751.

241. See *id.* at 752.

242. See *id.* at 744.

243. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc); Rostron, *supra* note 7, at 744; see also *supra* notes 123–24, and accompanying text.

244. See Rostron, *supra* note 7, at 746 (citing Volokh, *supra* note 139, at 1467–70).

245. See Volokh, *supra* note 139, at 1467–68.

246. See *id.* at 1468; Rostron, *supra* note 7, at 747 (discussing how “[t]he research that exists simply is not capable of proving . . . one way or the other” whether gun control laws actually reduce harm and make citizens safer).

“strong showing”<sup>247</sup> that the challenged restriction reasonably furthers an important government interest.<sup>248</sup> Reducing gun violence and protecting public safety are clearly important government interests,<sup>249</sup> and Rostron argues that lower courts find that restrictions further that interest based on logical arguments and conclusions, even in the absence of overwhelming empirical evidence.<sup>250</sup>

Second, many courts have required a showing of a substantial burden<sup>251</sup> on the right to keep and bear arms before allowing a constitutional challenge to proceed to the intermediate scrutiny inquiry.<sup>252</sup> This requirement, Rostron argues, acts as a gatekeeper to constitutional challenges to firearms restrictions, effecting even more deference to legislators.<sup>253</sup> Thus, courts may theoretically require more than simply a plausible logical rationale for the reduction in public harm, but end up deferring to legislators by finding that the restriction does not rise to the level of a substantial burden on the Second Amendment right.

Rostron acknowledges that there are several lower court decisions that seem to point in the opposite direction. The Seventh Circuit, in *Ezell v. City of Chicago*, suggested that the highly deferential approach used in *Skoien* (and across the country) might not apply to restrictions that come closer to substantially burdening the core of the Second Amendment right.<sup>254</sup> Rostron argues, however, that this exception to the overall trend is decidedly a narrow one<sup>255</sup> and that the majority of lower courts have eschewed the categorical and historical approach of Justice Scalia’s *Heller* opinion in favor of the approach laid out in Justice Breyer’s dissent.<sup>256</sup>

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247. *Skoien*, 614 F.3d at 641.

248. See Rostron, *supra* note 7, at 748.

249. See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 876–77 (4th Cir. 2013) (citing *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 376 (1997) (concluding that the offered government interests of “protecting public safety and preventing crime . . . are substantial”)).

250. See Rostron, *supra* note 7, at 748. *But see* *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (“The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense. Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden.”).

251. See *supra* Part II.C.2.b.

252. See Rostron, *supra* note 7, at 750 (“By requiring a threshold showing of a significant burden on the exercise of the right to keep and bear arms, courts reduce the number of constitutional claims that even reach the intermediate scrutiny stage where some showing of the challenged law’s probable effects is required.”).

253. See *id.* (“The sorting achieved by the substantial burden framework thus sensibly pushes more of the job of evaluating gun control laws away from judges and back to legislators.”).

254. See *id.* at 754 (citing *Ezell v. City of Chi.*, 651 F.3d 684 (7th Cir. 2011)).

255. See *id.* at 755 (“[I]t is remarkable to think that this . . . ruling that enables Chicagoans to travel a slightly shorter distance to firing ranges, is the most dramatic advance for gun rights made by the lower courts in the years since *Heller*.” (footnote omitted)).

256. See *id.* at 757 (“Struggling to work within the more categorical framework of decisionmaking favored by Justice Scalia, the lower courts have essentially wound up embracing the sort of interest balancing that Justice Breyer recommended and that Scalia

Lower courts since *Heller* have taken that decision and protected a right to keep and bear arms “that is broad but not particularly deep.”<sup>257</sup>

## 2. The “Common Use” Standard

Nicholas Johnson argues that *Heller* stands for the idea that the Second Amendment protects “those firearms in ‘common use for lawful purposes like self-defense.’”<sup>258</sup> The “common use standard” refers to “functionally common” firearms, that is, firearms that, regardless of their manufacturer, share certain characteristics.<sup>259</sup> While this standard is problematic in many ways, Johnson maintains that it represents “the core test for determining the scope of the individual right to arms . . . articulated in [*Heller*]” with respect to device restrictions.<sup>260</sup>

Johnson first argues that some restrictions should clearly fail under the common use standard and are thus vulnerable to constitutional challenges.<sup>261</sup> Restrictions that require firearms to have certain product safety features, such as magazine safeties or integral trigger locks, are likely to be struck down because guns without these features are “undeniably common self-defense guns.”<sup>262</sup> Similarly, a New Jersey statute that will restrict the sale of handguns without “smart gun”<sup>263</sup> technology once that technology is commercially available should clearly fail under the common use standard, as “[o]rdinary handguns are widely used, and explicitly protected under *Heller*.”<sup>264</sup>

Some restrictions are more difficult to analyze under the common use standard. Johnson maintains that because of the “politics, mythology and

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vociferously denounced.”). Rostron is careful to point out, however, that this may not be a deliberate move away from the majority’s holding, but merely a pragmatic shift when confronted with “the reality that historical inquiries are extremely difficult and do not produce determinate answers to the types of detailed questions that must be resolved concerning the wide range of gun laws and regulations in effect . . . throughout the country.” *Id.* at 756–57.

257. *Id.* at 762. Although the right to keep and bear arms is now certainly broad enough to protect nonmilitia uses, lower courts applying some form of highly deferential intermediate scrutiny have proceeded with the utmost restraint. *Id.*

258. See Johnson, *Common Use*, *supra* note 106, at 4 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008)).

259. See *id.*

260. Johnson, *Administering*, *supra* note 106, at 1263; see also Michael S. Obermeier, Note, *Scoping Out the Limits of “Arms” Under the Second Amendment*, 60 KAN. L. REV. 681, 700–01 (2012) (criticizing *Heller*’s common use standard for “basing an important constitutional right on the vicissitudes of popular opinion, rather than a consistent, objective standard”).

261. See Johnson, *Administering*, *supra* note 106, at 1264 (describing how the “common use standard gives straightforward answers to a number of questions”).

262. *Id.* at 1265.

263. “Smart gun” technology is a generic category referring to safety features that, among other things, prevent a gun from being unlocked unless by an identified user. See Michael S. Rosenwald, *‘We Need the iPhone of Guns’: Will Smart Guns Transform the Gun Industry?*, WASH. POST (Feb. 17, 2014), [http://www.washingtonpost.com/local/we-need-the-iphone-of-guns-will-smart-guns-transform-the-gun-industry/2014/02/17/6ebe76da-8f58-11e3-b227-12a45d109e03\\_story.html](http://www.washingtonpost.com/local/we-need-the-iphone-of-guns-will-smart-guns-transform-the-gun-industry/2014/02/17/6ebe76da-8f58-11e3-b227-12a45d109e03_story.html).

264. Johnson, *Administering*, *supra* note 106, at 1264.

symbolism” surrounding how firearms get categorized, the standard is more susceptible to manipulation and distortion.<sup>265</sup> Johnson argues that because some of the characteristics and distinctions used to separate restricted from nonrestricted firearms are “mainly political or symbolic,” it is much more difficult for courts to meaningfully analyze how the common use standard might apply to those restrictions.<sup>266</sup> Johnson predicts that this difficulty may manifest in pressure to uphold device restrictions that are less defensible under *Heller*’s common use standard.<sup>267</sup> The real question that *Heller* poses, and that lower courts have yet to answer, is to what extent courts will accept these “taxonomical” manipulations as distinct categories.<sup>268</sup>

Johnson points out that the common use standard will not assist lower courts in handling challenges to frictional restrictions.<sup>269</sup> For these restrictions, Johnson suggests that the Court’s regulatory takings analysis may predict how lower courts will address challenges to frictional restrictions that add time, cost, or difficulty to the exercise of the Second Amendment right.<sup>270</sup> Thus, restrictions that are so costly or time-consuming as to nearly extinguish the right will be unconstitutional, while restrictions that impose minor burdens will be upheld.<sup>271</sup>

### III. EVALUATING POST-*HELLER* ACCOUNTS

This Part evaluates how the accounts that Rostron and Johnson offer measure against recent case law of lower courts. It concludes that the confusion among lower courts more closely resembles Rostron’s account of judicial deference and interest balancing. Though Johnson provides a logical and plausible route that lower courts may choose to follow in the future, decisions thus far have yet to lend support for this approach.

First, Johnson is accurate in predicting that courts will sometimes evaluate challenges to device restrictions using a common use approach.<sup>272</sup> Courts have been most confident in applying the common use logic when

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265. *See id.* at 1265–66.

266. *See id.* at 1266 (discussing how these political or symbolic distinctions “distort[] the delineation of legitimate substantive categories and complicates extrapolations from the common use standard”).

267. *See id.* at 1266–67 (discussing assault weapons as a category that “has undeniable political and symbolic resonance” such that “states, municipalities, and perhaps even courts will feel especially pressured to uphold those distinctions”). Johnson worries “that lower courts will be tempted to diminish [*Heller* and *McDonald*] and the Supreme Court will respond or not depending on its political makeup at the time.” *Id.* at 1268.

268. *See id.* at 1272 (“The open question is how far courts will credit the fine distinctions that are necessary to maintain restrictions on particular categories of technology. How small a difference in appearance, mechanics, or ballistics will sustain a separate regulated category?”).

269. *See id.* at 1273.

270. *See id.* at 1273–74.

271. *See id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), and *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), for the Court’s regulatory takings framework).

272. *See supra* notes 193–99 and accompanying text.

confronted with weapons that are clearly dangerous and unusual, and so have upheld those prohibitions that restrict firearms *not* in common use.<sup>273</sup> Even when confronted with the kinds of “easy fits” characterized by Johnson, however, courts have shied away from applying any sort of common use logic. Instead, those courts decide to bypass the scope inquiry and uphold the challenged restrictions under some form of means-ends scrutiny without deciding whether the weapons at issue are protected under the Second Amendment.<sup>274</sup>

Further, recent case law has not shown indications of the kind of manipulation of classifications of firearms Johnson has warned against.<sup>275</sup> For device restrictions that are not clearly constitutional under the simplest common use analysis, courts do not go through the trouble of applying a common use analysis. Instead, courts have chosen to bypass this scope inquiry, assuming that the restrictions *do* proscribe protected conduct, and then proceed under some level of means-ends scrutiny.<sup>276</sup>

This approach much more closely resembles Rostron’s argument that courts will uphold restrictions on dangerous and unusual weapons using the common use logic, while eschewing the same logic when confronted with less clearly unusual or dangerous weapons.<sup>277</sup> While Johnson argues that the common use standard will provide gun rights proponents with the opportunity to challenge certain “easy fits,” the case law cuts the other way.<sup>278</sup>

In addition, courts use *Heller*’s passage referring to those weapons in common use to support broader propositions about the scope of the Second Amendment right.<sup>279</sup> Courts have interpreted the passage to lend general support for the existence of categorical exclusions to the Second Amendment guarantee (i.e., for certain uncommon weapons).<sup>280</sup> Courts have also read the passage to support the idea that an inquiry into the scope of the Second Amendment’s protections should be historical in nature.<sup>281</sup> In this way, courts have simply read the common use passage to support the broader, interest-balancing inquiries that Rostron describes.<sup>282</sup>

In the context of evaluating challenges to frictional restrictions, Johnson may be more accurate in his predictions.<sup>283</sup> The district court’s order denying summary judgment to the government defendants in *Silvester v. Harris* may be an indication that courts will analyze more severe frictional restrictions like mandatory waiting periods differently.<sup>284</sup> In *Silvester*, the

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273. *See supra* notes 198–99 and accompanying text.

274. *See supra* note 197 and accompanying text.

275. *See supra* notes 267–69 and accompanying text.

276. *See supra* notes 213–15 and accompanying text.

277. *See supra* note 221 and accompanying text.

278. *See supra* note 261 and accompanying text.

279. *See supra* notes 193–98 and accompanying text.

280. *See supra* note 194 and accompanying text.

281. *See supra* note 193 and accompanying text.

282. *See supra* Part II.B.1.

283. *See supra* Part I.C.1.c.

284. *See supra* note 134 and accompanying text.

court denied the government's motion for summary judgment, because a California law that imposed at least a ten-day waiting period between purchase and delivery of a firearm would pass rational basis review but was not likely to pass intermediate scrutiny.<sup>285</sup> Though that court did not explicitly utilize a takings framework as Johnson suggested,<sup>286</sup> the court was certainly taking a less deferential approach than Rostron would have predicted by actually scrutinizing the fit between the mandatory waiting period and the asserted government justifications.<sup>287</sup>

The majority of court decisions since *Heller*, however, demonstrate that courts prefer to apply some sort of means-ends scrutiny rather than engaging in either a common use inquiry or a deeply historical analysis.<sup>288</sup> Within a framework of interest balancing and some form of means-ends scrutiny that does not require narrow tailoring, state and municipal regulators have enjoyed much greater deference than predicted by Johnson. It is too soon to tell whether less deferential recent opinions such as *Silvester* will survive appellate review.<sup>289</sup> It is unlikely, however, that against the great weight of case law decided in favor of upholding firearms restrictions in the last five years, that decision will shift the trend away from deference and judicial restraint.

#### CONCLUSION

While *Heller* certainly may be “historic in its implications”<sup>290</sup> for theoretical discussions of firearms regulations, lower courts have made clear that the Second Amendment right is “broad but not particularly deep.”<sup>291</sup> Faced with confusing and contradictory signals from the Supreme Court, lower courts have retreated to the familiar territory of means-ends scrutiny. In doing so, courts have upheld the vast majority of firearms regulations against challenges by gun rights proponents, so long as those regulations do not rise to the level of a total ban as seen in the District of Columbia and Chicago. While it remains to be seen whether regulators will seize this trend as an opportunity to expand current restrictions up to (but not crossing) the line of a total ban, it is clear that courts have signaled their deference to state and local governments in this area.

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285. *Silvester v. Harris*, No. 1:11-CV-2137, 2013 U.S. Dist. LEXIS 172946 (E.D. Cal. Dec. 9, 2013).

286. See *supra* notes 270–71 and accompanying text.

287. See *supra* note 134 and accompanying text.

288. See *supra* Part II.A.

289. See *supra* note 134 and accompanying text.

290. Barnett, *supra* note 12.

291. Rostron, *supra* note 7, at 762.