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## UP IN ARMS: THE HUNT TO DEFINE THE SECOND AMENDMENT'S SCOPE

### I. FIRST SHOT: AN INTRODUCTION TO SECOND AMENDMENT RIGHTS

#### A. The Sporting Life: Hunting and the Second Amendment

As hunting technology advances at a rapid pace, sport hunting moves leaps and bounds beyond its modest origins.<sup>1</sup> With these innovations, the advent of smart rifles, drones, and other features raise questions concerning the ethics of hunting and Second Amendment applicability.<sup>2</sup> Courts have yet to define the scope of the Second Amendment.<sup>3</sup> However, a Pennsylvania district court

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1. See Dan Seufert, *Using Drones as Hunting Tool to Track Wildlife at Issue*, UNION LEADER (Jan. 17, 2015, 5:20 PM), <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150118/NEWS0621/150119167/0/sport04> (discussing New Hampshire's proposed smart rifle ban). Fish and Game law enforcement representatives expressed that using drones and smart rifles for hunting is neither appropriate nor ethical. Traditional hunting revolves around the principle of fair chase and a balance between human technology and environmental preservation. Advances in hunting technology enable seemingly unerring accuracy in hunting, which raises ethical questions about the direction in which the sport is heading. Proponents for restriction on the use of weapons such as smart rifles argue that the technology violates the moral tenets of hunting. This sentiment impacts legislative and judicial treatment of the use of such technology as it gains popularity among hunters. See *id.*

2. See Robert Leider, *Our Non-Originalist Right to Bear Arms* 89 IND. L. REV. 1587, 1624 (2014) (noting debate on applicability of Second Amendment to particular types of firearms). Smart rifles include several improvements upon traditional hunting firearms. Targets increase human safety by ensuring that only authorized users may fire the weapon. The same technology may be used to ensure that holders may only fire at inanimate targets. However, these advances also enable hunters to shoot with unflinching accuracy when combined with other features. See Joseph Steinberg, *Why You Should Be Concerned About the New 'Smart Guns' (Whether You Love or Hate Guns)*, FORBES (May 4, 2014, 2:40 PM), <http://www.forbes.com/sites/josephsteinberg/2014/05/04/smartguns/> (describing smart gun technology). Opponents of smart rifle technology argue that it inherently precludes fairness of the hunt, a central component of traditional hunting. See Rick Ganley & Michael Brindley, *Tradition v. Technology: The Debate Over Drones, Smart Rifles in Hunting*, N.H. PUB. RADIO (Jan. 29, 2015), <http://nhpr.org/post/tradition-vs-technology-debate-over-drones-smart-rifles-hunting> (discussing proposed regulation's relationship to ethics of hunting and fair chase principle).

3. See Michael P. O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597, 598 (2013) (outlining Second Amendment application in recent cases). The Second Amendment's focus is on the individual right of a law-abiding citizen to keep firearms in the home for personal protection. However, courts have yet to definitively outline the scope of Second Amendment protected conduct, leaving it to future courts to determine what firearm conduct legislation may regulate without impinging upon a constitutional right. See *id.*

recently dismissed a hunting advocacy group's Second Amendment claim, finding hunting outside the realm of constitutional protection offered by the Second Amendment.<sup>4</sup>

Hunting advocates argue that the right to bear arms includes hunting.<sup>5</sup> Firearm possession is generally thought of as a “penumbral” right to the foundation of the Second Amendment.<sup>6</sup> Even strict Second Amendment interpretations have expanded to include rights to self-defense unrelated to the military.<sup>7</sup> Cases have yet to define a clear outer limit to the Second Amendment.<sup>8</sup> Advances in hunting technology further complicate the issue, as equipment features arguably lessen the need for human skill, which may further remove hunting technology from original Second Amendment-protected equipment.<sup>9</sup> Recent cases have addressed gun possession rights and hunting rights without providing definitive answers.<sup>10</sup>

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4. See *Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n*, 28 F. Supp. 3d 340 (M.D. Pa. 2014) (finding no Second Amendment protection for hunters).

5. See O'Shea, *supra* note 3, at 617–18 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)) (describing hybrid interpretation of Second Amendment rights). *District of Columbia v. Heller*, 554 U.S. 570 (2008), expanded on an ambiguous constitutional right to self-defense to build upon a more solid conception of Second Amendment rights. It expanded upon related constitutional case law to establish a secure right to self-defense in the Second Amendment. In ruling as such, “even courts that viewed self-defense as merely an auxiliary, penumbral aspect of the Second Amendment would still likely strike those restrictions down.” See O'Shea, *supra* note 3, at 617–18.

6. See O'Shea, *supra* note 3, at 617–18 (describing hybrid interpretation of Second Amendment rights).

7. See *id.* (rejecting originalist Second Amendment interpretation). *Heller* avoided prior case law's focus on the Second Amendment's military origins. The Court focused on the individual right to bear arms rather than precedent's focus on the right to bear arms as a civil and political right. See *id.*

8. See *id.* at 598 (describing expansion of Second Amendment interpretation). While the Second Amendment explicitly addresses the right to bear arms in the military realm, it likely covers other traditional legal uses of firearms such as hunting. See *id.*

9. See *supra* note 1 and accompanying text. See Leider, *supra* note 2, at 1624 (describing judicial approach to firearms in post-Civil War era). While the Second Amendment addresses a military need to bear arms, it is not an explicitly exhaustive list of protected uses of firearms. A Second Amendment interpretation focused on the individual right rather than political need supports the argument that the Second Amendment protects an individual right unrelated to military purposes. Applying the Second Amendment to such an individual right rather than a military right would render legislation seeking to curb the right to bear arms unconstitutional. See *id.*

10. See *supra* note 1 and accompanying text (discussing New Hampshire's proposed smart rifle ban).

Hunting combines weaponry, survival skills, ethics, and technology.<sup>11</sup> Hunters argue for an inclusive interpretation of the Second Amendment.<sup>12</sup> In doing so, hunters conceptualize a constitutional right to bear arms beyond basic self-defense.<sup>13</sup> However, tensions strain between an asserted basic American freedom and a country struggling with constant tragedies brought by gun violence.<sup>14</sup> What should be unfathomable has become routine in a country slowly numbed by violence.<sup>15</sup> This conflict has necessitated a close examination of the Second Amendment in recent years.<sup>16</sup> In evaluating constitutional bases, case precedent, and societal needs, it seems reasonable that a right to recreationally hunt falls far outside the scope of Second Amendment protection.<sup>17</sup>

This comment considers the probability that courts will extend Second Amendment rights to hunters. Section II of this comment explores Second Amendment analytical framework throughout history, followed by an overview of societal views on firearms and the right to bear arms from Second Amendment's enactment in 1791

11. See *supra* note 2 and accompanying text (describing essence of hunting).

12. See *District of Columbia v. Heller*, 554 U.S. 570, 572 (2008) (discussing self-defense aspect of Second Amendment); see also Thomas Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 *How. L.J.* 589 (analyzing Second Amendment original intent and expansion of definition for modern times). Rapid advances in hunting technology raise questions of whether such changes remove current hunting firearms from the realm of the Second Amendment altogether. The Second Amendment sought to ensure a right to bear arms aimed at enabling the United States to protect itself. This foundation suggests that the Second Amendment's scope is tied to military purposes rather than a right ensuring firearm possession for individual citizens. The Second Amendment explicitly contextualizes the right to bear arms for military purposes. Nothing in the text suggests an intent to include the rights of citizens in a non-military capacity. See Moncure, *supra*.

13. See *Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n*, 28 F. Supp. 3d 340, 340–41 (M.D. Pa. 2014) (presenting alleged Constitutional right to bear arms in hunting context).

14. See *id.* (presenting alleged Constitutional right to bear arms in hunting context); see also Sabrina Siddiqui, *Almost 100 School Shootings Have Occurred Since Newtown While Congress Has Done Nothing*, HUFFINGTON POST (Dec. 9, 2014, 7:00 AM), [http://www.huffingtonpost.com/2014/12/09/school-shootings-newtown\\_n\\_6292052.html](http://www.huffingtonpost.com/2014/12/09/school-shootings-newtown_n_6292052.html) (noting consistent occurrence of gun violence in schools in years following Sandy Hook Elementary School shooting).

15. See Gardiner Harris & Michael D. Shear, *Obama Condemns 'Routine' of Mass Shootings, Says U.S. Has Become Numb*, N.Y. TIMES (Oct. 1, 2015), [http://www.nytimes.com/2015/10/02/us/obama-oregon-shooting-umpqua-community-college-gun-control.html?\\_r=0](http://www.nytimes.com/2015/10/02/us/obama-oregon-shooting-umpqua-community-college-gun-control.html?_r=0) (noting President Obama's response to most recent public shootings and nation's apparent complacency).

16. See Moncure, *supra* note 12, at 597 (analyzing Second Amendment original definition application in modern times). The Second Amendment secures an individual liberty unrelated to a right to hunt. See *id.*

17. See *Hunters*, 28 F. Supp. 3d at 340–41 (denying Second Amendment protection for hunters).

through today. Section III of this comment chronicles the technological progression of firearms throughout the same time range. Section IV of this comment provides an overview of recent Second Amendment cases, and applies these standards to a hypothetical suit brought against the New Hampshire state legislature for its proposed regulation. Finally, Section V of this comment provides an overview for the future of Second Amendment claims in the realm of hunting.

Courts have yet to announce a definite level of scrutiny for Second Amendment claims. New Hampshire's ban on a particular breed of firearms adds additional layers to defining the Second Amendment's scope. Bans on particular firearm technology will likely cause courts to evaluate the constitutionality of such categorical bans. Additionally, courts may eventually have to determine at what point technology removes firearms from the Second Amendment's scope entirely. Finally, courts may choose to apply the Second Amendment and evaluate regulations based upon the conduct implicated: self-defense or hunting.

#### B. Direct Hit: How to Define the Right to Bear Arms Accurately

Gun possession is a polarizing issue in the United States, fueled by seemingly constant accidental shootings, school shootings, and other public massacres.<sup>18</sup> When people blame the weapons themselves rather than infrastructural issues, pro-gun groups rally to affirm the right to bear arms.<sup>19</sup> Several recent cases question the

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18. See Mark Berman, *How Often Do Children in the U.S. Unintentionally Shoot and Kill People? We Don't Know*, WASH. POST (Sep. 4, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/04/how-often-do-children-in-the-u-s-unintentionally-shoot-and-kill-people-we-dont-know/> (noting prevalent media coverage of gun-related incidents but lack of concrete data).

A three-year-old boy is playing with a gun and shoots himself in the face. A four-year-old girl discovers a gun and shoots her four-year-old cousin, killing him. A three-year-old boy shoots himself in the head. A five-year-old accidentally shoots a three-year-old girl. A five-year-old boy accidentally shoots and kills himself. A four-year-old boy accidentally shoots himself. A two-year-old boy shoots and kills his eleven-year-old sister. It goes on like this, story after story of unintentional shootings involving children that lead to injuries or deaths.

*See id.* Regardless of national focus on gun violence in the wake of Sandy Hook, the country later witnessed an additional forty-five fatal and seventy-eight non-fatal shootings. See Siddiqui, *supra* note 14 and accompanying text (describing pervasive gun violence in America).

19. See Jackie Kucinich, *Can Mental Health Care Reform Help Stop Mass Killings*, WASH. POST (June 3, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/03/can-mental-health-care-reform-help-stop-mass-killings/> (discussing relationship between mental health and gun violence in United States). Gun possession advocates argue that laws seeking to curb gun use and ownership im-

outer bounds of the Second Amendment, particularly the alleged rights of hunters.<sup>20</sup>

Courts have distinguished the right to bear arms from the right to hunt.<sup>21</sup> The Second Amendment at its “core” protects the right to defend oneself.<sup>22</sup> Numerous cases repeat this principal.<sup>23</sup> A constitutional right to hunt is far hazier.<sup>24</sup> In recent years cases have distinguished firearm possession from hunting.<sup>25</sup> In doing so, courts tend to reject the notion that Second Amendment extends to hunting.<sup>26</sup> Consequently, hunting laws face a different level of scrutiny than the strict scrutiny applied to firearms possession cases, rendering prohibitive statutes more likely to be upheld.<sup>27</sup>

## II. MUSKETS TO SMART RIFLES—SECOND AMENDMENT TREATMENT THROUGHOUT HISTORY

### A. Second Amendment Interpretation

#### Defining and asserting constitutional rights necessitates

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pinge upon an individual right secured by the Second Amendment. Additionally, they argue that all gun control laws are pointless, merely furthering a liberal agenda without enhancing safety for American citizens. *See NRA Files Lawsuits to Protect Second Amendment Rights in Pennsylvania*, NRA INST. FOR LEGISLATIVE ACTION (Jan. 14, 2015), <https://www.nraila.org/articles/20150114/nra-files-lawsuits-to-protect-2nd-amendment-rights-in-pennsylvania> (discussing NRA’s suit for alleged infringement upon Second Amendment rights).

20. *See Hunters*, 28 F. Supp. 3d at 340–41 (denying Second Amendment protection for hunters).

21. *See id.* (denying Second Amendment protection for hunters).

22. *See United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (noting fundamental core to Second Amendment protection). The Second Amendment does not preclude a legislature from categorically banning possession of handguns without serial numbers. Such a categorical restriction thus fails to violate a right secured by the Second Amendment and fails to violate the central holding of *Heller*. The fundamental right recognized by *Heller* encompassed a right to bear arms for the purposes of protecting an individual’s person and home. *See id.*

23. *See, e.g., Hunters*, 28 F. Supp. 3d at 340–41 (denying Second Amendment protection for hunters).

24. *See id.* (noting lack of authority for Second Amendment extension to hunting). “Plaintiffs acknowledge that no legal precedent establishes a constitutional right to hunt, but argue that the Supreme Court’s recent decision[s] represent persuasive authority that the Second Amendment has been extended to embrace the right to hunt.” *See id.*

25. *See id.* (noting lack of authority for Second Amendment extension to hunting).

26. *See id.* (noting lack of authority for Second Amendment extension to hunting).

27. *See id.* (denying Second Amendment protection for hunters).

interpretation.<sup>28</sup> Constitutional interpretation shifts with society.<sup>29</sup> Extension of the right to bear arms raises ethical and public safety issues.<sup>30</sup> As technology removes human skill from hunting,<sup>31</sup> it calls into question the human right to engage in hunting.<sup>32</sup>

The Second Amendment refers to the purpose behind the constitutional safeguard before identifying the right.<sup>33</sup> In turn, “the purpose of the right to keep and bear arms informs the content of that right.”<sup>34</sup> The Fourteenth Amendment encapsulates the Second Amendment right to possess firearms for self-defensive purposes.<sup>35</sup> Technology, particularly that associated with weaponry, raises constitutional interpretation issues.<sup>36</sup>

The word “arms,” in the context of the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense;?the arms of the infantry soldier are the musket and bayonet;?of cavalry and dragoons, the sabre, holster pistols, and carbine;?of the artillery, the field piece, siege gun, and mortar, with side arms.<sup>37</sup>

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28. See *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 742 (2010) (considering whether Second Amendment applies to individual states as well as federal government).

29. See *supra* note 1 and accompanying text; see also James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 4 *BYU L. REV.* 1037, 1038–39 (1993) (considering public opinion’s impact on judicial interpretation).

30. See *supra* note 1 and accompanying text (noting ethical concern with use of smart rifles).

31. See *id.* (noting ethical concern with use of smart rifles).

32. See U.S. CONST. amend. II (securing right to bear arms for United States citizens).

33. See *id.* (securing right to bear arms for United States citizens). “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.” See *id.* The right to bear arms is the “constitutional right of a person to own firearms.” BLACK’S LAW DICTIONARY 1522 (9th ed. 2009) (defining Right to Bear Arms).

34. See Leider, *supra* note 2, at 1614 (describing judicial approach to Second Amendment interpretation).

35. See *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 742 (2010) (synthesizing *Heller*’s central holding).

36. See Moncure, *supra* note 12, at 597 (analyzing Second Amendment original intent).

37. *English v. State*, 35 Tex. 473, 476 (1871) (providing narrow interpretation of right to bear arms in alleged Second Amendment violation claim). A narrow interpretation of the Second Amendment limits its scope to firearm possession only in the context of war and protection of a nation against the threat of tyranny. The right does not extend beyond military purposes to an individual right to protect oneself against other citizens. Additionally, this narrow interpretation would limit possession to military-grade firearms for use strictly in military context. See *id.*

Defining this alleged right requires defining the piece of equipment itself.<sup>38</sup> “The natural meaning of ‘bear arms,’ as used in the Second Amendment, means wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.”<sup>39</sup> While the Second Amendment generally protects a fundamental right, “some categorical disqualifications are permissible.”<sup>40</sup>

While strict scrutiny generally rejects sweeping prohibitions, “Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court.”<sup>41</sup> Additionally, recent cases state that “[precedent] did not suggest that disqualifications would be effective only if the statute’s benefits are first established by admissible evidence,” and “[c]ategorical limits on the possession of firearms would not be a constitutional anomaly.”<sup>42</sup>

Courts evaluate whether a right’s context, foundation, and historical weight justify protection afforded by the Bill of Rights.<sup>43</sup> *Hunters United for Sunday Hunting v. Pennsylvania Game Commission*<sup>44</sup> analyzed hunting and the Second Amendment, building upon Second Amendment framework provided by *District of Columbia v. Heller*<sup>45</sup> and expanded by *United States v. Marzzarella*<sup>46</sup> and *United States v. Skoien*.<sup>47</sup>

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38. See *supra* note 1 and accompanying text.

39. *District of Columbia v. Heller*, 554 U.S. 570, 675 (2008).

40. See *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (upholding firearms possession restriction).

41. See *id.* (upholding firearms possession restriction).

42. See *id.*; see also *Heller*, 554 U.S. at 580 (noting context’s impact on legislative interpretation). A court cannot simply divorce a constitutional right from the context in which the legislature enacted it. This interpretation may preclude expansion of a right to cover conduct not initially envisioned. See *Heller*, 554 U.S. at 580.

43. See *Washington v. Glucksberg*, 521 U.S. 702, 736 (1997) (providing analysis for evaluation of alleged fundamental right).

44. 28 F. Supp. 3d 340 (M.D. Pa. 2014).

45. 554 U.S. 625 (2008).

46. 614 F.3d 85 (3d Cir. 2010).

47. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010). See *Hunters*, 28 F. Supp. 3d at 345 (providing Second Amendment challenge framework). A Court first considers whether a law burdens conduct protected by the Second Amendment. The inquiry ends if the conduct falls outside the Second Amendment’s intended scope. If the conduct is protected, the court evaluates the law under “some form of means-end scrutiny.” In making this consideration, the court compares the law’s purpose and means of accomplishing the purpose. If the court considers the means and end somewhat proportional, the law is constitutional. If the two



In considering whether the law protects certain conduct, the court makes several considerations.<sup>48</sup> First, the court classifies the conduct allegedly infringed.<sup>49</sup> Next, the court considers whether the constitution protects the conduct.<sup>50</sup> Finally, the court determines if the conduct in question falls within the realm of protection offered by the Constitution.<sup>51</sup> Similar to the First Amendment, the Second Amendment does not offer unchecked protection.<sup>52</sup> In other words, exceptions exist to the constitutionally secured rights conferred by the amendment.<sup>53</sup>

While recent cases acknowledge the “unsettled” nature of Second Amendment’s “scope,” recent Second Amendment suits “underscore[ ] that the ‘core’ of the Second Amendment is the right of ‘law-abiding, responsible citizens to use arms in defense of hearth and home.’”<sup>54</sup> A “core” implies uncertain Second Amendment bounds, and that the right to bear arms exists with limitations.<sup>55</sup>

The recreational sport of hunting has not been recognized as a constitutionally protected liberty or property interest by state or federal law. Unlike a license to pursue a livelihood or engage in a profession, which has been held to be a property right protected by Article I, Section 1 of the Pennsylvania Constitution, no cases have held that provisions of the federal or state constitutions establish or

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lack congruence, then the law is unconstitutional. *Hunters*, 28 F. Supp. 3d at 345; see also *Marzarella*, 614 F.3d 85; *Skoien*, 614 F.3d at 638.

48. See *Hunters*, 28 F. Supp. 3d at 345 (providing Second Amendment challenge framework).

49. See *id.* (providing Second Amendment challenge framework).

50. See *id.* (providing Second Amendment challenge framework).

51. See *id.* (providing Second Amendment challenge framework).

52. See *Skoien*, 614 F.3d at 641 (noting permissibility of statutory categorical distinctions). The Second Amendment allows for some categorical restrictions on firearms possession. This reflects well-established First Amendment precedent. For example, courts recognize a number of exceptions to the constitutionally ensured right to freedom of speech. Courts uphold categorical exceptions to obscenity, defamation, and incitement among others. As exceptions, the First Amendment offers no constitutional protection to these categories as means of expression. See *id.* The Second Amendment is not without limitation. Specifically, the Court stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibition on the possession of firearms.” See *District of Columbia v. Heller*, 554 U.S. 625 (2008) (noting permissibility of firearm restrictions).

53. See *Heller*, 554 U.S. at 625 (noting permissibility of firearm restrictions).

54. See *Hunters*, 28 F. Supp. 3d at 345 (upholding statutory restriction on hunting).

55. See *Heller*, 554 U.S. at 572 (noting both core and limitations to core of Second Amendment protection).

protect a right to hunt or trap or the right to engage in a particular sport.<sup>56</sup>

In examining a constitutional case, courts first look to the supposed classification, identifying it as suspect, or quasi-suspect, or an alleged fundamental right.<sup>57</sup> Courts have found fundamental rights to include voting, privacy, and interstate travel.<sup>58</sup> This identification dictates the court's evaluation of the legislation, using the rational-basis test, intermediate scrutiny, or strict scrutiny.<sup>59</sup> The

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56. *See* Pennsylvania Game Comm'n v. Marich, 666 A.2d 253, 256 (Pa. 1995) (citations omitted) (finding revocation of hunting licenses not Due Process violation). "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1 (outlining natural rights of Pennsylvania citizens). "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historical and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustees of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people." *Id.* art. I, § 27 (outlining environmental rights of Pennsylvania citizens).

57. A suspect classification is "[a] statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis." BLACK'S LAW DICTIONARY 1675 (9th ed. 2009). A quasi-suspect classification is "[a] statutory classification based on gender or legitimacy, and therefore subject to intermediate scrutiny under equal-protection analysis." *Id.* A fundamental right is "[a] right derived from natural or fundamental law. A significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the [Fourteenth] Amendment." *Id.* at 378. A constitutional right is "a right guaranteed by a constitution; esp[ecially] one guaranteed by the U.S. Constitution or a state constitution." *Id.* A fundamental constitutional right is "a right that is specifically identified in a constitution or has been found to be protected under the Due Process or Equal Protection Clause." *Id.*

58. *See* Saenz v. Roe, 526 U.S. 489, 500 (1999) (finding right to interstate travel fundamental right); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966) (finding poll tax violation of fundamental right to vote); Lawrence v. Texas, 539 U.S. 558, 564 (2003) (striking down statute prohibiting particular sexual behavior on grounds of violation of constitutionally assured right to privacy).

59. The rational basis test is,

[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective. Rational basis is the most deferential of the standards of review that courts use in due-process and equal-protection analysis.

BLACK'S LAW DICTIONARY 1453 (9th ed. 2009). Intermediate scrutiny is "[a] standard lying between the extremes of rational-basis review and strict scrutiny. Under the standard, if a statute contains a quasi-suspect classification (such as gender or legitimacy), the classification must be substantially related to the achievement of an important governmental objective." *Id.* at 938. Strict scrutiny is "[t]he standard

standard impacts the likelihood a court will uphold a regulation, as higher scrutiny exposes the regulation to a more thorough and difficult to withstand analysis.<sup>60</sup> Courts have yet to supply definitive classifications for hunting, leaving it to future cases.

### B. Societal Attitudes On Guns and Hunting

New Hampshire's proposed regulation is hardly the first piece of legislation based upon morality.<sup>61</sup> Throughout United States history, legislatures have enacted laws reflecting mainstream societal views on moral turpitude.<sup>62</sup> Legislatures have regulated gambling, alcohol consumption, drug use, prostitution, sexuality, abortion, marriage, child labor, and hunting.<sup>63</sup> This legislation is based in part upon moral perceptions of conduct.<sup>64</sup> In turn, the courts eval-

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applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights) in due process analysis. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question." *Id.* at 1648.

60. *See id.* at 1648 (defining Strict Scrutiny).

61. *See* Manuel Possolo, Note, *Morals Legislature After Lawrence: Can States Criminalize the Sale of Sexual Devices?*, 65 STAN. L. REV. 565, 569 (2013) (providing background on moral legislation in America).

62. *See id.* (detailing morality laws in United States).

63. *See Gambling Law: An Overview*, LEGAL INFORMATION INST., <http://www.law.cornell.edu/wex/gambling> (last visited Feb. 29, 2016) (providing overview on gambling laws in America). *See* U.S. CONST. amend. XVIII (prohibiting alcohol in America); 21 U.S.C. § 812 (2012) (providing schedule of prohibited drugs in America); *Caminetti v. United States*, 242 U.S. 470 (1917) (upholding statute prohibiting crossing of state lines with prostitutes on grounds of Commerce Clause); *Lawrence v. Texas*, 539 U.S. 558, 559 (2003) (striking down statute prohibiting particular sexual behavior on grounds of violation of constitutionally assured privacy). Here the court struck down a Texas statute criminalizing sodomy, and in doing so relied upon a constitutionally assured right to privacy. In doing so, the Court applied an ambiguously heightened scrutiny standard, relying on judicial power to expand clearly defined rights assured by the Constitution. *See* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (noting constitutional protection of intimacy of particular personal decisions). *See* *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (striking down Defense of Marriage Act); *Hammer v. Dagenhart*, 247 U.S. 251, 268 (1918) (upholding Congress's power to regulate child labor under Commerce Clause); *Hunters United for Sunday Hunting v. Pennsylvania Gaming Comm'n.*, 28 F. Supp. 3d 340, 340–41 (M.D. Pa. 2014) (denying Second Amendment protection for hunters); *see also* *Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't 312.03 (2015) (banning smart rifles).

64. *See* Steve Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 227 (2002) (providing background on societal moral views on behavior and corresponding impact on legislation). "[B]oth law and morality serve to channel our behavior. Law accomplishes this primarily through the threat of sanctions if we disobey legal rules. Morality too involves incentives: bad acts may result in guilt and disapprobation, and good acts may result in virtuous feelings and praise." *See id.*

uate these laws to determine what, if any, constitutional safeguards exist for an alleged right.<sup>65</sup>

As with New Hampshire's proposed regulation, context regarding societal attitudes during the Second Amendment's enactment provide some insight as to its intended scope.<sup>66</sup> The Framers enacted the Second Amendment in the wake of the Revolutionary War.<sup>67</sup> This politically charged atmosphere undoubtedly impacted the drafting of rights for United States citizens.<sup>68</sup> This political context shaped the Second Amendment's intended scope, definition, and subsequent court interpretations.<sup>69</sup>

Despite initial feelings towards firearms, the militia, and hunting, societal views shifted with time, and significant events catalyzed changed perceptions.<sup>70</sup> Public opinion of guns shifted notably during two events: the Revolutionary War and the Civil War.<sup>71</sup> Both events stimulated production and technological advances (as discussed later) which impacted common views on the industry and its users.<sup>72</sup> These changes cyclically impacted and were impacted by

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65. See, e.g., *Hunters*, 28 F. Supp. 3d at 340-41 (denying Second Amendment protection for hunters).

66. See Michael A. Bellesiles, *The Origins of Gun Culture in the United States*, 83 J. AM. HIST. 425, 454 (1996) (describing political context of Second Amendment ratification). The Second Amendment's enactment stemmed from political unrest and a need to protect a young nation against the threat of war. This protection necessitated a constitutionally secured right of military members to possess and bear arms. See *id.* The Second Amendment sought to ensure a right of American citizens to protect their nation against the threats posed by tyranny and other nations. This right existed in a purely political and military realm. See O'Shea, *supra* note 3, at 628 (describing context of Second Amendment enactment).

67. See O'Shea, *supra* note 3, at 615 (describing context of Second Amendment enactment). Along with the threats stemming outside the United States, the Second Amendment sought to ensure the rights of citizens to protect democracy against the threat of tyranny within national boundaries. See *id.*

68. See *id.* (describing second amendment intent). The Second Amendment was not intended to provide citizens with a right to possess firearms for use in personal matters. Its objective was to secure an ability to protect a nation by means of military force in the face of invasion or tyranny. Protection of citizens against other citizens falls outside the scope of the Second Amendment. See *id.*

69. See *id.*; see also Leider, *supra* note 2, at 1588 (discussing societal viewpoint and impact on judicial interpretation). "In an era when many men carried weapons, lawfully or not, the courts interpreted differently worded state constitutional rights to arms so they converged around popular beliefs about the scope of the right." Leider, *supra* note 2, at 1588.

70. See Bellesiles, *supra* note 66, at 444-46 (chronicling shifts in public perception of firearms from 1760 through 1865).

71. See *id.* (explaining reasons for shifting public perception).

72. See *id.* at 426 (noting disparity between romanticized gun prevalence in past several hundred years in America versus reality). Individually often erroneously assume that guns have always been prevalent in the United States due to their current ubiquitous presence. People imagine American settlers forging paths out west "with guns in their hands and bullets on their belts." Reality did not

Congress's treatment of arms and the court's interpretation of the right to bear arms.<sup>73</sup> A combination of national insecurity, media portrayal, industrial advancements, and government backing paved the way for society's viewpoints on guns and hunting today.<sup>74</sup> The Civil War triggered the first major turning point.<sup>75</sup>

Public perception concerning guns in the 1800s centered around two groups: hunters and military personnel.<sup>76</sup> The public considered the military largely inept, and was similarly unimpressed by hunters.<sup>77</sup> Nonetheless, the public generally embraced a right to possess firearms.<sup>78</sup> Despite this accepted right to firearm possession, hunters in the nineteenth century did not experience the strong sense of pride and community felt throughout the nation today.<sup>79</sup> However, enhanced production capabilities and media

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match this view, as "in the imagined past, the requirements for self-defense and food-gathering had put firearms in the hands of nearly everyone." *See id.*

73. *See id.* (noting staying power of gun culture). The Second Amendment reflected a nod to the importance of gun-ownership in a young nation. This need has shifted and grown into want. The National Rifle Association seeks to defend the individual right to firearm ownership. *See id.*

74. *See id.* at 455 (describing progression of firearm presence in United States). The Civil War served as a catalyst to spur firearm production and technology improvements. Government and industry worked in tandem for seventy years to produce sufficient firearms. It took an additional twenty years of active promotion before American citizens began to embrace firearm possession as a necessity for personal security. The Civil War created the weapons demand of the Revolutionary War but at a time when technology allowed for more efficient production and weapons. A national need for firearms for personal security during the war transitioned to a lasting desire for firearms for personal security. *See id.*

75. *See* Leider, *supra* note 2, at 1620 (describing legislative shift in viewpoint regarding firearms caused by Civil War). The Civil War marked a shift in firearms safety concerns. Pre-war safety concerns "revolved primarily around concealed weapons, dueling, and honor-related killings" while post-war concerns focused on handgun violence. *See id.*

76. *See* Bellesiles, *supra* note 66, at 434 (describing negative public view of militia and arms bearers). "Public perception of the militia in the first half of the nineteenth century tended toward the contemptuous. Most observers held that the militia was better fortified with alcohol than firearms and had little sense of the safe use of either." *Id.*

77. *See id.* at 438 (describing negative public view of militia and arms bearers). "This widespread rejection of the militia was paralleled in public attitudes toward hunting." *Id.*

78. *See* Leider, *supra* note 2, at 1588 (noting public acceptance of right to possess arms). Citizens likely initially viewed a right to bear arms distinct from military service as the right to carry firearms. Case law reflects this sentiment. Citizens challenged the constitutionality of every state law (excluding that of Virginia) prohibiting carrying concealed weapons enacted prior to the Civil War. *See id.*

79. *See* Bellesiles, *supra* note 66, at 439 (describing negative public view of militia and arms bearers). "From the start, hunting was an inessential luxury. In the first decades of the nineteenth century, hunting was held up to ever-increasing ridicule as a waste of time, money, and resources and mocked as the play of insufficiently grown-up boys." *Id.*

presence catalyzed shifting public and judicial opinions.<sup>80</sup> The media portrayed arms-bearers as “gentlemen” rather than drunkards and fools, further contributing to firearm’s national presence.<sup>81</sup> While perception shifted from the negative extreme, the nation had yet to develop today’s fanatical gun culture.<sup>82</sup>

Today, societal approval of hunting reflects the technology used.<sup>83</sup> Even among hunters, certain technological features draw criticism.<sup>84</sup> Despite negative association of hunting with firearms and related violence, hunting and gun advocates remain firmly situated in the United States today.<sup>85</sup> Hunters and firearms continue to draw strong criticism for environmental and firearms reasons.<sup>86</sup>

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80. *See id.* at 447 (noting correlation between prevalence and societal approval of firearms in America). Production improvements enabled more citizens to own handguns, though they remained prohibitively expensive for a majority of Americans. This expense caused citizens to view handguns as a luxury. Along with handgun possession, the act of hunting with such a luxury was itself a status symbol for the wealthy. Possession of expensive equipment merely for sport rather than protection was totally unnecessary and became part a lavish American lifestyle. *See id.* After the Civil War a majority of states recognized a personal right to bear arms. However, courts found prohibitions against carrying concealed weapons did not infringe upon the right to bear arms. “In an era when many men carried weapons, lawfully or not, the courts interpreted differently worded state constitutional rights to arms so they converged around popular beliefs about the scope of the right.” *See Leider, supra* note 2, at 1596 (noting historically recognized right to possess firearms).

81. *See Bellesiles, supra* note 66, at 447 (noting correlation between prevalence and societal approval of firearms in America).

82. *See id.* at 448 (describing shifting societal attitude toward firearms in America). While production capabilities made firearms more prevalent in the United States, Americans did not embrace the supposed need to possess firearms for personal protection immediately. *See id.*

83. *See* RESPONSIVE MANAGEMENT AND THE NATIONAL SHOOTING SPORTS FOUNDATION, *THE FUTURE OF HUNTING AND SHOOTING SPORTS: RESEARCH-BASED RECRUITMENT AND RETENTION STRATEGIES* 167–71 (2008) [hereinafter *NAT’L SHOOTING SPORTS*] (providing data on trends in Americans’ perceptions of hunting and firearms). Americans tend to distinguish gun ownership for personal protection from gun ownership for hunting. This is particularly true when hunting firearms contain features rendering the weapons considerably more dangerous and/or accurate than basic handguns. Approval surveys reflect this sentiment. A 2007 survey conducted by Responsive Management reported that only twenty-percent of American adults supported hunting using high tech gear. Sixty-nine percent of adults opposed hunting with high tech gear. The survey specifically referenced gear enabling enhanced vision, hearing, and lasers. *See id.*

84. *See id.* (noting lack of support for use of high-tech hunting gear demonstrated by survey).

85. *See* SOUTHWICK ASSOCS., *HUNTING IN AMERICA: AN ECONOMIC FORCE FOR CONSERVATION* 3 (2012) (providing statistics for hunting in America in recent years). The U.S. Fish and Wildlife Service reported that over thirteen million individuals over sixteen years old went hunting in 2007. This number correlates to six percent of the United States population. *See id.*

86. *See, e.g., supra* note 14 and accompanying text (explaining self-defense aspect of Second Amendment’s military foundation).

However, United States history indicates strong ties between increased prevalence of firearms and public acceptance of firearms.<sup>87</sup> Improved societal views certainly seem plausible when considering the rate at which hunting is growing in popularity the United States.<sup>88</sup> Only time will tell if a theoretical shift in perception of hunting will impact Second Amendment interpretation.<sup>89</sup>

### III. THERE'S AN APP FOR THAT: TECHNOLOGICAL ADVANCES IN HUNTING AND THE IMPACT ON SECOND AMENDMENT PROTECTION

Historical context provides insight into legislative intent for the Second Amendment.<sup>90</sup> However, courts give limited weight to this consideration.<sup>91</sup> Hunting technology advances at a rapid pace, and equipment has advanced to the point of little if any resemblance to that available when the Second Amendment passed in 1791.<sup>92</sup> Advances in production methods and firearms themselves have contributed to firearm prevalence in the United States, impacting acceptance of firearms.<sup>93</sup>

Constitutional interpretation shifts as technology advances.<sup>94</sup> Courts and legislatures must adjust to determine if new technology

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87. See Bellesiles, *supra* note 66, at 454–55 (providing overview of public attitude concerning firearms in United States).

88. See *supra* note 85 and accompanying text (providing hunting statistics). The U.S. Fish and Wildlife Service reported that the number of hunters in the United States increased by nine percent between 2006 and 2011. At the same time, expenditures on hunting increased by over thirty percent. See *id.*

89. See O'Shea, *supra* note 3, at 598 (interpreting Second Amendment's intended conduct). The Second Amendment secures an individual right to own and carry firearms for personal security. The right revolves around a need of individuals to defend themselves. Simultaneously, the right may extend to other traditionally legally protected conduct, which some argue includes hunting. See *id.*

90. See *id.* (discussing Second Amendment's intended scope of protected conduct).

91. See *United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010) (upholding firearms possession restriction).

92. See NAT'L SHOOTING SPORTS, *supra* note 83, at 167 (providing data on trends in Americans' perceptions of hunting and firearms). See *Important Dates in the History of Firearms*, AM. FIREARMS INST., <http://www.americanfirearms.org/gun-history/> (last visited Mar. 18, 2015) [hereinafter *History of Firearms*] (providing timeline for critical dates in history of firearms).

93. See Bellesiles, *supra* note 66, at 454–55 (providing overview of public attitude concerning firearms in United States).

94. See O'Shea, *supra* note 3, at 598 (distinguishing firearm categories covered by Second Amendment). "The only constitutionally protected weapons were those that had value for militia service—the ordinary military equipment. Most handguns did not qualify. Post-Civil War courts recognized a broad right to keep arms in the home and, in general, a very limited right to bear arms in public." *Id.*

falls within extant laws.<sup>95</sup> Nonetheless, original intent plays a role in constitutional interpretation.<sup>96</sup> No court could logically conclude the Second Amendment's coverage extends only to muskets.<sup>97</sup> This argument errs to the same extent as a erroneously broad interpretation.<sup>98</sup> Analogizing to the more developed First Amendment jurisprudence, courts find exceptions to even the most critical Bill of Rights securities.<sup>99</sup> Thus, proper Second Amendment interpretation similarly lies between the two extremes.<sup>100</sup>

In colonial America, guns were far more scarce than public perception often assumes.<sup>101</sup> Lack of efficient production minimized the presence of guns.<sup>102</sup> Firearm technology in colonial America was limited to that brought over from Europe.<sup>103</sup> Constraints on production and materials rendered firearms barely resembled those used today.<sup>104</sup> Early firearms in America were

95. See, e.g., Leider, *supra* note 2, at 1588 (describing gaps in Second Amendment interpretation).

96. See Marzavella, 614 F.3d at 85 (upholding firearms possession restriction).

97. See O'Shea, *supra* note 3, at 598 (noting technology's impact on Second Amendment interpretation). "It may be well true today that a militia, to be as effective as militias in the [eighteenth] century, would require sophisticated arms that are highly unusual in society at large . . . . But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." See *id.*

98. See *id.* (describing shortcomings of originalist Second Amendment interpretation).

99. See *id.* at 605 (explaining that other constitutional rights extend beyond strict textual interpretation).

100. See *id.* at 608 (describing hybrid right to bear arms).

101. See Bellesiles, *supra* note 66, at 443 (describing developing gun industry and production capabilities in colonial America). The early American firearm industry faced enormous production limitations. For example, one of the earliest gunsmiths in colonial America created a firearms production business that thrived for two centuries yet produced fewer than thirty guns annually. See *id.*

102. See *id.* at 443–44 (describing quality of original firearms available in colonial America). Early firearms fell into two categories: functional for hunting and beautifully designed merely for show and status. Most firearms were not functional but rather owned as heirlooms and not kept in working order. See *id.* "Around 1750, men stop carrying rapiers, and guns became the weapon of choice for a duel." See *Gun Timeline*, PBS, <http://www.pbs.org/opb/historydetectives/technique/gun-timeline/> (last visited Mar. 1, 2016) (providing timeline of gun technology from 1364 through 1900).

103. See Jim Supica, *A Brief History of Firearms*, NRA NAT'L FIREARMS MUSEUM, <http://www.nramuseum.org/gun-info-research/a-brief-history-of-firearms.aspx> (last visited Mar. 1, 2016) (providing overview of technological advancements in firearms through present day). Original gunsmiths in colonial American drew upon European firearm technology and designs. See *id.*

104. See *id.* (describing early gun features). Early firearms consisted of three basic components: lock, stock, and barrel. The lock ignites the gunpowder. The stock is the apparatus upon which a barrel is mounted. The barrel provides the channel through which bullets pass upon ignition. Together these three elements compromise the most rudimentary firearms. See *id.*



rudimentary; the greatest technological improvements comprised basic improvements to accuracy and keeping gunpowder dry.<sup>105</sup> While vast improvements occurred in the 1600s, the industry did not achieve quality results by today's standards until a few hundred years later.<sup>106</sup>

Much like societal attitudes in the nineteenth century, gun technology underwent rapid transition.<sup>107</sup> Congress began to dedicate significant expenditures to expansion of American production where the nation previously relied upon Europe.<sup>108</sup> However, this increased demand far outpaced production capability in the United States.<sup>109</sup> While capacity for production grew from improvements such as interchangeable parts, output continued to fall short of increased demands.<sup>110</sup> Eventually production capabilities rose and increased the presence of firearms throughout the nation.<sup>111</sup>

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105. *See id.* (describing colonial American gun features).

106. *See History of Firearms, supra* note 92 (providing timeline for critical dates in history of firearms).

107. *See* Bellesiles, *supra* note 66, at 443 (describing quality of original firearms available in colonial America). The majority of firearms in existence prior to the Civil War were not functional but rather decorative for display, status, and heirlooms. Production technology limited gun possession to members of the military or elite members of society wealthy enough to afford a hand-crafted firearm. *See id.*

108. *See id.* at 445–46 (describing historical government support of firearms industry). In 1808 Congress apportioned a considerable amount of the federal budget to equipping the military. With an initial annual budget of \$200,000, Congress sought to increase the presence of firearms in the United States. This government backing fueled increased production and consequently prevalence of firearms across the nation. *See id.*

109. *See id.* at 446 (describing early Congressional efforts to bolster firearms industry). “No shop was too small to escape the government’s efforts at financial encouragement. Yet even with these efforts, Congress failed to fulfill its constitutional mandate of arming the militia in any year prior to the Civil War. Production levels in the United States just could not keep up with congressional demands.” *Id.*

110. *See Interchangeable Parts, HISTORY*, <http://www.history.com/topics/inventions/interchangeable-parts> (last visited Mar. 1, 2016) (describing progress of production improvements enabled by Eli Whitney’s interchangeable parts). In 1798 the government commissioned Eli Whitney to produce 10,000 muskets by the early 1800s. Whitney failed spectacularly, failing to produce a single firearm by 1801. *See id.*

111. *See id.* (describing Eli Whitney’s contribution to firearms production). Eli Whitney contributed considerably to mass production capabilities by devising plans to divide labor and use interchangeable parts. However, production still paled in comparison to expectations. Whitney eventually completed an order for 10,000 muskets due by 1800 six years late. Nonetheless, continued improvements enabled Whitney to more than double his output after the initial order. He produced an additional 15,000 firearms, one hundred and fifty percent of his original order, four years after completing his first order. This unprecedented growth in production capabilities set in motion a steady stream of production improvements that continued after the close of the Civil War. *See id.*

At the tail-end of the Industrial Revolution, manufacturing improvements triggered massive growth in firearm production.<sup>112</sup> Tremendous governmental support further spurred production improvements.<sup>113</sup> Simultaneously, the Colt revolver eliminated the constant need to reload.<sup>114</sup> Up until the arrival of mass-production techniques and the Colt revolver in 1835, firearms remained more form than function.<sup>115</sup>

The Civil War provided a catalyst for unprecedented demand in the firearms industry.<sup>116</sup> The growth in demand persisted, with government support contributing to a stable presence embodied in the National Rifle Association (NRA).<sup>117</sup> Gun features and produc-

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112. See Bellesiles, *supra* note 66, at 446–47 (describing evolution of firearms production in America).

113. See *id.* (describing evolution of firearms production in America). Firearm production continued to take off through the middle of the nineteenth century. Production capability grew at an unprecedented rate, due largely to substantial government contributions. The United States government furnished the funding, intellectual property protection, technology, and a steady demand for firearms in the military. It also provided both supply and demand in a rapidly developing firearms industry. See *id.*

114. See Billy Hallowell, *The History and Evolution of Guns as Told Through Pictures*, THE BLAZE (Mar. 12, 2013, 8:52 AM), <http://www.theblaze.com/stories/2013/03/12/the-history-and-evolution-of-guns-as-told-through-pictures/> (providing visual and descriptive history of firearms from 1364 through present time).

The first multi-shot, revolving firearms that were mass produced came from Samuel Colt. Colt produced a gun that enabled people to fire multiple shots without reloading – a development that forever changed warfare. By mass-producing these weapons, the inventor made them more affordable and . . . their accuracy and reliability made them useful among hunters and soldiers, alike.

See *id.*

115. See PBS, *supra* note 102 (providing timeline of gun technology from 1364 through 1900). The Colt Revolver combined mass production technology with accuracy capabilities that made the firearm far superior to its predecessors. Affordability and shooting technology finally came together in a weapon readily available for the masses. See *id.*

116. See Bellesiles, *supra* note 66, at 452 (describing Civil War acting as catalyst for firearms industry expansion in America).

The Civil War dramatically accelerated the slow cultural shift that had been instigated by the increase in arms production in the 1840s. By 1865 it would seem that most Americans believed that the ability to use a gun made one a better man as well as a patriot more able to defend the nation's liberties.

*Id.* Additionally, “[t]echnological innovation coupled with government support had powerfully altered the national character and sensibilities within a single generation.” *Id.*

117. See *id.* at 453 (describing government endorsement of firearms). After establishing a secure foothold for the firearms industry in America in the nineteenth century, the government proceeded to take a more passive role in later years. However, the government did actively participate in the expansion of gun culture in the United States by subsidizing the National Rifle Association. The organization sought and continues to seek a longstanding place for firearms in

tion capability massively improved.<sup>118</sup> The ability to shoot unhindered by continuous reloading changed warfare entirely.<sup>119</sup> In 1861, even greater capabilities for rapid firing arrived in the Gatling Gun.<sup>120</sup> This new technology was a precursor to the “first truly fully automatic machine guns” of the 1880s.<sup>121</sup> Rapid progress within the firearms industry provided further support of growing acceptance and prevalence of firearms in the nation.<sup>122</sup> This momentum built, with unceasing advancements occurring regularly since the Antebellum era.<sup>123</sup> These changes impacted the court’s definition of firearms.<sup>124</sup> However, the Second Amendment remained tied to the military.<sup>125</sup>

Firearm technology continues to improve at a rapid pace.<sup>126</sup>  
Growing expenditures on firearms and other hunting equipment

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America much like the government did in fostering the entire firearms industry. *See id.* “National Rifle Association (NRA) was incorporated in 1871 to provide firearms training and encourage interest in shooting sports.” *See History of Firearms, supra* note 92 (providing timeline for critical dates in history of firearms). As the NRA sought to increase the presence of firearms in the United States, government contributions indirectly sought to contribute to that cause by expanding the presence, technology, and utility of firearms throughout the nation. *See id.*

118. *See* Hallowell, *supra* note 114 (providing visual and descriptive history of firearms from 1364 through present time). Firearm technology improved drastically in the middle of the nineteenth century, exemplified by developments such as the pin fire cartridge and the first shotguns. *See id.*

119. *See id.* (describing advances in gun technology). A critical improvement to firearm technology was the capability of repeated firing rather than firing a single shot and being forced to reload immediately. *See id.*

120. *See* Supica, *supra* note 103 (providing overview of technological advancements in firearms through present day). The Gatling gun introduced Americans to truly rapid fire and repetitive shooting capabilities. The gun’s multiple rotating barrels enabled its shooter to continue firing shots with ammunition supply serving as the only limiting factor. *See id.* In 1861 Americans were introduced to the Gatling gun. “The Gatling gun was a hand-driven, crank-operated, multi-barreled, machine gun. The first machine gun with reliable loading, the Gatling gun had the ability to fire sustained multiple bursts.” *See* Hallowell, *supra* note 114 (providing visual and descriptive history of firearms from 1364 through present time).

121. *See* Hallowell, *supra* note 114 (providing visual and descriptive history of firearms from 1364 through present time). A fully-automatic machine gun is capable of firing continuously while the shooter holds the trigger down, as opposed to the Gatling gun’s crank mechanism. *See id.*

122. *See History of Firearms, supra* note 92 (providing timeline for critical dates in history of firearms).

123. *See id.* (detailing chronology of firearm development).

124. *See* Leider, *supra* note 2, at 1588 (noting Second Amendment ties to military firearms). Most states recognized an individual right to possess and carry arms by the beginning of the twentieth century. Individual weapons were easily distinguished from military weapons in strength and shooting capability. *See id.*

125. *See id.* (noting Second Amendment ties to military).

126. *See* Supica, *supra* note 103 (providing overview of technological advancements in firearms through present day). Hunting firearms today evolve consistently to bring on enhanced shooting capabilities and additional features. *See id.*

reflected a voracious appetite of hunters for improved weaponry.<sup>127</sup> Developments in ammunition, semi-automatic shooting capabilities, and use of lightweight materials have yielded more easily-used weapons.<sup>128</sup> Weapon accuracy improved dramatically.<sup>129</sup> New features allowed electronic targeting, night vision, and laser aiming systems.<sup>130</sup> This improved accuracy comes into play with New Hampshire's proposed regulation banning smart rifles, which provide a degree of accuracy that some legislators consider unethical.<sup>131</sup> As firearms resemble those envisioned by the framers less and less, legislatures and courts alike must consider what this means for the Second Amendment.<sup>132</sup> Advanced technology may remove hunting gear such as smart rifles from the Second Amendment's scope.<sup>133</sup> Additionally, courts may determine that the act of hunting falls outside of the Second Amendment's scope.<sup>134</sup>

#### IV. ANALYSIS: SHOT THROUGH THE HEART—DOES NEW HAMPSHIRE'S PROPOSED REGULATION IMPINGE UPON A SECOND AMENDMENT RIGHT?

##### A. New Hampshire Proposed Regulation: Direct Hit or Missing the Mark?

A New Hampshire proposed regulation seeks to limit hunting based on equipment rather than time or location.<sup>135</sup> Considering

127. See *supra* note 85 and accompanying text (providing statistics for hunting in America in recent years). In 2012, the estimated 13,700,000 hunters in the United States spent \$38.3 billion on hunting related expenditures, generating more income than Google and the Goldman Sachs Group. "If hunting were a company, the amount spent by sportsmen to support their hunting activities would place it number [seventy-three] on the Fortune 500 list." *Id.*

128. See *id.* (providing statistics for hunting in America in recent years).

129. See *id.* (describing improvements in firearm accuracy). One notable feature that has seen remarkable improvement over the years is vision technology on firearms. Vision aids on firearms used in the nineteenth century are a far cry from the advanced scopes developed in the later twentieth century and continuously improved through present day. See *id.*

130. See Supica, *supra* note 103 (providing overview of technological advancements in firearms through present day).

131. See *infra* note 135 and accompanying text (proposing equipment regulation and noting moral reasoning behind proposal).

132. See *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010) (distinguishing hunting from self-defense).

133. See *id.* (distinguishing hunting from self-defense).

134. See, e.g., *infra* note 194 and accompanying text.

135. See *Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't 312.03 (2015). Per the proposed regulation, [t]he Fish and Game Department is proposing to adopt Fis 312 to regulate the method and manner of taking wildlife with respect to emerging technologies. Specifically, the new rule would (i) ban the taking, driving,

America's pervasive gun culture, it is likely that passage of this and any similar regulation will face Second Amendment challenges.<sup>136</sup> Though the regulation differs from those previously considered by courts under Second Amendment challenges, it would likely also be upheld.<sup>137</sup>

Given that statutes infringing upon the designated "core" conduct protected by the Second Amendment are upheld, it is even less likely a plaintiff would find success in a suit challenging a hunting regulation.<sup>138</sup> *Hunters* in particular highlights the unlikely success on the merits of such a claim.<sup>139</sup> Despite strong ties to hunting and firearms in the United States,<sup>140</sup> a continued lack of precedence mars claimed Second Amendment rights for hunters.<sup>141</sup>

#### B. Give Me Smart Rifles or Give Me Death: Hypothetical New Hampshire Suit

Should hunters in New Hampshire bring suit against the state for an alleged Second Amendment violation, the case would likely draw from the framework applied in *Heller* (later applied by *Marzzarella* and *Skoien*) and *Hunters*.<sup>142</sup> A hypothetical suit would draw from issues raised by both sets of cases but factually resemble *Hunters*.<sup>143</sup> All cases referenced support a conclusion of denial of

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or locating of wildlife using an unmanned aerial vehicle, (ii) ban the use of smart rifles for taking wildlife, and (iii) ban the use of live action game cameras to locate wildlife for the purpose of taking said wildlife.

35 N.H. Rulemaking Reg. 1 (Jan. 8, 2015) (proposing ban of smart rifles).

136. See *supra* note 85 and accompanying text (providing statistics for hunting in America in recent years).

137. See *Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n*, 28 F. Supp. 3d 340 (M.D. Pa. 2014) (rejecting Second Amendment application to hunting).

138. See *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (upholding firearms possession restriction).

139. See *Hunters*, 28 F. Supp. 3d at 340 (rejecting Second Amendment application to hunting).

140. See *supra* note 85 and accompanying text (providing statistics for hunting in America in recent years).

141. See *Hunters*, 28 F. Supp. 3d at 340–41 (noting lack of precedent applying Second Amendment to hunting). "Plaintiffs acknowledge that no legal precedent establishes a constitutional right to hunt . . ." *Id.*

142. See *infra* note 195 and accompanying text; see also *Marzzarella*, 614 F.3d at 85 (providing Second Amendment claim framework); *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010) (providing Second Amendment claim framework); *Hunters*, 28 F. Supp. 3d at 345 (providing Second Amendment claim framework).

143. See *Hunters*, 28 F. Supp. 3d at 345 (providing case facts).

Second Amendment protection to hunters in New Hampshire considering their Second Amendment analysis framework.<sup>144</sup>

1. *D.C. v. Heller*

In *D.C. v. Heller*, the U.S. Supreme Court addressed the Second Amendment's central meaning for the first time in seventy years.<sup>145</sup> The District of Columbia passed legislation barring handgun registration, requiring licensing for pistols, and requiring legal firearms to be kept unloaded and disassembled or trigger-locked.<sup>146</sup> In response, a group of citizens brought suit claiming the laws violated their Second Amendment rights.<sup>147</sup> The federal court in the District of Columbia disagreed, holding that the Second Amendment applied exclusively to militias rather than private gun ownership.<sup>148</sup> The U.S. Court of Appeals for the District of Columbia reversed, holding that the Second Amendment protects private gun owners.<sup>149</sup> The case finally reached the U.S. Supreme Court, seeking a conclusive answer to whether the Second Amendment shields private use of handguns and other firearms within the home.<sup>150</sup>

In a five-four decision, the Court held that the Second Amendment protects a personal right to firearm ownership unrelated to the military.<sup>151</sup> The Court looked to the Second Amendment's text and that of relevant state constitutions adopted soon after the Constitution.<sup>152</sup> *Heller* essentially rejected rational basis application to Second Amendment claims.<sup>153</sup> However, the Court's acceptance of categorical restrictions on Second Amendment rights suggested inapplicability of strict scrutiny as well.<sup>154</sup> Similar to the First Amendment, the right to bear arms is not absolute but allows for

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144. See *Marzzarella*, 614 F.3d at 85 (providing Second Amendment framework); see also *Skoien*, 614 F.3d at 639 (providing Second Amendment framework); *Hunters*, 28 F. Supp. 3d at 345 (providing Second Amendment framework).

145. See *District of Columbia v. Heller*, 554 U.S. 570, 570 (2008) (outlining *Heller* issues); see also *United States v. Miller*, 307 U.S. 174 (1939) (marking prior instance in which Court addressed Second Amendment before *Heller*).

146. See *Heller*, 554 U.S. at 573 (describing firearm legislation in question).

147. See *id.* at 570 (providing case history).

148. See *id.* at 570–71 (providing case history).

149. See *id.* at 571 (providing case history).

150. See *id.* (outlining case issues).

151. See *id.* (finding Second Amendment right beyond military use of firearms).

152. See *id.* at 573–74 (interpreting Second Amendment text).

153. See *United States v. Skoien*, 614 F.3d 638, 639 (synthesizing *Heller*'s Second Amendment analysis).

154. See *infra* note 194 and accompanying text (suggesting strict scrutiny not appropriate).

concessions.<sup>155</sup> The Court left future courts to determine which categorical restrictions states may enact without offending the Second Amendment.<sup>156</sup> Looking to the First Amendment provides limited guidance in this area.<sup>157</sup> First Amendment case law carves out a number of clearly defined exceptions to the rights to free speech and religion.<sup>158</sup> Second Amendment case law is far less developed, as evidenced by *Heller's* novelty.<sup>159</sup>

While the *Heller* Court addressed the Second Amendment's scope, it warned that its decision did not call into question "long-standing" and "presumptively lawful" firearm laws.<sup>160</sup> The Court also failed to specify the appropriate standard of review for Second Amendment claims.<sup>161</sup> This lack of direction forces lower courts to wrestle with their own interpretations of Second Amendment application.<sup>162</sup> *U.S. v. Marzzarella* and *U.S. v. Skoien* exemplify the application of *Heller's* minimal guidance and lower courts' continuing need to construct their own approaches to Second Amendment claims.<sup>163</sup>

## 2. *D.C. v. Heller Application in U.S. v. Marzzarella*

In *U.S. v. Marzzarella*, the defendant was convicted for "possession of a firearm with an obliterated serial number."<sup>164</sup> The statute in question criminalized the "transport[ation], ship[ment], or recei[pt], in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed. . ." <sup>165</sup> The defendant claimed that the statute "violated his Second Amendment right to keep and bear arms," which the court re-

155. *See id.* (suggesting strict scrutiny not appropriate).

156. *See infra* note 231 and accompanying text.

157. *See supra* note 58 and accompanying text.

158. *See id.*

159. *See infra* note 194 and accompanying text.

160. *See* District of Columbia v. Heller, 554 U.S. 570, 625–27 (2008) (cautioning about limited reach of case holding).

[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.

*Id.* at 626–27.

161. *See infra* note 218 and accompanying text.

162. *See id.*

163. *See infra* note 194 and accompanying text; *infra* note 198 and accompanying text.

164. *See* United States v. Marzzarella, 614 F.3d 85, 88 (3d Cir. 2010) (providing case facts).

165. *See id.* (providing case facts).

jected.<sup>166</sup> The defendant appealed, but the Third Circuit Court of Appeals affirmed, upholding the statute.<sup>167</sup>

The court relied on *District of Columbia v. Heller* in its holding.<sup>168</sup> *Marzzarella* utilized the two-prong Second Amendment analysis from the prior case.<sup>169</sup> Upholding a categorical restriction on handgun possession, the court noted a fundamental right protected by the Second Amendment.<sup>170</sup>

Under the first prong, the court considers the conduct regulated by legislation.<sup>171</sup> In considering conduct, the court evaluates the foundation of Second Amendment protection.<sup>172</sup> Defining breadth of Second Amendment protection necessarily requires analysis of constitutional intent.<sup>173</sup> The court reiterated that Second Amendment protection is limited in scope of protection of-

166. *See id.* (providing case facts).

167. *See id.* (providing case facts).

168. *See id.* at 88–89 (noting limitations on Second Amendment protection). The court noted a “core” right of the Second Amendment to bear arms for personal protection of lawful individuals. While securing this individual right, the court noted that the Second Amendment is subject to the same limitations of other Bill of Rights securities. The Second Amendment is thus not absolute, but may be limited by legislation without necessarily impinging upon a constitutional right. *See id.*

169. *See id.* at 89 (describing Second Amendment claim analysis).

First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

*Id.* (citations omitted).

170. *See id.* (limiting Second Amendment applicability).

171. *See id.* (limiting Second Amendment applicability).

172. *See id.* (describing Second Amendment claim analysis). The court’s primary inquiry is whether the conduct in question falls within the Second Amendment’s scope. If the court determines that it does not, there is no constitutional infringement. If the conduct is within the scope of the Second Amendment, the court proceeds with its inquiry. The court in *Marzzarella* sought to determine if personal possession of unmarked firearms fell within the scope of Second Amendment protected conduct. *See id.*

173. *See id.* at 89–90 (describing contextual impact on Second Amendment scope). Courts consider the context in which a constitutional right arose. This consideration provides insight to the intent of lawmakers in the text’s enactment and what exactly lawmakers sought to ensure for the American people. Taking this into consideration, the court concluded that the Second Amendment incorporated an individual right to firearm possession for purposes of self-defense and security. *See id.*



278 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 255

ferred to citizens.<sup>174</sup> This conclusion would extend to New Hampshire's categorical regulation.<sup>175</sup>

The court's reference to bases for categorical restrictions is particularly apt to a hypothetical New Hampshire suit.<sup>176</sup> The New Hampshire legislators conceptualized the proposed regulation due to immorality of use of particular types of equipment.<sup>177</sup> A court may find that the unfailing accuracy of smart rifles renders them equally "dangerous and unusual."<sup>178</sup> This categorization would render the proposed regulation permissible and constitutionally valid.<sup>179</sup>

The court may consider historical context in interpreting scope of protection, which requires consideration of original intent.<sup>180</sup> This makes for a particularly strong case against smart rifles due to lack of resemblance between current technology and that in existence during Second Amendment enactment.<sup>181</sup> Using this logic, smart rifles fall outside the scope of protection.<sup>182</sup> However, courts have rejected this extreme originalist interpretation.<sup>183</sup> Re-

174. *See id.* at 90 (noting limited protection of Second Amendment). The right to bear arms secured by the Second Amendment is not absolute. It may be limited by legislation without necessarily infringing upon the constitutional right so long as it does not deny the core right of lawful citizens to possess firearms for traditionally lawful purposes. *See id.*

175. *See Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't 312.03 (2015) (banning use of certain categories of hunting technology).

176. *See Marzarella*, 614 F.3d at 91 (noting categorical lack of Second Amendment protection for some firearms). Specifically, the court noted it was clear that restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because "those weapons are outside the ambit of the amendment. . . . By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the court intended to treat them equivalently – as exceptions to the Second Amendment guarantee." *See id.*

177. *See Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't at 312.03 (banning use of certain types of hunting technology).

178. *See Marzarella*, 614 F.3d at 91 (justifying Second Amendment scope limitation).

179. *See id.* (justifying Second Amendment scope limitation).

180. *See id.* (justifying Second Amendment scope limitation).

181. *See Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't at 312.03 (proposing ban on use of certain categories of hunting technology).

182. *See Marzarella*, 614 F.3d at 93 (limiting Second Amendment protection).

183. *See BLACK'S LAW DICTIONARY* 1275 (9th ed. 2009) (defining Originalism). Originalism is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Id.* In addition to word definition Originalism, the doctrine holds "that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Id.* In the case of the Second Amendment, this principle dictates that "firearms" include those envisioned by drafters of the Second Amendment, a narrow interpretation rejected in a number of recent Second Amendment cases, particularly in light of changing

ardless, a claim for smart rifle protection would likely fail even with more flexible Second Amendment interpretation.<sup>184</sup> Recent suits establish a clear analysis for Second Amendment claims, and those cases have yet to establish outer limits, though none definitively include hunting within the scope.<sup>185</sup> A New Hampshire suit, like *Hunters*, may be dismissed without applying Second Amendment analysis.<sup>186</sup>

If a court finds the Second Amendment applicable, it proceeds to the second prong.<sup>187</sup> Under the second prong, the court applies the appropriate level of scrutiny.<sup>188</sup> The appropriate level is not clearly defined for Second Amendment claims, which allows courts some flexibility.<sup>189</sup> Rational basis would be an inappropriate standard.<sup>190</sup> Heightened scrutiny is the proper standard for a fundamental right.<sup>191</sup> However, even under strict scrutiny, courts have upheld restrictions on Second Amendment conduct.<sup>192</sup>

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technology and firearm uses. See *Marzzarella*, 614 F.3d at 93 (rejecting originalist approach to Second Amendment interpretation). In rejecting an overly narrow Second Amendment interpretation, the court noted that

*Heller* cautions against using such a historically fact-bound approach when defining the types of weapons within a scope of the right. Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century were protected by the Second Amendment. We do not interpret constitutional rights that way.

*Id.*

184. See *Marzzarella*, 614 F.3d at 93 (rejecting rigid Second Amendment interpretation).

185. See *Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't at 312.03 (banning use of certain categories of hunting technology).

186. See *Marzzarella*, 614 F.3d at 89–90 (providing Second Amendment claim analysis).

187. See *id.* at 89–90 (providing Second Amendment claim analysis).

188. See *id.* at 96 (providing Second Amendment claim analysis).

189. See *id.* at 95–96 (noting lack of scrutiny assigned in Second Amendment infringement suits). *Heller* failed to provide an express standard under which firearms possession laws are to be evaluated. The Court merely noted that the law in question would fail under any level of scrutiny applied. See *id.*

190. See *id.* (noting lack of established standard).

191. See *id.* (determining appropriate level of scrutiny). “[S]ome form of heightened scrutiny must have applied.” See *Leider*, *supra* note 2, at 1588. Rather than dictating the proper level of scrutiny, *Heller* merely ruled out rational basis as an appropriate evaluator of laws impacting Second Amendment rights. See *id.*

192. See *Marzzarella*, 614 F.3d at 85 (upholding restrictive firearms statute over alleged Second Amendment infringement); see also *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010) (upholding restrictive firearms statute over alleged Second Amendment infringement); *Hunters United for Sunday Hunting v. Pennsylvania Game Comm’n*, 28 F. Supp. 3d 340, 345 (M.D. Pa. 2014) (upholding hunting limitation statute over alleged Second Amendment infringement).

*Marzzarella's* statute differs from New Hampshire's in categorization type.<sup>193</sup> The court in *Marzzarella* regulated "the manner in which any person may lawfully exercise their Second Amendment rights."<sup>194</sup> New Hampshire's proposed regulation regulates a class of firearms.<sup>195</sup> The regulation does not preclude possession of smart rifles but prohibits use of the equipment in a particular context: hunting.<sup>196</sup> A court may find this a limitation on "manner" in which individuals exercise the right to bear arms.<sup>197</sup> This distinction may result in application of intermediate scrutiny rather than strict scrutiny.<sup>198</sup> Lowering the standard to intermediate scrutiny increases the likelihood of upholding a statute.<sup>199</sup>

The outcome under strict scrutiny application is less clear.<sup>200</sup> However, courts have found Second Amendment restrictions valid under strict scrutiny.<sup>201</sup> Rationale behind the ban on use of smart rifles differs from that prohibiting firearm possession.<sup>202</sup> New Hampshire legislators note that the ban stems from immorality of using such equipment.<sup>203</sup> Lawmakers noted that the unnatural advantage provided by technology necessitated equipment limitations.<sup>204</sup>

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193. See Smart Rifles, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't 312.03 (2015) (categorically banning certain types of hunting equipment in New Hampshire).

194. See *Marzzarella*, 614 F.3d at 97 (analyzing challenged firearms possession restriction statute). The court considered the law in question a regulation in the manner in which an individual may possess firearms rather than a categorical restriction on particular types of firearms. This same distinction between type of conduct and manner in which protected conduct may be expressed appears in First Amendment precedent. See *id.*

195. See Smart Rifles, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't at 312.03 (categorically banning certain types of hunting equipment in New Hampshire).

196. See *id.* (categorically banning certain types of hunting equipment).

197. See *Marzzarella*, 614 F.3d at 97 (distinguishing types of Second Amendment restrictions).

198. See *id.* (recognizing firearms possession rights).

199. See *id.* at 97–98 (noting judicial standard's impact on case outcome).

200. See *id.* at 99 (noting comparatively undeveloped Second Amendment body of case law). Second Amendment interpretation looks to First Amendment interpretation for guidance. First Amendment case law is far more developed than Second Amendment case law, which has but a single Supreme Court decision in the past one hundred years providing authority. See *id.*

201. See *id.* (noting lack of developed Second Amendment case law).

202. See Smart Rifles, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't 312.03 (2015) (describing ban on certain types of hunting equipment in New Hampshire).

203. See *id.* (describing categorical hunting ban).

204. See *id.* (describing categorical hunting ban).

3. *D.C. v. Heller Application in U.S. v. Skoien*

In *U.S. v. Skoien*, the defendant's prior convictions prevented him from carrying "[f]irearms in or affecting interstate commerce."<sup>205</sup> Nonetheless, the defendant was later convicted for possession of three firearms.<sup>206</sup> The defendant claimed that the law violated his Second Amendment rights. The court disagreed and upheld the statute.<sup>207</sup> The defendant appealed, but the Seventh Circuit Court of Appeals affirmed the lower court's decision.<sup>208</sup>

*Skoien* analyzed Second Amendment rights in the context of firearms possession rather than hunting.<sup>209</sup> However, the case provides a comprehensive analysis for categorical Second Amendment claims by touching upon several critical considerations.<sup>210</sup> *Skoien* distinguished the Second Amendment rights secured by *Heller* from those still undefined and noted the importance of the proper level of scrutiny in Second Amendment claims.<sup>211</sup> Additionally, the court analyzed categorical restrictions under the Second Amendment.<sup>212</sup> This consideration would apply to a hypothetical claim under New Hampshire's restriction on specific hunting equip-

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205. See *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010) (distinguishing hunting from self-defense).

206. See *id.* (detailing defendant's possession of pistol, rifle, and shotgun).

207. See *id.* (upholding restrictive firearms legislation).

208. See *id.* (rejecting defendant's claim).

209. See *id.* at 641 (providing Second Amendment challenge framework).

210. See *id.* at 639 (determining constitutionality of statute). The court noted that it must first determine whether Congress may enact categorical limitations on Second Amendment conduct prior to considering the alleged impact on hunting. See *id.*

211. See *id.* (exploring standard of review for Second Amendment claim). Applying rational basis to Second Amendment legislation would not comport with the treatment of other Bill of Rights securities. While the proper level of scrutiny is yet to be determined, the minimal protection offered by rational basis would render the Second Amendment useless in securing a right to possess firearms as the deference granted to the government under such a standard would almost certainly ensure the upholding of any law impacting the right to bear arms. See *id.*

212. See *id.* (noting permissibility of certain legislative firearm restrictions). Categorical limits may exist without impinging upon constitutional rights. The First Amendment in particular provides an example of a fundamental right subject to numerous exceptions that Congress may proscribe. See *id.* Thus, even if a court concluded that the Second Amendment applies to hunters in a hypothetical New Hampshire suit, categorical restrictions applicable to Second Amendment rights are not presumptively invalid. See *id.*

282 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 255

ment.<sup>213</sup> A court may consider New Hampshire's statute a categorical restriction under the Second Amendment.<sup>214</sup>

#### 4. *Hunters United for Sunday Hunting*

The Pennsylvania Game and Wildlife Code generally prohibits hunting on Sundays.<sup>215</sup> The blue law prohibits the hunting of big game on Sundays, with exceptions in game type and hunting location.<sup>216</sup>

*Hunters* examined the constitutionality of the prohibition.<sup>217</sup> A group of hunters claimed that the Pennsylvania Gaming Commission violated their First Amendment, Second Amendment, and Fourteenth Amendment rights.<sup>218</sup> The District Court of the Middle

213. See *Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't 312.03 (2015) (categorizing ban on certain types of hunting equipment in New Hampshire).

214. See *Skoiien*, 614 F.3d at 640 (finding some Second Amendment possession restrictions permissible).

215. See *Hunting on Sunday Prohibited*, 34 PA. STAT. ANN. § 2303 (West 2016) (banning hunting on Sundays).

(a) **General rule.** Except as otherwise provided in this title, it is unlawful for any person to hunt for any furbearer or game on Sunday.

(b) **Construction of section.** This section shall not be construed to prohibit:

- (1) The training of dogs.
- (2) The participation in dog trials as provided for in this title.
- (3) The removal of lawfully taken game or wildlife from traps or the resetting of the traps on Sunday.

(b.1) **Exceptions.** Subsection (a) shall not apply to:

- (1) The hunting of foxes.
- (2) The hunting of coyotes.
- (3) Any hunting which occurs on noncommercial regulated hunting grounds holding a valid permit under section 2928(b)(2) (relating to regulated hunting grounds permits).

(c) **Penalty.** A violation of this section is a summary offense of the fifth degree.

See *id.*

216. See BLACK'S LAW DICTIONARY 207 (9th ed. 2009) (defining Blue Law). A blue law prohibits particular conduct and commercial activities on Sundays. Such laws still exist, though they are far less common since 1980 when courts began to find them invalid due to their religious roots. Blue laws may be upheld if a court finds justification for the law aside from religious observation. See *id.* "Big game consists of white-tailed deer, black bear, elk and wild turkey, whereas small game consists of woodcock, rabbit, pheasant, northern bobwhite, quail, ruffed grouse, groundhog, and squirrel." *Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n*, 28 F. Supp. 3d 340, 342 (M.D. Pa. 2014) (defining big game). "[B]y statute, foxes, coyotes, crows, and feral hog are excepted from the Sunday hunting restriction, meaning that these animals may be taken on Sunday." *Id.*

217. See *Hunters*, 28 F. Supp. 3d at 340 (challenging constitutionality of hunting restriction).

218. See *Hunters*, 28 F. Supp. 3d at 340 (challenging constitutionality of hunting restriction). The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

District of Pennsylvania disagreed and held that the Second Amendment did not apply to hunters.<sup>219</sup>

*Hunters* and a hypothetical New Hampshire suit both involve restrictions on hunting firearms rather than those used for self-defense.<sup>220</sup> Both statutes regulate recreational hunting with sweeping restrictions.<sup>221</sup> However, neither case involves an outright hunting ban.<sup>222</sup> New Hampshire regulates by equipment while Pennsylvania law involves temporal restrictions.<sup>223</sup> Both statutes provide a number of exceptions to their limitations.<sup>224</sup>

*Hunters* applies the previously mentioned two-prong framework.<sup>225</sup> The court noted the unresolved scope of Second Amendment coverage.<sup>226</sup> Like other cases, the court found hunting outside the foundational protection of the Second Amendment.<sup>227</sup>

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abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The Second Amendment provides: “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. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

219. *See Hunters*, 28 F. Supp. 3d at 340 (challenging constitutionality of hunting restriction).

220. *See Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep’t 312.03 (2015) (describing categorical ban on certain types of hunting equipment in New Hampshire).

221. *See id.* (detailing hunting restrictions).

222. *See id.* describing categorical ban on certain types of hunting equipment in New Hampshire)

223. *See Hunters*, 28 F. Supp. 3d at 340–41 (challenging statute prohibiting hunting on Sundays).

224. *See Smart Rifles*, 186 N.H. Code Admin. R. Ann. Fish and Game Dep’t at 312.03 (describing categorical ban on certain types of hunting equipment in New Hampshire); *see also Hunters*, 28 F. Supp. 3d at 345 (challenging statute prohibiting hunting on Sundays).

225. *See Hunters*, 28 F. Supp. 3d at 345 (applying Second Amendment framework used in firearms possession legislation cases).

226. *See id.* (noting lack of precedent for extension of Second Amendment to hunting). The Second Amendment’s scope is not fully defined by case law but has yet to definitively include hunting. *See id.*

227. *See id.* (noting lack of Second Amendment precedent).

5. *Application to Hypothetical New Hampshire Suit*

It is likely a court would feel the same reluctance to explicitly define or expand the Second Amendment's scope in a New Hampshire suit.<sup>228</sup> Applying this rationale, the court rejected Second Amendment coverage to hunters.<sup>229</sup> It is difficult to see why a court would reject this rational argument in a hypothetical New Hampshire suit, considering the similarities between the statutes.<sup>230</sup> If the Second Amendment does not apply to the conduct implicated, as the court concluded in *Hunters*, there will be no need to proceed to any scrutiny determination in a New Hampshire suit.<sup>231</sup> The statute would likely be similarly upheld.<sup>232</sup> However, uncertainty remains due to clear definition of the appropriate level of scrutiny, permissibility of categorical restrictions, distinction between hunting and core Second Amendment conduct, and advances in hunting technology.<sup>233</sup> Together, these factors suggest that hunting legislation falls outside the reach of the Second Amendment.<sup>234</sup>

*Heller* rejected rational basis application to Second Amendment claims.<sup>235</sup> Strict scrutiny also appears to be an improper standard based on the minimal guidance provided by *Heller*.<sup>236</sup> Thus, the appropriate standard must fall somewhere on the spectrum between the highest and lowest level of scrutiny.<sup>237</sup> However, narrow-

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228. *See id.* at 345–46 (questioning outer limits of Second Amendment). Courts have yet to determine the boundaries of conduct protected by the Second Amendment beyond basic self-defense in an individual's home. It is up to future courts to determine the extent of protection afforded. *See id.*

229. *See id.* (questioning outer limits of Second Amendment).

230. *See Smart Rifles*, 35 N.H. Rulemaking Reg. 1 (Jan. 8, 2015) (commenting on lack of Second Amendment violation in the proposed Regulation).

231. *See Hunters*, 28 F. Supp. 3d at 345–46. (rejecting Second Amendment application to hunting). The court rejected the contention that the Second Amendment applied to hunting due an absence of precedent suggesting such. Because the court determined that the conduct fell outside the scope of Second Amendment conduct, it halted its inquiry before evaluating the legislation under any level of scrutiny. *See id.* *See also Smart Rifles*, 35 N.H. Rulemaking Reg. 1 (Jan. 8, 2015) (commenting on lack of Second Amendment violation in proposed Regulation).

232. *See Smart Rifles*, 35 N.H. Rulemaking Reg. 1 (Jan. 8, 2015) (commenting on lack of Second Amendment violation in proposed Regulation).

233. *See, e.g., supra* note 189 and accompanying text (noting lack of definite level of scrutiny).

234. *See supra* note 231 and accompanying text.

235. *See supra* note 217 and accompanying text.

236. *See id.*

237. *See id.*

ing the standard even marginally still leaves a number of gaps for courts to fill in the future.<sup>238</sup>

One of these gaps is what categorical restrictions are permissible under the Second Amendment.<sup>239</sup> First Amendment opinions distinguish the regulation of particular categories of conduct from those regulating the manner in which conduct may be carried out.<sup>240</sup> While this provides some insight, it still leaves courts with a great deal of flexibility in determining how exactly to distinguish means from manner. The line between the two seems to dissolve when thoroughly investigated and the distinction becomes more a battle over semantics. Courts also have yet to determine exactly what categories of firearms it will allow or by what criteria it will evaluate categories of firearms.<sup>241</sup> Gun control legislation could categorize permissible conduct by time, age of individuals, manner in which weapons are carried, weapon capabilities, and geographic location among other categories.<sup>242</sup> Additionally, courts could consider the type of conduct a user intends to engage in with a firearm, which would further blur the lines as most conduct is hybrid or unintentional.<sup>243</sup> For example, an individual may be of proper age accompanied by minors and outside of his or her home carrying a licensed gun with additional features not on the gun originally licensed. This example implicates numerous factors relevant to evaluating permissible Second Amendment legislation.

Categorical restrictions bleed into the classification of conduct with firearms and how that may impact the Second Amendment's application.<sup>244</sup> *Hunters* found hunting was not implicated by the Second Amendment.<sup>245</sup> This consideration disregards the particular firearm used and focuses instead on the context in which it is used.<sup>246</sup> Considering the permissibility of laws restricting the core right safeguarded by the Second Amendment, it does not seem far-fetched to predict that higher courts may make the same decision

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238. See *e.g.*, *supra* note 189 and accompanying text (noting remaining lack of definite level of scrutiny).

239. See *supra* note 27 and accompanying text.

240. See *supra* note 57 and accompanying text.

241. See, *e.g.*, *supra* note 231 and accompanying text (noting lack of analysis before claim dismissal).

242. See, *e.g.*, *supra* note 231 and accompanying text (noting lack of analysis before claim dismissal).

243. See *id.*

244. See *supra* note 97 and accompanying text.

245. See *supra* note 231 and accompanying text.

246. See *supra* note 231 and accompanying text.



286 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 255]

in future cases.<sup>247</sup> Firearm possession is already limited outside the confines of an individual's home and beyond use for self-defense.<sup>248</sup> Hunting in the United States occurs for sport rather than sustenance.<sup>249</sup> This distinction may pull hunting outside the original intent of the Second Amendment.<sup>250</sup> Hunting in the United States is born of luxury rather than necessity.<sup>251</sup> It does not comport with Second Amendment origins and precedent to claim that a sporting and leisure activity requires the same constitutional safeguards afforded to basic needs of expression and self-defense.<sup>252</sup>

Technological advances further muddy the waters of Second Amendment interpretation.<sup>253</sup> Courts have recognized a non-military right to bear arms.<sup>254</sup> The outer limits to this right remain uncertain but appear to revolve around self-defense.<sup>255</sup> Hunting firearms have progressed to the point where they are finely tuned devices suited for hunting rather than self-defense.<sup>256</sup> Many features standard on a hunting rifle are clearly superfluous on a handgun intended solely for self-defense.<sup>257</sup> It remains yet to be determined if these technological features should remove such firearms from the realm of the Second Amendment's protection altogether.<sup>258</sup>

#### 6. *Smart Rifles, Smart Legislation?*

The Constitution of the State of New Hampshire incorporates many aspects of the U.S. Constitution.<sup>259</sup> New Hampshire's proposed hunting regulation states outright that the limitation does

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247. See, e.g., *supra* note 185 and accompanying text.

248. See, e.g., *supra* note 27 and accompanying text.

249. See *supra* note 110 and accompanying text.

250. See *supra* note 231 and accompanying text.

251. See *supra* note 92 and accompanying text.

252. See *supra* note 28 and accompanying text.

253. See *supra* note 1 and accompanying text.

254. See *supra* note 28 and accompanying text.

255. See *id.*

256. See *supra* notes 1–3 and accompanying text.

257. See *id.*

258. See *supra* note 231 and accompanying text.

259. See N.H. CONST. Pt. 1, art. II (establishing natural rights for New Hampshire residents). "All men have certain natural, essential, and inherent rights – among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." *Id.*

not violate any rights assured by the New Hampshire Constitution.<sup>260</sup>

The proposed regulation clarifies the scope of those impacted by the proposal, identifying “groups affected”: “[t]his rule affects hunters and others wishing to take wildlife.”<sup>261</sup> In addressing ethical concerns in hunting the regulation specifically references the use of “[u]nmanned aerial vehicle[s],” “[s]mart rifle[s],” and “[l]ive-action game camera[s].”<sup>262</sup> Rather than referring strictly to hunting, the proposal references “[t]ake” and “taking.”<sup>263</sup> While seemingly enabling the regulation to cover a wider scope of activity and avoid ambiguity, the terminology also reflects the moral issues underpinning proposal.<sup>264</sup> The state is considering banning equipment that is more machine-operated than hunter-operated.<sup>265</sup> There is no chase.<sup>266</sup> Hunters now resemble gatherers without the

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260. *See* Smart Rifles, 35 N.H. Rulemaking Reg. 1 (Jan. 8, 2015) (commenting on lack of Second Amendment violation in proposed Regulation). “The proposed adoption of Fis 312 does not violate the New Hampshire Constitution. The proposed does not impose any programs or responsibilities on any political subdivision of the state nor is any political subdivision involved in the process from an administrative perspective.” *Id.*

261. *See id.* (defining parties affected by proposed regulation).

262. *See id.* (defining unarmed aerial vehicle). An unarmed aerial vehicle is “any device capable of flying in the air which is remotely, automatically, or otherwise piloted without an occupant, including, but not limited to, drones.” *Id.* (defining smart rifle). A smart rifle is “any firearm that is equipped with a guided trigger, laser range finder, and/or a ballistics computer.” *Id.* (defining live action game camera). A live-action game camera is

any device capable of recording and transmitting photographic or video data in real time to a remote device, such as a computer or smart phone. Live-action game camera shall not include game cameras that merely record photographic or video data and store such data for later use, as long as the device cannot transmit data in real time.

*Id.*; *see also* Smart Rifles, 186 N.H. Code Admin. R. Ann. Fish and Game Dep’t at 312.01 (defining live action game camera).

263. *See* Smart Rifles, 35 N.H. Rulemaking Reg. 1 (Jan. 8, 2015) (defining take and taking). Taking

means pursuing, shooting, hunting, killing, capturing, trapping, snaring, and netting wildlife, and all lesser acts, such as disturbing, harrying, worrying, wounding, or placing, setting, drawing, or using any net or other device commonly used to take wildlife, whether they result in taking or not, and includes every attempt to take and every act of assistance to every other person in taking or attempting to take wildlife, in accordance with RSA 207:1, XXVII.

*Id.*; *see also* Smart Rifles, 186 N.H. Code Admin. R. Ann. Fish and Game Dep’t at 312.01 (defining take and taking).

264. *See* Smart Rifles, 35 N.H. Rulemaking Reg. 1 (Jan. 8, 2015) (defining take and taking); *see also* Smart Rifles, 186 N.H. Code Admin. R. Ann. Fish and Game Dep’t at 312.01 (same).

265. *See supra* note 1 and accompanying text (expressing concern with rapid advances in hunting technology).

266. *See supra* note 2 and accompanying text.

288 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 255

effort required prior to harvest.<sup>267</sup> Considering the standards set by prior cases, it is unlikely a court would consider the New Hampshire proposed regulation constitutionally invalid.<sup>268</sup>

V. BULLETPROOF? THE FUTURE OF SECOND AMENDMENT INTERPRETATION.

As technology advances at a rapid pace, basic constitutional interpretations shift to apply to modern situations.<sup>269</sup> Hunting equipment progresses to the point of removing the human element entirely from the equation, which may justify increased ability on behalf of the government to regulate the use of such equipment in coming years.<sup>270</sup> This interpretation is particularly relevant as firearms such as smart rifles become more common among hunters.<sup>271</sup>

*Hunters* noted a lack of precedent for Second Amendment extension to recreational hunting, but that may well change as new cases arise in the light of technology bans in hunting.<sup>272</sup> In considering traditional means of constitutional interpretation, this *Hunters* follows relevant precedent and reflects social and political need firearm restrictions.<sup>273</sup> On that note, few issues consistently polarize the United States as much as gun rights and gun control.<sup>274</sup> The framers initially sought to secure the right to arm oneself in years immediately following an attack on the nation's liberty, focusing on military needs.<sup>275</sup> But society's topical views change, and Constitutional interpretation shifts with them.<sup>276</sup> When the Constitution fails to explicitly define a right relevant to contemporary needs, such as new technology, courts adapt to fill the gaps.<sup>277</sup>

Legislation and judicial opinions throughout the years have shifted further from the Second Amendment's military roots,

267. *See id.*

268. *See, e.g.,* *Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n*, 28 F. Supp. 3d 340, 345 (M.D. Pa. 2014) (rejecting Second Amendment protection for hunters).

269. *See supra* note 1 and accompanying text.

270. *See id.*

271. *See supra* note 1 and accompanying text (addressing legislative response to growing popularity of smart rifles).

272. *See Hunters*, 28 F. Supp. 3d at 345–46 (noting lack of precedent for extension of Second Amendment to hunters).

273. *See, e.g., supra* note 14 and accompanying text.

274. *See, e.g., supra* note 18 and accompanying text.

275. *See Bellesiles, supra* note 66, at 454 (describing political context of Second Amendment enactment).

276. *See O'Shea, supra* note 3, at 598 (noting societal viewpoint's impact on judicial interpretation).

277. *See id.*

though original context ought not be dismissed entirely considering the significant protection afforded by the Second Amendment.<sup>278</sup> Courts finding it applies to hunting would trigger a number of new issues.<sup>279</sup> Among these would be what, if any, technology falls outside the offered protection.<sup>280</sup> Additionally, courts would have to determine at what point hunting technology has all but removed the human element from the sport, and if this would impact the alleged Second Amendment right.<sup>281</sup> Smart rifles all but ensure kills at the hands of their owners, and owners become little more than glorified button-pushers.<sup>282</sup> As things stand, removing hunters from the equation entirely clarifies the issue and obviates the need to consider particular technology.<sup>283</sup>

Additionally, it is important to note that New Hampshire's proposed ban makes a number of concessions.<sup>284</sup> The ban merely prohibits one of countless unfair advantages of man over nature in the quest to kill for sport.<sup>285</sup> The fact remains that the Second Amendment both does not and should not extend to sport hunting.<sup>286</sup> Even if it did, hunting with smart rifles—particularly when coupled with technology such as drones—hardly resembles the core right to bear arms.<sup>287</sup>

Numerous questions remain in determining Second Amendment applicability to hunting.<sup>288</sup> Lack of controlling authority allows for discrepancies in jurisdictional approaches.<sup>289</sup> This uncertainty enables the courts to consider a number of societal concerns in determining the Second Amendment's scope of protec-

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278. See O'Shea, *supra* note 3, at 598–601 (detailing Second Amendment's historical context).

279. See *supra* note 231 and accompanying text (noting lack of Second Amendment analysis prior to claim dismissal).

280. See *id.*

281. See *supra* note 1 and accompanying text.

282. See *id.*

283. See *supra* note 231 and accompanying text (noting rejection of Second Amendment applicability to hunting).

284. See Smart Rifles, 186 N.H. Code Admin. R. Ann. Fish and Game Dep't 312.03 (2015) (banning certain categories of hunting technology).

285. See *supra* note 1 and accompanying text.

286. See *Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n*, 28 F. Supp. 3d 340, 340–41 (M.D. Pa. 2014) (rejecting Second Amendment application to hunting).

287. See *History of Firearms*, *supra* note 92 (providing timeline for critical dates in history of firearms).

288. See *supra* note 231 and accompanying text (noting lack of Second Amendment analysis prior to claim rejection).

289. See *Hunters*, 28 F. Supp. 3d at 340–41 (noting lack of precedent outlining Second Amendment application to hunting).

290 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 255

tion.<sup>290</sup> Courts may consider moral implications raised by the use of certain technology, dangers posed to society, environmental concerns, and the slippery slope that accompanies limiting or extending constitutional protection.<sup>291</sup> The Second Amendment's lack of explicit reference to hunting provides the courts with flexibility.<sup>292</sup> This flexibility brings with it a great deal of responsibility in determining how far courts will go in protecting the right to kill for sport. Ultimately, the unresolved level of scrutiny, permissibility of categorical restrictions, distinction between hunting and core Second Amendment conduct, and advances in hunting technology show that Second Amendment application misses the mark when it comes to hunting.

*Holly E. Jones\**

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290. See Bellesiles, *supra* note 66, at 448 (describing shifting societal attitude toward firearms in America).

291. See, e.g., *supra* note 1 and accompanying text (noting legislative response to moral concerns of using smart rifles).

292. See *Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n*, 28 F. Supp. 3d 340, 340–41 (M.D. Pa. 2014) (noting lack of precedent outlining Second Amendment application to hunting).

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