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SCOPE OF THE SECOND AMENDMENT RIGHT—POST-*HELLER* STANDARD OF REVIEW

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I. INTRODUCTION

IN a controversial, 5–4 decision in *District of Columbia v. Heller*, the U.S. Supreme Court held that the Second Amendment protects an individual's right to keep and carry arms in self-defense.[1] At issue in *Heller* was a District of Columbia law that "totally [banned] handgun possession in the home" and further "[required] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable."[2] Ruling in favor of Mr. Heller, the Court held that the District of Columbia "ban on handgun possession in the home [violated] the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[3] As a result, the Court concluded that unless Heller is disqualified "from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."[4]

Because Heller challenged a District of Columbia law, rather than a state law or an ordinance adopted by a political subdivision of a state, the Court did not have to address the incorporation issue—whether the Second Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[5] Incorporation remains an issue for the lower courts, and ultimately the Supreme Court, to address in the future.[6]

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1. 128 S. Ct. 2783, 2797, 2821-22 (2008).

2. *Id*. at 2817.

3. *Id*. at 2821-22.

4. *Id*. at 2822.

5. *Id*. at 2812-13 & n.23. The Court noted that three of its decisions—*Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); and *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)—hold that the Second Amendment applies only to the federal government. *Id.* The trend, however, has been to incorporate the provisions of the Bill of Rights, clause-by-clause, with only a few—including the Second and Third Amendments, the Fifth Amendment right to a grand jury indictment, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment prohibition on excessive fines—not incorporated. *See, e.g., id.* at 2817-18 n.27 (listing incorporated rights). As stated in *Malloy v. Hogan*, the Court "has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in

Another issue the Court did not decide, and the subject of this article, is the appropriate standard of review in cases challenging gun-control laws based on the *Heller* decision. The majority stated that the right it discovered in the Second Amendment, "[l]ike most rights …[,] is not unlimited."[7] It found it unnecessary to determine the standard of review because, "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' would fail constitutional muster."[8] The Court's determination in *Heller* that the Second Amendment comes into play when an individual claims a self-defense-related right to keep and carry arms, as opposed to only a militia-related right, tells us very little about the actual scope of this right.[9] For the purposes of this article, I will accept the Court's interpretation of the Second Amendment—even though I believe the dissenters have the better argument[10]—and I will instead focus on the limited, but very important, standard of review issue.

Part II outlines what the majority opinion and Justice Breyer's dissenting opinion say about the standard of review.[11] Part III discusses the process by which the Court currently determines the standard of review, particularly in cases alleging a violation of one of the amendments found in the Bill of Rights or the Fourteenth Amendment.[12] In Part IV, I argue that one of the goals of judicial review should be improvement of the legislative process; a legislative body that

the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." 378 U.S. 1, 5 (1964).

6. In *Duncan v. Louisiana*, the Court explained that the test for determining whether the rights provided by the Fifth and Sixth Amendments are incorporated has been stated in a variety of ways, including "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" "whether it is 'basic in our system of jurisprudence,'" and "whether it is 'a fundamental right, essential to a fair trial.'" 391 U.S. 145, 148-49 (1968) (internal citations omitted). The Court concluded that "trial by jury in criminal cases is fundamental to the American scheme of justice" and incorporated this Sixth Amendment right. *Id.* at 149. Before *Heller*, a few circuits decided that the Second Amendment should not be incorporated. *See, e.g.*, Bach v. Pataki, 408 F.3d 75, 84-86 (2d Cir. 2005); Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 729-31 (9th Cir. 1992); Quilici v. Vill. of Morton Grove, 695 F.2d 261, 269-71 (7th Cir. 1982). After *Heller*, the court in *Maloney v. Cuomo* decided it must follow *Presser* and confirmed its position in *Bach*. 554 F.3d 56, 58-59 (2d Cir. 2009). *See also* National Rifle Ass'n of Am. v. City of Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom* McDonald v. City of Chicago, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08-1521) (confirming its holding in *Quilici*). *Compare* Nordyke v. King, 563 F.3d 439, *reh'g en banc ordered by* 575 F.3d 890 (9th Cir. 2009) (holding the Second Amendment is incorporated).

7. *Heller*, 128 S. Ct. at 2816.

8. *Id*. at 2717-18.

9. While the Second Amendment is part of the Bill of Rights, that too tells us little about the scope of the right because whether a provision in the Constitution actually protects an individual often depends on the standard of review the court applies. *But see id*.

10. *Id.* at 2822-47 (Stevens, J., dissenting).

11. District of Columbia v. Heller, 128 S. Ct. 2783, 2847-70 (2008) (Breyer, J., dissenting).

12. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) (applying rational basis, but reviewing the alleged reasons for refusal to grant permit to an assisted living center and finding them based on "irrational prejudice").

engages in an in-depth analysis of its goal and the means of achieving that goal should receive greater deference from the courts. Applying this approach, I conclude that "heightened rational basis scrutiny," a standard utilized by the Court in other cases,[13] is appropriate in cases challenging gun-control laws based on the Second Amendment.

II. WHAT *HELLER* SAYS ABOUT THE STANDARD OF REVIEW

A. Majority Opinion

The majority opinion, authored by Justice Scalia, notes that "the right secured by the Second Amendment is not unlimited."[14] By this, the Court means that the right to keep and carry arms is not absolute, but allows at least some government regulation.[15] For example, the Court writes:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[16]

The Court also recognized a distinction between weapons "in common use at the time" and weapons that were considered dangerous and unusual, because according to the Court, the right to "keep and carry arms" is limited to only those weapons that are "in common use at the time," leaving the government free to prohibit "the carrying of 'dangerous and unusual weapons.'"[17] These "presumptively lawful regulatory measures," according to the Court, should be viewed only as examples, not as an exhaustive list of permissible regulations.[18] This tells us little if anything about the standard of review, although a presumption of validity is usually associated with rational basis, not strict scrutiny.[19] Under true strict scrutiny, any legislation conflicting with a constitutional right carries a presumption of invalidity and the right is therefore closer to being unlimited.[20]

The Court avoided addressing the standard of review issue by concluding that the District of Columbia law would "fail constitutional muster" based on the Second Amendment "[u]nder any of the standards of scrutiny that we have

13. *See, e.g., id.*

14. *Heller*, 128 S. Ct. at 2816.

15. *Id*.

16. *Id*. at 2816-17.

17. *Id*. at 2817.

18. *Id*. at 2817 n.26.

19. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-15 (1993) (holding that non-suspect classifications, which are subject to rational basis review, have "a strong presumption of validity").

20. *See, e.g.*, Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 876 (2002) (noting that "[i]f a statute is subjected to heightened scrutiny, it is almost invariably struck down").

applied to enumerated constitutional rights."[21] In a footnote following this statement, the Court said that "Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny."[22] Apparently, based on these statements, the Court has never utilized rational basis review in a case alleging that a law violates one of the "enumerated constitutional rights."[23] After noting its agreement with Justice Breyer's conclusion that the District of Columbia law at issue would pass rational-basis scrutiny, the Court stated:

> [R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.[24]

Of course, if a constitutional provision specifically prohibited laws that are not rational, then the "very substance of the constitutional guarantee" would be the equivalent of "rational basis" review.[25] The Court does not, however, identify an "enumerated" right in either the Bill of Rights or the Fourteenth Amendment that specifically prohibits laws and government actions that are not rational.[26] Rather, the Court has utilized rational basis review in certain cases alleging a violation of the Freedom of Speech and Free Exercise Clauses of the First Amendment, as well as in cases alleging a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[27] The Court's redundancy point is no different in the Second Amendment context than in other contexts, such as cases where rational basis review is utilized in evaluating First Amendment or Fourteenth Amendment claims.[28]

21. District of Columbia v. Heller, 128 S. Ct. 2783, 2817-18 (2008).

22. *Id*. at 2817 n.27.

23. *Id.* As discussed below, this statement is problematic.

24. *Id.* (citations omitted).

25. *Id*.

26. *See id.* The Fourth Amendment prohibits "unreasonable" action, but the prohibition is limited to "searches and seizures." U.S. CONST. amend. IV.

27. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) (Freedom of Speech) (noting that, unlike the case where a government employee is speaking as a citizen, which requires a "delicate balancing" of First Amendment issues, when "the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny"); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881, 885 (1990) (Free Exercise Clause).

28. *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 977-78 (2009).

As an example of its "evaluating laws under constitutional commands that are themselves prohibitions on irrational laws,"[29] the Court refers to *Engquist v. Oregon Department of Agriculture*,[30] where it held that the "class-of-one theory of equal protection" is not available to public employees challenging an employment decision.[31] While the "class-of-one theory of equal protection," recognized in *Village of Willowbrook v. Olech*, is premised on the notion that the plaintiff has been singled out irrationally for different treatment, the substantive constitutional claim is based on the Equal Protection Clause and the standard of review is traditional rational basis.[32] In fact, traditional rational basis review is the norm for equal protection claims unless the Court determines that a fundamental right is implicated or the classification is suspect or quasi-suspect, thereby triggering heightened scrutiny.[33]

Heightened scrutiny includes strict scrutiny, the standard applied in discrimination claims based on race,[34] national origin,[35] and non-citizenship,[36] as well as claims alleging the deprivation of a fundamental right as a result of a challenged classification.[37] Heightened scrutiny also includes intermediate scrutiny, which is used to review claims of discrimination based on gender[38] and illegitimacy.[39] Yet another form of heightened scrutiny, although usually not identified as such, is heightened rational basis, under which the Court actually examines the justifications the government advances, rather than deferring completely to the legislature's judgment.[40] In short, equal protection cases span the entire "spectrum of standards" utilized under the level-of-scrutiny approach to constitutional claims.[41]

29. *Heller*, 128 S. Ct. at 2817 n.27.

30. 128 S. Ct. 2146 (2008).

31. *Id.* at 2156.

32. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000).

33. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (finding that "[u]nless a statute employs a classification that is inherently invidious or that impinges on fundamental rights … this Court properly exercises only a limited review power over Congress").

34. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989).

35. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944).

36. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

37. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate). The right to vote was subjected to rational basis review in *Ball v. James*, where the Court upheld a water reclamation district rule limiting voter eligibility to landowners and apportioning voting power according to the amount of land a voter owns because of the relatively narrow function of the local governmental body at issue. 451 U.S. 355, 357, 371 (1981).

38. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532-33 (1996). *See also* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 60-61 (2001).

39. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

40. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-40, 449 (1985); Plyler v. Doe, 457 U.S. 202, 224, 228-30 (1982).

41. Justice Marshall, in *San Antonio Independent School District v. Rodriguez*, was critical of the Court's "rigidified approach to equal protection analysis" that seeks to fit equal protection cases into "one of two neat categories" when in fact the Court "has applied a spectrum of standards in reviewing" such cases. 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

Similarly, in cases alleging a violation of rights enumerated in the First Amendment, the Court has utilized a wide range of scrutiny levels, including rational basis.[42] For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[43] an opinion written by Justice Scalia, the Court applied rational basis to a free-exercise challenge to a facially-neutral law of general applicability.[44] In *Garcetti v. Ceballos*, without explicitly saying so, the Court applied rational basis to reject a government employee's free-speech claim where the speech was made in furtherance of the employee's official duties.[45]

Earlier cases discounted the First Amendment rights of government employees and applied a balancing test to resolve the competing interests at stake.[46] The Court balanced the employees' interest in commenting on matters of public concern against the government's interest, as an employer, in promoting the efficiency of the services it provides.[47] Other freedom of speech cases identify various categories of unprotected speech, such as fighting words,[48] speech that incites a hostile audience,[49] speech conveying a true threat,[50] obscenity,[51] and child pornography (speech exploiting children in pornographic productions),[52] and uphold the regulation of such speech as long as the regulation is rational.[53]

In another First Amendment case challenging the constitutionality of the Children's Internet Protection Act, which denies public libraries federal funds for internet access unless they install software to block images that constitute obscenity or child pornography, Justice Scalia joined Justice Rehnquist's plurality opinion applying rational basis.[54] Justice Kennedy concurred, but left

42. Lara Geer Farley, Comment, *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights*, 46 WASHBURN L.J. 603, 608 (2007).

43. 494 U.S. 872 (1990).

44. *Id.* at 885-89.

45. Garcetti v. Ceballos, 547 U.S. 410, 423 (2006). Determining that a government employee's speech made as part of his or her official duties as an employee is not protected narrows the scope of the First Amendment and means that the government employer is free to restrict such speech as long as it acts rationally.

46. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 668 (1994); Connick v. Myers, 461 U.S. 138, 140, 142 (1983); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

47. *See, e.g.*, *Connick*, 461 U.S. at 140. *See also* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 490-93 (1995) (Rehnquist, J., dissenting, joined by Justices Scalia and Thomas) (arguing in favor of applying the government employee balancing test to a federal statute that broadly prohibits federal employees from accepting compensation for speeches or articles, and upholding the law).

48. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

49. Feiner v. New York, 340 U.S. 315, 320 (1951).

50. Virginia v. Black, 538 U.S. 343, 359-62 (2003).

51. Miller v. California, 413 U.S. 15, 23 (1973).

52. New York v. Ferber, 458 U.S. 747, 756-64 (1982).

53. In *R.A.V. v. City of St. Paul*, however, the Court held that the City's Bias-Motivated Crime Ordinance was facially unconstitutional, even though it was construed by the Minnesota Supreme Court as reaching only "fighting words," because only certain "fighting words" were prohibited, meaning it discriminated based on content and/or viewpoint. 505 U.S. 377, 391 (1992).

54. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 208 (2003).

the door open to an as-applied challenge and suggested heightened scrutiny should apply.[55] Justice Breyer, in his concurrence, suggested that heightened scrutiny, but not strict scrutiny, should apply where "complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests."[56] According to Justice Breyer, the key question in this situation is typically "one of proper fit" and the appropriate inquiry is "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives."[57] This inquiry, he says, supplements the level-of-scrutiny approach and adds flexibility.[58]

While the majority did not establish the standard of review for the Second Amendment right it discovered in *Heller*, it seemingly eliminated at least low-level, or traditional, rational basis as the appropriate standard.[59] Its reason for doing so appears suspect in light of the Court's historic use of rational basis in cases alleging a violation of an enumerated constitutional right, as described above.[60] Further, portions of the *Heller* opinion seem to cast doubt on whether the Court in fact foreclosed traditional rational-basis review in the Second Amendment context.[61] After stating that "the right secured by the Second Amendment is not unlimited,"[62] the Court gave examples of "longstanding prohibitions on the possession of firearms" that are "presumptively lawful regulatory measures."[63] Under the "traditionally expressed levels [of scrutiny]," challenged laws are "presumptively lawful" only when evaluated under traditional rational basis, not heightened scrutiny.[64]

Whether a broad ban "on the possession of firearms by felons and the mentally ill" would survive heightened scrutiny is unclear.[65] For example, does one convicted of a non-violent felony, such as a "white-collar" crime, have less

55. *Id*. at 214-15 (Kennedy, J., concurring).

56. *Id*. at 216-17 (Breyer, J., concurring).

57. *Id*. at 217.

58. *Id.* at 218.

59. District of Columbia v. Heller, 128 S. Ct. 2783, 2817-18 & n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

60. *See, e.g.*, Vill. of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000); Garcetti v. Ceballos, 547 U.S. 410, 423 (2006); Employment Div., Dep't of Human Res. of Or., 494 U.S. 872 485-89 (1990).

61. *Heller*, 128 S. Ct. at 2797, 2821-22.

62. *Id*. at 2816.

63. *Id*. at 2816-17 & n.26.

64. *See* Ryan L. Card, Note, *An Opinion Without Standards: The Supreme Court's Refusal to Adopt a Standard of Constitutional Review in* District of Columbia v. Heller *Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 BYU J. PUB. L. 259, 279 (2009) (citing Heller v. Doe, 509 U.S. 312, 320 (1993)) (noting that under rational-basis scrutiny, "a statute is presumed constitutional").

65. *Heller*, 128 S. Ct. at 2816-17.

need for protection in his home than others?[66] Does one who is "mentally ill," with no history of violence, have less need for protection in his home? Perhaps not, considering that, a woman who is "mentally ill" as a result of years of abuse and violence inflicted by her spouse may have a greater need for protection in her home than the average citizen.[67] The point is simply that Justice Scalia's list of "presumptively lawful regulatory measures"[68] may not withstand heightened scrutiny and that, therefore, he must have intended to suggest traditional rational-basis review as the proper standard for Second Amendment claims.

B. Dissenting Opinion of Justice Breyer

In the dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg, Justice Breyer argued that the Court's "conclusion is wrong for two independent reasons."[69] The first reason, described in Justice Stevens's dissent, is that "the Second Amendment protects militia-related, not self-defense-related, interests."[70] The second reason is that, because the protection the Second Amendment provides is not absolute, the "majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms."[71] Justice Breyer's second reason relates to the Court's failure to supply a standard of review.[72]

Justice Breyer began by asking what he refers to as a "process-based question: How is a court to determine whether a particular firearm regulation … is consistent with the Second Amendment?"[73] He disagreed with the majority's statement that the District of Columbia law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[74] Rather, as Justice Breyer pointed out, the law would not be unconstitutional under a rational basis standard since it bears a rational relationship to a legitimate governmental purpose.[75] According to Justice Breyer,

> [T]he majority implicitly, and appropriately, rejects [Heller's proposal that the Court adopt strict scrutiny] by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of

66. *See* Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 424 (2009) ("Felons who have served their sentences are no less susceptible to home invasions and assaults than are law-abiding people (perhaps even more susceptible).").

67. *See, e.g.*, U.S. DEP'T OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 9-14 (1996).

68. *Heller*, 128 S. Ct. at 2817 n.26

69. District of Columbia v. Heller, 128 S. Ct. 2783, 2847 (2008) (Breyer, J., dissenting).

70. *Id*.

71. *Id*.

72. *Id.* at 2851.

73. *Id*. at 2850-51.

74. *Id*. at 2817, 2851.

75. *Id*. at 2851.

> commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear.[76]

Justice Breyer further reasoned that "adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible" because most gun regulations seek to advance a compelling governmental interest in preventing crime and promoting public safety.[77] Therefore, he predicted that

> [A]ny attempt in theory to apply strict scrutiny to gun regulations will in practice turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."[78]

It appears that Justice Breyer was describing the second prong of strict scrutiny analysis, which asks whether the regulation at issue is narrowly tailored to serve the government's compelling interest, although that prong is not always described as "an interest-balancing inquiry."[79] For example, in challenges to benign race-conscious action, the Court requires the government to show that no less restrictive, race-neutral means of accomplishing the government's goal exist.[80]

Because the interests on both sides of the issue are important, the dissenters would explicitly adopt an interest-balancing inquiry rather than an approach that carries a presumption of either constitutionality (rational basis) or unconstitutionality (strict scrutiny).[81] In support of this approach, Justice Breyer pointed to his concurring opinion in *Nixon v. Shrink Missouri Government PAC*[82] and his dissenting opinion in *Thompson v. Western States Medical Care*,[83] as well as several other decisions of the Court.[84] He could have pointed to his concurring opinion, joined by Justice O'Connor, in *Bartnicki v. Vopper*,[85] in which he stated that the Court should "avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility,"[86] in cases where the issue "implicates competing constitutional concerns."[87]

76. *Id*.

77. *Id*.

78. *Id*. at 2852.

79. District of Columbia v. Heller, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting).

80. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

81. *Heller,* 128 S. Ct. at 2852 (Breyer, J., dissenting).

82. 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

83. 535 U.S. 357, 388 (2002) (Breyer, J., dissenting).

84. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 433-34 (1992); Mathews v. Eldridge, 424 U.S. 319, 339-49 (1976); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

85. 532 U.S. 514, 541 (2001).

86. *Id.* (Breyer, J., concurring).

87. *Id.* at 536. The statute at issue in this case both fostered private speech by protecting privacy in telephone communications and interfered with media freedom. *Id.* at 536-38. Therefore,

Further, Justice Breyer cited *Turner Broadcasting System, Inc. v. FCC*,[88] for the proposition that the Court, in applying the interest-balancing approach, "normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity."[89] In another First Amendment case, Justice Breyer purported to agree with the Court that the Child Online Protection Act should be subject to "the most exacting scrutiny," but nevertheless appeared to employ a balancing test insofar as he characterized the Act as imposing a modest burden on some protected speech while significantly helping to achieve the congressional goal of protecting children from pornography.[90]

Applying Justice Breyer's interest-balancing approach, which requires the Court to ask "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon the other important governmental interests,"[91] the dissenters concluded that the District of Columbia "measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it."[92] In reaching their conclusion, the dissenters asked "how the statute seeks to further the governmental interests that it serves, how the statute burdens the interest that the Second Amendment seeks to protect, and whether there are practical, less burdensome ways of furthering those interests."[93] The "ultimate question," according to the dissenters, "is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate."[94]

In examining the first factor, Justice Breyer considered "the facts as the legislature saw them when it adopted the District statute"[95] and concluded that its "special focus on handguns … reflects the fact that the committee report found them to have a particularly strong link to undesirable activities in the District's exclusively urban environment."[96] He also considered "the facts as a court must consider them looking at the matter as of today,"[97] and concluded that the recent statistics presented to the Court tell essentially the same story that the committee report told thirty years earlier and, at least, "they present nothing that would permit us to second-guess the Council in respect to the numbers of gun crimes, injuries, and deaths, or the role of handguns."[98] Finally, he said that Heller and his amici generally do not disagree with the statistics, but rather "disagree

Justice Breyer argued that strict scrutiny, with its strong presumption against constitutionality, is out of place. *Id*.

88. 520 U.S. 180, 195-96 (1997).

89. District of Columbia v. Heller, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting).

90. Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 677-87 (2004) (Breyer, J., dissenting).

91. *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting).

92. *Id*. at 2870.

93. *Id*. at 2854.

94. *Id*.

95. *Id*.

96. *Id*. at 2855.

97. *Id*.

98. *Id.* at 2856.

strongly with the District's predictive judgment that a ban on handguns will help solve the crime and accident problems that these figures disclose."[99] Justice Breyer agreed that the studies and counter-studies presented to the Court "could leave a judge uncertain about the proper policy conclusion," but in reviewing a legislature's "predictive judgments," the role of the court is simply to ensure that the legislature "has drawn reasonable inferences based on substantial evidence."[100]

The second factor addresses the extent to which the law at issue "burdens the interests that the Second Amendment seeks to protect."[101] Examining each of the interests advanced by Heller and his amici,[102] as well as the majority—preservation of a "well regulated Militia,"[103] safeguarding the use of firearms for sporting activities,[104] and assuring the use of firearms for self-defense[105]—Justice Breyer concluded that the District of Columbia law burdens the first two interests "little, or not at all,"[106] and burdens to some degree the interest of self-defense, an interest that Justice Breyer assumed the Second Amendment seeks to further.[107]

Addressing the third factor, the availability of "reasonable, but less restrictive alternatives," Justice Breyer found no such alternative, suggesting that there is no plausible way to achieve a significant reduction in the number of handguns in the District other than to ban the guns.[108] He said that the "absence of equally effective alternatives to a complete prohibition finds support in the empirical fact that other States and urban centers prohibit particular types of weapons,"[109] suggesting that there may be no substitute for an outright prohibition where a governmental entity deems "a particular type of weapon especially dangerous."[110]

After examining these three factors, Justice Breyer turned to the final question, whether "the District's law disproportionately burden[s Second] Amendment-protected interests."[111] Based on four considerations, he concluded

99. District of Columbia v. Heller, 128 S. Ct. 2873, 2857 (2008) (Breyer, J., dissenting).

100. *Id*. at 2860 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)). *See also* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 544-45 (2005) (expressing concern about using a "substantially advances" formula in Takings Clause jurisprudence because "it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies").

101. *Id.* at 2861.

102. The following is a non-exhaustive list of parties filing amicus briefs on behalf of Respondent, Dick Heller: The State of Wisconsin; The American Center for Law and Policy; Former Senior Officials of the Department of Justice; The Center for Individual Freedom; and the National Rifle Association.

103. *Heller*, 128 S. Ct. at 2814.

104. *Id.* at 2801.

105. *Id*. at 2822.

106. *Id.* at 2863 (Breyer, J., dissenting).

107. *Id*. at 2863-64.

108. *Id*. at 2864.

109. District of Columbia v. Heller, 128 S. Ct. 2873, 2864-65 (2008) (Breyer, J., dissenting).

110. *Id*. at 2865.

111. *Id.*

that it did not.[112] First, the District law is "tailored to the life-threatening problems it attempts to address," and "there is no less restrictive way to achieve the problem-related benefits that it seeks."[113] Second, "the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the primary interest, but at most a subsidiary interest, that the Second Amendment seeks to serve."[114] Third, Justice Breyer found support in what eighteenth century legislatures thought they could enact in the way of gun control regulation, pointing to the fact that Samuel Adams, who lived in Boston, supported a constitutional amendment providing protection similar to that provided by the Massachusetts Constitution, which did not trump a Massachusetts law that prohibited residents of Boston from keeping loaded guns in the house.[115] In other words, Justice Breyer thought it unlikely that Samuel Adams would have supported a constitutional amendment that would have precluded the District of Columbia from adopting a law similar to the Massachusetts law governing Boston.[116] The question, he argued, "should not be whether a modern restriction on a right to self-defense duplicates a past one, but whether that restriction, when compared with restrictions originally thought possible, enjoys a similarly strong justification."[117] Fourth, Justice Breyer predicted that the Court's decision "will have unfortunate consequences," in that it invites legal challenges to gun regulations throughout the country without providing standards for resolving the challenges and, more importantly, it "threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems."[118]

In the majority opinion, Justice Scalia observed that Justice Breyer "proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering, 'interest-balancing inquiry.'"[119] Justice Scalia also said that he is not aware of any "other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[120] In response to the "judge-empowering" comment, Justice Breyer indicated that he takes such criticism seriously and explained that the Court has taken the same approach in other areas of constitutional law.[121] He conceded that his approach "requires judgment", but points out that his method is transparent in that it requires "careful identification of the relevant interests" and evaluation of "the law's effect upon them."[122] It is not obvious that Justice Breyer's approach is more

112. *Id*. at 2865-68.
113. *Id*. at 2865-66.
114. *Id*. at 2866.
115. *Id*. at 2867-68.
116. *Id.* at 2867.
117. *Id*. at 2868.
118. *Id*.
119. District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).
120. *Id.*
121. *Id*. at 2868.
122. *Id*.

"judge-empowering" than the levels-of-scrutiny approach, since the latter requires judges to make judgments about the government's interests—whether they are legitimate, important, or compelling—as well as the government's chosen means—whether they are rationally related to a legitimate interest, substantially related to an important interest, or narrowly tailored to serve a compelling interest.

In *Mistretta v. United States*,[123] Justice Scalia recognized that a "certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[124] In *Estate of McIntyre v. Ohio Election Commission*,[125] challenging an Ohio statute that prohibited the distribution of anonymous campaign literature, Justice Scalia characterized the case as "the most difficult case for determining the meaning of the Constitution" because there is no accepted existence of such governmental restrictions, but their absence cannot "clearly be attributed to constitutional objections."[126] Constitutional adjudication, in such a case, "necessarily involves not just history but judgment: judgment as to whether the government action under challenge is consonant with the concept of the protected freedom … that existed when the constitutional protection was accorded."[127] Justice Scalia would have upheld the Ohio law because a "governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality."[128]

In sum, the dissenters criticized the majority for failing to provide sufficient guidance to the lower courts on how to approach Second Amendment challenges to a wide range of gun-related laws.[129] They attempted to limit the effect of the Court's decision by supplying a standard that would appear to leave legislative bodies with substantial discretion and deference in regulating firearms.[130] While identifying the appropriate standard for challenges based on the Second Amendment presents a new challenge for the courts, it is an issue that has been addressed frequently in the context of challenges based on other constitutional

123. Mistretta v. United States, 488 U.S. 361 (1989).

124. *Id.* at 417 (Scalia, J., dissenting).

125. Estate of McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

126. *Id.* at 375 (Scalia, J., dissenting).

127. *Id*. In contrast, Justice Thomas agreed the law is unconstitutional, saying "we should determine whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafleting." He believed that it did. *Id*. at 359 (Thomas, J., concurring).

128. *Id*. at 375.

129. In a different context, Justice Scalia, joined by Justice Thomas, was very critical of Justice Kennedy's refusal to find a political gerrymandering claim nonjusticiable, instead concluding that the plaintiffs "failed to state a claim as to political gerrymandering, without ever articulating what the elements of such a claim consist of," thus providing "no guidance to lower court judges and perpetuat[ing] a cause of action with no discernible content." League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 406 (2006) (Scalia, J., concurring in part and dissenting in part). *See also* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (where Justice Scalia noted that because "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged, … gerrymandering claims are nonjusticiable").

130. District of Columbia v. Heller, 128 S. Ct. 2783, 2852-53 (Breyer, J., dissenting).

provisions.[131] How the lower courts should approach the issue, and what standard they should adopt, will be addressed in the following parts.

III. HOW THE COURT CURRENTLY DETERMINES THE STANDARD OF REVIEW

While judges, lawyers, and law students often fight about the appropriate standard of review in constitutional litigation, the importance of identifying the appropriate standard for a particular case or for a particular type of claim may be overrated.[132] One may legitimately question whether the Court's chosen standard of review helps it to decide a particular case or whether it simply provides a rationale or justification after the decision is made.[133] Further, there is much slack within each of the three most commonly utilized standards—rational basis, intermediate scrutiny, and strict scrutiny. For example, one view of rational basis, which gives almost complete deference to the legislative body, permits the Court to supply a rationale even if the legislative process failed to do so.[134] Another version results in a much more searching inquiry, in which the Court determines whether the government's interest is legitimate and whether its proffered justifications are supported in fact.[135] Similarly, the intermediate scrutiny utilized in equal protection cases alleging discrimination based on illegitimacy[136] is less demanding than the intermediate scrutiny utilized in sex-discrimination cases where the government's justification must be "exceedingly persuasive."[137]

The same range is present with respect to strict scrutiny review in equal protection cases. The standard in cases involving an alienage-based classification[138] is less demanding than the standard in cases involving a race-

131. *See, e.g., id.* at 2851-52 (discussing why the standard used is important and providing examples of decisions where the court used various standards of review).

132. *See generally, e.g.,* Virginia P. Croudace & Steven A. Desmarais, Note, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV. 1425, 1435 (1985) ("Application of [the] standard leaves considerable room for judicial discretion, because what constitutes a close fit between the statutory classification and the objective sought cannot be defined with any degree of precision.").

133. *But see generally* Richard H.W. Maloy, *"Standards of Review"—Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603 (2000) (explaining characteristics of standards of review such as what they are, why the Court has them, and how they are formulated).

134. This is demonstrated by cases such as *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-20 (1993), and *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-79 (1980).

135. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632-35 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-40, 449 (1985).

136. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 509 (1976) (administrative convenience justifies a classification).

137. United States v. Virginia, 518 U.S. 515, 524 (1996).

138. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (holding that "classifications based on alienage … are inherently suspect and subject to close judicial scrutiny"). *But see, e.g.*, Foley v. Connelie, 435 U.S. 291, 296-300 (1978) (law requiring state troopers to be citizens held constitutional because "citizenship bears a rational relationship to the special demands of the particular position").

based classification,[139] although the difference is accomplished by creating an exception for some alienage classifications.[140] In *Graham v. Richardson*,[141] the Court applied strict scrutiny to strike down a statute that conditioned public assistance benefits on citizenship or fifteen-year residency in the United States, but in *Foley v. Connelie*, the Court created an exception and applied rational basis to uphold a citizenship requirement for state trooper positions.[142]

To the extent that the standard of review depends on the governmental interest at stake, ranging from legitimate (rational basis) to important (intermediate scrutiny) to compelling (strict scrutiny), courts have great discretion in attaching a label to the governmental interest.[143] There is no magic formula for determining which "value" should be assigned to a particular governmental interest.[144] The value assigned is usually not based on empirical data, but rather the judgment of a judge or judges.[145] Similarly, application of the second prong, ranging from rational relationship (rational basis) to substantial relationship (intermediate scrutiny) to narrowly tailored (strict scrutiny), is discretionary and requires judgment.[146] Thus, it is not clear whether the "interest-balancing inquiry" Justice Breyer proposed in *Heller*[147] is any more "judge-empowering" than the "traditionally expressed levels [of scrutiny]" Justice Scalia seemingly preferred, though he did not expressly indicate which level he would utilize.[148]

Even though the levels-of-scrutiny approach and the interest-balancing approach that judges use to identify the proper standard of review are "judge-empowering" since they require judgment and the exercise of discretion, both approaches serve a useful purpose.[149] A standard of review provides guidance and helps determine where the presumptions lie.[150] For example, lawyers and their clients challenging laws in cases that trigger only traditional rational basis review know they have an uphill battle, while those challenging laws in cases

139. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

140. *See, e.g., Foley*, 435 U.S. at 296-300.

141. *Graham*, 403 U.S. at 371-72.

142. *Foley*, 435 U.S. at 296-300 (police officers). *See also* Cabell v. Chavez-Salido, 454 U.S. 432, 445-46 (1982) (citizenship requirement upheld for probation officers); Ambach v. Norwick, 441 U.S. 68, 75-82 (1979) (citizenship requirement upheld for public school teachers).

143. *See, e.g.*, Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 Nw. U. L. REV. 2035, 2042-43 (2008).

144. *Id*.

145. *See, e.g.*, Croudace & Desmarais, *supra* note 132, at 1435 ("Application of [the] standard leaves considerable room for judicial discretion, because what constitutes a close fit between the statutory classification and the objective sought cannot be defined with any degree of precision.").

146. *Id.*

147. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2847-70 (2008) (Breyer, J., dissenting).

148. *Id.* at 2817 & n.27.

149. Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1471 n.44 (2003) (reviewing JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002)).

150. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-15 (1993) (holding that non-suspect classifications, which are subject to rational basis review, have "a strong presumption of validity").

that demand strict scrutiny know success is likely.[151] Thus, once the standard of review is established for a particular type of case, it will either encourage or discourage litigation.[152] The absence of a standard of review for Second Amendment challenges likely will encourage, rather than discourage, litigation because neither side is in a good position to predict the outcome.[153]

The majority opinion may be viewed as eliminating rational basis review, thereby encouraging litigation. The dissenters propose a balancing-of-the-interests approach that, while not entirely predictive, is likely to discourage litigation because, according to the dissenters, even the restrictive District of Columbia law would have been upheld under that approach. Further, a standard of review puts government bodies interested in implementing gun-control laws on notice of the legislative record and places them in the best position to defend such laws when challenged in court.[154] A standard of review provides a related tool for litigants by helping them establish a framework for presenting their arguments.[155]

Justice Scalia's opinion for the majority, particularly the non-exhaustive list of "presumptively lawful regulatory measures," suggests that a compromise was required to obtain the fifth vote.[156] While this is risky, it can be assumed that Justices Scalia, Thomas, Roberts, and Alito would prefer strict, or at least intermediate, scrutiny, while Justice Kennedy was unwilling to join an opinion establishing such a standard.[157] If this assumption is accurate, then Justice Kennedy holds the key, as is frequently the case with the current Court.[158] The question then becomes what standard of review, or what approach to determining the scope of the right identified in Heller, is Justice Kennedy likely to adopt, given the fact that he joined an opinion saying "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster."[159] As stated earlier, that sentence is a bit curious, though it was perhaps necessary to

151. *Id*.

152. *Id*.

153. *See generally* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1984).

154. Allocation of the burden of proof is informed by the standard of review, with traditional rational basis imposing a heavy burden on the challenger (presumption of validity) and strict scrutiny imposing a heavy burden on government (presumption of invalidity). *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 313-15 (1993) (holding that non-suspect classifications, which are subject to rational basis review, have "a strong presumption of validity").

155. *See Heller*, 128 S. Ct. at 2817 n.27. *See also* Tushnet, *supra* note 66, at 419-20.

156. *See generally* Tushnet, *supra* note 66 (discussing the Heller compromise in greater detail).

157. *Id.* at 420.

158. Examples include cases challenging restrictions on abortion and voluntary, benign race-conscious programs.

159. District of Columbia v. Heller, 128 S. Ct. 2783, 2817-18 (2008) (citing Parker v. District of Columbia, 478 F.3d 370, 400 (2007)).

allow the majority to dispose of the case in the manner chosen, without identifying a standard of scrutiny to govern future cases.[160]

In searching for the appropriate standard of review or level of scrutiny in Second Amendment claims, courts could, of course, begin with the famous footnote in *United States v. Carolene Products Co*.[161] That footnote, however, is of little help because it simply indicates that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[162] In other words, the rational basis standard that the Court in *Carolene Products* employed to review a due process challenge to federal "regulatory legislation affecting ordinary commercial transactions,"[163] may not be appropriate when enumerated rights are at issue.[164]

In *City of Cleburne*, an equal protection challenge to the denial of a special use permit for the operation of a group home for persons with mental disabilities, the Court discussed the standards devised by the courts "for determining the validity of state legislation or other official action that is challenged as denying equal protection."[165] After stating the general rule, "that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest,"[166] the Court summarized the three-tier, level-of-scrutiny standard of review ranging from rational basis to heightened review, either intermediate or strict scrutiny.[167] It concluded that the court of appeals had "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation."[168]

The Court identified four reasons in support of its conclusion: (1) the large size and the diversity of the class, which makes determining the appropriate treatment of the group a difficult and technical matter for which legislators are better suited than the judiciary;[169] (2) the legislative response to the plight of class members demonstrates that lawmakers have been addressing issues related to the class "in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary," i.e., legislators

160. *See* Tushnet, *supra* note 66, at 419-20 (discussing the compromise needed to obtain Justice Kennedy's vote).

161. 304 U.S. 144, 152 n.4 (1938).

162. *Id.*

163. *Id*. at 152-53.

164. Strict scrutiny may be utilized "when state laws impinge on personal rights protected by the Constitution." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). *But see* Burdick v. Takushi, 504 U.S. 428, 432-34 (1992) (rejecting the argument that strict scrutiny applies to all laws imposing a burden on the right to vote and utilizing a flexible balancing standard).

165. *Cleburne*, 473 U.S. at 439-40.

166. *Id*. at 440.

167. *Id*. at 440-42.

168. *Id*. at 442.

169. *Id.* at 442-43.

are not ignoring the concerns of the class;[170] (3) the legislative response shows public support and "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers";[171] and (4) if this "large and amorphous" class is deemed quasi-suspect, it would be difficult to distinguish other groups with immutable disabilities, such as the aging, the disabled, the mentally ill, and the infirm, who can claim some degree of prejudice from the general public.[172] After rejecting heightened scrutiny, the Court noted that this does not leave the class "entirely unprotected from invidious discrimination"[173] because the classification still had to survive rational basis review and, in fact, the Court found a violation of equal protection.[174]

The Court's analysis in *City of Cleburne* incorporated the same criteria identified in previous cases where the Court has searched for the appropriate standard of review.[175] For example, the Court has considered immutable characteristics, the ability of the group to protect itself through the political process, the history of discrimination against the group, and the likelihood that the classification reflects prejudice rather than a legitimate justification.[176] In short, the Court has almost unfettered discretion in determining the appropriate standard of review in each particular case, and how a justice views the merits of each case will certainly influence that determination.[177] Therefore, given the close vote on the merits in *Heller* and the likelihood that Justice Kennedy is the key, an examination of his approach to the standard of review may be instructive.

Two Fourteenth Amendment cases in which Justice Kennedy wrote the opinion of the Court might shed some light on his approach.[178] In *Lawrence v. Texas*, the Court held that a "Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct" violates the Due Process Clause of the Fourteenth Amendment.[179] More specifically, the Court held that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[180] "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[181] The "Texas statute

170. *Id.* at 443-45.
171. *Id.* at 445.
172. *Id*. at 445-46.
173. *Id*. at 446.
174. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985).
175. *Id.*
176. *Id*.
177. *See, e.g.*, Reynolds & Denning, *supra* note 143, at 2042.
178. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).
179. *Lawrence*, 539 U.S. at 562.
180. *Id.* at 578.
181. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

[furthered] no legitimate state interest [that could] justify its intrusion into the personal and private life of the individual."[182]

Justice Kennedy did not explicitly state the standard of review, but his reference to the lack of a "legitimate" state interest suggests some version of rational basis review.[183] At the same time, his opinion clearly demands more than mere rationality; his analysis is better characterized as heightened rational basis or a form of balancing along the lines of what Justice Breyer has suggested in a number of cases.[184] Justice Scalia's dissenting opinion, joined by Justices Rehnquist and Thomas, criticized Justice Kennedy for applying "an unheard-of form of rational-basis review that will have far-reaching implications beyond this case."[185]

Justice Kennedy also wrote the opinion of the Court in a related case, *Romer v. Evans*,[186] which held that an amendment to the Colorado Constitution that repealed current laws prohibiting sexual-orientation discrimination and prevented the future enactment of such laws in Colorado, violated the Equal Protection Clause.[187] After stating that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end,"[188] the Court concluded that the Colorado amendment did not satisfy rational basis because it was "born of animosity toward the class of persons affected" and a bare "'desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'"[189]

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182. *Id*. at 578 (citation omitted). Justice O'Connor wrote an opinion agreeing that the Texas statute is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 579 (O'Connor, J., concurring) (citations omitted).

> Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Id. at 582 (citations omitted). More generally, Justice O'Connor said "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Id*. at 580.

183. *Id.* at 578.

184. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting); Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 677-87 (2004) (Breyer, J., dissenting); Thompson v. W. States Med. Ctr., 535 U.S. 357, 388 (2002) (Breyer, J., dissenting); Bartnicki v. Vopper, 532 U.S. 514, 541, 536 (2001) (Breyer, J., concurring); Nixon v. Shrink Mo. Government PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195-96 (1997); Burdick v. Takushi, 504 U.S. 428, 433 (1992); Mathews v. Eldridge, 424 U.S. 319, 339-49 (1976); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

185. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

186. 517 U.S. 620 (1996).

187. *Id.* at 635-36.

188. *Id.* at 631.

189. *Id*. at 634 (citing Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973)) (internal citations omitted).

The review Justice Kennedy utilized in those two cases is vastly different from the rational basis the Court used in cases such as *United States Railroad Retirement Board v. Fritz*,[190] *Federal Communications Commission v. Beach Communications, Inc.*,[191] and *Railway Express Agency, Inc. v. New York*,[192] in which the Court required only "plausible" reasons for the legislative action—even if the plausible reasons identified failed to provide a basis for the legislative decision, or any conceivable legislative purpose.[193] Further, the Court in those cases placed the burden on the challenger to negate every conceivable basis that might support the legislation.[194] Thus, the Court's approach to "rational basis" review ranges from almost complete deference to the legislative body[195] to a more searching inquiry into whether the government can articulate a legitimate purpose and whether the classification bears a rational relation to that legitimate purpose.[196]

This heightened form of rational basis review was applied in two cases decided before Justice Kennedy was on the Court. In the first, *City of Cleburne, Texas v. Cleburne Living Center, Inc.*,[197] the Court applied rational basis to hold that denying a special use permit to operate a group home for the mentally retarded violated the Equal Protection Clause.[198] The second case, *Plyler v. Doe*,[199] held that a Texas law violated the Equal Protection Clause by denying undocumented school-age children the free public education that it provided to children who are U.S. citizens or legally admitted aliens.[200] Certainly, the District of Columbia law at issue in *Heller* would survive the "regular," or traditional, rational basis standard utilized in *Fritz*,[201] *Beach*,[202] and *Railway Express*,[203] and it may very well have survived application of what is referred to as heightened rational basis, which was utilized in *Lawrence*,[204] *Romer*,[205] *City of Cleburne*,[206] and *Plyler*.[207] Promoting public safety is obviously a legitimate, if

190. 449 U.S. 166 (1980).

191. 508 U.S. 307 (1993).

192. 336 U.S. 106 (1949).

193. *See generally* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-14 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949).

194. *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 315 (noting that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it'").

195. *See generally id.*

196. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996).

197. 473 U.S. 432, 438 (1985).

198. *Id.* at 447-50.

199. 457 U.S. 202 (1982).

200. *Id.* at 224-26.

201. *Fritz*, 449 U.S. at 179.

202. *Beach Commc'ns*, 508 U.S. at 313-14.

203. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949).

204. Lawrence v. Texas, 539 U.S. 558, 586 (2003).

205. *Romer*, 517 U.S. 620.

206. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-40 (1985).

not compelling, governmental interest, and there is no indication that gun-control laws in general are "born of animosity."[208] Similarly, the District of Columbia, as well as municipalities and states, could demonstrate a rational relationship between the safety interest and the gun-control legislation, a relationship the Court found lacking in *City of Cleburne*.[209]

First Amendment cases are helpful in understanding the flexibility with which Justice Kennedy determines the appropriate standard of review. In his concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*,[210] Justice Kennedy favored a flexible approach to a content-based ordinance that regulated the location of "adult speech businesses" in order to reduce the secondary effects of such businesses.[211] In an earlier case, *City of Renton v. Playtime Theaters, Inc.*,[212] a similar ordinance that regulated adult speech businesses was described as "content-neutral," which meant that it fell into the Court's time, place, and manner analysis and, as a result, triggered intermediate, rather than strict, scrutiny.[213] Justice Kennedy said that such ordinances clearly are content-based, and that the Court should have recognized this.[214] Nevertheless, he said "[a] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it."[215] He further reasoned that if such an ordinance "is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech," then "the ordinance is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances."[216] Therefore, while Justice Kennedy agreed that the Court should utilize intermediate scrutiny, as it did in *Renton*, he took a different route to arrive at that conclusion.[217]

To Justice Kennedy, the key to justifying an ordinance that prohibits two adult businesses under the same roof is a factual showing that the "ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced."[218] Justice Kennedy went on to say that cities must have "latitude to experiment," that "very little evidence is required," and that "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners."[219] Such deference is justified because the city

207. Plyler v. Doe, 457 U.S. 202 (1982).

208. Romer v. Evans, 517 U.S. 620, 631, 634 (1996).

209. *Cleburne*, 473 U.S. at 448-49.

210. 535 U.S. 425 (2002).

211. *Id*. at 445-49 (Kennedy, J., concurring).

212. City of Renton v. Playtime Theaters, Inc., 475 U.S. 4 (1986).

213. *Id.* at 48-50.

214. *Alameda Books,* 535 U.S. at 444-45 (Kennedy, J., concurring) (noting that the term "content neutral" is "imprecise").

215. *Id.* at 447.

216. *Id.*

217. *Id.* at 445-53.

218. *Id*. at 451.

219. *Id.*

council "knows the streets of Los Angeles better than we do."[220] Similarly, I expect the city council of Chicago, for example, "knows the streets of [Chicago] better than [the Justices] do" and, therefore, Justice Kennedy might say "courts should not be in the business of second-guessing fact-bound empirical assessment of city [officials]" who decide gun-control ordinances are needed.[221]

In another First Amendment case, *Arkansas Educational Television Commission v. Forbes*,[222] an independent candidate for a congressional position challenged his exclusion from a candidate debate sponsored by a state-owned public television broadcaster.[223] Justice Kennedy, writing for the Court, avoided heightened scrutiny by using the forum analysis, even though he conceded that public broadcasting generally does not lend itself to scrutiny under the forum analysis, and characterizing the debate as a nonpublic forum.[224] As a result, the exclusion of Forbes only had to be a reasonable, viewpoint-neutral exercise of journalistic discretion and the constitutional challenge was rejected.[225]

Recently, in *Garcetti v. Ceballos*,[226] Justice Kennedy, again writing for the Court, relied on government employers' "heightened interests in controlling speech made by an employee in his or her professional capacity"[227] to create an unprotected subcategory of government employee speech—statements made "pursuant to [employees'] official duties."[228] As pointed out by the dissenters, including Justice Breyer,[229] there was no need to categorically exclude such employee speech from First Amendment protection because the government's interests are protected adequately under the balancing that *Pickering* required.[230] In effect, Justice Kennedy determined, as a matter of law, that balancing always favors the government employer when its employees speak as part of their official duties.[231]

220. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 452 (2002). Justice Scalia expressed a similar view in his dissenting opinion in *Estate of McIntyre v. Ohio Elections Commission*, criticizing the majority for "set[ting] their own views—on a practical matter that bears closely upon the real-life experience of elected politicians and not upon that of unelected judges—up against the views of 49 … state legislatures and the Federal Congress," in striking down an Ohio statute prohibiting the distribution of anonymous campaign literature. 514 U.S. 334, 381 (1995) (Scalia, J., dissenting). Nevertheless, in *Heller*, Justice Scalia said that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table[, including] the absolute prohibition of handguns held and used for self-defense in the home." District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).

221. *Alameda Books*, 535 U.S. at 451.

222. 523 U.S. 666 (1998).

223. *Id.* at 669-701.

224. *Id.* at 672-76.

225. *Id.* at 669.

226. 547 U.S. 410 (2006).

227. *Id*. at 422.

228. *Id.* at 423.

229. *Id*. at 444-50 (Breyer, J., dissenting). *See also id*. at 427-44 (Souter, J., dissenting).

230. Pickering v. Bd. of Educ. of Twp. High Sch., 391 U.S. 563, 568 (1968).

231. *Id.* at 569-70 (explaining that the statements in the case were not made in an official capacity).

The Court has reached a general consensus that the rights protected by the Bill of Rights and the Fourteenth Amendment are not absolute.[232] This opens the door to legislation restricting constitutional rights or, more accurately, their scope.[233] When such legislation is challenged as an infringement on a constitutional right, the Court then reviews the legislation and definitively determines the scope of the right.[234] This is the Court's role, a role that dates back to the Court's decision in *Marbury v. Madison*, which first established judicial review.[235]

Ever since 1803, the Court has struggled with the critical question not addressed in *Marbury*—the scope of judicial review or the appropriate deference to afford the legislative decision at issue.[236] Particularly in First and Fourteenth Amendment cases, the Court frequently utilizes the levels-of-scrutiny analysis as a means to explain or quantify the appropriate deference a legislative decision should receive.[237] This serves a purpose, but it has serious limitations and generally oversimplifies, or maybe hides, what the Court is really doing.[238] Sometimes the Court abandons the levels-of-scrutiny analysis and instead balances the interests of the government against the interests of the individual.[239] Whether done explicitly, as Justice Breyer does in *Heller*,[240] or implicitly under the levels-of-scrutiny guise, the justices are making judgments.[241] *Marbury* is judge-empowering and any approach will require judges to make judgments.[242] While Justice Scalia is critical of the balancing approach because he believes it is too "judge-empowering," as pointed out above, it is difficult to understand how it is more empowering than the levels-of-scrutiny approach considering all of the judgments required in its application.[243] Therefore, it can be assumed that judge empowerment is not a legitimate factor in determining the appropriate standard of review.[244]

232. Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1142 (1996) ("Like other rights in the Bill of Rights, [the Second Amendment Right] is not absolute ….").

233. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

234. *See* Joseph M. Pellicciotti, *Redefining the Relationship Between the States and the Federal Government: A Focus on the Supreme Court's Expansion of the Principle of State Sovereign Immunity*, 11 B.U. PUB. INT. L.J. 1, 25 (2001).

235. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

236. Gerard J. Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485, 485 (2001).

237. *Id.* at 500-03.

238. *See* Daniel E. Witte, Comment, People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 205-06.

239. *See* Clark, *supra* note 236, at 506-09.

240. *Heller*, 128 S. Ct. at 2847-80 (Breyer, J., dissenting).

241. *See* Clark, *supra* note 236, at 500-03.

242. *Marbury*, 5 U.S. (1 Cranch) at 176.

243. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

244. One might argue that judges are paid to make judgments.

IV. A REVISED APPROACH TO THE STANDARD OF REVIEW AND ITS APPLICATION TO SECOND AMENDMENT CLAIMS

The current levels-of-scrutiny approach should be abandoned because it offers little assistance in tough cases. As a practical matter, deciding to utilize traditional rational basis in a case is another way of saying the challenger loses, while deciding to utilize true strict scrutiny is another way of saying the challenger wins.[245] There may be exceptions here and there, but not many.[246] With the exception of challenges to benign race-conscious actions, in essence, there is no real judicial review at either end of the spectrum—application of traditional rational basis means the law is upheld and application of true strict scrutiny means the law is struck down.[247]

The difficult cases are those where the standard of review is one located somewhere between traditional rational basis[248] and true strict scrutiny, as in race cases.[249] In these cases, the Court makes a judgment as to the importance of the justification or goal the government relies on, determines the extent of the burden imposed on the constitutional interest, conducts a fairly rigorous assessment of the match between the justification or goal and the means (the restriction imposed on the constitutional interest) utilized to accomplish the governmental goal, and then determines whether the goal is sufficiently served by the restriction, (i.e., whether the particular restriction on a constitutional interest is justified).[250] Whatever labels are attached to this heightened judicial review process, it provides an incentive to improve the legislative process.[251]

245. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-15 (1993) (non-suspect classifications, which are subject to rational basis review, have "a strong presumption of validity").

246. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (applying strict scrutiny but upholding the benign race-conscious admissions program of the University of Michigan Law School); Burson v. Freeman, 504 U.S. 191 (1992) (applying strict scrutiny but upholding a content-based regulation prohibiting distribution of campaign literature within 100 feet of the entrance to a polling place).

247. *Compare Beach Commc'ns*, 508 U.S. at 313-15, *with* Yoshino, *supra* note 20, at 769 (noting that strict scrutiny review carries a presumption of invalidity).

248. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); *Beach Commc'ns*, 508 U.S. 307; Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

249. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (requiring the "'most rigid scrutiny'") (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

250. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386-90, 397-98 (2000) (holding state's campaign contribution restrictions were constitutional by applying less than strict scrutiny).

251. In discussing the relationship between due process and equal protection, Justice Jackson said:

> Invocation of the Equal Protection Clause … does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and

Proposed legislation should have an identified goal and the proposed restrictions imposed on constitutional interests should actually promote that goal.[252] If there are a number of means available with an equal likelihood of achieving the goal, the legislative body should choose the one with the least adverse impact on the constitutional interest at stake.[253] In making these judgments, the legislative body should conduct hearings, gather information, and seek out the assistance of experts.[254] When the legislative process is transparent, and those involved make an honest effort to assess potential benefits and the extent of any restrictions, then deference to the legislative process makes sense.[255] In part, effective judicial review promotes and rewards good process while discounting the products of sloppy process.[256]

A good example of judicial review along the lines described above is found in *City of Cleburne*,[257] in which the Court found that the denial of a "special use permit for the operation of a group home for the mentally retarded"[258] violated equal protection, in large part because the reasons advanced by the City in support of the denial simply were not supported by the record.[259] While the Court rejected the challengers' argument that the mentally retarded constitute a quasi-suspect class and heightened scrutiny should be utilized, its rational basis review was much more searching than traditional rational basis.[260] In fact, the review utilized in *City of Cleburne* would result in most, if not all, invidious racial classifications being struck down.[261]

Another example is found in First Amendment challenges to content-neutral time, place, or manner restrictions on speech.[262] Such a restriction is not as offensive to First Amendment values as a restriction that bans speech.[263] In his dissenting opinion in *City of Erie v. Pap's A.M.*, Justice Stevens said "[a]

> unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.

Ry. Express Agency, 336 U.S. at 112 (Jackson, J., concurring).

252. *See* Barry Bostrom, Karlin v. Foust: *United States District Court Western District of Wisconsin June 19, 1997*, 14 ISSUES L. & MED. 377, 382 (1999).

253. Barry Sullivan, *Some Thoughts on the Constitutionality of Good Samaritan Statutes*, 8 AM. J.L. & MED. 27, 32-29 (1983).

254. In a case addressing the Takings Clause of the Fifth Amendment, the Court imposed a "rough proportionality" standard requiring the city to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

255. *See* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 255 (2008).

256. *See id.*

257. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

258. *Id.* at 435.

259. *Id.* at 448-50.

260. *Id.* at 446.

261. *Id.* at 450 (because "irrational prejudice" against a group is not a rational basis).

262. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981).

263. City of Erie v. Pap's A.M., 529 U.S. 277, 322 (2000) (Stevens, J., dissenting) (upholding an ordinance banning public nudity when applied to expressive, nude erotic dancing).

dispersal that simply limits the places where speech may occur is a minimal imposition, whereas a total ban is the most exacting of restrictions."[264] This is because "[t]he State's interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden."[265] Content-neutral time, place, or manner restrictions are supposedly subjected to intermediate scrutiny, as is a regulation of expressive conduct that is aimed at the conduct rather than the message,[266] but the review is less than rigorous, at least where government is regulating low value speech, such as adult entertainment.[267] The Court's willingness to relax the evidentiary basis for municipal assertions about the negative "secondary effects" of adult entertainment demonstrates this lack of rigor.[268]

When deciding the many Second Amendment challenges to gun-control legislation and regulation that inevitably will follow *Heller*, the courts should apply a standard of review that (a) is not based on presumptions, (b) takes into account the importance of the governmental interest or goal—public safety, (c) takes into account the value of the Second Amendment right discovered in *Heller*—self-defense,[269] (d) requires government to establish an evidentiary record, as part of the legislative or regulatory process, showing an actual connection between its goal and the restrictions imposed on guns, and (e) gives substantial deference to the legislative assessment of the fit between goals and restrictions, where this assessment is based on empirical data reflected in the legislative record. This can be accomplished by heightened rational basis, as applied in *City of Cleburne*,[270] or lowered intermediate scrutiny, as applied in the

264. *Id.* at 322.

265. *Id*.

266. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

267. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 429-30 (2002) (overruling lower court's determination that law against allowing multiple adult oriented stores in the same building was a content based distinction and holding that "[t]he City of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of [the law] to demonstrate that its ban on multiple-use adult establishments serves its interests in reducing crime"); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976) (holding that "zoning ordinances requiring that adult motion picture theaters not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment"). The Court further noted that since the "record discloses a factual basis for the [City] Council's conclusions that the [1,000 foot] restriction will have the desired effect[,]" the Court would not "appraise the wisdom of its decision." *Young*, 427 U.S. at 71.

268. *Alameda Books*, 535 U.S. at 438 ("In *Renton*, we specifically refused to set such a high bar [of requiring a municipality to disprove every other theory for the link between high concentrations of adult operations and secondary effects other than its own] for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest.").

269. Interestingly, gun-control laws and the self-defense-related right discovered in Heller have a common goal—safety. This argues against any presumption in favor of either the laws or the Second Amendment. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 216-17 (2003) (Breyer, J., concurring).

270. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). *See also* Romer v. Evans, 517 U.S. 620, 631-36 (1996) (applying a heightened standard of rational basis

low-value speech cases,[271] although part (d) imposes a more rigorous burden on government than the Court imposes in the low-value speech cases.[272] The evidentiary burden is required to justify the substantial deference afforded to the legislative fact-finding process as required by part (e). In most, if not all, Second Amendment cases, this approach will lead to the same result as Justice Breyer's interest-balancing inquiry and will allow government considerable room to impose gun controls.[273] However, this proposed standard of review will give more guidance to both legislators and litigants and explicitly encourages legislative bodies to improve their process.[274]

After *Heller*, legislative bodies considering gun-control laws know that they are operating in a zone in which the Constitution (Second Amendment) is in play and that any law they adopt will likely be challenged in court.[275] The committee or legislator initiating the law should openly address the constitutional limits the Court imposed in *Heller* and should seek the advice of counsel to ensure that the new law is within those limits. In addition to attorneys, other experts, as well as citizens, can assist in the process by helping to identify the problem, measuring the scope of the problem, identifying methods of addressing the problem, assessing the likely effectiveness of the various methods, and selecting the remedial method that is likely to achieve the desired result without unduly burdening the constitutional right. Of course, there is no guarantee that a court will agree, but it is much easier to give substantial deference to the decision of a legislative body that engaged in an open, good faith attempt to identify the scope of the constitutional right at issue, documented the problem calling for a legislative remedy, and then selected a remedy that does not disproportionately burden the right.

This approach to judicial review of legislation and regulations, which gives legislators and administrators an incentive to improve their process, will work in all cases where the courts currently use the level-of-scrutiny approach. For

review to a law removing certain protections from homosexuals); Plyler v. Doe, 457 U.S. 202, 216-30 (1982) (applying heightened review to a Texas law withholding funds from school districts that provided free education to the children of illegal immigrants); Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-38 (1973) (applying heightened review to law that excluded from participation in the federal food stamp programs people those living in a household containing unrelated members).

271. *See, e.g.*, *Alameda Books*, 535 U.S. 425; *Pap's A.M.*, 529 U.S. 277; City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); *Young*, 427 U.S. 50. Compare with those the heightened intermediate scrutiny utilized in United States v. Virginia, 518 U.S. 515, 524 (indicating that government must demonstrate an "'exceedingly persuasive justification'" in a sex discrimination case) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

272. I realize that the Court does not admit to using heightened rational basis, nor does it always admit it is treating some speech as low value and applying a discounted intermediate scrutiny, but that is what it in fact does.

273. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2852 (2008).

274. In addition, heightened rational basis review stays within a framework that is more acceptable to those who fear that balancing gives judges unfettered discretion.

275. *See* Allen Rostron, *Protecting Gun Rights and Improving Gun Control After* District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 383, 383 (2009) (discussing the "continuing controversy over gun laws in the District of Columbia and the lower courts' reactions to a wave of post-*Heller* challenges").

example, in cases challenging invidious racial classifications, even a perfect legislative process will be able to justify such a classification only rarely, if ever.[276] However, the results may be very different in cases challenging benign race-conscious actions or classifications. This is true because it will be very difficult for the government to provide a legitimate reason for an invidious classification, while the government may have an important reason for a benign classification.[277]

At the other end of the spectrum, where traditional rational basis governs, the suggested approach will lead to different results, at least until lawmakers learn to make a record sufficient to justify their actions.[278] There is no point in having judicial review where the courts give nearly absolute deference to lawmakers who are unable to articulate a rational purpose for a classification.[279] The any "conceivable basis" standard, which requires the challenger to negate every conceivable basis that might support a law, even those not articulated by the defenders,[280] places an almost impossible burden on the challenger and rewards sloppy lawmaking.[281] Traditional rational basis would be eliminated, but that does not mean more laws will be struck down. Rather, the result might be that lawmakers will limit their activity to laws that have a legitimate purpose, articulated in the law.[282]

The result in cases that now fall between true strict scrutiny and traditional rational basis will not necessarily change, although that will depend on how much a law burdens a constitutional right, how well the lawmakers articulate their purpose, the importance of the purpose, and the nexus between the law and the purpose.[283] In most cases, gender-based classifications will fail because there are so few situations where gender alone, stripped of all stereotypes, really makes a difference.[284] Maybe lawmakers could gather empirical data and expert

276. *See, e.g.*, Loving, 388 U.S. at 11-12 (suggesting that the burden on the government to override invidious racial discrimination is difficult, if not impossible).

277. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (stating the negative opinion of invidious classifications while illustrating that benign reasons exist). "Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society." *Id.*

278. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (finding that the record did not contain evidence of a rational basis).

279. *Cf.* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1180 (1970) (arguing that "[i]t is unrealistic to sustain laws … on the basis of deference to a greater capacity of the legisla[ture]").

280. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-16 (1993).

281. *Id.*

282. Requiring that the purpose of a statute be articulated is different than attempting to determine the motivation of anyone who votes in favor of it, a task that the Court is sometimes unwilling to undertake.

283. *See* footnote 251 and accompanying text.

284. Caban v. Mohammed, 441 U.S. 380, 388-89 (1979) (finding that "maternal and paternal roles are not invariably different in importance").

opinions that would support the conclusion that separate elementary schools for males and females would improve the education for both groups.[285]

In short, a case's outcome would not turn on which level-of-scrutiny category the court applies; rather, the outcome would turn on the record and whether it supports a law that burdens a constitutional right. Judges would make judgments, but lawmakers could influence those judgments significantly by identifying the actual purpose of the law and the considerations that were taken into account to arrive at the legislative judgment reflected in the law.[286] Each branch of government would retain its role, but the process each branch would engage in would be transparent and improved.

V. CONCLUSION

In the highly politicized world of gun control, no standard of review will fully satisfy both sides of the battle.[287] It may be that the decision in *Heller*, which recognized a self-defense-related right without defining the scope of the right, may ultimately lead to a resolution that reasonable people on both sides can tolerate.[288] If the Court eventually adopts strict scrutiny as the controlling standard, then the pro-gun forces will have achieved a major victory since the Second Amendment would trump most gun-control legislation. On the other hand, if the Court eventually adopts the heightened rational basis standard proposed here, then the pro-gun forces will have established that the Second Amendment is in play and requires legislative bodies to act carefully, while the anti-gun forces will have succeeded in containing the scope of the right, leaving most well-reasoned gun-control legislation in place. Pro-gun forces will have won the battle, but maybe not the war?

285. Elizabeth Weil, *Teaching to the Testosterone: Teaching Boys and Girls Separately*, N.Y. TIMES, Mar. 2, 2008, http://www.nytimes.com/2008/03/02/magazine/02sex3-t.html?scp=1&sq=teaching+to+the+testosterone&st=nyt.

286. *Id.*

287. District of Columbia v. Heller, 128 S. Ct. 2783, 2817-18 (2008).

288. *Id*. at 2816-17.