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Abstract

Does the Second Amendment protect commerce in firearms? The simple answer is: yes, to an extent. An individual's right to possess and use a gun for self-defense in the home is black-letter law after District of Columbia v. Heller. *The right to possess and use a gun requires the ability to obtain a gun, ammunition, and firearms training. Therefore, gun dealers, servicers, and training providers receive some constitutional protection as facilitators of their customers' Second Amendment rights. Whether these constitutional rights belong to firearms-related businesses independently of their customers is unclear. The scope of the Second Amendment matters as recent, horrific gun violence has launched serious regulation of firearms commerce back into the spotlight. These regulations are constantly challenged and must be adjudicated using the precious little guidance the Supreme Court has provided.*

Federal circuits have coalesced around a two-part Firearms Commerce Test to evaluate laws regulating firearms businesses. First, courts determine if the challenged law burdens conduct protected by the Second Amendment. Second, courts apply some level of heightened scrutiny. The Firearms Commerce Test is widely accepted. It is simple to understand and execute. The results it produces are consistent, fair, and useful. In fact, chances are good that the Supreme Court adopts the test as a national standard when it hears its first firearms commerce case. Even with these positive attributes, the test could and should function more optimally.

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This article argues that the test could be more efficient, effective, and faithful to Heller *with two substantive modifications. First, courts should assume at step one that the Second Amendment is implicated. This approach is much better than the scavenger hunt through history courts now employ to answer this question. Second, judges should uniformly apply a tougher form of intermediate scrutiny at step two that requires the government to provide evidence that the law is effective (i.e., substantially related to an important government interest). This stricter level of review would ferret out the effective gun regulations from the rest and protect this often-unpopular constitutional right. This article argues that the vast majority of gun regulations will and should still be upheld because the government always has a compelling interest in reducing crime and protecting the public. With that huge advantage, however, officials must demonstrate that their law actually promotes these noble goals.*

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I. INTRODUCTION: THE TIGHTROPE WALK OF REGULATING FIREARMS COMMERCE

Does the Second Amendment protect commerce in firearms? The simple answer is: yes, to an extent. The reasons why are more complicated, but follow a logical progression. An individual's right to possess and use a gun[1] for self-defense in the home is black-letter law after *District of Columbia v. Heller*.[2] The right to possess and use a gun requires the ability to *obtain* a gun, ammunition, gunsmithing, and firearms training.[3] Therefore, gun dealers, servicers, and training providers receive some constitutional protection as facilitators of their customers' Second Amendment rights.[4]

Whether these constitutional rights belong to firearms-related businesses independently of their customers is unclear. This tends to be an issue of first impression in federal circuit courts.[5] A definitive answer will require an

1. The word "gun" is used throughout this article in a broad sense as found in the OXFORD LIVING DICTIONARY: "A weapon incorporating a metal tube from which bullets, shells, or other missiles are propelled by explosive force, typically making a characteristic loud, sharp noise." *Gun*, OXFORD LIVING DICTIONARIES: ENGLISH, https://en.oxforddictionaries.com/definition/gun. (last visited Sep. 10, 2018). This article indicates when a similar term—such as semi-automatic weapon or assault weapon—deviates from this broad definition in a legally-significant manner. This choice to use the term "gun" broadly is deliberate as the public is often confused by the many types and names of firearms in existence today. The focus of this article is on the business of guns in general and not whether certain types of guns should be banned from sale or restricted. The broad definition removes confusion from the important issues this article seeks to address. *See, e.g.*, Mark Joseph Stern, *The Gun Glossary*, SLATE (Dec. 17, 2012, 6:14 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/12/the_gun_glossary_definitions_of_firearm_lingo_and_types_of_weapons.html (stating that the "terms used by the media [in discussing guns and assault weapons bans] are often confusing and imprecise, and few reporters explain the differences among various types of firearms").

2. 554 U.S. 570, 635 (2008). To be specific, the Supreme Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.*

3. *See, e.g.*, Jackson v. City and County of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) ("The Second Amendment protects 'arms,' 'weapons,' and 'firearms'; it does not explicitly protect ammunition. Nevertheless, without bullets, the right to bear arms would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose.").

4. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 677 (9th Cir. 2017), *cert. denied*, 138 S. Ct 1988 (2018) (discussing this limited protection for firearms commerce and stating that, after "[a]fter *Heller*, this court and other federal courts of appeals have held that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense.").

5. *See id.* at 673 (holding that, in this case of first impression in the Ninth Circuit, a "textual and historical analysis of the Second Amendment demonstrates that the Constitution does not confer a

opinion from a Supreme Court that appears to be dodging controversial Second Amendment cases.[6] In the meantime, firearms commerce is protected—to an extent—as ancillary to core Second Amendment rights.[7] Laws that critically interfere with the ability to purchase guns and ammunition, obtain gun repair, or conduct firearms training rest on shaky legal ground.[8] Such commercial regulations are seen, at a minimum, to interfere with "the right of the people to keep and bear Arms."[9]

Less severe regulations also pose complex legal dilemmas left unanswered by the Supreme Court.[10] Do these complexities mean that the government lacks the ability to regulate firearms commerce in substantial ways? The short answer is: certainly not. Constitutional rights are rarely absolute. Accordingly, the Supreme Court has limited the scope of the Second Amendment to allow certain regulations that meet critical governmental interests like public safety and crime prevention.[11]

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freestanding right on commercial proprietors to sell firearms").

6. *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 945 (2018), *denying cert. to* 843 F.3d 816 (9th Cir. 2016) (Thomas, J., dissenting) (lamenting that "[i]f a lower court treated another right so cavalierly [as the lower court treated the Second Amendment in this case], I have little doubt that this [Supreme] Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this [Supreme] Court. Because I do not believe we should be in the business of choosing which constitutional rights are '*really worth* insisting upon,' I would have granted certiorari in this case.") (internal citations omitted).

7. *See Teixeira II*, 873 F.3d at 677 (confirming that there are ancillary rights protected by the Second Amendment necessary to protect the right to possess and use a firearm).

8. *See id.* at 690 (holding that zoning ordinance to limit a proprietor's ability to open a new gun store does not burden conduct protected by the Second Amendment because the ordinance only limited the locations a store can be opened but does not prevent the opening of the gun store itself); *Jackson*, 746 F.3d at 970 (holding that regulation against sale of certain ammunition did not destroy the Second Amendment right to bear arms, it only limited the ability to purchase dangerous ammunition).

9. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

10. *See, e.g.*, *Teixeira II*, 873 F.3d at 682–83 (stating that the "language in *Heller* regarding the regulation of 'the commercial sale of arms,' . . . is sufficiently opaque with regard to that issue . . . [and] rather than relying on it alone to dispose of Teixeira's claim, we conduct a full textual and historical review").

11. The contemporary Supreme Court holds that virtually all constitutional rights are subject to at least some regulation; in other words, they do not offer absolute protection. For example: you cannot yell "Fire!" in a crowded theater (a limit on an individual's First Amendment right to free speech), your home is subject to reasonable searches by the police (a limit on an individual's Fourth Amendment right to privacy), and your private property is subject to seizure after the government pays "just compensation" (a limit on an individual's Fifth Amendment right to control private property). At most, a constitutional right is protected by strict scrutiny, which can be overcome by a "compelling governmental interest." *See, e.g.*, Sonja West, *The Second Amendment Is Not Absolute*,

Despite this regulatory wiggle-room, new laws targeting gun sales are inevitably challenged on Second Amendment grounds. Making matters increasingly difficult, these legal battles take place in tumultuous times when it comes to gun violence.[12] A recent plague of mass shootings in safe havens such as churches, concert venues, government buildings, malls, movie theaters, restaurants, and schools has justifiably driven gun regulation back into the spotlight.[13] Tensions are high, and passionate people entrench themselves on their side of the debate.[14] For the well-intentioned among the problem-solvers, the dilemma is real. Viable solutions must protect the Second Amendment rights of law-abiding gun owners and keep weapons out of the hands of dangerous individuals. Walking this tightrope is merciless. So difficult, it seems, that Congress finds itself bombarded by outrage on both

SLATE, (Dec. 7, 2015, 3:37 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/12/second_amendment_allows_for_gun_control.html (stating that "[c]onstitutional rights are not absolute. They never have been and, practically, never can be. In our constitutional democracy, we have always recognized that we can, and must, have our constitutional cake and regulate it too."). The majority in *Heller* limited the Second Amendment right in this manner by stating: "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

12. *See, e.g.*, Aimee Kaloyares, *Annie, Get Your Gun? An Analysis of Reactionary Gun Control Laws and Their Utter Failure to Protect Americans from Violent Gun Crimes*, 40 S.U. L. Rev. 319, 319 (2013) (calling attention to instances of gun violence in recent history and pointing out the reactionary gun control legislation that followed).

13. *See, e.g.*, Mark Berman, *The Parkland Massacre Sparked a Renewed Debate Over Gun Control. Here's What Happens Next*, WASH. POST (Feb. 20, 2018, 9:34 AM), https://www.washingtonpost.com/news/post-nation/wp/2018/02/20/after-parkland-massacre-renewed-debate-over-gun-control-puts-spotlight-on-students-public-officials/ (explaining that after a recent shooting at a South Florida school, "students . . . and public officials alike [prepared] for days of high-profile events highlighting the renewed debate over gun control and school safety. These events . . . put a *glaring spotlight* on the central question that has been asked over and over since this latest mass shooting left 17 people dead: What can be done to stop it from happening again?") (emphasis added).

14. *See, e.g.*, Jonathan C. Rothermel, *Here's Why Gun Debate, Ultimately, Leads Nowhere,* PHILA. INQUIRER (Dec. 3, 2015, 12:57 PM), http://www.philly.com/philly/blogs/thinktank/Heres-why-gun-debate-ultimately-leads-nowhere.html (stating: "The gun debate is loathsome. First, the debate becomes most heated in the immediate aftermath of senseless gun violence, which lately has come about all too often. The same questions are raised on cable news, and the same guests are brought back to re-tell the all-too-familiar sides of the debate. Secondly, the so-called debate is not really a debate but rather a reaffirmation of entrenched points of view on either side. Nowhere is that discussion more evident than on social media, where any suggestion of the need for changes in our gun laws is likely to be met by an avalanche of posts emphatically defending Second Amendment rights—or vice versa.").

sides and spins its wheels.[15]

Inaction at the federal level leaves state and local governments to mind the gap.[16] Because these local officials are closer to the frustrated people they represent, they are motivated to craft workable solutions. But, as mentioned previously, there are few Supreme Court cases revolving around the Second Amendment to begin with and none that focus on firearms commerce.[17] In the absence of binding precedent, jurisdictions across the United States experiment and, in the process, create a patchwork quilt of firearms commerce laws.[18] Some regulations are strict (total bans on certain types of guns, ammunition, or firing ranges) and others are more lenient (amped-up licensing or background check requirements).[19] When these laws are challenged, the paucity of precedent results in many unanswered questions and a lack of clarity to guide the federal courts.[20] Judges faced with this reality must interpret sparse dicta as well as the convoluted Second Amendment to rule on motions and resolve cases.[21]

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15. *See, e.g.*, Nicholas Fandos & Thomas Kaplan, *Frustration Grows as Congress Shows Inability to Pass Even Modest Gun Measures,* N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/politics/congress-inaction-guns.html (explaining that "Democrats, who have put forward a spate of gun safety bills only to see them left unaddressed by Republicans, who control the House and Senate, [are seething] with frustration").

16. Mind the gap "is an audible or visual warning phrase issued to rail passengers to take caution while crossing the horizontal, and in some cases vertical, spatial gap between the train door and the station platform" so they don't fall under the tracks. *Mind the Gap*, WIKIPEDIA, https://en.wikipedia.org/wiki/Mind_the_gap (last visited Sep. 10, 2018). This is an apt analogy for lawmakers seeking to regulate firearms commerce. They must be careful to navigate the space between the gun rights groups and the gun control groups lest they fall under the tracks and find themselves crushed.

17. *See, e.g.*, Donald Scarinci, *Will the US Supreme Court Ever Bring Clarity to the Gun Control Debate?*, OBSERVER (Mar. 6, 2018, 6:00 AM), http://observer.com/2018/03/supreme-court-gun-control-debate-stance/ (explaining that "[i]n recent years, the [Supreme] Court has refused to wade into the growing Second Amendment debate," the most recent major cases being *McDonald* and *Heller*, which were decided in 2010 and 2008, respectively).

18. Michael Siegel et al., *Firearm-Related Laws in All 50 US States, 1991–2016*, 107 AM. J. OF PUB. HEALTH, 1122, 1122 (2017), (although "many states have enacted laws regulating the sale [and] purchase . . . of firearms" in order "[t]o reduce and prevent firearm-related violence," there is "substantial variation in firearm legislation at the state level" resulting in "a widening disparity in the number of firearm laws").

19. *Id.* at 1124.

20. *See, e.g.*, David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?* 127 HARV. L. REV. F. 230, 230 (2014) (stating that "[i]n the lower federal courts, there is a *developing split* about whether firearms sellers have Second Amendment rights which the courts are bound to respect.") (emphasis added).

21. Lower courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." United States

This is an uncomfortable position for judges desiring to honor the Constitution and weary of being overturned on appeal. That said, these courts have done a praiseworthy job in creating a near uniform approach. The result has been a useful two-part Firearms Commerce Test[22] that: (1) evaluates whether the regulation burdens conduct protected under the Second Amendment and, if so, (2) applies some form of heightened judicial scrutiny to balance an individual's right to keep and bear arms with the government's interests in public safety, decreasing gun violence, and preventing crime. The test is workable but also has some major shortcomings. The judicial analysis would be more efficient and effective if*, in every case*, courts:

- Avoided parsing scattered, contradictory, and centuries-old history to determine whether the Second Amendment is implicated and, instead, assume it is;
- Applied the textbook intermediate scrutiny standard; and
- Required the government to prove its laws actually work without excessively burdening protected Second Amendment conduct.

Judges should no longer merely assume that the government's means further its ends. This is particularly powerful in cases invoking the Second Amendment—perhaps the most controversial and unpopular Bill of Rights guarantee.[23]

Optimizing this important legal test forms the focus of this article which proceeds in five parts. Part I introduces the problem, laments the tightrope upon which legislators operating in good faith are forced to ascend, and narrows this broad area of Second Amendment jurisprudence to firearms commerce and optimizing the Firearms Commerce Test.[24]

Part II evaluates the Supreme Court's limited pronouncements on firearms commerce.[25] Though no case speaks directly to this issue, the Justices have hinted at its boundaries beginning with *Heller* in 2008 and proceeding

v. Serawop, 505 F.3d 1112, 1122 (10th Cir. 2007) (quoting United States v. Nelson, 383 F.3d 1227, 1232 (10th Cir. 2004)).

22. This name is my own and does not come from the case law.
23. *See supra* notes 14–15 and accompanying text.
24. *See infra* Part I.
25. *See infra* Part II.

through *McDonald v. City of Chicago* in 2010.[26] Famously, at least to people immersed in this area, Justice Scalia stated in *Heller* that nothing in the Court's "opinion should be taken to cast doubt on longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms."[27] He continued in a footnote: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[28]

Limited and vague statements like these constitute the extent of Supreme Court guidance on firearms commerce. With this in mind, Part II parses every statement from *Heller* and *McDonald* even remotely related to this domain. This analysis surfaces two common denominators to guide lower courts:

- *COMMON DENOMINATOR #1*: At a minimum, firearms-related businesses have limited Second Amendment rights to engage in commerce. These rights are either their own or derive from their customers' Second Amendment rights; and

- *COMMON DENOMINATOR #2*: The government remains free to regulate the firearms commerce industry . . . to a certain extent. When doing so, the government possesses the benefit of presumptive validity for many of its "longstanding" regulations covering firearms commerce.

This second Part concludes with key questions left unresolved in this line in of cases. For example, *Heller* discussed the presumptive validity of "longstanding regulations" on firearms.[29] But, this seemingly prized position for centuries-old laws was the beginning of a long and awkward sentence ending with phrasing on firearms commerce. If only laws with analogues from the eighteenth century are "longstanding" and presumptively valid but newer laws are not, a vast majority of firearms commerce statutes become vulnerable (think about twenty-first century restrictions on assault weapons or large-capacity magazines). These drastic consequences explain why the fine points in *Heller* are so hotly disputed.[30]

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

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

28. *Id.* at 627 n.26. The majority in *Heller* also added that, "our list [of ways in which governments can regulate guns] does not purpose to be exhaustive." *Id.*

29. *See Heller*, 554 U.S. at 636.

30. *See, e.g.*, Dahlia Lithwick, *Bloody* Heller, SLATE (Oct. 5, 2017, 5:12 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/the_supreme_court_created_a_gun_rights_cri

Part III does the heavy lifting of evaluating how federal circuit courts have handled these tough questions.[31] The analysis begins with the three most difficult firearms commerce issues post-*Heller*: (1) Do firearms-related businesses have Second Amendment rights of their own? (2) What does it take for a law to be "longstanding" and, thereby, "presumptively valid?" (3) And, what level of scrutiny should lower courts adopt in firearms commerce cases? The answers to these questions are critical because they are often outcome-determinative. This Part concludes with an evaluation of the Firearms Commerce Test which has proven to be a workable approach to dealing with most Second Amendment challenges left unresolved after *Heller*.

Part IV is diagnostic and demonstrates that the Firearms Commerce Test can be made more effective, efficient, and faithful to *Heller*.[32] The analysis identifies two critical shortcomings and proposes solutions. Briefly:

- *SHORTCOMING #1*: Courts are reluctant to decide whether a law burdens conduct protected by the Second Amendment. This makes sense as the Justices have provided little guidance on how to make these calls other than to conduct a broad historical analysis. Problematically, the history of gun regulations in early America is voluminous, opaque, and often inconsistent. Some judges venture into this scavenger hunt while others just punt and assume the Second Amendment is in play. This assumption allows them to apply heightened scrutiny and adjudicate the case under a more familiar formula. In the end, the test's first step leads to inconsistencies across the circuits and frustration among judges, the parties, and the general public.

- *PROPOSED SOLUTION*: The fact that many courts merely assume the Second Amendment applies to avoid this trek into history renders step one basically meaningless. So, this article argues that any discretion in step one be eliminated. Instead, courts should assume that laws touching upon firearms commerce—the dealing in and around guns—burden protected conduct and then move to step two. This is in accord with *Heller*'s

sis_it_s_unwilling_to_solve.html ("We know now that we have a 'right' and that it implicates our 'freedom,' but the Supreme Court has left us to guess at what the contours of that right and that freedom might be.").

31. *See infra* Part III.

32. *See infra* Part IV.

guidance that the Second Amendment not be treated as a subsidiary right.

- *SHORTCOMING #2:* Most courts apply intermediate scrutiny in step two to laws alleged to burden conduct protected by the Second Amendment. Others vary the scrutiny level depending upon how drastic an invasion they perceive. These different approaches also lead to inconsistencies across the circuits and frustration among judges, the parties, and the general public. Making matters worse, the intermediate scrutiny standard implemented in these cases has become too deferential to the government. It now approximates the interest-balancing that *Heller* prohibited with the scales tipped in favor of firearms commerce regulations. Because the government will always have important, if not compelling, interests in reducing crime and protecting the public, a deferential standard when it comes to fit spells doom for all but the most egregious Second Amendment violations. There is a strong likelihood that a majority of Supreme Court Justices will view this quasi interest-balancing approach as unfaithful to *Heller*.

- *PROPOSED SOLUTION*: Uniformly apply the textbook intermediate scrutiny formula: regulations burdening firearms commerce must be substantially related to an important governmental interest. But, as part of the analysis, courts should require officials to prove that their laws actually meet their objectives. This incentivizes demonstrably effective regulations and disincentivizes legislation passed primarily with an animus towards guns. Such a solution is more faithful to *Heller* and provides a more reasonable justification for infringements of the Second Amendment guarantee.

Part V concludes with a call for an optimized Firearms Commerce Test that is more efficient, effective, and faithful to *Heller*.[33] Importantly, even after increasing its rigor, the vast majority of firearms commerce regulations should still be upheld. The governmental interests in this domain are almost always compelling. The major difference is that officials under the opti-

33. *See infra* Part V.

mized test must now prove their law is effective and, thereby, justify the burden on protected conduct. The hope is that the Supreme Court, upon deciding its first firearms commerce case, will approve of and utilize some form of this optimized test to issue stronger guidance in this arena.

II. THE SECOND AMENDMENT & FIREARMS COMMERCE: PRECIOUS LITTLE GUIDANCE FROM THE SUPREME COURT

The line of Supreme Court cases interpreting the Second Amendment is miniscule—especially in comparison to other guarantees in the Bill of Rights.[34] From this handful, only two cases touch upon firearms commerce in a meaningful way: *District of Columbia v. Heller*[35] and *McDonald v. City of Chicago*.[36] This part evaluates each opinion, focusing on particular passages (often dicta) that bear on regulating firearms commerce. This analysis reveals important issues left unresolved in Second Amendment jurisprudence. The Supreme Court is free to dodge these questions, but inaction by the Justices forces the lower courts to fill in the blanks. This path being blazed by the federal circuits in this realm forms the focus of Part III. The meat of Part II, however, begins with *Heller* and *McDonald* and the precious little guidance to be gleaned from these groundbreaking cases.

34. The small group of major Supreme Court cases interpreting the Second Amendment over the past century include: United States v. Miller, 307 U.S. 174, 178–79 (1939) (holding that short-barrel shotguns are not the types of weapons covered under the thrust of the Second Amendment—the "preservation or efficiency" of state militias); *Heller*, 554 U.S. at 582 (finding a Second Amendment right to possess "all instruments that constitute bearable arms," particularly in the home for self-defense); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (incorporating the Second Amendment to states and local governments via the Fourteenth Amendment's Due Process Clause); Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (per curiam) (vacating and remanding a Massachusetts Supreme Court decision that upheld a state stun gun ban under the (false) premise that stun guns are not the types of weapons protected by *Heller*); and Voisine v. United States, 136 S. Ct. 2272, 2278 (2016) (holding that convictions for reckless domestic assaults may lead to lifetime gun-ownership bans). The last two cases on this list did not specifically interpret the Second Amendment but have a bearing on its interpretation by the lower courts. Compare this small list to the many dozens of "Landmark" First Amendment cases from the Supreme Court. *See, e.g.*, *Freedom of Speech: General*, BILL OF RTS. INST., http://www.billofrightsinstitute.org/educate/educator-resources/landmark-cases/freedom-of-speech-general/ (last visited Sept. 14, 2018) (providing additional links to cases classified under several different Bill of Rights guarantees).

35. *Heller*, 554 U.S. at 570.

36. *McDonald*, 561 U.S. at 742.

A. The Groundbreaking Heller *Decision: "Guidance" for Regulating Firearms Commerce*

It is difficult to comprehend how the *Heller* case impacts firearms commerce without a somewhat detailed history of the facts and procedural history. This is because lower courts, seeking guidance that is opaque at best, tend to analyze details of the entire *Heller* saga to adjudicate their Second Amendment cases.[37] For example, lower courts seek to determine whether the firearms commerce regulation at issue burdens conduct protected by the Second Amendment.[38] The Supreme Court has not answered that question, so district judges and appellate panels must scour *Heller* to intuit an answer. They also look to the ratification history of the Second Amendment as well as commentary from the eighteenth century. All of this is elaborately researched and discussed in each stage of the *Heller* case. With this in mind, it is advisable to possess a thorough understanding of how the courts involved in *Heller* navigated the issues.

1. The Facts

Dick Heller worked as an armed security officer for the federal courts in the District of Columbia (D.C.).[39] He was allowed to carry a gun at work as a "special police officer."[40] However, Mr. Heller desired to carry his weapon outside of work and have it at-the-ready at home for self-defense.[41] So, he applied for a registration certificate for his handgun and was denied.[42] Without a certificate or a rarely-issued one-year license from the chief of police, D.C. law basically forbade Mr. Heller from possessing his handgun outside of work.[43] Mr. Heller, along with five other residents, challenged this ban as well as a regulation requiring all lawfully-owned guns kept in the home to be unloaded and safely stored (basically, disassembled or locked).[44] The plaintiffs argued that these laws violated their *individual* Second

37. *See, e.g.*, Hightower v. City of Boston, 693 F.3d 61, 72–73, 78–79 (1st Cir. 2012).

38. *See* United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (weighing "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee").

39. *Heller*, 554 U.S. at 575.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 575–76.

44. *Id.*

Amendment rights to "keep and bear arms."[45]

2. Federal District Court—A Decision in Favor of the Government

A federal district court in D.C. dismissed the plaintiffs' complaints.[46] Judge Emmet Sullivan felt bound by the 1939 case of *U.S. v. Miller*.[47] There, the Supreme Court unanimously found that short-barreled shotguns were not the types of weapons covered under the thrust of the Second Amendment—the "preservation or efficiency" of state militias.[48] Judge Sullivan joined "the vast majority of circuit courts"[49] at the time to find that *Miller* analyzed the Second Amendment to discover no "individual right to bear arms separate and apart from service in the Militia."[50] This holding, he wrote, combined with "sixty-five years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia" made dismissal the appropriate choice.[51]

3. D.C. Circuit Court of Appeals—A Reversal & An Individual Right to Possess Firearms

Judge Sullivan's decision was reversed three years later by a divided panel of the District of Columbia Court of Appeals.[52] The panel looked at

45. *Id.*

46. Parker v. District of Columbia (*Parker I*), 311 F. Supp. 2d 103, 109 (2004).

47. 307 U.S. 174, 183 (1939). Judge Sullivan was appointed by President Bill Clinton in 1994. *See District Judge Emmet G. Sullivan*, U.S. DISTRICT CT. FOR THE D.C., http://www.dcd.uscourts.gov/content/district-judge-emmet-g-sullivan (last visited Sept. 14, 2018) (stating also that Judge Sullivan was previously appointed by Presidents Ronald Reagan and George H.W. Bush to local D.C. courts).

48. *Miller*, 307 U.S. at 178 (stating that in the "absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. . . . With obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view").

49. *Parker I*, 311 F. Supp. 2d at 105.

50. *Id.* at 109.

51. *Id.* at 109–10.

52. Parker v. District of Columbia (*Parker II*), 478 F.3d 370, 401 (D.C. Cir. 2007). The panel decision was two to one with Judge Karen Henderson filing a dissent based on the idea that "the District [of Columbia] is not a State [with any organized militia] within the meaning of the Second

the case as one of first impression in the Circuit and decided to determine whether the Second Amendment provides an individual right to keep and bear arms or a collective right reserved for members of a state-organized militia.[53] In reaching its conclusion, two of the three judges on the panel, Judges Laurence Silberman[54] and Thomas Griffith,[55] found that the:

> Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia.[56]

An opinion of this nature by a federal circuit court needed to distinguish *Miller*, a binding precedent. Contrary to the District Court, the panel majority found *Miller* silent on whether the Second Amendment codifies an individual right to keep and bear arms.[57] They found instead that *Miller* stands for the proposition that short-barreled shotguns are not the type of "Arms" covered by the Second Amendment's text.[58] Therefore, the case had nothing to say about the individual versus collective right question. This reading of *Miller* by one of the most prestigious federal circuit courts helped dramatically change the national conversation on guns.[59] Moving forward, judges

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Amendment." *See id.* at 402, 409 (Henderson J., dissenting).

53. *See id.* at 380–81.

54. Judge Silberman was appointed by President Ronald Reagan in 1985. *See Silberman, Laurence Hirsch*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/silberman-laurence-hirsch (last visited Sept. 14, 2018).

55. Judge Griffith was appointed by President George W. Bush in 2004. *See Griffith, Thomas Beall*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/griffith-thomas-beall (last visited Sept. 14, 2018).

56. *Parker II*, 478 F.3d at 395.

57. *See id.* at 393–94.

58. *Id.* at 394. The panel came to this conclusion because the Court in *Miller* was asked by the government (in its primary argument) to find a collective right, but instead took the approach of addressing the type of weapon involved (the government's secondary argument). *See id.* at 393.

59. *See, e.g.*, Sandy Froman, *Why You Should Care About Parker v. District of Columbia*, TOWNHALL.COM (May 1, 2007, 10:43 AM), https://townhall.com/columnists/sandyfroman/2007/05/01/why-you-should-care-about-parker-v-district-of-columbia-n1184285 (stating that the "case is monumental. Already the DC Circuit Court opinion—if left untouched—will totally change gun ownership rights in the District of Columbia. And the DC Circuit is one of the most respected and

(at least in the D.C. Circuit and the Fifth Circuit, which adopted the individual right to keep and bear arms position in 2001)[60] would have to grapple with the major issues surrounding this change in the law without any concrete guidance from the Supreme Court.[61]

A key issue quickly emerged concerning how the individual right to keep and bear arms could be limited by the government, if at all. This issue is relevant to our inquiry as well because the ability to limit someone's right to keep and bear arms certainly limits a gun dealer's ability to conduct commerce in such arms. The panel opinion did recognize that the individual right may be limited by the same types of "reasonable restrictions" that limit First Amendment protections.[62] The court singled out the appropriateness of gun regulations covering: intoxication, concealed carry, felony convictions, registration and training requirements, and mental illness.[63] No mention was made, at least in this opinion, of how the government could constitutionally restrict firearms commerce.

After reversing the dismissal, the D.C. Circuit ordered Judge Sullivan to grant summary judgment in favor of Mr. Heller.[64] The other petitioners were dismissed from the case for lack of standing. The government had not charged them with violations of the laws at issue and, therefore, none had suffered a concrete injury.[65] The District of Columbia appealed to the D.C.

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well-credentialed courts in America. Its opinions and rulings have a major impact on courts and lawmakers all over the country").

60. *See* United States v. Emerson, 270 F.3d 203, 264–65 (5th Cir. 2001) (stating that "[w]e agree with the district court that the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by *Miller*, regardless of whether the particular individual is then actually a member of a militia."). The *Emerson* court did, however, uphold the gun regulation at issue (a temporary restraining order in a divorce case that barred Emerson from possessing a gun) as a narrowly tailored deprivation of this newly found individual right to keep and bear arms. *Id.* at 264–65. The *Emerson* court also distinguished *Miller* as standing for something other than a collective right to keep and bear arms. *Id.* at 225–26.

61. *See* Katharine E. Kohm, *Parker v. District of Columbia: Putting the "I's" in Militia*, 42 U. RICH. L. REV. 807, 807–08 (2008) ("[I]n the midst of a recent individual rights trend in Second Amendment scholarship, the difficulty in determining how these two clauses fit together has risen to the forefront of constitutional jurisprudence.").

62. *See* Parker v. District of Columbia (*Parker II*), 478 F.3d 370, 399 (2007).

63. *See id.*

64. *See id.* at 401.

65. *See id.* at 374–78 (stating that the appellants other than Mr. Heller failed to establish an injury-in-fact). This is why the case named changed at the Supreme Court to *District of Columbia v. Heller*. Shelly Parker and five other appellants, not including Mr. Heller, were no longer parties to the case.

Circuit for an *en banc* hearing, which was denied,[66] and then to the United States Supreme Court.[67]

4. *Heller* at the Supreme Court

The Supreme Court granted certiorari in *District of Columbia v. Heller* on November 20, 2007—its first major Second Amendment case in nearly 70 years![68] The case resulted in a bitterly contested five-to-four affirmance of the D.C. Circuit.[69] Justice Scalia's opinion, a "tour de force" of originalism[70] full of history from the eighteenth century and beyond, adopted the appellate panel's view that the Second Amendment protects an individual right to "possess and carry weapons in case of confrontation."[71] In lieu of overruling *Miller*, the Court agreed with the D.C. Circuit that the case merely held that short-barreled shotguns were not the types of weapons covered by the Second Amendment.[72] More specifically, Justice Scalia wrote that "*Miller* stands only for the proposition that the Second Amendment right, *whatever its nature*, extends only to certain types of weapons."[73] Unencumbered by precedent, the majority held that bans on handgun possession in the home and requirements that guns kept at home be rendered inoperable *violate* an individual's right to keep and bear arms under the Second Amendment.[74]

This holding was controversial and included nearly ninety pages in dissent.[75] Each dissenting Justice joined both dissents in full.[76] Their points

66. Parker v. District of Columbia, No. 04–7041, 2007 U.S. App. LEXIS 11029, at *4 (D.C. Cir. May 8, 2007) (per curiam) (showing that four out of the ten D.C. Circuit judges voting for rehearing (Judges Randolph, Rodgers, Tatel, and Garland) desired to grant the petition to hear the *en banc* appeal).

67. District of Columbia v. Heller, 552 U.S. 1035, 1035 (2007) (stating that the issue the Court voted to hear was "limited to the following question: Whether the [D.C. laws discussed above] violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?").

68. The Supreme Court hadn't addressed this issue since *United States v. Miller*. 307 U.S. 174 (1939). *See also* Andrew R. Gould, *The Hidden Second Amendment Framework within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1542 (2009) (indicating that the 1939 *Miller* decision was the "only pre-*Heller* Supreme Court case that directly addresses the Second Amendment").

69. *Heller*, 554 U.S. at 572.

70. *See* Worman v. Healey, 293 F. Supp. 3d 251, 254 (D. Mass. 2018).

71. *Heller*, 554 U.S. at 592.

72. *See id.* at 621–22.

73. *Id.* at 623 (emphasis added).

74. *See id.* at 635.

75. *Id.* at 636–81 (Stevens, J., dissenting) and 681–723 (Breyer, J., dissenting).

were clear: "Majority, you read the history wrong. The Second Amendment is 'most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia'" (Justice Steven's dissent).[77] "And, even on the unlikely assumption that you read the history correctly, the proper test is to balance the interests. Here, the District's interests in safety outweighed an individual's right to 'keep loaded handguns in the house in crime-ridden urban areas'" (Justice Breyer's dissent).[78]

The majority spent many pages rebutting these dissents and also recognized the monumental nature of the opinion. Justice Scalia issued this disclaimer:

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici . . . . The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns . . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. . . . [W]hat is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[79]

This was an important inflection point in American Constitutional Law. After *Heller*, the Second Amendment would not join the Third Amendment in the graveyard of Bill of Rights guarantees.[80] With the individual right to keep and bear arms fully adopted, a large part of the public policy debate over the Second Amendment shifted to how governments could constitutionally regulate guns. And, a large part of that regulatory effort has been to restrict or ban firearms commerce (think: assault weapons bans, large capacity magazine bans, gun show regulations, firing range bans or restrictions, gun dealer licensing, and commercial restrictions).[81] With this in

76. *Id.*

77. *Id.* at 637, 651 (Stevens, J., dissenting) (stating "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution").

78. *Id.* at 722 (Breyer, J., dissenting).

79. *Id.* at 636.

80. *See* Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 214 (1991) ("[T]he Third Amendment was consigned to the graveyard of history, to be remembered only . . . when we seek to recapture the world of the founding fathers for its own sake.").

81. *See, e.g.*, Leslie Shapiro, Sahil Chinoy, & Aaron Williams, *How Strictly Are Guns Regulated Where You Live*, WASH. POST, https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/ (last updated Feb. 20, 2018) (showing seven types of gun control laws, state-by-

mind, this Part turns to how the *Heller* court touched upon firearms commerce.

5. *Heller's* Guidance for Firearms Commerce

Firearms commerce played a small but very important role in the *Heller* case—both in the majority opinion and Justice Breyer's dissent. Justice Scalia opined that nothing in the Court's "opinion should be taken to cast doubt on longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms."[82] He went on in a footnote to state: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[83] For example, governments are seemingly able to require licenses and background checks to deal in and around guns.[84] These would be "conditions" or "qualifications" on the commercial sale of arms.[85] Whether these laws count as "longstanding" conditions and qualifications and whether that temporal distinction even matters requires some reading between the lines and is the focus of Part III.[86]

Justice Scalia continued on in *Heller* to seemingly eliminate "rational basis" as the test to evaluate laws imposing conditions and qualifications on firearms commerce.[87] He argued that rational basis is never the proper standard to judge a law that burdens 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."[88] But, in eliminating the most regulatory-permissive test, he did not lay down a tougher standard that should be used to evaluate these regulations. Instead, he argued that the District's laws in this case would fail any standard of scrutiny.[89] Beyond that, he left the proper test for another case. Absent also is any mention of whether gun

state).

82. *Heller*, 554 U.S. at 626–27.

83. *Id.* at 627 n.26.

84. *See, e.g.*, Abramski v. United States, 134 S. Ct. 2259, 2262–63 (2014) ("Before a federally licensed firearms dealer may sell a gun, the would-be purchaser must provide certain personal information, show photo identification, and pass a background check."); *see also* 18 U.S.C. § 923(a)(2012) ("No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General.").

85. *See Heller*, 554 U.S. at 626–27.

86. *See infra* Part III.

87. *See Heller*, 555 U.S. at 628 n.27.

88. *Id.*

89. *See id.* at 628–29.

dealers have any Second Amendment rights subject to Second Amendment means-ends scrutiny.

And there you have it. This is the only guidance from the majority in *Heller* with any bearing upon firearms commerce.

Of the two dissents in *Heller*, Justice Breyer's stands out as the most applicable to the regulation of firearms commerce. He begins by stating his position that the Second Amendment is a collective right—the right to keep arms for militia, not self-defense, purposes.[90] He then moves to the key part of his dissent for our purposes—the idea that a "Balancing of Interests" test should be used to judge laws that burden Second Amendment rights.[91] Strict scrutiny will always be met in gun regulation cases, he argues, because the government always has a compelling interest in the "safety and indeed the lives of its citizens."[92] This means that every analysis of a gun regulation will turn into a balancing of the government's compelling interest in safety versus the burden on an individual's Second Amendment rights.[93]

To avoid this sleight of hand, Justice Breyer claimed that he "would simply adopt such an interest-balancing inquiry explicitly."[94] This interest-balancing approach is important because it resembles the analysis the circuit courts resort to in firearms commerce cases.[95] The big question, discussed in Part III, will be whether the majority of justices, in a future firearms commerce case at the Supreme Court, will reject the circuit court balancing test just as the majority rejected Justice Breyer's approach in *Heller*.[96] With the evaluation of *Heller* complete, the next section briefly evaluates how the *McDonald v. City of Chicago* case reiterated this guidance from *Heller* and made the Second Amendment applicable to evaluate state and local laws.

B. McDonald v. City of Chicago*: Incorporation of the Second Amendment to the States & Guidance for Firearms Commerce Cases*

McDonald v. City of Chicago[97] is the second most influential case in the recent development of Second Amendment jurisprudence. When it comes to

90. *See id.* at 681 (Breyer, J., dissenting).
91. *See id.* at 689
92. *Id.* (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).
93. *Id.*
94. *Id.*
95. *See infra* Part III.
96. *See Heller*, 554 U.S. at 689 (Breyer, J., dissenting).
97. 561 U.S. 742 (2010).

evaluating the constitutionality of firearms commerce regulations, however, this groundbreaking case is a bit less pertinent.[98] *McDonald's* key contributions, for our purposes, stem from: (1) the principles it reiterates from *Heller* on the commercial sale of arms, (2) its disclaimer that interest balancing cannot be the judicial approach to evaluating gun regulations, and (3) the fact that the Supreme Court, for the first time, applied the Second Amendment protections surfaced in *Heller* to state and local legislation.[99] With this in mind, the *McDonald* analysis is briefer.[100] But, *McDonald* still matters because it too guides lower court interpretation when gun dealers invoke the Second Amendment to challenge state and local firearms regulations.[101]

1. The Facts

The facts in *McDonald* are strikingly similar to *Heller*. A group of plaintiffs found themselves basically banned by local laws in the cities of Chicago and Oak Park, Illinois from possessing handguns in their homes for self-defense.[102] Joined by the NRA, they challenged these laws as interfering with their individual Second Amendment right to keep and bear arms.[103]

These suits were filed a mere one day after *Heller* was decided and were eventually consolidated in the Northern District of Illinois.[104]

98. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n. v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015) (stating "*McDonald* was a landmark case in one respect—the Court held for the first time that the Fourteenth Amendment "'incorporates' the Second Amendment against the states. Otherwise, *McDonald* did not expand upon *Heller's* analysis and simply reiterated *Heller's* assurances regarding the viability of many gun-control provisions. Neither *Heller* nor *McDonald*, then, delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions.").

99. *McDonald*, 561 U.S. at 786 (repeating the assertions of the Court in *Heller*); *id.* at 790–91 (rejecting the interest-balancing test); *id.* at 758–66, 791 (applying the Second Amendment protections in *Heller* to the states).

100. *See id.* at 786; *Heller*, 554 U.S. at 626–27.

101. *See McDonald*, 561 U.S. at 791 ("[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

102. *See McDonald*, 561 U.S. at 750. Chicago's ordinance banned possession of firearms without a valid registration certificate from the city, a certificate that was basically banned by another section of the law. *Id.* The Village of Oak Park banned the possession of any firearm. *Id.*

103. *See id.* at 752 (stating the plaintiffs' argument that the laws at issue "violate the Second and Fourteenth Amendments to the United States Constitution," and that all the filed cases were consolidated under one district court judge).

104. NRA v. Vill. of Oak Park (*Oak Park*), 617 F. Supp. 2d 752, 752 (N.D. Ill. 2008), *vacated sub nom. McDonald*, 561 U.S. 742 (2010).

2. *McDonald*, The Lower Courts & The Incorporation Doctrine

The *McDonald* plaintiffs encountered an immediate problem. *Heller's* ruling applied to gun regulations promulgated under federal law. This is because the District of Columbia is a constitutionally-created federal enclave which makes D.C. law akin to federal law.[105] The Second Amendment had never before been used as a tool to strike down state and local laws like those at issue in *McDonald*. In fact, longstanding Supreme Court precedent (circa 1833) claimed that the Bill of Rights was intended to bind only the federal government.[106]

The ratification of the Fourteenth Amendment in 1868, however, changed the rules.[107] Arguments began to circulate that the Due Process Clause in the Fourteenth Amendment—which reads "nor shall any State deprive any person of life, liberty, or property, without due process of law"[108]—was meant to protect rights that are "deeply rooted in the nation's tradition" from invasion. These rights are so fundamental, the theory goes, that neither the federal government *nor* state and local governments can take them away.[109]

The Supreme Court agreed and slowly began to hold that certain guarantees in the Bill of Rights also bind on the states via the Fourteenth Amendment's Due Process Clause.[110] This process is called "selective incorporation" because only some of the Bill of Rights protections are found to be deeply rooted enough (i.e., evaluated and selected by the Justices as such) to bind state and local governments.[111]

105. The District of Columbia is governed under the authority of the federal government. *See DC Home Rule*, COUNCIL OF THE DISTRICT OF COLUMBIA, http://dccouncil.us/pages/dc-home-rule (last visited Sept. 15, 2018) (stating that, under the Home Rule Act, "Congress reviews all legislation passed by the [D.C.] Council before it can become law and retains authority over the District's budget. Also, the President appoints the District's judges, and the District still has no voting representation in Congress.").

106. Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. 243, 247 (1833) (holding, in an opinion by Chief Justice John Marshall, that the question of whether the Bill of Rights applied to the federal government exclusively was "of great importance" but "not of much difficulty").

107. *See McDonald*, 561 U.S. at 765–66.

108. U.S. CONST. amend. XIV, § 1.

109. *McDonald*, 561 U.S. at 765–66 (citing Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)).

110. *See McDonald*, 561 U.S. at 765–66.

111. For example, the Supreme Court has used selective incorporation to make the following guarantees applicable to the states: the First Amendment's protection of free expression, *see* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); the First Amendment's Establishment Clause, *see* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226–27 (1963); the First Amendment protection of freedom of the press, *see* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 722–23 (1931);

The *McDonald* plaintiffs needed to convince the courts hearing their case that the individual right to keep and bear arms from *Heller* is a liberty interest deeply rooted in the tradition of the United States.[112] If successful, the Second Amendment would be applied (or incorporated) to judge the constitutionality of state and local laws. Courts would then be far more likely to hold that individual gun owners are protected from excessively burdensome gun regulations enacted by state and local governments. And, the *McDonald* plaintiffs could then argue that the regulations enacted by Chicago and Oak Park were of the excessively burdensome type which violate the Second Amendment.[113]

Perhaps obviously, federal district and circuit courts lack the authority—or at least the willingness—to make this type of incorporation decision on their own. These judges are bound by the Supreme Court and, lacking guidance from the Justices, by circuit precedent. It is frowned upon for a lower court to anticipate what the Supreme Court will (or perhaps should) do and act accordingly.[114] This rule holds unless circuit precedent is overruled or the case is one of first impression in the circuit.[115] The Seventh Circuit, hearing the *McDonald* case, had clear circuit precedent reiterating this general rule:

"The Supreme Court has told the lower courts that they are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless the Court overrules it, however out of step with

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the First Amendment protection of the freedom of assembly, *see* DeJonge v. Oregon, 299 U.S. 353 (1937); the Fourth Amendment protection against unreasonable searches and seizures, *see* Mapp v. Ohio, 367 U.S. 643, 660 (1961); the Fifth Amendment right against self-incrimination, *see* Miranda v. Arizona, 384 U.S. 436, 444 (1966); the Sixth Amendment right to counsel for indigent defendants, *see* Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963). This is just a taste; there are other guarantees selectively incorporated by the Supreme Court. Conversely, other guarantees have not been selectively incorporated. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. 243, 250–51 (1833) (declining to incorporate the Fifth Amendment guarantee of "just compensation" for the taking of property).

112. *See McDonald*, 561 U.S. at 760 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (showing that the Due Process clause protects rights that are "so rooted in the traditions and conscious" of our people that they are considered fundamental)).

113. *See* NRA v. Vill. of Oak Park (*Oak Park*), 617 F. Supp. 2d 752, 753 (N.D. Ill. 2008).

114. *See* Saban v. United States U.S. Dep't of Labor, 509 F.3d 376, 378 (7th Cir. 2007).

115. District Court Judge Milton Shadur stated this well in his opinion declining to incorporate the Second Amendment in this case: "the judge's duty [is] to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction." *Oak Park*, 617 F. Supp. 2d at 753. Recall that the case-of-first-impression angle is what the D.C. Circuit panel used to find the individual right to keep and bear arms in *Heller*. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

current trends in the relevant case law the case may be."[116]

Predictably, the plaintiffs lost in both the District Court[117] and the Seventh Circuit on appeal.[118] Neither court was willing to overrule circuit precedent and ignore a footnote in *Heller* that clearly stated that the Supreme Court had not incorporated the Second Amendment to the states.[119] The Seventh Circuit did foreshadow the Supreme Court's upcoming opinion by reiterating that incorporation for the Second Amendment is "open to reexamination by the Justices themselves when the time comes."[120] The plaintiffs' only remaining hope was that the Supreme Court would take their case and extend the Second Amendment to states and local jurisdictions via incorporation.

3. *McDonald* at the Supreme Court

And . . . the plaintiffs' efforts were rewarded. The Supreme Court took the case[121] and agreed that the right to keep and bear arms for self-defense was deeply rooted not only in the American tradition but also "recognized by many legal systems from ancient times to the present day."[122] From the English Bill of Rights, to Blackstone, and through the Civil War period, Justice Alito's opinion demonstrated how important the individual right was to average Americans, framers of the Constitution, families on the frontier, freed slaves, abolitionists, etc.[123] Justice Alito concluded with the statement: "We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[124]

116. *Saban*, 509 F.3d at 378 (emphasis omitted).

117. *See Oak Park*, 617 F. Supp. 2d at 754 (holding that "this Court—duty bound as it is to adhere to the holding in [a Seventh Circuit case upholding the laws in question], rather than accepting plaintiffs' invitation to 'overrule' it—declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances").

118. *See* NRA v. City of Chicago, 567 F.3d 856, 860 (7th Cir. 2009) (holding that the Second Amendment had not been incorporated by the Supreme Court and that "arguments of this kind . . . are for the Justices rather than a court of appeals"), *vacated sub nom.* McDonald v. City of Chicago, 561 U.S. 742 (2010).

119. NRA v. City of Chicago, 567 F.3d at 858 (citing the footnote from Justice Scalia's opinion in *Heller* which made clear that prior Supreme Court cases had not incorporated the Second Amendment to the states).

120. *Id.*

121. *See* McDonald v. City of Chicago, 561 U.S. 742, 753 (2010).

122. *Id.* at 767.

123. *See id.* at 767–78.

124. *Id.* at 791.

Like *Heller*, the outcome in *McDonald* was controversial—even among the Justices who eventually formed a majority. Only part of Justice Alito's controlling opinion became binding precedent joined by five justices—Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.[125] The remainder was joined by a mere plurality of the Court as Justice Thomas declined to join in full.[126] Instead, Justice Thomas thought it proper to incorporate the Second Amendment through the Privileges and Immunities Clause of the Fourteenth Amendment as opposed to the Due Process Clause.[127]

As in *Heller*, the *McDonald* opinion garnered two long dissents from the same two justices.[128] Justice Stevens's dissent proved to be his last on the Court as this was the final case decided before he retired at the end of the October 2009 term.[129] Justice Stevens's thesis statement in dissent can be boiled down to these thoughts: "By its terms, the Second Amendment does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. The Second Amendment was adopted to protect the States from federal encroachment."[130] Justice Breyer's separate dissent claimed that he could "find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes."[131] This meant, at least to four members on the Court, that the Second Amendment did not qualify for incorporation.

4. *McDonald's* Guidance on Firearms Commerce

As noted in the introduction to this Part, *McDonald's* key guidance on firearms commerce stems from: (1) the principles it reiterates from *Heller* on the commercial sale of arms, (2) its disclaimer that interest balancing cannot be the judicial approach to evaluating gun regulations, and (3) the fact that the Supreme Court, for the first time, applied the Second Amendment protections that surfaced in *Heller* to state and local legislation. With the con-

125. *See id.* at 747 (showing that the "opinion of the Court" in *McDonald* contains Parts I, II.A, II.B, II.D, and III and the plurality is formed by the remaining Parts II.C, IV, and V).

126. *See id.* (showing that Justice Thomas did concur in part and in the judgment, which allows for *McDonald* to be binding precedent).

127. *See id.* at 858 (Thomas, J., concurring).

128. See id. at 858–912 (Stevens, J., dissenting); *id.* at 912–41 (Breyer, J., dissenting).

129. *See John Paul Stevens,* OYEZ https://www.oyez.org/justices/john_paul_stevens (last visited Sept. 15, 2018).

130. McDonald, 561 U.S. at 911 (Stevens. J., dissenting).

131. *Id.* at 913 (Breyer, J., dissenting).

text of the case in mind, this section addresses each piece of guidance.

#1: REITERATION OF KEY PRINCIPLES FROM *HELLER*: *McDonald* is important because it echoes, and often states more clearly, key pronouncements from *Heller*. For example, Justice Alito reiterated: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as . . . laws imposing conditions and qualifications on the commercial sale of arms."[132] The difference between the two cases when it comes to this statement is subtle but important—in *McDonald*, the Court appeared to clarify that the word "longstanding" at the beginning of the list also applies to laws imposing conditions and qualifications on the commercial sale of arms. That is an important distinction. To compare:

> *Heller:*
>
> [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.[133]
>
> *McDonald*:
>
> We made it clear in Heller that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "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. We repeat those assurances here."[134]

Notice the subtle difference in the way the word "longstanding" is used in each case. In *Heller*, it appears that "longstanding" is best read to modify only the prohibition for felons and the mentally ill. That means the word "longstanding" does not apply to "laws imposing conditions or qualifications

132. *Id.* at 786.
133. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (emphasis added).
134. *McDonald*, 561 U.S. at 786 (emphasis added) (quoting *Heller*, 554 U.S. at 626–27).

on the commercial sale of arms."[135] In contrast, in *McDonald,* the word "longstanding" seems to modify the entire list. There is certainly a more transparent way to make this point. The wording in *McDonald* is still a bit opaque and the quotation mark placement is odd. But, the sense in *McDonald*, is that *only* longstanding "laws imposing conditions and qualifications on the commercial sale of arms" are a part of the group of regulations permissible, or even presumptively valid, under *Heller*.[136] This is an important distinction, as we will see in Part III, because many firearms commerce laws are of a recent vintage as opposed to longstanding regulations.[137] Does that place them on less stable constitutional ground? Are they more likely to be struck down or judged more harshly as outside of the scope of *Heller's* presumptive validity?

#2: NO INTEREST BALANCING: Justice Alito reiterated that interest balancing tests—where a judge weighs the government's interests against the Second Amendment interests of the challengers—were rejected in *Heller*.[138] This is a direct response to the arguments from the city respondents in *McDonald*[139] and Justice Breyer's dissents in *Heller* and *McDonald* advocating just such an approach.[140] Justice Alito quoted *Heller* again to reiterate this point: "The very enumeration of the [individual] right [to keep and bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon."[141] At this point, it would be risky for circuit courts to create an interest balancing test for firearms commerce cases.[142] But, as Part III will demonstrate, these judges must deal at some level with Justice Breyer's compelling point that all levels of judicial scrutiny are de facto interest balancing tests.[143]

#3: THE SECOND AMENDMENT NOW BINDS THE STATES: Before

135. *See Heller,* 554 U.S. at 627.

136. *See id.*

137. *See infra* Part III.

138. *See McDonald*, 561 U.S. at 790–91 (stating that "Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.").

139. *See* Brief for Respondents City of Chicago and Village of Oak Park at 25–32, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521), 2009 U.S. S. Ct. Briefs LEXIS 1893.

140. *See, e.g.*, *McDonald*, 561 U.S. at 922–26 (Breyer, J., dissenting); *Heller,* 554 U.S. at 687–91.

141. *McDonald*, 561 U.S. at 791 (quoting *Heller*, 554 U.S. at 634).

142. *See Heller*, 554 U.S. at 634–35.

143. *See infra* Part III.

McDonald, states could regulate firearms commerce in various ways.[144] State and local governments were not constrained by the Second Amendment and this provided them leeway to tinker with gun control legislation.[145] After the *McDonald* decision, this authority narrowed considerably.[146] Moving forward, challenges to gun control regulations heard in state and local courts are strengthened by the language of *McDonald* and *Heller* and the powerful individual right to keep and bear arms.[147]

C. Conclusions & Common Denominators: What We Know After Heller *&* McDonald

Heller looms large as the most important case in Second Amendment jurisprudence. For the first time, the Justices focused solely on interpreting the intent behind the Framer's convoluted language.[148] Though an analysis of the Amendment's breadth was tabled for future cases,[149] it is clear that litigants battling over firearms commerce must deal squarely with *Heller* and the individual right to keep and bear arms.[150] These challenges will often implicate *McDonald* as well because state and local laws are now appraised under Second Amendment principles. Besides . . . state and local lawmakers are the parties neck-deep in the struggle to navigate the firearms commerce tightrope.[151] Congress has apparently fallen off.[152]

In conclusion, Part II unearthed two common denominators gleaned from the history, context, arguments, and opinions in *Heller* and *McDonald*:

144. *See McDonald*, 561 U.S. at 786.

145. *Id.* at 783–85.

146. *Id.* at 790 (quoting *Heller*, 554 U.S. at 636).

147. *See Heller*, 554 U.S. at 595.

148. *See id*. at 670, 680 (Stevens, J., dissenting).

149. *Id.* at 635 (stating that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . . And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.") (internal citations omitted).

150. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 88 (3d Cir. 2010) (analyzing a federal law criminalizing possession of guns with obliterated serial numbers and stating that to "determine whether [the law in question] impermissibly burdens Marzzarella's Second Amendment rights, we begin with *Heller*").

151. *See, e.g.*, Joseph Blocher, Opinion, *We Can Regulate Guns at the Local Level, Too*, N.Y. TIMES, Dec. 10, 2015, at A41 (stating that "[a]lthough the gun debate is national in scope, a vast majority of gun regulation happens at the local level.").

152. *See, e.g.*, James Davenport, *The Four Reasons Congress Won't Do Anything About Gun Control*, NEWSWEEK (Feb. 23, 2018, 10:19 AM), http://www.newsweek.com/four-reasons-congress-wont-do-anything-about-gun-control-818075.

- *COMMON DENOMINATOR #1:* Firearms-related businesses have (at least) limited Second Amendment rights to engage in commerce. These rights are either their own or derive from their customers' Second Amendment rights. If the Second Amendment did not offer such protection, there would be no need for the Supreme Court to state in *Heller*, and to reiterate in *McDonald*, that "laws imposing conditions and qualifications on the commercial sale of arms [are presumptively lawful regulatory measures]."[153] In other words, without a constitutional right to deal in guns, the government could just ban all firearms commerce without worry.[154] Lawmakers would not need the benefit of presumptive validity for laws imposing conditions and qualifications on firearms commerce and the Court's statements would be oddly superfluous; and

- *COMMON DENOMINATOR #2:* The government remains free to regulate the firearms commerce industry . . . to a certain extent.[155] When doing so, the government possesses the benefit of *presumptive validity* for many of its longstanding regulations covering firearms commerce. This legal benefit means that laws which can be traced back far enough in time (precisely how old each law must be is unclear) are very likely to be upheld against a facial challenge. That leaves as-applied challenges as the primary vehicles to enforce Second Amendment rights.

Part III utilizes these common denominators as a foundation from which to evaluate critical questions left unaddressed by the Supreme Court after *Heller* and *McDonald*. The centerpiece of this analysis will be the work of the federal circuits and their attempt to adjudicate firearms commerce cases in accordance with the small amount of Supreme Court guidance provided to date.

153. *See Heller*, 554 U.S. at 626–27, 627 n. 26.

154. *See id.*

155. *See* McDonald v. City of Chicago, 561 U.S. 742, 790 (2010) (implying that while the "incorporation of the Second Amendment right will to some extent limit the legislative freedom of the States," it will not eliminate it).

III. CLARITY FROM THE CIRCUIT COURTS: TOUGH QUESTIONS & A WORKABLE SOLUTION

When it comes to firearms commerce, the Supreme Court has positioned the country much like a law student after a Property lecture—desperately wanting more clarity, unsure on the state of the law, and bickering about who has the best answer. Clearly, best practices on how to regulate and conduct business in this domain are convoluted, heavily disputed, and in flux. Amidst this uncertainty, however, shine rays of clarity from federal circuit courts. Part III evaluates the front lines in this lower court battle to establish appropriate standards for firearms commerce.[156]

The first half begins with remarkable news: the federal circuits have coalesced around the common denominators surfaced above. This consensus matters as judges tackle difficult questions pending after *Heller* and *McDonald*. Confusion at this foundational level would multiply uncertainty for regulators, business owners, and the public. This consensus breaks down, however, once courts begin to answer three critical questions:

(1) Do firearms-related businesses possess Second Amendment rights of their own?

(2) When is a regulation "longstanding" and, thereby, presumptively lawful?

(3) What level of heightened scrutiny should cover firearms commerce laws?

This first section exposes how lower courts answer these tough questions and recognizes that these answers are generally outcome-determinative.[157]

The final half of Part III demonstrates that the federal circuits have coalesced around a two-part test to evaluate firearms commerce regulations.[158] Though results vary based on the approach to the tough questions above, the test is similarly structured throughout the nation. This section breaks down each component of this Firearms Commerce Test, evaluates its effectiveness,

156. *See infra* Figure 1.
157. *See infra* Sections III.A.1–3.
158. *See infra* Section III.B.

and argues that the test generates a workable approach. Part IV makes the case that the process can be made more efficient, effective, and faithful to *Heller*.[159] But, first things first.

A. In the Wake of Heller & McDonald*: Major Unanswered Questions*

Part II codified common denominators from these seminal cases which are useful to evaluate firearms commerce regulations.[160] Businesses in this domain are entitled to some Second Amendment protection. However, the government may impose conditions and qualifications on dealing in and around guns. Some of these regulations even receive the benefit of the doubt (they are "presumptively lawful," in legalese) when challenged under the Second Amendment.[161] This means that: (1) these laws are much more likely to survive facial challenge and (2) as-applied challenges remain as the primary vehicles by which firearms commerce regulations will be scrutinized. From there, the details become murkier and the inquiries more complicated. The search for clarity begins with an analysis of the three most critical questions for firearms commerce left open after *Heller* and *McDonald.*

1. Do Firearms-Related Businesses Possess Second Amendment Rights?

This important question was neither presented in *Heller* or *McDonald* nor addressed in the opinions. Such an omission was predictable, as the Justices prefer to avoid proclamations outside the sphere of the Questions Presented.[162] The Court would rather legislators (those officials accountable to voters) make law and set public policy. This constitutional avoidance is certainly an appropriate and careful approach to the law.[163] However, proclaim-

159. *See infra* Part IV.

160. *See supra* Section II.C.

161. Binderup v. Att'y Gen. U.S., 836 F.3d 336, 343 (3d Cir. 2016) (citing *Heller*, 554 U.S. at 626–27, 627 n. 26).

162. *See, e.g.*, Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944), *rev'd on other grounds sub nom.* Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) (stating: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

163. City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 173 (1942) ("Avoidance of constitutional adjudications where not absolutely necessary is part of the wisdom of the doctrine of the Pullman case." (citing R.R. Com. of Tex. v. Pullman Co., 312 U.S. 496 (1941))).

ing that the Second Amendment protects an individual right to keep and bear arms while leaving the details for another day opened a wide chasm for legislators to bridge.[164] Unsurprisingly, difficult questions surrounding the right to *deal in and around guns* (think of gun manufacturers, sellers, repair shops, training providers, and firing ranges) quickly emerged.[165] These questions revolve around whether firearms-related businesses have Second Amendment rights:

- Are gun dealers akin to booksellers under the First Amendment with similar constitutional rights to conduct business?[166]
- How many firearms-related businesses are allowed to locate in a certain jurisdiction, commercial area, or shopping center?[167] Or, like bookstores, are there few limits?[168]
- Do people have a right to sell guns in close proximity to where their customers live?[169]
- Is it legal to regulate in-store gun sales differently from online gun sales?[170]
- Can excessively dangerous weapons and ammunition now be

164. *See* Ezell v. City of Chicago (*Ezell I*), 651 F.3d 684, 701 (7th Cir. 2011) (noting "[t]he Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal 'test' for resolving future claims.").

165. *See* Jeff Golimowski, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post*-Heller *World*, 49 AM. CRIM. L. REV. 1599, 1601 (2012) (identifying that "[a]lthough the majority exhaustively explained its analysis for finding that the Second Amendment protects an individual's right to bear arms, it left implicit much of the way that the right plays out in modern America.") (internal citations omitted).

166. See Teixeira v. County of Alameda (Teixeira II), 873 F.3d 670, 688 (9th Cir. 2017) (en banc) (comparing gun sellers with booksellers in addressing whether gun sellers have similar rights to conduct business).

167. *See, e.g.*, *id.* at 679–80 (holding that "gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained").

168. *See id.*

169. *See* Jordan Lamson, *Too Little Space: Does a Zoning Regulation Violate the Second Amendment?*, 58 B.C. L. REV. E-SUPPLEMENT 76, 90 (2017) (highlighting a "potentially large increase in the number of constitutional challenges to zoning laws throughout the United States").

170. *See generally* District of Columbia v. Heller, 554 U.S. 570, 636–723 (2008) (Breyer, Stevens, Souter, & Ginsberg, JJ., dissenting) (warning of the impact of potentially absolute protection the majority is giving under the Second Amendment).

prohibited from commerce?[171]

Making matters more difficult, *Heller* and *McDonald* were handed down around the same time as when horrific gun violence overtook the Virginia Tech campus in 2007, a military base in Fort Hood, Texas in 2009, and a Tucson, Arizona supermarket in 2011.[172] These mass shootings rocketed firearms commerce back into the public consciousness. Lacking clarity from the judicial branch and facing great pressure, jurisdictions began to regulate firearms businesses in a multitude of ways.[173]

The objectives of such legislation—stem gun violence, keep guns away from dangerous individuals, protect and calm a nervous public—are certainly compelling in the moral and legal sense.[174] However, some regulations seem over-inclusive (firing range bans throughout Chicago)[175] and others under-inclusive ($340 handgun registration fees imposed solely on New York City residents to "promote public safety and prevent gun violence").[176] Some laws take the form of zoning restrictions prohibiting the establishment or expansion of new gun dealers too close to schools, neighborhoods, churches, or liquor stores.[177] Some prohibit the manufacture, sale, transfer, or possession of certain types of guns (assault-style weapons) or ammunition (high-capacity magazines).[178] Others establish very strict business licensing

171. *See* Golimowski, *supra* note 165, at 1614.

172. *See, e.g.*, *Deadliest U.S. Mass Shootings, 1984–2017*, L.A. TIMES (Oct. 2, 2017, 5:26 PM), http://timelines.latimes.com/deadliest-shooting-rampages/. These were the most publicized mass shootings over this period, but there were others. *See id.*

173. *See, e.g.*, Cristian Farias, *The Second Amendment is No Barrier to Stricter Gun Laws,* N.Y. MAG. (Feb. 25, 2018), http://nymag.com/daily/intelligencer/2018/02/the-second-amendment-is-no-barrier-to-stricter-gun-laws.html (stating, "[i]n the wake of the Sandy Hook Elementary School massacre[,] . . . legislators . . . sprang to action and passed stringent bans on assault-style rifles and high-capacity magazines—the very kind Adam Lanza, the school shooter, had in his possession at the time of the rampage").

174. *See id.*

175. *See* Ezell v. City of Chicago (*Ezell I*), 651 F.3d 684, 689–90 (7th Cir. 2011) (discussing two conflicting city laws – one that "mandates one hour of range training as a prerequisite to lawful gun ownership" and another that "prohibits all firing ranges in the city" of Chicago) (internal citations omitted).

176. *See* Kwong v. Bloomberg, 723 F.3d 160, 162–63 (2d Cir. 2013) (discussing how handgun registration fees range from $3–$10 throughout New York while similar fees in New York City exceed $300). This law purports to "promote public safety and prevent gun violence," *id.* at 168–69, but its requirement of a $300 fee-increase to register a handgun only in New York City seems under-inclusive when compared to these lofty goals. *Id.*

177. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 673 (9th Cir. 2017) (en banc).

178. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 120 (4th Cir. 2017) (en banc) (discussing the Gen-

and background check requirements.[179]

Whether these laws effectuate the government's objectives is the subject of a great national debate.[180] Many people are convinced that gun violence decreases as the number of guns available to purchase decreases.[181] Many others believe that law-abiding citizens with the ability to readily purchase guns create safer environments, and are often the last line of defense for the defenseless in places of refuge like schools or churches.[182] Regardless of the public debate, each of these regulations is more likely to be struck down if firearms-related businesses possess Second Amendment rights.[183]

Amidst all the confusion, one position remains clear—on emotional, ever-changing, and important matters of public policy such as this, judges are

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eral Assembly of Maryland's decision to ban the AR-15 and other military-style rifles in response to the Sandy Hook mass shooting).

179. *See, e.g.*, *Gun Dealers*, GIFFORDS, LAW CENTER TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/gun-sales/gun-dealers/ (last visited Sept. 16, 2018) (collecting federal and state laws on this issue).

180. *See infra* Part IV.

181. *See, e.g.*, Christopher Ingraham, *It's Time to Bring Back the Assault Weapons Ban, Gun Violence Experts Say*, WASH. POST (Feb. 15, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/02/15/its-time-to-bring-back-the-assault-weapons-ban-gun-violence-experts-say/ (quoting an expert who studied mass shootings before, during, and after the expired federal assault weapons ban and found: "Compared with the 10-year period before the ban, the number of gun massacres during the ban period fell by 37 percent, and the number of people dying from gun massacres fell by 43 percent. But after the ban lapsed in 2004, the numbers shot up again—an astonishing 183 percent increase in massacres and a 239 percent increase in massacre deaths."); John J. Donohue III, *Facts Do Not Support Claim That Guns Make Us Safer,* STANFORD UNIV. (Oct. 12, 2015), https://law.stanford.edu/2015/10/12/professor-john-donohue-facts-do-not-support-claim-that-guns-make-us-safer/ (stating that "guns are a bit like chest x-rays. If you really need them, they can be helpful to have around, and even save lives. If you don't need them, and yet are constantly exposed to them, they represent a constant threat while conferring little or no benefit. Most Americans recognize that guns have both potential costs and benefits, and that for most people, having a gun creates more risks than benefit. On the other hand, if one happens to be in a particularly high-risk category, then having a gun for personal protection could make sense. One reason that gun ownership in the United States is *declining* is that more and more Americans recognize that for them guns are unlikely to be [sic] confer benefits that exceed their costs.").

182. *See, e.g.*, Rick Jervis, *For Gun-Control Activists, NRA Convention in Dallas is Ground Zero for Protests*, USA TODAY (May 4, 2018, 7:38 PM), https://www.usatoday.com/story/news/2018/05/04/nra-convention-gun-control-activists-dallas-ground-zero/580735002/ (discussing a 2018 speech to the National Rifle Association by President Donald Trump, who dismissed "calls to ban guns as a way to reduce terrorism or gun deaths, by noting the outbreak of incidents in which terrorists used trucks to ram pedestrians," and Vice President Mike Pence, who "offered a vigorous defense of the Second Amendment in his address to the convention . . . . [and] mentioned the notion of arming teachers, saying 'the quickest way to stop a bad guy with a gun is a good guy with a gun'").

183. Teixeira v. County of Alameda (*Teixeira I*), 822 F.3d 1047, 1053 (9th Cir. 2016) (employing the two-step inquiry formed by *Heller* "which begins by asking whether a challenged law burdens conduct protected by the Second Amendment").

forced to sit uncomfortably in the middle as independent, neutral arbitrators of the cases and the Constitution.[184] Certainly aware of this national discussion and their personal opinions on it, judges wrestle with these issues and often enter the debate with lengthy, emotional opinions.[185] In doing so, lower courts answer the question of whether firearms-related businesses have Second Amendment rights using two different approaches.[186] The approach chosen generally determines whether a law targeting firearms commerce is upheld or struck down.[187]

a. The Commercial Rights Approach

This approach posits that firearms-related businesses possess Second Amendment rights of their own.[188] Thus, the right to conduct firearms commerce is on par with the individual right to keep and bear arms.[189] Under the Commercial Rights approach, serious restrictions on where firearms-related businesses may open or operate, what they sell, and the services they provide are subject to heightened judicial scrutiny and rest on less certain constitutional ground.[190] Outright bans on dealing in and around guns would

184. *See, e.g.*, *Code of Conduct for United States Judges: Canon 1:A*, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b (last visited Sept. 16, 2018) (stating: "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.").

185. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 120–63 (2d Cir. 2017) (en banc) (reproducing forty-three pages of opinions including emotional paragraphs like: "On the morning of December 14, 2012, in Newtown, Connecticut, a gunman used an AR-15-type Bushmaster rifle and detachable thirty-round magazines to murder twenty first-graders and six adults in the Sandy Hook Elementary School. Two additional adults were injured by gunfire, and just twelve children in the two targeted classrooms were not shot. Nine terrified children ran from one of the classrooms when the gunman paused to reload, while two youngsters successfully hid in a restroom. Another child was the other classroom's sole survivor. In all, the gunman fired at least 155 rounds of ammunition within five minutes, shooting each of his victims multiple times.").

186. David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?* 127 HARV. L. REV. F. 230, 230 (2014) (identifying "a developing split about whether firearms sellers have Second Amendment rights" in the lower courts).

187. *Id.* at 230–31.

188. *See, e.g.*, *id.* at 230 (arguing that even though "this question has divided the federal courts, the answer is quite clear: operating a business that provides Second Amendment services is protected by the Second Amendment.").

189. *See, e.g.*, Petition for A Writ of Certiorari at 25–29, Teixeira v. County of Alameda, 873 F.3d 670 (9th Cir. 2017) (No. 17-982), 2018 U.S. S. Ct. Briefs LEXIS 86 [hereinafter *Teixeira Cert. Petition*].

190. Kopel, *supra* note 186, at 236.

be struck down just like the handgun ban in *Heller*.[191]

Advocates of this approach claim that the right to conduct firearms commerce is akin to the right of free expression; gun dealers must be treated like booksellers.[192] It would violate the First Amendment and free speech principles for the authorities to ban or seriously restrict booksellers from operating in commercial areas.[193] This would be true even if there were a bookstore on every city block.[194] Ergo, it violates the Second Amendment when firearms businesses are banned or seriously restricted from operating in commercial areas.[195]

Proponents look to American and English history for support[196] and argue that the colonists understood that the right to keep and bear arms included the right to conduct firearms commerce.[197] They cite many historical examples including a 1676 Virginia law holding that all persons have "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony."[198] Proponents also tout comments from Framers like Thomas Jefferson who touched upon this topic in 1793: "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them."[199] The fact that the Framers did not express this right on paper is not a problem, the argument concludes:

> Common sense dictates that the Framers were not required to spell

191. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira I*), 822 F.3d 1047, 1063 (9th Cir. 2016) (stating that if the "evidence does confirm that the Ordinance, as applied, completely bans new gun stores (rather than merely regulates their locations), something more exacting than intermediate scrutiny will be warranted").

192. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 688 (9th Cir. 2017) (en banc).

193. *Id.* ("Selling, publishing, and distributing books and other written materials is therefore *itself* expressive activity. Sellers, publishers, and distributors of such materials consequently have free-standing rights under the First Amendment to communicate with others through such protected activity.").

194. *Id.* at 681 (repeating the plaintiff's contention that "even if there were a gun store on every square block in unincorporated Alameda County and therefore prospective gun purchasers could buy guns with exceeding ease, he would still have a right to establish his own gun store somewhere in the jurisdiction").

195. *See* Kopel, *supra* note 186, at 236.

196. *See, e.g.*, *Teixeira Cert. Petition*, *supra* note 189, at 41 (arguing that the "historical record supports the Second Amendment's protection of a right to sell arms").

197. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira I*), 822 F.3d 1047, 1054, 1056 (9th Cir. 2016).

198. *Id.* (citing Laws of Va., Feb. 1676–77, Va. Stat. at Large, 2 Hening 403 (1823)).

199. *Id.* at 1055 (citing Thomas Jefferson, 3 *Writings*, 558 (H.A. Washington ed., 1853)).

> out every possible dimension of an enumerated right. . . . It does not matter that the Framing Era lacked "commentary suggest[ing] that the right codified in the Second Amendment independently created a commercial entitlement to sell guns if the right of the people to obtain and bear arms was not compromised." The Framers could not have anticipated every argument of twenty-first century judges hostile to the Second Amendment right. Individuals seeking to enforce their rights need not disprove, as an historical matter, every negative proposition concocted by the right's opponents.[200]

The Commercial Rights approach was accepted recently by a Ninth Circuit panel in a prominent firearms commerce case styled *Teixeira v. County of Alameda*.[201] In *Teixeira*, a gun dealer alleged that Alameda County's zoning requirements, mandating 500 feet between gun stores and neighborhoods, interfered with his Second Amendment rights to *sell* guns.[202] He argued: "As a logical matter, commerce inherently involves buyers as well as sellers, who may have equal constitutional rights in the transaction."[203]

The district court declined this invitation to adopt the Commercial Rights approach.[204] However, a divided three-judge panel reversed.[205] After an extensive historical analysis, the panel majority inferred that people who possess the right to keep and bear arms must also be able to acquire those arms commercially.[206] The opinion concluded that "Alameda County has offered nothing to undermine our conclusion that the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms."[207] With the Commercial Rights approach adopted, the district court was reversed on Second Amendment grounds.[208] As in *Heller*, Alameda County would now have to offer much more than "unsubstantiated

200. *Teixeira Cert. Petition*, *supra* note 189, at 40, 42 (citing Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 686 (9th Cir. 2017)).

201. *Teixeira I*, 822 F.3d at 1047.

202. *Teixeira II*, 873 F.3d at 673, 676.

203. *Teixeira Cert. Petition*, *supra* note 189, at 40–41.

204. *See* Teixeira v. County of Alameda, No. 12-cv-03288, 2013 U.S. Dist. LEXIS 128435, at *19 (N.D. Cal. Sept. 9, 2013) (stating that "[w]hile both the Supreme Court and the Ninth Circuit left unanswered precisely how broad the scope of the Second Amendment is . . . they have not extended the protections of the Second Amendment to the sale or purchase of guns") (internal citations omitted).

205. *Teixeira I*, 822 F.3d at 1049, 1056.

206. *See id.* at 1055.

207. *Id.* at 1056.

208. *Id.* at 1064.

assertions" to overcome the heightened scrutiny that accompanies this constitutional guarantee.[209] This position would change to the Ancillary Rights approach, discussed below, in the Ninth Circuit's *en banc* opinion.

The Commercial Rights approach is a drastic interpretation of the Second Amendment—especially after the paucity of guidance offered on the subject in *Heller* and *McDonald*.[210] This might explain why only a few opinions adopt it and why *en banc* courts stand ready to reverse.[211] Accordingly, no circuit court today takes the Commercial Rights approach.[212]

b. The Ancillary Rights Approach

Instead, circuits tend to adopt the Ancillary Rights approach where Second Amendment rights belong to gun owners and not firearms-related businesses. These businesses are protected just enough to provide community members with adequate (not necessarily convenient) access to guns, gun repair, and gun training.[213] In other words, these businesses act as advocates for the constitutional rights of their customers.[214] Past the point where individuals can adequately obtain or repair guns and conduct firearms training, the government may regulate or perhaps even prohibit firearms commerce.[215] This is especially true where "restrictions on a commercial actor's ability to enter the firearms market may . . . have little or no impact on the

209. *See id.* at 1063–64.

210. *See generally* McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (describing the scarcity of precedent of the courts sustaining bans on gun-related activities, so there is not a lot of court commentary on the issue).

211. *See, e.g.*, Radich v. Guerrero, No. 1:14-CV-00020, 2016 U.S. Dist. LEXIS 41877, at *19 (D. N. Mar. I. Mar. 28, 2016) (holding that "if the Second Amendment individual right to keep and bear a handgun for self-defense is to have any meaning, it must protect an eligible individual's right to purchase a handgun, as well as the complimentary right to sell handguns"); Mance v. Holder, 74 F. Supp. 3d 795, 807 n.8 (N.D. Tex. 2015), *rev'd on other grounds sub nom.* Mance v. Sessions, 880 F.3d 183 (5th Cir. 2018) (holding "that operating a business that provides Second Amendment services is generally protected by the Second Amendment, and prohibitions on firearms sales are subject to similar scrutiny").

212. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (discussing the application and popularity of the Ancillary Rights approach among federal circuit courts as it applies to Second Amendment protections).

213. *Id.* at 687 (explaining that generally the rights of the retailers and the rights of owners are the same, but there are times when restrictions on the retailers have little impact on the owners' Second Amendment rights).

214. *See id.* at 678 (citing Craig v. Boren, 429 U.S. 190, 195 (1976)).

215. *Id.* at 682 (finding that "the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor to sell them").

ability of individuals to exercise their Second Amendment right to keep and bear arms."[216]

The crux of this argument is that the Second Amendment speaks of "the right of the people to keep and bear Arms."[217] This keeping and bearing of arms by "the people" is much different from the selling of arms, which is neither mentioned in nor easily inferred from the text. Additionally, proponents of the Ancillary Rights approach read the history much differently than advocates for the Commercial Rights approach. They argue that the American colonies promulgated many restrictions on the commercial sale of guns.[218] Whether it was a ban on selling guns to Native Americans or the regulation of firearms commerce outside colony boundaries, these laws demonstrate that eighteenth-century Americans did not believe that they possessed the right to sell guns.[219]

Proponents of this approach also argue that the First Amendment and bookselling is not a great analogue to the Second Amendment and gun dealing.[220] They argue that the First Amendment does not mention whose rights are protected when it says, "Congress shall make no law . . . abridging the freedom of speech"[221] (this could include readers *or* booksellers) while the Second Amendment is more specifically geared to the right of the "people to keep and bear Arms" (i.e., gun owners).[222] Additionally, the selling of books is itself an expressive activity in itself and booksellers are "not in the position of mere proxies arguing another's constitutional rights."[223] A better analogy, the argument goes, is to medical service providers who advocate for patients' rights to reproductive health services.[224] Patients certainly have constitutional rights to obtain contraceptives or abortion procedures, but the cases do not hold that medical providers possess independent rights to sell or provide these services.[225] Medical providers, like firearms-related businesses, merely exercise rights on behalf of their patients/customers.[226]

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216. *Id.* at 687.
217. U.S. CONST. amend. II.
218. *See Teixeira II*, 873 F.3d at 685.
219. *See id.*
220. *Id.* at 688.
221. *Id.* (quoting U.S. CONST. amend. I).
222. *Id.* (quoting U.S. CONST. amend. II).
223. *See id.* at 688–89 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963)).
224. *See id.* at 689–90.
225. *See id.* (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312–13, 2316 (2016)).
226. *See id.* at 689.

The *Teixeira* case from the Ninth Circuit, discussed above, also demonstrates this approach in action. Sitting *en banc*, the court rejected the Commercial Rights approach adopted by the appellate panel.[227] After reading the text and history much differently, the *en banc* court found that neither suggest that the Second Amendment protects an individual's right to sell a firearm unconnected to the rights of citizens to possess arms.[228] Of course, this is the primary argument of the Ancillary Rights approach, now adopted as binding precedent in the Ninth Circuit.[229]

To conclude, every circuit to opine on the issue has adopted the Ancillary Rights approach.[230] This comes as no surprise as the arguments are stronger in terms of text and history.[231] This approach is also more faithful to *Heller*, which spoke of the *individual right* to keep and bear arms as well as the *presumptive lawfulness* of regulations on firearms commerce without insinuating anything about the rights of firearms businesses.[232] Keep in mind that firearms-related businesses are still protected under this approach, just to a lesser extent.[233]

In sum, firearms commerce laws face an arduous path to survival if there is a Second Amendment right to deal in and around guns. Blanket prohibitions on opening new gun stores, firing ranges, or other gun-related establishments would surely be stuck down. Serious licensing or zoning requirements on firearms-related businesses may be seen as burdening protected Second Amendment conduct.[234] Assault weapons bans may survive because of the excessively dangerous nature of the weapons, but it would be a closer call. Therefore, how courts answer this question is critical. Today, the Ancillary Rights approach has prevailed in the lower courts. How the Supreme Court will answer this question when presented, however, is any-

227. *See id. at* 686–87.

228. *See id.*

229. *Id.* at 690.

230. *See, e.g.*, *id.* at 678 (stating that "Teixeira, as the would-be operator of a gun store, thus has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers"); *see also* Ezell v. City of Chicago, 846 F.3d 888, 890 (7th Cir. 2017) (holding that Chicago's restrictions on shooting range locations resulted in a Second Amendment injury because it "severely limit[ed] Chicagoans' Second Amendment right to maintain proficiency in firearm use via target practice at a range," not because the range owners have any protected interest in operating a shooting range in Chicago).

231. See *Teixeira II,* 873 F.3d at 693–94 (Tallman, J., concurring in part).

232. District of Columbia v. Heller, 554 U.S. 570, 582, 635 (2008).

233. *See Teixeira II*, 873 F.3d at 681 (indicating that a ban on businesses providing firearms instruction and training would violate the Second Amendment rights of gun users).

234. *See Ezell*, 846 F.3d at 890.

one's guess.

2. When is a regulation "longstanding" (and, thereby, presumptively lawful)?

The Supreme Court appeared to clarify in *McDonald* that only "longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful.[235] This indicates, at first glance, that more recent firearms commerce regulations are vulnerable.[236] But did the Justices mean that only laws "restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis" into their constitutionality?[237] Lower courts have not interpreted *Heller* and *McDonald* this way. Instead, these cases provide guidance on when gun regulations are appropriately "longstanding" and what to do with such laws.[238]

First, laws regulating firearms commerce need not have been on the books in 1791 to count as "longstanding" and "presumptively lawful" regulations under *Heller*. The majority view is that "a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."[239] That has to be true because *Heller* itself included gun restrictions on felons and the mentally ill as "longstanding," even though these restrictions come from the mid-twentieth century.[240] Some courts even hold that newer regulations "might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the

235. *See* McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626–27).

236. *See McDonald*, 561 U.S. at 786.

237. Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016) (citing Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc)).

238. Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013) (finding that the requirement that applicants for a handgun permit law demonstrate a "justifiable need" to publicly carry a handgun was a "'presumptively lawful,' 'longstanding'" regulation under *Heller* and *McDonald*); *see also* United States v. Rene E., 583 F.3d 8, 12 (1st Cir. 2009) (upholding the constitutionality of a law that prohibited persons under age eighteen from possessing handguns because of the "existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns" although the line between childhood and adulthood was historically twenty-one, not eighteen).

239. NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 196 (5th Cir. 2012).

240. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 640–41 (7th Cir. 2010) (explaining that a federal law forbidding gun possession by someone who has been adjudicated to be mentally ill was enacted in 1968).

record."[241]

Second, courts generally uphold "longstanding" laws under rational basis review.[242] They argue that such laws do not fall under the umbrella of the Second Amendment and, therefore, *Heller* and *McDonald* do not apply.[243] Lacking protection from a constitutional guarantee, courts need only find the law rationally related to a legitimate governmental interest.[244] It is easy to imagine how most gun regulations pass this test. The governmental interests in reducing crime, decreasing violence, and increasing public safety are far past legitimate; they are compelling.[245]

This interpretation of "longstanding" is pivotal.[246] All of the laws regulating or banning the sale of military-style weapons and ammunition are of recent vintage.[247] Zoning regulations are just over a century old; business licenses and sophisticated background checks are more recent innovations.[248] None of these regulations were entrenched in the minds of eighteenth-century Americans.[249] Unless lower courts interpret "longstanding" broadly, these laws lose their presumptive validity and face heightened scrutiny.[250] As with the Commercial versus Ancillary rights determination, categorizing

241. Fyock v. Sunnyvale, 779 F.3d 991, 997 (9th Cir. 2015) (citing *BATFE*, 700 F.3d at 196).

242. *See, e.g.*, *BATFE*, 700 F.3d at 196 (stating that "a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller's* illustrative list—would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework").

243. *Id.* at 203 (deciding that a law preventing youth from purchasing handguns is sufficiently longstanding and, thus, falls outside of the Second Amendment's protection).

244. *Id.* at 207 (explaining that the law and the important government objective only need have a reasonable connection).

245. N.Y. State Rifle & Pistol Ass'n, v. Cuomo, 804 F.3d 242, 262 (2d Cir. 2015) (showing the importance of the government's interest in controlling semi-automatic weapons).

246. *BATFE*, 700 F.3d at 207 (showing that the determination that the law is longstanding allowed the court to choose the less severe intermediate scrutiny level).

247. *Id*. at 196 (stating that modern gun bans "are of mid-20th century vintage").

248. Teixeira v. County of Alameda (*Teixeira I*), 822 F.3d 1047, 1058 (9th Cir. 2016) (noting that the "Nation's first comprehensive zoning law did not come into existence until 1916"); *see generally* Brendan J. Healey, *Plugging the Bullet Holes in U.S. Gun Law: An Ammunition-Based Proposal for Tightening Gun Control*, 32 J. MARSHALL L. REV. 1 (1998) (discussing the Brady Handgun Violence Prevention Act, enacted in 1993, which mandated federal background checks on firearm purchasers in the United States, and advocating for stricter licensing requirements for sellers).

249. *See BATFE,* 700 F.3d at 196 (citing United States v. Booker, 644 F.3d 12, 23–24 (1st Cir. 2011) (explaining that today's firearm bans differ greatly from those of the eighteenth century)).

250. *See* Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 699 (9th Cir. 2017) (Bea, J., dissenting) (arguing for a narrow interpretation of "longstanding" when considering a Second Amendment challenge to a firearms regulation).

a law as "longstanding" is outcome determinative.[251]

3. What level of heightened scrutiny should cover firearms commerce laws?

In the 1930s, the Supreme Court introduced levels of scrutiny to analyze laws burdening constitutional guarantees.[252] As the scrutiny level rises, the government is required to more closely connect its law to its goals.[253] This reduces the likelihood that constitutional rights will be invaded without a very good reason.[254] Judicial scrutiny is a measure of scope and effectiveness in that overly broad or ineffective laws should never interfere with constitutional guarantees such as free expression or equal protection.[255] Today, there are three primary levels of scrutiny with some play in the joints:[256]

(1) *Rational Basis*—requires laws be rationally related to legitimate governmental interests.[257] This test is used "when a local, commercial, or economic right, rather than a fundamental individual constitutional right, is infringed."[258] Almost all laws survive rational basis review. In the firearms commerce domain, "[l]aws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise" are

251. *Id.* at 683 (declaring a distinction that the Second Amendment does not protect commercial rights related to the right to bear arms).

252. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating, in a famous footnote, that there "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").

253. *See generally* Colo. Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050, 1066 (D. Colo. 2014) (explaining the levels of scrutiny in full).

254. *See BATFE,* 700 F.3d at 195–96 (citing District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008)) (explaining that if the rational basis test were used for the Second Amendment right, it would make that right without effect).

255. *See, e.g.*, Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006).

256. In other areas of the law, courts apply an enhanced rational basis review. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). This level is just below intermediate scrutiny, but not as deferential as rational basis. *See id.* This type of scrutiny is not mentioned in firearms commerce opinions. *See BATFE,* 700 F.3d at 195–96 (only mentioning traditional rational basis review).

257. *See* Winkler, *supra* note 255 at 716 ("Under rational basis review, the question is whether the law is a rational means of furthering legitimate governmental ends.").

258. *Hickenlooper*, 24 F. Supp. 3d at 1066.

generally upheld under rational basis review.[259]

(2) *Intermediate Scrutiny*—presents a higher hurdle.[260] Here, the government must prove its law is (1) substantially related to achieve (2) an important government objective.[261] The law need not be the least intrusive means of meeting policy goals. And, laws are still upheld even if the challenger incurs some burden on protected conduct.[262] Most courts use intermediate scrutiny to evaluate firearms commerce regulations within the scope of the Second amendment but not implicating its core protection of self-defense in the home.[263]

(3) *Strict Scrutiny*—represents the highest hurdle.[264] Here, the government must prove its law is "(1) narrowly tailored, to serve (2) a compelling [governmental] interest."[265] This is "the most demanding test known to constitutional law"[266] and generally, (though not always) leads to the law's demise. Strict scrutiny is rarely applied in the firearms arena, which helps explain why most gun-related regulations withstand legal challenge.[267]

The Justices have left lower courts to decide, for the most part, what level of scrutiny should apply to laws concerning the right to keep and bear

259. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 258 (2d Cir. 2015).

260. *See Hickenlooper*, 24 F. Supp. 3d at 1066 (explaining the intermediate scrutiny level of review).

261. Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *see also* Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (en banc) (stating the standard a bit differently: "The less onerous standard of intermediate scrutiny requires the government to show that the challenged law 'is reasonably adapted to a substantial governmental interest'" (quoting United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011))).

262. *Masciandaro*, 638 F.3d at 474 (stating that "intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question").

263. *Id.* (applying intermediate scrutiny on firearm regulations affecting self-defense outside the home).

264. *Hickenlooper*, 24 F. Supp. 3d at 1066 (explaining that strict scrutiny is the most rigorous test, requiring laws to be "narrowly-tailored" to fit government objectives).

265. Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002); *see also* Abrams v. Johnson, 521 U.S. 74, 82 (1997).

266. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

267. *See* N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015) (showing the ease with which laws can still pass under intermediate scrutiny).

arms.[268] Recall that *Heller* made clear that rational basis review is unacceptable with constitutional rights at stake.[269] Therefore, lower courts struggle to determine which level of heightened scrutiny (intermediate or strict) is appropriate.[270] Most courts select and stick to intermediate scrutiny for firearms commerce cases.[271] Others vary the scrutiny level depending upon (1) "how close the law comes to the core of the Second Amendment right" and (2) "the severity of the law's burden on the right."[272]

Importantly, the level of scrutiny selected often dictates the result; for instance, courts applying intermediate scrutiny tend to uphold the challenged law—at least in the firearms commerce arena.[273] Recall that governments always have an important, likely compelling, interests in decreasing violent crime and increasing public safety. With such important goals established, lawmakers merely have to ensure that their laws are effective or "substantially related" to achieving those goals.[274] Courts in firearms commerce cases have given the government broad leeway to make that case.[275]

In other words, so long as officials "produce evidence that 'fairly support[s]' their rationale, the laws will pass constitutional muster."[276] In analyzing such evidence, courts applying intermediate scrutiny "accord substantial deference to the predictive judgments of [the legislature]"[277] and allow the government to "rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense" in discharging its burden."[278] Plaintiffs are doomed unless they show that this evidence does not support the government's interest or introduce contradictory evi-

268. *Id*. at 258 (stating that *Heller* did not give a method to decide which level of scrutiny to use and instead adopting a two-step analysis).

269. District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008).

270. *See Cuomo*, 804 F.3d at 260 (deliberating on which level to apply).

271. *Id.* (deciding upon intermediate scrutiny after deliberating on which level to apply).

272. Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011).

273. *See, e.g.*, *Cuomo*, 804 F.3d at 261.

274. *See id.* at 261 (stating that it is "beyond cavil that both [Connecticut and New York] have 'substantial, indeed compelling, governmental interests in public safety and crime prevention.' We need only inquire, then, whether the challenged laws are 'substantially related' to the achievement of that governmental interest" (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012))).

275. *See infra* Part IV.

276. *Cuomo*, 804 F.3d at 261 (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (plurality opinion)).

277. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (internal citation omitted).

278. Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 694 (6th Cir. 2016).

dence.[279]

B. The Firearms Commerce Test

Despite answering the tough questions inconsistently, federal circuits apply a standardized test to laws challenged under the Second Amendment.[280] Beginning with the 2010 case of *United States v. Marzzarella* in the Third Circuit[281] through the 2015 case of *New York State Rifle & Pistol Ass'n v. Cuomo* in the Second Circuit,[282] this near-uniform approach has coalesced. Derived from the precious little guidance in *Heller*, the test asks two questions:

(1) Does the law at issue burden conduct protected by the Second Amendment?

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279. *See Turner Broad. Sys., Inc.*, 520 U.S. at 195.

280. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 132 (4th Cir. 2017) (en banc); Binderup v. Att'y Gen. U.S., 836 F.3d 336, 339 (3d Cir. 2016) (en banc); *Cuomo*, 804 F.3d at 254 (2d Cir. 2015); GeorgiaCarry.org v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1322 (11th Cir. 2015); *Tyler*, 775 F.3d at 318 (cautioning that there "may be a number of reasons to question the soundness of this two-step approach" as *Heller* was very negative on the interest-based analyses this test undertakes), *rev'd,* Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016); Jackson v. City and County of San Francisco, 746 F.3d 953, 962–63 (9th Cir. 2014); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874–75 (4th Cir. 2013); NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, (*BATFE*),, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). The First Circuit did not explicitly adopt the test even when it had an opportunity to do so. *See, e.g.*, Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015). The court in *Powell* rather opaquely discussed a better approach in these terms: "We thus far have entered the discourse on few occasions, mostly in direct appeals of federal firearms convictions, and have hewed closely and cautiously to *Heller's* circumscribed analysis and holding." *Id*. Out of all the circuits to adopt the test, the Sixth Circuit seems the most skeptical. *See* Tyler, 775 F.3d at 318. Perhaps lacking a proper test case, it appears that the Eighth Circuit Court of Appeals, has not adopted or considered the test. *See id.* at 334. However, a few district courts in the Eighth Circuit have waded into the issue. *See, e.g.*, United States v. Johnson, No. CR15-3035-MWB, 2016 U.S. Dist. LEXIS 18233, at *20–23 (N.D. Iowa Feb. 16, 2016) (titling a section of the opinion "Application of the two-step test," claiming that the defendant's Second Amendment rights were burdened by a lifetime ban on gun possession, and then avoiding the rest of the test by stating that the court need not wade "into the 'levels of scrutiny' quagmire" because the law at issue "passes constitutional muster even under strict scrutiny" (quoting United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010))).

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

282. *Cuomo,* 804 F.3d at 260.

- If yes . . . proceed to step two.

- If no . . . stop. The Second Amendment is not implicated, and the law is constitutional as long as it passes rational basis review.

(2) Can the law withstand heightened scrutiny? The scrutiny applied ranges from intermediate to strict scrutiny depending upon how close the law comes to interfering with the core Second Amendment right of self-defense (particularly in the home).

- If the regulation withstands heightened scrutiny, it is constitutional.

- If the regulation fails heightened scrutiny, it is unconstitutional.[283]

The test is concise, straightforward, and workable. It adds much-needed clarity and clout to rulings in this highly-contested domain. There is real power underlying an approach uniformly applied by most of the nation's federal judges. For example, in evaluating Connecticut and New York bans on assault weapons and high-capacity magazines, the Second Circuit wrote that it was guided by "the teachings of the Supreme Court, our own jurisprudence, and the *examples provided by our sister circuits*."[284] This led to the official adoption of this test in the Second Circuit[285] and surely allowed the panel to feel more constitutionally comfortable upholding this controversial legislation.[286] In a separate case dealing with lifetime gun-possession bans

283. *See, e.g.*, *Binderup*, 836 F.3d at 346 ("If it fails, it is invalid." (quoting *Marzzarella*, 614 F.3d at 89)).

284. *Cuomo*, 804 F.3d at 252–53 (emphasis added).

285. Two cases foreshadowed this adoption. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 94 (2d Cir. 2012); United States v. Decastro, 682 F.3d 160, 167 (2d Cir. 2012).

286. *See, e.g.*, Joe Mahoney, *Cuomo Ramps Up Pressure Against Gun Makers*, DAILY STAR (May 2, 2018), http://www.thedailystar.com/news/local_news/cuomo-ramps-up-pressure-against-gun-makers/article_6d24ca1d-726c-50b3-abc0-5c16bb060b29.html (discussing the New York law at issue in the case and stating the Governor Andrew Cuomo "defended one of his legislative centerpieces—the New York Secure Ammunition and Firearms Enforcement (SAFE) Act—signed into law in January 2013, just weeks after 20 children and six adults were shot to death by a mentally ill man at a Connecticut school. While that controversial law has been 'politically hurtful to me,' Cuomo said, it has not infringed on the rights of gun owners. The law requires pistol owners to get recertified every five years, bans arms the state defines as assault weapons, sets up a mental-health database and imposes limits on magazine capacity.").

for criminal convictions, Third Circuit Judge Thomas Ambro praised this test and exclaimed: "Indeed, it has escaped disparagement by any circuit court."[287] That is a rare feat for any judicially-created test designed to safeguard a constitutional guarantee.

It is critical to keep in mind that this test is applied to most challenges arising under the Second Amendment, not just firearms commerce regulations.[288] As we have seen, few cases revolve around the business of guns.[289] That said, judges who hear firearms commerce cases consistently apply this test in its current form.[290] This article thus predicts that the other circuits will follow, just as they have when evaluating Second Amendment challenges unrelated to firearms commerce. Since the focus here is on firearms commerce, however, this test is referred to as the Firearms Commerce Test.[291] The remainder of this section briefly breaks down each of the test's two parts. Through this analysis, the weakness in each becomes more obvious. Improving the test is the subject of Part IV.[292]

1. Question One: Is the Conduct at Issue Protected by the Second Amendment?

Heller made clear that the individual right to keep and bear arms is "not unlimited."[293] As demonstrated in Part II, *Heller* went as far as to include a "non-exhaustive" list of "presumptively lawful regulatory measures" that have historically limited the individual right to keep and bear arms.[294] These include at least some conditions and qualifications on the commercial sale of

287. *Binderup*, 836 F.3d. at 346.

288. *See id.* at 339–41 (applying the test to challenges on lifetime gun possession bans based on criminal convictions).

289. *See, e.g.*, Donald Scarinci, *Will the US Supreme Court Ever Bring Clarity to the Gun Control Debate?* OBSERVER (Mar. 6, 2018, 6:00 AM), http://observer.com/2018/03/supreme-court-gun-control-debate-stance/ (discussing the hesitation of the Supreme Court to enter into the Second Amendment debate and "characterizing the Second Amendment as the Supreme Court's 'constitutional orphan'").

290. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 682 (9th Cir. 2017) (en banc); Kolbe v. Hogan, 849 F.3d 114, 132–33 (4th Cir. 2017) (en banc).

291. This evaluation could more generically be called the *Second Amendment Burden Test* or the *Firearms Regulation Test*.

292. *See* discussion *infra* Part IV.

293. District of Columbia v. Heller, 554 U.S. 570, 595, 626 (2008).

294. Binderup v. Att'y Gen. U.S., 836 F.3d 336, 343 (3d Cir. 2016) (citing *Heller*, 554 U.S. at 626–27, 627 n.26).

arms.[295] However, the "non-exhaustive" nature of Justice Scalia's list means that there are surely other ways to navigate the Second Amendment from a regulatory standpoint.[296]

The first question of the Firearms Commerce Test evaluates whether the challenged law merits a place on *Heller's* non-exclusive list.[297] If so, the conduct is not protected by the Second Amendment.[298] To make this call, courts "consider whether the challenged law impacts firearms or firearm use, whether the affected firearms are currently in 'common use,' whether the affected firearms are used for self-defense inside or outside of the home, and whether the restriction is akin to restrictions that were historically imposed and customarily accepted."[299] The closer the regulation comes to restricting gun use for self-defense (particularly in the home), the more likely it is to fall within the scope of the Second Amendment and pass step one.[300]

Perhaps unsurprisingly, the way courts answer the tough questions above dictates how they answer this first question. Courts adhering to the Commercial Rights approach are more likely to find protected conduct burdened and move to question two.[301] Jurisdictions adhering to the Ancillary Rights approach are more likely to find that the Second Amendment is not implicated and uphold the law.[302]

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295. *Heller*, 554 U.S. at 626–27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing 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.").

296. *See id.*

297. *See Binderup*, 836 F.3d at 343 ("*Heller* catalogued a non-exhaustive list of 'presumptively lawful regulatory measures' that have historically constrained the scope of the right." (quoting *Heller*, 554 U.S. at 626–27, 627 n.26))).

298. *See id.*

299. Colo. Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050, 1065 (D. Colo. 2014).

300. *See Heller,* 554 U.S. 628–29 ("The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under 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.") (internal citation omitted).

301. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira I*), 822 F.3d 1047, 1058 (9th Cir. 2016) ("Here, the County failed to demonstrate that the Ordinance 'falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected.'").

302. *See, e.g.*, Teixeira v. County of Alameda *(Teixeira II)*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc) ("Alameda County's Zoning Ordinance, to the extent it simply limits a proprietor's ability to open a new gun store, therefore does not burden conduct falling within the Amendment's scope and is 'necessarily allowed by the Amendment.'" (quoting Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016))).

Recall that in *Teixeira v. County of Alameda* a local government prohibited new firearms dealers within 500 feet of a neighborhood.[303] After an in-depth historical analysis, a Ninth Circuit panel took the Commercial Rights approach and found that the law burdened protected conduct.[304] The Ninth Circuit sitting *en banc*, however, adopted the Ancillary Rights approach and found that the law did not burden protected conduct.[305] That much-different approach by the *en banc* court to who possesses the right to keep and bear arms resolved the case under the Firearms Commerce Test at its first step.[306] There was no need to proceed to question two and wade into the levels of scrutiny.

In the end, the analysis under this prong is very subjective. Much depends on how the particular court reads history and answers the tough questions detailed above. Part IV provides a more efficient and effective way to handle this issue.[307]

2. Prong Two: Review the Regulation Under Heightened Scrutiny

Once protected conduct is burdened, courts move to this second question in the Firearms Commerce Test. Because *Heller* outlawed rational basis but otherwise left open the scrutiny question, courts are free to elect some form of heightened scrutiny.[308] The problem with this freedom is that the "appropriate level of scrutiny that courts should apply in Second Amendment cases . . . remains a difficult, highly contested question."[309]

That said, most circuits apply *some form* of intermediate scrutiny to firearms commerce cases.[310] As the Sixth Circuit put it, the "strongest argument in favor of intermediate scrutiny is that other circuits have adopted it as their test of choice. . . . A closer look, however, reveals that the circuits' actual approaches are less neat—and far less consistent—than that."[311] The following chart shows the nuances among the circuits:

303. *Teixeira I,* 822 F.3d at 1050.
304. *See id.* at 1056.
305. *See Teixeira II*, 873 F.3d at 683, 686–87.
306. *See id.* at 690.
307. *See* discussion *infra* Part IV.
308. *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008).
309. Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 326 (6th Cir. 2014), *rev'd,* Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016).
310. *Id.*
311. *Id.* at 324.

Figure 1 | DIFFERENT APPROACHES TO INTERMEDIATE SCRUTINY UNDER THE SECOND AMENDMENT

CIRCUIT	THE CIRCUIT HAS APPLIED INTERMEDIATE SCRUTINY TO:	STANDARD
FIRST	"[C]ategorial ban on gun ownership by a class of individuals"[312]	Law "must be supported by some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective"[313]
SECOND	Laws regulating outside the Second Amendment's core[314]	Law must be substantially related to an important governmental interest[315]
THIRD	Laws that do not severely limit the possession of firearms[316]	Must be a reasonable fit between the law and a significant, substantial, or important governmental end, but the law need not be the least restrictive means to that end[317]

312. United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011).
313. *Id.* Interestingly, this court did not use the words "intermediate scrutiny" to describe this standard, and in a later case said: "As an initial matter, this court has not adopted intermediate scrutiny as the appropriate type of review for a challenge such as [plaintiff's]." United States v. Armstrong, 706 F.3d 1, 8 (1st Cir. 2013).
314. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012).
315. *See id.*
316. United States v. Marzzarella, 614 F.3d 85, 97–98 (3d Cir. 2010).
317. *Id.*

FOURTH	Laws burdening Second Amendment rights outside the home[318]	Law must be "reasonably adapted to a substantial governmental interest"[319]
FIFTH	Look to the "nature of the conduct being regulated and the degree to which the challenged law burdens the [Second Amendment]"[320]	"Government [must] demonstrate a 'reasonable fit' between the challenged regulation and an 'important' government objective"[321]
SIXTH	Look to how closely the law comes to the core of the Second Amendment and how severe a burden it creates[322]	Government must state a "significant, substantial, or important . . . objective" and establish "a reasonable fit" between the challenged restriction and that objective[323]
SEVENTH	Laws closer to the margins of the Second Amendment that regulate, rather than restrict and present modest burdens[324]	Must be a substantial relation between the law and an "important governmental objective"[325]

318. United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011).
319. *Id.*
320. NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 195 (5th Cir. 2012).
321. *Id.*
322. Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 693 (6th Cir. 2016).
323. *Id.* at 693, 695. This was a substituted opinion from a prior case that ruled strict scrutiny was the standard for Second Amendment challenges in part because violation of an enumerated constitutional right is at stake. *See* Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 328–29 (6th Cir. 2014) (creating a circuit split on the issue of intermediate versus strict scrutiny).
324. *See* United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc).
325. *Id.*

EIGHTH	Unclear at the circuit level	No circuit case on point[326]
NINTH	Laws that implicate but do not place a substantial burden on conduct at the core of the Second Amendment[327]	Requires a significant, substantial, or important governmental objective and a "reasonable fit between the challenged regulation and the asserted objective"[328]
TENTH	Laws applying to a narrow class of people, not the public at large[329]	Must be an important governmental objective that is "advanced by means substantially related to that objective"[330]
ELEVENTH	Unclear at the circuit level	No circuit case on point[331]

326. However, a district court looked to classes of people excluded from the Second Amendment in *Heller*, adopted intermediate scrutiny, and stated that the government "bears the burden of demonstrating that the [subject] classification serves important governmental objectives and that the use of [the] classification is substantially related to the achievement of that objective." United States v. Adams, No. 15-00153-01-CR-W-GAF, 2015 WL 5970548, at *2 n.1 (W.D. Mo. Oct. 13, 2015) (alteration in original) (quoting Lawson v. Kelly, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014).

327. Jackson v. City and County of San Francisco, 746 F.3d 953, 965 (9th Cir. 2014).

328. *See id.* (quoting United States v. Chovan, 735 F.3d 1127, 1139 (9th Cir. 2013)).

329. United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010).

330. *Id.* (quoting United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010)).

331. GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1326–27 (11th Cir. 2015) (stating that "we are not called upon to engage in a full constitutional scrutiny analysis—nor should we do so on the basis of so limited a factual record and narrow argumentation"); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) (stating that, "[i]n this case, we need only reach the first step [of the Firearms Commerce Test]. In reaching this conclusion, we obviously need not, and do not, decide what level of scrutiny should be applied"). However, a district court in the circuit looked to laws that do not substantially burden the core Second Amendment right and reiterated that the government's stated objective must be "significant, substantial or important," and there must be a "reasonable fit between the challenged regulation and the asserted objective." United States v. Focia, No. 2:15cr17-AKK, 2015 WL 3672161, at *4–5 (M.D. Ala. June 12, 2015) (citing *Jackson*, 746 F.3d at 965).

D.C.	Laws imposing less substantial burdens on the core of the Second Amendment	The law must be "substantially related to an important governmental objective."[332] The government must establish a tight "fit" that "employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective"[333]

332. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

333. *Id.* (quoting Board of Trustees of S. Univ. of N.Y. v. Fox, 492 U.S. 469, (1989)).

Courts tend to avoid strict scrutiny in the firearms commerce arena.[334] But, that does not mean that intermediate scrutiny is as tough as it gets for the government in all cases. Recently, the Seventh Circuit struck down a ban on firing ranges in Chicago using a test that it referred to as "not quite 'strict scrutiny.'"[335] That test requires the government to "establish a close fit between the [law at issue] and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights."[336] Unsurprisingly, this stricter test led to the law's demise.[337]

Life is even harder for gun regulations burdening conduct near the Second Amendment's core. In *Moore v. Madigan*,[338] the Seventh Circuit struck down a Chicago law prohibiting the carrying of guns in public. Judge Posner found the law unconstitutional without resorting to any level of scrutiny because the Second Amendment core is not subject to judicial discretion.[339] In *Peruta v. County of San Diego*,[340] a Ninth Circuit panel stuck down a San Diego law requiring good cause to obtain a concealed carry permit.[341] The panel refused to apply any level of scrutiny which it compared to the type of interest-balancing prohibited by *Heller*.[342] This groundbreaking opinion was reversed by the Ninth Circuit sitting *en banc*.[343]

In the end, courts requiring more than intermediate scrutiny are outliers. The vast majority use an intermediate scrutiny standard, and though the language differs, this test is rarely fatal to firearms commerce laws.[344] The government always has an "important" interest in reducing crime and protecting the public, and judges provide leeway to show the substantial relationship between laws and the government's important interests.

This Part demonstrated that the Firearms Commerce Test is a workable solution, especially considering the lack of guidance from the Supreme

334. *Id.* at 1252–53 ("[I]n keeping with other circuits, we think that insofar as the laws at issue here do impinge upon a Second Amendment right, they warrant intermediate rather than strict scrutiny.").
335. *See* Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011).
336. *Id.* at 708–09.
337. *See id.* at 711.
338. 702 F.3d 933 (7th Cir. 2012).
339. *See id.* at 942.
340. 742 F.3d 1144 (9th Cir. 2014).
341. *Id.* at 1179.
342. *Id.* at 1175.
343. Peruta v. County of San Diego, 824 F.3d 919, 919–20 (9th Cir. 2016) (en banc).
344. *See supra* Figure 1 and the accompanying text and footnotes.

Court. But, it is far from perfect. Its first question leads judges on a scavenger hunt through the dawn of American history. Its second part allows for an intermediate scrutiny standard without the (in)famous bite. At the end of the day, courts tend to uphold most gun regulations subject to the test.

This is not a bad outcome, by any means. Most of these laws are popular, well-intentioned, minimally-burdensome, and desperately needed (i.e., interest-balancing at its best). The problem is that the test is inefficient in that it allows over- and under-inclusive laws through the gauntlet at the expense of an important constitutional right. It is also somewhat unfaithful to *Heller* and its prohibition of interest-balancing. That leaves the test vulnerable on appeal to a Supreme Court majority likely to defend the positions staked out in *Heller* and *McDonald*. With this in mind, Part IV discusses optimizing the Firearms Commerce Test.

IV. OPTIMIZING THE FIREARMS COMMERCE TEST

The Firearms Commerce Test is widely accepted. It is simple to understand. Its results are consistent, fair enough, and useful. The Supreme Court will surely be asked to adopt the test as a national standard when briefs are filed in its next Second Amendment case.[345] Even after recognizing these qualities, however, the test could and should function more optimally. This Part analyzes two substantive suggestions to morph the Firearms Commerce Test into something more effective, efficient, and faithful to *Heller*.

Both prongs are sub-optimal. Step one is structurally problematic and asks judges to do too much. Step two is functionally problematic and provides the government too much deference in cases where this particular, often-unpopular, constitutional guarantee is at stake. Neither of these problems is exceedingly difficult or painful to correct. This final Part proposes low-risk, high-reward solutions.

Step one requires judges to determine if the Second Amendment is even implicated by the challenged law. Part III demonstrated that courts determine whether the law is on *Heller's* "presumptively lawful" list by rehashing sometimes centuries-old laws, statements, commentaries, and other historical evidence.[346] The goal is to determine whether early Americans believed

345. *See generally* Heller v. District of Columbia, 554 U.S. 570 (2008). The dissent in *Heller*, backed by four Justices, was only one vote short of succeeding. *Id.* at 636. As such, it is likely that any party arguing along the same lines will advocate for the interest-balancing approach explicitly advocated for in Justice Breyer's dissent. *Id.* at 689 (Breyer, J., dissenting).

346. *See Heller*, 554 U.S. at 627 n.26.

that their right to keep and bear arms was burdened by similar regulations. If, and only if, the court finds protected conduct burdened, step two comes into play and some form of heightened scrutiny is applied to review the fit between the law's goals and its impact.

Two major shortcomings stand out:

- *THE STRUCTURAL PROBLEM:* Courts unsympathetic to *Heller* can manipulate step one. It is relatively easy to shape the complicated history of guns in America to a desired end. This makes it relatively easy to "show" that the Second Amendment is not burdened by the challenged law. And, this means laws are upheld absent heightened scrutiny.

  Allowing judges (who are rarely trained historians) to determine the fate of a regulation based on an analysis of a complicated historical picture is problematic. This is especially true given that the history of firearms commerce regulations in early America is voluminous, inconsistent, opaque, and scattered at best.[347] Relying on a court's gathering and interpretation of this history to uphold laws without measuring their effectiveness is a disservice to *Heller* and its guidance that the "very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon."[348] These complications explain why many courts just assume that protected conduct is burdened and move to step two, which has functional problems of its own.

- *THE FUNCTIONAL PROBLEM:* The intermediate scrutiny standard in this line of cases has become too deferential. Today, it approximates the interest-balancing that Justice Breyer promoted[349] but that the *Heller* majority prohibited.[350] There is no doubt that the scales tip toward upholding most firearms regulations. However, *Heller* spent dozens of pages reiterating the

347. *See, e.g.*, Kopel, *supra* note 186 at 234–35 (recounting a brief history of firearms commerce and its role in the American revolution)

348. *Heller*, 554 U.S. at 634 (2008) (emphasis omitted).

349. *See Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

350. *See id.* at 634.

> strength of the individual right to keep and bear arms and only a few paragraphs on its limitations.[351] Because the government will always have important, if not compelling, interests in reducing crime and protecting the public, a deferential standard—when it comes to fit—spells doom for all but the most egregious violations of the Second Amendment.[352] Constitutional guarantees, particularly those in the Bill of Rights, deserve more protection.[353] And, chances are high that at least five Justices will demand as much in their next big Second Amendment case.[354] This loose intermediate scrutiny standard may spell the end of the Firearms Commerce test as currently structured.

These shortcomings do not mean that the test is rigged or that too many gun regulations are upheld. This article credits neither of those accusations. Instead, the current version is problematic because it does not provide enough resistance to ferret out ineffective and, therefore, unconstitutional laws. While the government has some leeway under *Heller* to regulate guns, it must tread lightly and regulate effectively.[355] Any other path leads to potential impingements of a constitutional right, public distrust of elected officials, allegations of animus towards guns, and a discounting of the judicial branch as a check on ineffective and unlawful gun regulations.[356] The rest of this Part addresses these problems and offers two solutions. The goal is that effective laws are upheld, and the rest are sent back (appropriately) to the drawing board.

A. SHORTCOMING #1: Step one is too easy to manipulate. SOLUTION: Eliminate it!

The first question of the Firearms Commerce Test—does the law at issue burden conduct protected by the Second Amendment—causes more

351. *See Heller*, 554 U.S. at 579–626, 626–28.

352. *See id.* at 689 (Breyer, J., dissenting).

353. *See id.* at 628 n.27.

354. *See* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (mem.) (Thomas, J., dissenting) (stating that Justice Thomas believes the Second Amendment is disfavored by the lower courts and needs stronger protection).

355. *See Heller*, 554 U.S. at 626–28.

356. *See*, *e.g.*, Eric Tirschwell & Mark Frassetto, *10 Years After* Heller*: Fiery Gun Rights Rhetoric, but Courts Back Second Amendment Limits*, USA TODAY (June 25, 2018, 2:30 PM), https://www.usatoday.com/story/opinion/2018/06/25/heller-ruling-courts-uphold-gun-control-second-amendment-limits-column/729202002/.

trouble than it is worth. Courts attempt to answer this question by looking to whether the law at issue "harmonizes with the historical traditions associated with the Second Amendment guarantee"[357]—whatever that means. This quest to find the original meaning of the Second Amendment is so tricky, in fact, that many courts just punt and assume protected conduct is burdened.[358] These punts, which render the test's first question basically meaningless, generally read:

> In the absence of clearer guidance from the Supreme Court or stronger evidence in the record, we follow the approach taken by [other circuits] and *assume for the sake of argument* that these "commonly used" weapons and magazines are also "typically possessed by law-abiding citizens for lawful purposes." In short, we proceed on the assumption that these laws ban weapons protected by the Second Amendment.[359]

or

> Nonetheless, we face institutional challenges [i.e., we are not trained historians] in conducting a definitive review of the relevant historical record. Although we are inclined to uphold the challenged federal laws at step one of our analytical framework, in an abundance of caution, we proceed to step two.[360]

The reasons why courts struggle to identify whether protected conduct is burdened is that history surrounding firearms commerce regulation is all over the map.[361] Lower courts may rely on "courts, legislators, and scholars

357. NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 194 (5th Cir. 2012).

358. *See, e.g.*, United States v. Chovan, 735 F.3d 1127, 1137 (9th Cir. 2013) (stating that "because of 'the lack of historical evidence in the record before us, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, [under step one of the Firearm Commerce Test, that Chovan's] Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection . . . .'" (quoting United States v. Chester, 628 F.3d 673, 681 (4th Cir. 2010)); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 257 (2d Cir. 2015); United States v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010) (trying, unsuccessfully, to answer this question and stating: "we cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms").

359. *Cuomo*, 804 F.3d at 257 (emphasis added) (quoting *Heller*, 554 U.S. at 625).

360. *BATFE*, 700 F.3d at 204.

361. *See* Kopel, *supra* note 186 at 234–35.

from before ratification through the late 19th century to interpret the Second Amendment."[362] Examining these voluminous sources causes judges to spill much ink and poor law clerks to expend much time conducting these historical scavenger hunts.[363] *Heller* and *McDonald* alone spent many dozens of pages discussing the history of the Second Amendment as it related to the individual right to keep and bear arms.[364] Those cases, however, spent very little time on the history relating to the right to deal in and around guns. This means that lower courts either have to conduct their own historical research (a subjective endeavor in most cases)[365] or dodge the question and assume the law burdens protected conduct. This is a structural problem that need not exist.

Instead of wasting time on an issue that is generally indeterminable without more guidance from the Supreme Court or a Ph.D. in American History, the test should assume that the challenged law burdens conduct protected by the Second Amendment. This assumption is appropriate under *Heller* and its persistent worry that the judicial branch would not take the right to keep and bear arms seriously enough.[366] The elimination of discretion in step one of the test would demonstrate that this right is being taken very seriously.

The analysis would then move to step two and a review of the law under heightened scrutiny. As long as the intermediate scrutiny review is conducted faithfully to *Heller*, as suggested in the next section, courts will be able to fairly evaluate whether a law unlawfully infringes the Second Amendment without the mess of step one. To be fair, this is what many courts implicitly do anyway via their assumptions that the law burdens protected conduct.[367] It is time to make that choice explicit.

362. *BATFE*, 700 F.3d at 194 (citing *Heller*, 554 U.S. 570 at, 600–26).

363. *See, e.g.*, Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 683–87 (9th Cir. 2017) (en banc) (conducting an in-depth historical inquiry).

364. *See Heller*, 554 U.S. at 579–626; McDonald v. City of Chicago, 561 U.S. 742, 767–91 (2010).

365. To aid in this endeavor, two Duke Law School professors have compiled "a searchable database of gun laws from the medieval age to 1776 in England and from the colonial era to the middle of the twentieth century in the United States." *Repository of Historical Gun Laws*, DUKE UNIVERSITY SCHOOL OF LAW, https://law.duke.edu/gunlaws/ (last visited Sept. 20, 2018).

366. *See Heller*, 554 U.S. at 576–626.

367. *See supra* note 358 and accompanying text.

B. SHORTCOMING #2: Intermediate scrutiny has become too deferential. SOLUTION: Put the bite back into intermediate scrutiny review and require the government to prove its regulations work!

The majority of circuit courts approach step two with some form of intermediate scrutiny. This is appropriate considering *Heller's* rejection of the rational basis test in Second Amendment cases.[368] This is also understandable given the reluctance of judges to invalidate reasonable gun laws via strict scrutiny.[369] The optimized test only requires strict scrutiny for laws *prohibiting* or *severely restricting* firearms commerce integral to the exercise of core Second Amendment rights. For example, blanket prohibitions on gun selling, ammunition, or firing ranges would be subject to strict scrutiny. This may be the minimally acceptable approach under *Heller*, which cautioned that perhaps no level of scrutiny is protective enough of core Second Amendment rights.[370]

On the other hand, laws touching more generally upon firearms commerce are evaluated by intermediate scrutiny. The problem with the version of intermediate scrutiny developing under the Second Amendment is that courts apply the test differently and with varying rigor.[371] Some circuits look to whether the challenged law burdens conduct very near the individual right to keep and bear arms[372] while others apply the standard only to conduct at the margins of these core rights.[373] Some circuits require a "substantial fit"[374] between the law and an important governmental objective while others require only a "reasonable fit."[375] Some circuits are extremely deferential to the challenged law while others are more skeptical.[376] This creates a functional problem because standards of review are designed to be consistently implemented to provide consistent and equitable results.

368. *Heller*, 554 U.S. at 628 n.27.

369. *Heller* does not require strict scrutiny review for all firearms commerce regulations. *See id.* at 628–29.

370. *See id*.

371. *See supra* Section III.B.2.

372. *See, e.g.*, United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2010).

373. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc).

374. *See, e.g.*, Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

375. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 97–98 (3d Cir. 2010).

376. *See supra* Figure 1.

> Today's mish-mash of standards is unnecessarily confusing—especially to firearms businesses operating nationwide—and should be simplified. The easiest fix is to adopt a uniform intermediate scrutiny review standard requiring that the government (1) prove that the challenged law substantially advances an important government interest and (2) supply evidence of the law's effectiveness.[377]

Note the major change to the familiar standard. Intermediate scrutiny under the Second Amendment should require the government to produce evidence that its regulations actually help tackle the problems it legislates to solve.[378] This is not required in today's test and too much deference is provided. For example, a dissenting judge from the Ninth Circuit complained:

> That the vote to deny Appellants' variance [to open a gun store within 500 feet of a residence] was purely political, and not based on an independent finding of danger to citizens, is confirmed by the record's utter lack of even the most minimal explanation for the [Alameda County] Supervisors' vote.[379]

The judge went on to opine that there was "nothing in the record which intimates that locating a gun store within 500 feet of a residence creates any risk to the residents."[380] This lack of evidence did not seem to bother the *en banc* majority working its way through the current Firearms Commerce Test to uphold the zoning regulation on new gun stores in unincorporated Alameda County.[381]

The evidence required under this optimized test could take the form of expert testimony or statistics on crime reduction rates in other jurisdictions with similar laws.[382] Or, the government could produce scientific evidence

377. *See* discussion *supra* Section IV.A, B.

378. Compare this standard with a strict scrutiny application, which would require an in-depth analysis that the law meets an overwhelming public safety concern and is narrowly tailored to protect to public from firearm-related crimes. *See* Elke C. Meeùs, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts' Standards of Scrutiny*, 45 W. ST. L. REV. 29, 70 (2017).

379. Teixeira v. County of Alameda (*Teixeira II*), 873 F.3d 670, 697 (9th Cir. 2017) (en banc) (Bea, J., dissenting).

380. *Id.*

381. *Id.* at 690.

382. *See generally* Ctr. for Gun Policy and Research, Johns Hopkins Bloomberg Sch. of Pub. Health, Updated Evidence and Policy Developments on Reducing Gun Violence in America (Daniel W. Webster & Jon S. Vernick eds., 2014).

that certain types of guns or ammunition are unreasonably dangerous and not critical to self-defense.[383] In all cases, the government should elicit testimony about why more narrowly drawn laws cannot meet its goals.

Heller made clear that the Second Amendment guarantee is not a subsidiary constitutional right.[384] This means that laws infringing on protected conduct should be scrutinized carefully—just as they are with other guarantees in the Bill of Rights.[385] This is especially true in a nation where many people are desperate to reign in gun violence and it is politically popular in some quarters to severely restrict firearms commerce.[386] Under these circumstances, it becomes too easy to use a relaxed intermediate scrutiny standard to fall in line with the loud, passionate voices and turn a blind eye to infringements of a constitutional right.

None of this means, however, that gun laws should be struck down regularly. This article argues just the opposite. In fact, under this new standard, if the government does its job and produces evidence as it should, the case for upholding most regulations is strong.[387] Remember, the government will always have at least an important interest in reducing crime, protecting the public, keeping guns out of the hands of people who will do harm, and so forth.[388] The optimized test appropriately adds an additional burden on the government to put its money where its mouth is, so to speak. With the evidence on the table, it will be much harder for people to complain that judges are biased against firearms commerce.[389] And, the government will be incentivized to put a great deal of thought into the means-ends effectiveness of its regulations.

Accordingly, the optimized test should be structured as follows:

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383. *Cf. supra* note 48 and accompanying text (explaining that due to lack of evidentiary support, the Supreme Court held short-barreled shotguns were not covered by the Second Amendment).

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

385. *Id.* at 634–35.

386. *See, e.g.*, Andrew Ross Sorkin, *How Banks Could Control Gun Sales if Washington Won't*, N.Y. TIMES (Feb. 19, 2018), https://www.nytimes.com/2018/02/19/business/banks-gun-sales.html (discussing the idea that the finance industry could regulate firearms more effectively than lawmakers).

387. *See id.* at 689 (Breyer, J., dissenting).

388. *See id.*

389. *See, e.g.*, *Second Amendment Foundation Calls for Impeachment of Judge Weinstein*, SECOND AMENDMENT FOUNDATION, https://www.saf.org/second-amendment-foundation-calls-for-impeachment-of-judge-weinstein/ (last visited Sept. 20, 2018) (stating that because of the "evident bias against firearms manufacturers exposed on the editorial page of the prestigious Wall Street Journal, and [his] having refused to recuse himself from yet another anti-gun case, federal Judge Jack Weinstein should be impeached").

(1) Laws prohibiting or severely restricting firearms commerce integral to the core Second Amendment right to keep and bear arms for self-defense are subject to strict scrutiny.[390]

(2) Laws regulating firearms commerce in any other way are assumed to burden conduct protected by the Second Amendment.[391]

(3) Such laws are subject to intermediate scrutiny whereby the government must (a) prove that the challenged law *substantially advances an important government interest* and (b) supply evidence of the law's effectiveness.[392]

- If the regulation withstands intermediate scrutiny, it is constitutional.

- If the regulation fails intermediate scrutiny, it is unconstitutional.

Ultimately, the optimized Firearms Commerce Test: (1) treats an often-unpopular constitutional guarantee with appropriate respect; (2) removes the result-seeking temptation to manipulate opaque pieces of history; (3) requires the government to offer evidence that its laws actually work; (4) avoids the interest-balancing *Heller* rejected; (5) inspires public confidence that firearms commerce regulations are being treated fairly; and (6) stands a better chance of garnering Supreme Court approval. Perhaps most importantly, this optimized test will yield similar results to the current version. But, it is designed to do so more effectively, efficiently, and faithfully to *Heller*.

V. CONCLUSION: AN OPTIMIZED & BALANCED SOLUTION

Heller and *McDonald* opened the floodgates to tough questions about gun regulation generally and firearms commerce more specifically. In both cases, the Justices had little opportunity to opine on these issues and left the

390. *See Heller*, 554 U.S. at 628–29 (stating that a law infringing the "inherent right of self-defense" in the home would not survive any standard of constitutional scrutiny).

391. *See supra* notes 358–60 and accompanying text.

392. *Cf.* Legal Information Institute, *Intermediate Scrutiny*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Sept. 20, 2018).

lower courts to mind the gap. The results have been admirable. The vast majority of the federal circuits agree on the two common denominators from *Heller* as well as a test to adjudicate contemporary gun regulations—an impressive feat.[393] This consensus provides important rays of clarity in an opaque area of the law. In particular, the Firearms Commerce Test presents a workable approach to deal with precious little guidance from the Supreme Court.

This article demonstrates that the Firearms Commerce Test can be made more efficient, effective, and faithful to *Heller* with a few substantive tweaks. Lower courts need not delve into complicated historical matters in order to "discover" whether a particular regulation was acceptable to eighteenth-century Americans. This question does matter . . . to the Supreme Court. The Justices must issue a definitive, uniform, and national answer. Leaving this process to the lower courts merely causes confusion and divergent historical conclusions. This is such awkward work for a judge that many opinions just assume that the challenged law burdens protected conduct and move to question two. Instead, the test should make a universal assumption that the firearms commerce regulation at issue burdens protected conduct.

This is the point where the second substantive modification comes into play. Courts should be required to apply a more rigorous form of intermediate scrutiny to all laws challenged under the Second Amendment except those affecting the core right to possess a gun for self-defense. Core invasions, according to *Heller*, fail any level of scrutiny.[394] However, when the intermediate scrutiny standard is imposed in these Second Amendment cases, the government must actually prove its laws are "substantially related" to an important government interest.[395] No longer should judges defer to a legislature's expertise or "common sense" in this area protected by an often-unpopular constitutional guarantee. If officials can produce such evidence and a substantial relationship is found, the law should stand.

As Part IV concluded, this optimized test: (1) treats an often-unpopular constitutional guarantee with appropriate respect; (2) removes the result-seeking temptation to manipulate opaque pieces of history; (3) requires the government to offer evidence that its laws actually work; (4) avoids the interest-balancing *Heller* rejected; (5) inspires public confidence that firearms

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

394. *Heller*, 554 U.S. at 628–29.

395. *See* Legal Information Institute, *Intermediate Scrutiny*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Sept. 20, 2018).

commerce regulations are being treated fairly; and (6) stands a better chance of garnering Supreme Court approval.[396] Perhaps most importantly, this optimized test will yield similar results to the current version. But, it is designed to do so more effectively, efficiently, and faithfully to *Heller*.

This article is unique in its focus on contemporary firearms commerce and its adjudication at the circuit court level. Hopefully, this analysis assists subsequent deep-dives into the tough questions presented in Part III, other modifications for the Firearms Commerce Test, or even advice for the Supreme Court for its next big Second Amendment case.[397] For now, this article attempts to walk the tightrope of firearms commerce regulation by calling for a few substantive tweaks in the standard test. This optimization allows lower courts to (1) be more protective of Second Amendment rights and (2) nevertheless, uphold any and all *provenly effective* firearms commerce regulations outside the core right to keep and bear arms. Balanced approaches such as this will ultimately prove to be the most productive way forward in this charged debate.

396. *See* discussion *supra* Part IV.
397. *See* discussion *supra* Part III.

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