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District of Columbia v. Heller: The Second Amendment Shoots One Down

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District of Columbia v. Heller: The Second Amendment Shoots One Down

"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."[1]

I. INTRODUCTION

District of Columbia v. Heller[2] decided the constitutionality of a series of Washington, D.C., statutes that prohibited the registration of handguns and required that all lawfully registered firearms be kept disassembled or secured with a trigger lock unless the firearm was kept in a place of business or was being used for lawful recreational purposes.[3] In determining whether this statute was constitutional, the United States Supreme Court addressed the meaning of the Second Amendment for the first time in more than half a century, finding that the Amendment protects an individual's right to self-defense.[4] As a result, the Court struck down the District of Columbia statutes as an unconstitutional infringement of an individual's Second Amendment rights.[5]

Because so few cases have involved violations of the Second Amendment, the Supreme Court has not had the opportunity to explore its meaning. As a result, *Heller* represented the Court's first extensive interpretation of the Second Amendment. Despite the detailed interpretation that it provides, the Court left many questions unanswered. The most important of these questions considers what impact the individual right interpretation of the Second Amendment will have on state and federal gun regulations.

This Note analyzes one issue that *Heller* left unresolved, namely the standard of review to be used by courts in determining the constitutionality of gun regulations. In the wake of *Heller*, this Note argues that courts should use a balancing test that weighs the interest of the government in public safety against an individual right to keep and bear arms as guaranteed by the Second Amendment. To reach this end, Part II of this Note discusses the development of Second Amendment interpretation in federal jurisprudence, particularly emphasizing the collective rights interpretation of the Second Amendment endorsed by federal

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1. U.S. CONST. amend. II.
2. 128 S. Ct. 2783 (2008).
3. *Id.* at 2788; D.C. CODE § 7-2507.02 (2001).
4. *Heller*, 128 S. Ct. at 2799.
5. *Id.* at 2818.

courts until the early twenty-first century. Part III examines the holdings of the majority opinion and the key issues raised by the dissenting opinions. Part IV explains what level of scrutiny courts should use to determine the constitutionality of state and federal gun regulations. Part V analyzes a variety of federal, state, and local regulations to predict whether they should survive the new level of scrutiny mandated by *Heller*. Part VI offers a brief conclusion.

II. FEDERAL PRECEDENT AND THE SECOND AMENDMENT

The Second Amendment has rarely surfaced in litigation before the Supreme Court. In fact, the Court has only significantly addressed the meaning of the Second Amendment in three cases prior to its decision in *Heller*. In none of these cases did the Court extensively address the nature of the right protected by the Second Amendment. The earliest of the Supreme Court cases, *United States v. Cruikshank*,[6] arose from a conspiracy indictment brought against several white defendants under the 1870 Enforcement Act.[7] The second count of the indictment accused the defendants of having the intent to "hinder and prevent [two African-American men from exercising] the 'right to keep and bear arms for a lawful purpose.'"[8] The Court provided little guidance on the meaning of the Second Amendment. Addressing the defendants' appeal of their conviction, the Court found that "bearing arms for a lawful purpose" was neither created by the Constitution nor dependent upon the Constitution for its existence.[9] Despite this reference to the right to keep and bear arms, the Court also reflected the common legal view of the time that the Bill of Rights was only applicable to the federal government: "The [S]econd [A]mendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government."[10]

The next case to address the meaning of the Second Amendment was *Presser v. State of Illinois*.[11] Presser was convicted of violating a section of the Illinois Military Code that forbade "any body of men whatever, other than the regular

6. 92 U.S. 542 (1875).
7. *Id.* at 545.
8. *Id.*
9. *Id.* at 553.
10. *Id.*
11. 116 U.S. 252 (1886).

organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof."[12] The petitioner challenged his conviction as a violation of the Second Amendment.[13] However, the Court found that this section of the Illinois Military Code did not violate the Second Amendment because it did not prevent qualified people from serving in either the United States or state militias.[14] Furthermore, the Court continued to adhere to the proposition that the Second Amendment was applicable only to the federal government and not the states.[15]

The most recent Supreme Court interpretation of the Second Amendment prior to *Heller* was *United States v. Miller*.[16] The defendant in *Miller* had been convicted of violating the National Firearms Act by transporting a shotgun with a barrel measuring less than eighteen inches in length across state lines.[17] The Court found that the provision of the National Firearms Act in question did not violate the Second Amendment as it did not interfere with the maintenance of the militia.[18] Because the weapons prohibited by the federal provision did not have a "reasonable relationship" to the maintenance of a militia, the Court held that the Second Amendment did not protect the defendant's right to possess the shotgun at issue.[19] Like the other Supreme Court jurisprudence, *Miller* focused almost exclusively on the relationship between the Second Amendment and the militia, developing a definition for the term "militia" as determined by sources produced at the time of the drafting and ratification of the Second Amendment.[20]

While the Supreme Court remained silent on the issue for roughly seventy years after *Miller*, legal scholars continued to debate the nature of the right protected by the Second Amendment during the twentieth century.[21] Two basic theories about the nature of the right—the collective rights theory and the individual right

12. *Id.* at 253.
13. *Id.* at 264–65.
14. *Id.*
15. *Id.*
16. 307 U.S. 174 (1939).
17. *Id.* at 175; 26 U.S.C § 1132 (1934).
18. *Miller*, 307 U.S. at 178.
19. *Id.*
20. *Id.* at 178–82.
21. *See generally* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (noting the increase in Second Amendment scholarship associated with the growing importance of the political gun control debate in the late twentieth century).

theory—emerged from this lively academic debate.[22] The collective rights theory claims that the Second Amendment protects the right of the states to maintain a militia without federal interference.[23] This theory adopts a narrow definition of militia, "which includes only current members of the National Guard, Army Reserve Corps[], and other government sponsored military forces."[24] Because of this interpretation, many collective rights theorists believe that the Second Amendment has become anachronistic and is no longer applicable to modern society.[25] On the other hand, the individual right theory claims that the Second Amendment protects an individual right to keep and bear arms.[26] Proponents of this theory believe that this right is protected from infringement by either the federal or state government.[27] The individual right theory has continued to attract legal scholars throughout the late twentieth century.[28]

While scholars argued over the nature of the Second Amendment, litigation on this issue continued in federal district and appellate courts.[29] In *United States v. Emerson*, a Texas state court issued several restraining orders against Emerson after he was engaged in a domestic dispute with his ex-wife's lover.[30] A few months later, Emerson was indicted for violating a federal firearm provision that prohibited a person subject to a restraining order from possessing a firearm "in and affecting interstate

22. Anthony Gallia, Comment, *"Your Weapons, You Will Not Need Them." Comment on the Supreme Court's Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 AKRON L. REV. 131, 135–46 (1999).

23. Robert Harman, Note and Comment, *The People's Right to Bear Arms—What the Second Amendment Protects: An Analysis of the Current Debate Regarding What the Second Amendment Really Protects*, 18 WHITTIER L. REV. 411, 415 (1997).

24. *Id.* at 414–15.

25. *See* Gallia, *supra* note 22, at 144; Harman, *supra* note 23, at 414; Andrea Moates, Note, *Second Amendment Jurisprudence: The Possible Destruction of the Rights of "The People,"* 30 OKLA. CITY U. L. REV. 363, 392 (2005).

26. Harman, *supra* note 23, at 413.

27. *Id.*

28. *See, e.g.*, Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 12–13 (2000); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

29. *See* United States v. Wright, 117 F.3d 1265 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977); Cases v. United States, 131 F.2d 916 (1st Cir. 1942).

30. 270 F.3d 203, 211 (5th Cir. 2001).

commerce."[31] Emerson challenged the constitutionality of this federal firearm provision, claiming that it violated his Second Amendment rights.[32]

In determining the constitutionality of the federal firearm provision at issue, the Fifth Circuit provided its own interpretation of the Second Amendment. The court first analyzed *Miller*, the most recent (at the time) Supreme Court precedent on the Second Amendment. The Fifth Circuit reasoned that *Miller* was likely decided on the premise that the shotgun at issue was not considered part of the class of arms protected by the Second Amendment.[33] Furthermore, the court found that *Miller* should not be limited to protecting arms within the militia context because the opinion failed to mention whether the defendants were members of a militia.[34] In light of this liberal reading of Supreme Court Second Amendment precedent and its own statutory and historical interpretations, the Fifth Circuit found that the Second Amendment protects an individual right to bear arms.[35] It defined this individual right as the right to possess firearms that can be used as personal weapons and that are not otherwise prohibited by the jurisprudential test established in *Miller*.[36]

The Fifth Circuit's interpretation of the Second Amendment as protecting an individual right to possess arms marked the first time that a federal appellate court adopted such a position.[37] In fact, the *Emerson* court recognized the revolutionary nature of its holding, acknowledging that no other federal circuit had endorsed this interpretation of the Second Amendment.[38] However, the court also found that such an individual right is subject to reasonable regulations.[39] As examples of such reasonable regulations, the Fifth Circuit provided the prohibition of firearm possession by "felons, infants and those of unsound mind."[40] In this context, the court upheld the federal firearm provision at issue as constitutional, finding its prohibition of firearm possession by a person

31. *Id.* at 211–12; *see* 18 U.S.C. § 922(g)(8) (2000).
32. *Emerson*, 270 F.3d at 212.
33. *Id.* at 224.
34. *Id.*
35. *Id.* at 260.
36. *Id.*
37. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2823 n.3 (2008) (Stevens, J., dissenting).
38. *Emerson*, 270 F.3d at 220.
39. *Id.* at 261.
40. *Id.*

considered a threat to a domestic partner to be a reasonable regulation.[41]

Shortly after *Emerson*, then-Attorney General John Ashcroft endorsed the Fifth Circuit's interpretation of the Second Amendment in a memorandum to all United States Attorneys.[42] The Attorney General approved both the restriction on the defendant's right to possess a firearm imposed by the federal firearm provision at issue and the individual right interpretation of the Second Amendment.[43] In addition, then-Attorney General Ashcroft stressed that the federal government would continue to maintain a balance between the enforcement of federal laws and the individual right to bear arms guaranteed by the Second Amendment.[44]

III. *DISTRICT OF COLUMBIA V. HELLER*

A. Facts and Procedural Background

The Supreme Court issued its much anticipated decision in *Heller* on June 26, 2008.[45] The main question presented in *Heller* was the constitutionality of a series of District of Columbia gun regulations that the Supreme Court characterized as effectively preventing the "possession of usable handguns in the home."[46] One District of Columbia statute required that all firearms be registered but imposed a blanket prohibition on the registration of handguns.[47] Despite this prohibition on the registration of handguns, a District of Columbia resident was permitted to carry a handgun if he had been issued a license to do so from the District of Columbia chief of police.[48] Furthermore, another statute required that any lawfully owned firearm be kept disassembled or bound by a trigger lock unless the firearm was kept in a place of business or used for lawful recreational purposes.[49]

Heller was a special police officer authorized to carry a handgun while serving on duty at the Federal Judicial Center in

41. *Id.* at 263.
42. Memorandum from John Ashcroft, United States Attorney General, on *United States v. Emerson* to United States Attorneys (Nov. 9, 2001).
43. *Id.*
44. *Id.*
45. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).
46. *Id.* at 2787–88.
47. *Id.*
48. *Id.*
49. *Id.* at 2788.

Washington, D.C.[50] After being denied a registration certificate for a handgun that he wanted to keep at home, Heller was one of several plaintiffs to challenge the District of Columbia gun regulations in *Parker v. District of Columbia*.[51] The federal district court initially denied injunctive relief to Heller because it did not recognize an individual right to keep and bear arms outside of the context of a militia.[52] On appeal, the Court of Appeals for the District of Columbia[53] reversed the district court and held that the Second Amendment protects an individual right to keep and bear firearms, that the general prohibition on handguns in the District of Columbia statutes at issue was unconstitutional, and that the requirement that firearms used for self-defense in the home be kept essentially non-functional was also unconstitutional.[54]

B. Majority Opinion by Justice Scalia

In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess firearms.[55] Writing for the majority,[56] Justice Scalia simply stated, "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."[57] To reach this holding, the majority engaged in a detailed analysis of the text, historical background, and legal precedent of the Second Amendment.

Beginning his analysis with the text of the Second Amendment, Justice Scalia divided the Second Amendment into two basic parts—the operative clause and the prefatory clause.[58] Under this classification, the operative clause consisted of the phrase "right of the people to keep and bear arms," and the prefatory clause consisted of the phrase "well-regulated Militia being necessary for the security of a free state."[59] After addressing the individual elements of the operative clause, Justice Scalia found that the overall purpose of the clause was to guarantee an "individual right

50. *Id.*
51. *Id.*
52. Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007).
53. Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).
54. *Id.*
55. *Heller*, 128 S. Ct. at 2799.
56. Justice Scalia was joined in his majority opinion by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 2787.
57. *Id.* at 2799.
58. *Id.* at 2789.
59. *Id.*

to possess and carry weapons in case of confrontation."[60] The majority also used history to support this interpretation of the operative clause, citing the importance of arms to the British in times of political upheaval and to the American colonists' own experience with political oppression by the British.[61]

The majority then addressed the meaning of the prefatory clause. The Court accepted the definition of the term "militia" from *Miller* as "all males physically capable of acting in concert for the common defense."[62] Meanwhile, the majority interpreted the phrase "free state" to refer to a free polity rather than individual states.[63] While this interpretation of the prefatory clause emphasizes the need to preserve the militia, the Court found that it does not limit the scope of the operative clause; in other words, the right to a militia is not the only right guaranteed by the Second Amendment.[64]

After addressing various historical interpretations of the Second Amendment, the Court then discussed its interpretation of the Second Amendment in light of its own precedent.[65] Although *Cruikshank* engaged in only a limited discussion of the Second Amendment,[66] the case seemed to imply that the Second Amendment protects an individual right because it did not discuss whether the alleged victims in the case were deprived of their right to keep and bear arms within the context of a militia.[67] The Court also found that *Presser*[68] did not prevent an individual right interpretation of the Second Amendment.[69] This interpretation of the Second Amendment would still allow the states to prohibit private military organizations such as the one at issue in *Presser*.[70] The majority then noted that *Miller* failed to discuss the scope of the Second Amendment.[71] Rather, *Miller* involved the scope of weapons protected under the Second Amendment—not the nature of the protected right.[72] In conclusion, the Court found that its own

60. *Id.* at 2797.
61. *Id.* at 2797–99.
62. *Id.* at 2799–800.
63. *Id.* at 2800.
64. *Id.* at 2801–02.
65. *Id.* at 2812–16.
66. Cruikshank v. United States, 92 U.S. 542 (1875).
67. *Heller*, 128 S. Ct. at 2812–13.
68. Presser v. Illinois, 116 U.S. 252 (1886).
69. *Heller*, 128 S. Ct. at 2813.
70. *Id.*
71. *Id.* at 2814.
72. *Id.*

precedent did not prevent the individual right interpretation of the Second Amendment endorsed in *Heller*.[73]

Though the majority held that the Second Amendment protects an individual right to bear arms, the *Heller* Court also stated that the government can limit this right.[74] In fact, the Court specifically found that most traditional prohibitions on firearm possession should be upheld; such prohibitions include firearm possession by felons or mentally ill persons and "in sensitive places such as schools and government buildings . . . ."[75] It also discussed other possible limitations on the right to keep and bear arms, including the type of arms protected by the Second Amendment.[76] Furthermore, the Court held that the Second Amendment only protects an individual right to keep and bear arms that were "in common use at the time" the Second Amendment was drafted.[77]

After examining the nature and the scope of the Second Amendment, the Court applied its interpretation of the Second Amendment to the District of Columbia statutes at issue.[78] First, the majority found the statute establishing an absolute prohibition on handguns to be unconstitutional because it violated the inherent right of self-defense protected by the Second Amendment.[79] The Court provided two main reasons for the statute's unconstitutionality: one, the fact that handguns are the most popular means of self-defense in America,[80] and two, because the prohibition significantly affects the home, the place where people are most likely to defend themselves and their property.[81]

The majority also found that this statute would be unconstitutional under any level of constitutional scrutiny.[82] While specifically avoiding the question of how gun regulations like the District of Columbia statute should be tested for constitutionality, the *Heller* Court did emphasize that rationality review would be an inappropriate level of scrutiny to evaluate a statute that restricts an enumerated constitutional right, opining that the application of such a low level of review to alleged violations of the Second Amendment would render the Second Amendment essentially

73. *Id.* at 2816.
74. *Id.*
75. *Id.* at 2816–17. The Court found that this list of permissible restrictions was not intended to be exhaustive. *Id.* at 2817 n.26.
76. *Id.* at 2817.
77. *Id.*
78. *Id.* at 2817–22.
79. *Id.* at 2817.
80. *Id.* at 2818.
81. *Id.* at 2817.
82. *Id.* at 2817–18.

useless.[83] Finally, the Court found the statute requiring that firearms within the home be kept inoperable to be unconstitutional because that requirement made it "impossible" for an individual to exercise the core right protected by the Second Amendment—the right of self-defense.[84]

C. Dissenting Opinion by Justice Stevens

In the first dissenting opinion, Justice Stevens[85] found that the Second Amendment protects an individual right to keep and bear arms for military purposes but does not prevent a legislature from restricting an individual's nonmilitary use of arms.[86] Like the majority, the Stevens dissent engaged in a textual and historical analysis of the Second Amendment to support its interpretation. Justice Stevens divided the Second Amendment into three basic parts: an introduction, which explains the purpose of the Second Amendment; the class of persons who enjoy the right provided by the Second Amendment; and the essence of the right.[87] According to his textual analysis, the introductory phrase "[a] well regulated Militia, being necessary to the security of a free State" clearly states that the purpose of the Second Amendment is the preservation of the militia.[88] Unlike the majority, Justice Stevens found the phrase "the people" to be collective in nature and to refer to the militia.[89] Furthermore, the collective nature of "the people" is emphasized by its use in other amendments, such as the First Amendment.[90] Finally, the Stevens dissent defined the phrase "to keep and bear arms" as the "right to use and possess arms in conjunction with service in a well-regulated militia."[91] Justice Stevens engaged in an extensive linguistic analysis to arrive at this definition. First, he found that the phrase "to bear arms" is most often used in a military context; then, he found that the phrase "to keep arms" is used in many contemporary militia statutes to refer to the common practice of having militia members store arms in their homes to be ready for military action on short notice.[92]

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83. *Id.* at 2818 n.27.
84. *Id.* at 2818.
85. Justice Stevens was joined in his dissenting opinion by Justices Souter, Ginsburg, and Breyer. *Id.* at 2822.
86. *Id.* at 2823 (Stevens, J., dissenting).
87. *Id.* at 2824.
88. *Id.*
89. *Id.* at 2827.
90. *Id.*
91. *Id.* at 2831.
92. *Id.* at 2828, 2830.

After engaging in a textual analysis, Justice Stevens discussed the historical background of the Second Amendment.[93] He found it particularly important that James Madison (the primary drafter of the Second Amendment) based his version of the Second Amendment on a Virginia proposal.[94] This proposal was different from many others considered in the drafting of the Bill of Rights because it specifically rejected civilian firearm use and was decidedly military in nature.[95] The Stevens dissent also focused on the conscientious objector provision that James Madison originally included in the Second Amendment.[96] This provision excused people from military service if they had religious objections to doing so; Justice Stevens believed that this demonstrated the military nature of the right protected by the Amendment.[97]

The final part of Justice Stevens' analysis examined the Supreme Court's limited Second Amendment precedent.[98] Though disagreeing with the majority's interpretation of *Cruikshank*, he nonetheless found that the case did not add much to the understanding of the Second Amendment.[99] While *Presser* did not necessarily address the meaning of the Second Amendment, the Stevens dissent found it to hold that the Second Amendment does not prohibit gun regulation by the states or protect the "use of arms outside the context of a militia . . . organized by the State or Federal Government."[100] Finally, the Stevens dissent placed great emphasis on the last major Second Amendment case heard by the Supreme Court—*Miller*.[101] Unlike the majority, Justice Stevens found the Court's basic distinction to be between military and non-military use of firearms.[102] Based on its understanding of the holding of *Miller*, the Stevens dissent found that the Second Amendment protects firearm use only within the context of the militia.[103] In conclusion, Justice Stevens found the majority's holding to break from a clear line of Supreme Court jurisprudence regarding the nature of the Second Amendment.[104]

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93. *Id.* at 2831–42.
94. *Id.* at 2835.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 2842–46.
99. *Id.* at 2843.
100. *Id.*
101. *Id.* at 2845–46.
102. *Id.* at 2845.
103. *Id.*
104. *Id.* at 2846.

D. Dissenting Opinion by Justice Breyer

In the second dissenting opinion, Justice Breyer[105] focused on the level of scrutiny to be used when determining the constitutionality of a gun regulation.[106] Even though Justice Breyer agreed with Justice Stevens as to the collective nature of the Second Amendment, Justice Breyer based his dissent on the assumption that the Second Amendment protects an individual right to self-defense in accordance with the majority.[107] The Breyer dissent first criticized the majority for its finding that the District of Columbia statute's absolute prohibition on the registration of handguns would be unconstitutional under any level of scrutiny.[108] For example, the statute would be constitutional under a rationality review because the regulation bears a "rational relationship" to the government's "'legitimate' life-saving objective" of preventing gun-related accidents.[109] However, Justice Breyer admitted that the use of a true strict scrutiny standard is impractical in evaluating the constitutionality of gun regulations because every gun regulation seeks to promote the compelling government interest of public safety and crime prevention.[110] Public safety and crime prevention are used to uphold statutes restricting personal liberties in a variety of ways and are applicable in the context of gun regulation.[111]

In recognition of the difficulties in applying strict scrutiny to gun regulations, the Breyer dissent proposed a solution to the problem of evaluating the constitutionality of gun regulations.[112] Justice Breyer described his solution as follows: "[A]n interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."[113] To prove that this interest-balancing inquiry would be a practical solution, Justice Breyer applied it to the District of Columbia statute banning handgun registration.[114]

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105. Justice Breyer was joined in his dissent by Justices Stevens, Souter, and Ginsburg. *Id.* at 2847.
106. *Id.* at 2850–53 (Breyer, J., dissenting).
107. *Id.* at 2847.
108. *Id.* at 2851.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 2851–52.
113. *Id.* at 2852.
114. *Id.* at 2854.

First, Justice Breyer considered the municipal government's objective in passing the statute. After providing pages of statistical evidence regarding gun violence in both the District of Columbia and the United States, he found that the city council pursued the legitimate government objectives of public safety and crime prevention in enacting the statute.[115] Justice Breyer then examined "the extent to which" the statute "burdens the interests that the Second Amendment seeks to protect."[116] He noted that while the statute imposed only a minimal burden on military and hunting interests, it imposed a much more significant burden on an individual's interest in self-defense.[117] In evaluating this burden on the right of self-defense, Justice Breyer considered whether there were less restrictive alternatives but determined that there were no less restrictive means by which to reduce the number of handguns in the District of Columbia than the total ban prescribed in the gun regulations at issue.[118] Finally, the Breyer dissent asked whether the burden imposed on the Second Amendment interest in self-defense was disproportionate.[119] Justice Breyer found that the restriction imposed by the statute was not disproportionate because it was narrowly tailored to the problems that the statute sought to remedy.[120] The statute only prohibited handguns, the weapon most associated with violent crime and firearm deaths, and was limited in scope to the urban area of the District of Columbia.[121] Furthermore, the interest in self-defense protected by the Second Amendment was only of secondary importance in comparison to its main objective regarding the militia.[122] Justice Breyer concluded by criticizing the majority for leaving cities without viable gun regulations.[123]

Although the majority opinion in *Heller* found the Second Amendment to protect an individual right to possess firearms, it failed to answer many questions about the Second Amendment. These questions include the scope of the right protected by the Second Amendment, whether the Second Amendment should be applicable to the states,[124] and the level of scrutiny to be used in

115. *Id.* at 2854–60.
116. *Id.* at 2861.
117. *Id.* at 2861–64.
118. *Id.*
119. *Id.* at 2865.
120. *Id.* at 2865–66.
121. *Id.* at 2866.
122. *Id.*
123. *Id.* at 2869.
124. The following analysis regarding the appropriate level of scrutiny for violations of the Second Amendment assumes that the Second Amendment will

evaluating the constitutionality of gun regulations. These questions leave room for future litigation to determine the true impact of the Supreme Court's interpretation of the Second Amendment. Of the several unanswered questions left in the wake of *Heller*, the level of scrutiny has the most potential to transform American gun regulations.

IV. LEVEL OF SCRUTINY

The Supreme Court traditionally uses three levels of constitutional scrutiny—rationality review, intermediate scrutiny, and strict scrutiny—in evaluating claims that a person's constitutional rights have been infringed. Each of these three levels of constitutional scrutiny contains two prongs in its analysis.[125] The first prong determines the government interest in a particular regulation at issue, while the second prong examines the connection between the government interest and the regulation.[126] Although both prongs change depending on the level of scrutiny, the second prong is the more important prong because it usually determines the constitutionality of the regulation.[127]

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be incorporated. At the time *Heller* was issued, the Second Amendment had not been officially incorporated through the Fourteenth Amendment so as to be applicable against the states; in fact, *Cruikshank* specifically held that the Second Amendment is a restriction only on the federal government. Cruikshank v. United States, 92 U.S. 542 (1875). However, the modern test for incorporation is derived from *Duncan v. Louisiana* and asks whether a particular right "is necessary to an Anglo-American regime of ordered liberty." 391 U.S. 145, 149 n.14 (1968). The *Heller* majority defines the right protected by the Second Amendment in such a manner that it satisfies the *Duncan* test. The Court recently granted certiorari to address the incorporation of the Second Amendment. Otis McDonald v. City of Chicago, Ill., 130 S. Ct. 48 (2009).

125. For the two prongs of rationality review, see *infra* Part IV.A. For the two prongs of strict scrutiny, see *infra* Part IV.B. For the two prongs of intermediate scrutiny, see *infra* Part IV.C.

126. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227 (2002).

127. The importance of the second prong of any given level of constitutional scrutiny is especially clear when considering the constitutionality of gun regulations. In the context of gun regulations, the government interests at issue—regardless of the level of constitutional scrutiny—are always public safety and crime prevention. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 731 (2007). As a result, it has been acknowledged that the connection between a particular regulation and these government interests (i.e., the second prong) will be the main source of litigation

A. Rationality Review

Rationality review is the minimal protection given to constitutional rights.[128] Rationality review answers the basic question of whether a particular law is rationally related to a legitimate state interest.[129] Courts often use rationality review when evaluating the constitutionality of economic and social welfare regulations.[130] Under this level of scrutiny, the courts presume that statutes are constitutional.[131]

Throughout the early twentieth century, the Supreme Court used rationality review to evaluate infringements of the economic rights protected by substantive due process.[132] For example, *Lochner v. New York* struck down a statute limiting the number of hours that a baker could work per week as a violation of a baker's liberty of contract protected by substantive due process.[133] However, *West Coast Hotel Co. v. Parrish* (*Parrish*) marked a significant change in the Court's approach to economic substantive due process claims.[134] In *Parrish*, the Court upheld a state law guaranteeing minimum wages for hotel maids, finding that the state had furthered a legitimate government purpose by aiding women, an economically disadvantaged group within society.[135] This judicial deference to economic regulations was confirmed by the Court's opinion in *Williamson v. Lee Optical of Oklahoma, Inc.*[136] *Williamson* essentially showed the Court's willingness to find a rational basis for a legislature's actions regarding any sort of economic regulation. Because rationality review has historically been such a deferential standard of review reserved for economic regulation, its usefulness in evaluating the constitutionality of gun regulations seems highly unlikely.

Rationality review is the only level of scrutiny mentioned specifically in the majority opinion of *Heller*.[137] Although the

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as gun regulations are challenged in the wake of *Heller*. Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1132 (2000).

128. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 160–61 (1989).

129. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (7th ed. 2004).

130. *Id.* § 11.4.

131. *Id.* § 14.3

132. *Id.* §§ 11.3–.4.

133. 198 U.S. 45 (1905).

134. 300 U.S. 379 (1937).

135. *Id.* at 398–400.

136. 348 U.S. 483, 490 (1955).

137. District of Columbia v. Heller, 128 S. Ct. 2783, 2818 n.27 (2008).

majority's discussion of rationality review might be considered dicta, Justice Scalia expressly found rationality review to be an inappropriate level of constitutional scrutiny for gun regulations in general: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[138] However, Justice Scalia's condemnation of rationality review as an appropriate level of scrutiny is not immediately obvious, especially in light of Justice Breyer's application of rationality review to the District of Columbia statute at issue.[139] In passing, Justice Breyer found that the statute could be upheld as constitutional using rationality review because it had a rational relationship to the legitimate objective of "prevent[ing] gun-related accidents."[140] Even though his dissent applied rationality review to the statute, Justice Breyer failed to address whether this level of constitutional scrutiny was the proper way for courts to evaluate the constitutionality of gun regulations. Based on courts' historical use of rationality review and the *Heller* Court's explicit dismissal of that level of scrutiny, courts should not use rationality review to determine the constitutionality of gun regulations.

B. Strict Scrutiny

In contrast to rationality review, strict scrutiny is the highest level of protection afforded to constitutional rights.[141] Strict scrutiny allows restriction of a constitutional right only when the restriction is narrowly tailored to serve a compelling government interest.[142] This level of scrutiny requires an extremely close connection between the restriction and the compelling government interest; in other words, a court asks whether the particular restriction is *necessary* to promote the government's compelling interest.[143] The Supreme Court has used this level of constitutional scrutiny in a variety of contexts, including content-based restrictions on the right of free speech protected by the First

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138. *Id.*
139. *See id.* at 2851 (Breyer, J., dissenting).
140. *Id.*
141. *See generally* Richard H. Fallon, Jr., *Strict Judicial Review*, 54 UCLA L. REV. 1267 (2007) (discussing the development of strict scrutiny to provide greater protection for constitutional rights than that provided by rationality review).
142. NOWAK & ROTUNDA, *supra* note 129, § 14.3.
143. *Id.*

Amendment;[144] infringement of fundamental rights protected by substantive due process;[145] and equal protection in those cases involving suspect classes, such as race[146] or alienage,[147] and fundamental rights, such as the right to vote.[148]

At first glance, strict scrutiny appears to be the logical level of scrutiny that courts should use in evaluating the constitutionality of gun regulations. The Fifth Circuit, the first federal appellate court to endorse an individual right interpretation of the Second Amendment, anticipated the use of strict scrutiny in evaluating gun regulations.[149] In discussing what restrictions on the individual right to keep and bear arms would be acceptable, the court found that this right could be restricted by "limited, narrowly tailored specific exceptions."[150] The court's holding that the Second Amendment protects an individual right strongly implies that the right is fundamental and thereby invokes a classic application of strict scrutiny. Furthermore, the court referred explicitly to the second prong of the strict scrutiny test in allowing only those restrictions on the Second Amendment that are narrowly tailored.

Another argument in favor of the application of strict scrutiny to the Second Amendment depends on whether the right protected by the Second Amendment is considered fundamental. Because the Second Amendment will likely be incorporated through the Fourteenth Amendment to apply to states,[151] at least the core right

144. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377 (1992) (finding a city ordinance banning a certain type of symbolic speech unconstitutional because it was not "necessary to achieve [the city's] compelling interests"); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam opinion finding the Ohio Criminal Syndicalism Act unconstitutional for its failure to distinguish between advocacy and speech that is intended to incite unlawful activity).

145. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a Connecticut statute preventing the use of contraception unconstitutional).

146. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (holding a Virginia miscegenation statute unconstitutional because it had no legitimate purpose other than invidious racial discrimination); Korematsu v. United States, 323 U.S. 214 (1944) (finding that restrictions that infringe the rights of a particular racial group are suspect and subject to "the most rigid scrutiny").

147. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (finding an Arizona statute denying aliens welfare benefits unconstitutional, holding that classifications based on alienage "are inherently suspect and subject to close judicial scrutiny").

148. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (finding a Virginia poll tax unconstitutional, holding "wealth or fee paying [has] no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned").

149. United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001).

150. *Id.*

151. *See supra* note 124.

of the Second Amendment—the right of self-defense[152]—will also likely be classified as a fundamental right.[153] Even though a lower level of constitutional review may be used to examine a regulation that infringes on a fundamental right,[154] strict scrutiny is traditionally used when the core of a fundamental right has been substantially restricted by a particular regulation.[155] Presuming that the right of self-defense protected by the Second Amendment is classified as a fundamental right, strict scrutiny is the appropriate level of constitutional review to evaluate cases involving a severe burden on that right.[156]

This application of strict scrutiny is consistent with the treatment of the District of Columbia statute at issue in *Heller*. The government will likely seek to further the same objectives of public safety and crime prevention in crafting any gun regulation. As mentioned in the dissent by Justice Breyer, both of these objectives are compelling government interests.[157] As a result, virtually all gun regulations, including the statute in *Heller*, would at least satisfy the first prong of the strict scrutiny test. On the other hand, a virtual prohibition on handguns like the District of Columbia statute in *Heller* would not satisfy the second prong of the test because it severely burdened the core of the right protected by the Second Amendment—the right of self-defense. Less restrictive means are available to further the government's interest

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152. *See* Part III.A; *see also* District of Columbia v. Heller, 128 S. Ct. 2873, 2817–18 (2008) (holding that "the inherent right of self-defense has been central to the Second Amendment right" and referring to "the core lawful purpose of self-defense" within the Second Amendment).

153. *See supra* Part III.B. *Heller* defines the right protected by the Second Amendment in such a way as to satisfy the *Duncan* test of fundamentality for incorporation. Nelson Lund, *Anticipating the Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 193–96 (2008). Even though the test for incorporation as expressed by *Duncan* and the determination of a right as fundamental are not identical, the Court has appeared willing to recognize that a right that satisfies the incorporation test should also be treated as a fundamental right. Janice Baker, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 55 (2002).

154. *See* discussion *infra* Part IV.C.1.

155. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002) (using strict scrutiny to find a Minnesota statute unconstitutional because it burdened political speech, often considered the core of the right of free speech).

156. Baker, *supra* note 153, at 55.

157. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting) ("[A]lmost every gun-control regulation will seek to advance (as the one here does) a 'primary concern of every government—a concern for the safety and indeed the lives of its citizens.' . . . The Court has deemed that interest, as well as the 'the Government's general interest in preventing crime' to be 'compelling.'" (quoting United States v. Salerno, 481 U.S. 739, 755 (1987))).

in public safety and crime prevention than a strict curtailment of an individual's right of self-defense.[158] In sum, strict scrutiny appears to be an appropriate level of review when a particular gun regulation directly interferes with the fundamental right of self-defense protected by the Second Amendment.

Despite the seeming ease with which strict scrutiny can be applied to the District of Columbia statute, the use of strict scrutiny is much more limited with regard to the vast majority of the nation's other gun regulations. The extremely restrictive District of Columbia statute is an outlier among the nation's gun regulations.[159] One legal scholar even noted prior to *Heller* that the statute at issue in the case had the potential to be one of the few gun regulations ever found unconstitutional in violation of the Second Amendment.[160] Unlike the District of Columbia statute, most gun regulations do not infringe upon the core right of self-defense protected by the Second Amendment.[161] Because these regulations do not violate the fundamental right of self-defense, strict scrutiny is an inappropriate level of constitutional review to evaluate the constitutionality of the vast majority of gun regulations.

C. Intermediate Scrutiny: Reasonableness Review

The final traditional level of constitutional review, commonly referred to as intermediate scrutiny, falls between rationality review and strict scrutiny. Despite its frequent references to strict scrutiny[162] and rationality review,[163] the Supreme Court has never formally recognized intermediate scrutiny *per se* as a level of constitutional scrutiny, instead using a variety of labels to describe this medium level of scrutiny. Regardless of the name used to describe it, this level of scrutiny requires that a particular restriction have a substantial relationship to an important government interest.[164] The Court often employs intermediate

158. *See generally* Part V.

159. Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L. J. 167, 178 (2008).

160. *Id.* at 179.

161. *See generally* Part V.

162. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Graham v. Richardson, 403 U.S. 365 (1971); Skinner v. Oklahoma, 316 U.S. 535 (1942).

163. *See* Romer v. Evans, 517 U.S. 620 (1996); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955).

164. NOWAK & ROTUNDA, *supra* note 129, § 14.3.

scrutiny in the context of equal protection in those cases involving quasi-suspect classes such as gender[165] or illegitimacy.[166] The Court has also applied this less stringent standard of review when addressing violations of fundamental rights, including restrictions on the time, place, and manner of speech in the context of the First Amendment[167] and the undue burden standard articulated in the context of substantive due process.[168]

The generally accepted approach to intermediate scrutiny operates in much the same way that strict scrutiny would operate in evaluating the constitutionality of gun regulations.[169] The important government interests in intermediate scrutiny are the same as the compelling government interests in strict scrutiny—public safety and crime prevention.[170] In addition, the second prong of strict scrutiny, which requires narrowly tailored restrictions, is similar in theory to the second prong of intermediate scrutiny, which requires a substantial relationship between the regulation and the important government interest.[171] Despite these similarities in the levels of scrutiny, statutes are more likely to survive constitutional challenges under intermediate scrutiny than under strict scrutiny.[172]

Beyond the traditional two-pronged test of intermediate scrutiny, the Supreme Court often applies this level of constitutional review in a much more flexible manner known as reasonableness review. Reasonableness review considers whether the burden that a regulation imposes on a constitutional right is reasonable.[173] Under this more flexible approach, intermediate

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165. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (holding Virginia Military Institute's admission policy of only admitting males unconstitutional); Craig v. Boren, 429 U.S. 190 (1976) (finding a statute preventing the sale of alcohol to men under the age of twenty-one and to women under the age of eighteen unconstitutional).

166. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (finding a state probation statute unconstitutional because it prevented an illegitimate child from receiving an inheritance from his father and criticizing the state court for failing to properly evaluate the relationship between the statute and the state's objective of an efficient probate system).

167. *See* discussion *infra* Part IV.C.1.a.

168. *See* discussion *infra* Part IV.C.1.b.

169. Winkler, *supra* note 127, at 731.

170. *Id.*

171. *Id.* at 731–32.

172. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358 (2006). *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the Supreme Court's application of strict scrutiny as "fatal in fact").

173. NOWAK & ROTUNDA, *supra* note 129, § 14.3.

scrutiny acts as a stronger level of rationality review because a legislature must prove that the law at issue *actually* advances public safety and prevents crime—not simply that the law would be a rational way to promote these interests, as is required under the traditional rationality review standard.[174] The reasonableness review of intermediate scrutiny would consider whether the regulation imposed on the individual right to keep and bear arms is justified by the actual social benefits resulting from that restriction.[175] At the same time, the reasonableness review of intermediate scrutiny serves as a less stringent level of review than strict scrutiny when the law at issue does not prevent the exercise of an individual right. Consequently, the reasonableness review of intermediate scrutiny appears to resolve many of the problems that traditional rationality review and strict scrutiny pose in evaluating the constitutionality of gun regulations.

In applying this intermediate level of review, courts frequently refer to legislative findings and statistics.[176] As indicated by the extensive statistical data provided in Justice Breyer's dissent,[177] gun regulations are often supported by a vast amount of legislative findings regarding the dangers of guns across the nation and especially in urban areas.[178] These legislative findings can assist courts in determining whether the statute at issue actually furthers the government's interest in enacting that statute. Additionally, these legislative findings allow a court to evaluate a particular statute in light of the problems that may be unique to a jurisdiction, such as the jurisdiction's urban nature.[179] For example, Justice Breyer provided statistical data regarding the crime rate in the District of Columbia following the implementation of the handgun prohibition at issue.[180] If the majority in *Heller* had applied intermediate scrutiny to evaluate the constitutionality of the District of Columbia statute, the Court could have found that the statute was not furthering the important government interest of

174. *See* Kelso, *supra* note 126, at 228.

175. Mark Tushnet, *A Symposium on Firearms, the Militia and Safe Cities: Merging History, Constitutional Law and Public Policy*, 1 ALB. GOV'T L. REV. 354, 358 (2008).

176. NOWAK & ROTUNDA, *supra* note 129, § 14.5.

177. District of Columbia v. Heller, 128 S. Ct. 2783, 2854–61 (2008) (Breyer, J., dissenting).

178. *See, e.g.*, Brief of Academics as Amici Curiae in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290).

179. *Heller*, 128 S. Ct. at 2861–62 (citing Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002)).

180. *Id.*

crime prevention because the crime rate actually increased in the wake of the handgun prohibition.[181]

The acceptance of the reasonableness review of intermediate scrutiny and the rejection of rationality review and strict scrutiny is the best solution to the problem of evaluating the constitutionality of gun regulations. Not only has this reasonableness review of intermediate scrutiny been used by the Supreme Court in a variety of constitutional contexts, it is the standard of review used by states in evaluating the constitutionality of gun regulations.[182] Applied to gun regulations, the reasonableness review of intermediate scrutiny results in a balancing test that considers the interest of the government in public safety and crime prevention in light of any infringement by a particular gun regulation on the individual right to keep and bear arms as protected by the Second Amendment.

1. Supreme Court Precedent

a. First Amendment

A comparison to the level of scrutiny used to evaluate alleged First Amendment violations provides the best model for the effective application of the reasonableness review of intermediate scrutiny. The *Heller* majority endorsed the comparison between the First Amendment and the Second Amendment, noting that the right to keep and bear arms may be subject to limitations in the same way that the right of free speech is.[183] This comparison seems particularly appropriate in light of the historical litigation trends of the First and Second Amendments. Neither amendment was the subject of extensive litigation in early American history.[184] Rather, the First Amendment was extensively litigated beginning in the

181. *Id.* It is important to note that the *Heller* majority would likely interpret the statistics regarding the District of Columbia statute at issue in direct contrast to Justice Breyer's own conclusions.

182. *See* Part IV.C.1–2.

183. *Heller*, 128 S. Ct. at 2799.

184. The free speech aspect of the First Amendment was not the subject of much litigation prior to the early twentieth century following World War I. The protection of free speech became a subject of litigation before the Supreme Court in light of the Espionage Act and Sedition Act, statutes designed to prevent speech undermining America's efforts in World War I. The famous case of *Schenck v. United States*, 249 U.S. 47 (1919), opened the floodgates of First Amendment jurisprudence. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 310–11 (1996); *see also* Van Alstyne, *supra* note 28, at 1239, 1241.

early twentieth century, eventually culminating in the present body of complex First Amendment jurisprudence.[185] This parallels the Second Amendment—rarely the subject of litigation from the time of its ratification but now experiencing an explosion of litigation following its rediscovery in *Heller*.

Though the right of free speech is a fundamental right, courts do not necessarily apply strict scrutiny to all regulations that impact the First Amendment.[186] Rather, courts divide First Amendment restrictions into several categories, which are analyzed using different levels of scrutiny. For example, restrictions on the content of speech are subject to strict scrutiny, while content-neutral restrictions on speech, such as time, manner, and place restrictions, are subject to a reasonableness review that is comparable to the reasonableness review of intermediate scrutiny.[187] Similarly, like content-neutral restrictions on speech, restrictions on the individual Second Amendment right to keep and bear arms may be analyzed under an intermediate level of scrutiny.[188] This analysis would require courts to develop a framework that fits the needs of the Second Amendment; this might include categorizing restrictions based on what class of people can possess firearms, places where firearms may be used, and the types of firearms a person may possess. Under this framework, courts would apply an intermediate level of scrutiny when considering the constitutionality of government restrictions falling within the aforementioned categories.

While this analogy to First Amendment constitutional scrutiny analysis appears to be readily applicable to the developing body of Second Amendment jurisprudence, it does not provide a solution to the questions left unanswered by *Heller*. The First Amendment categories have developed after many years of extensive litigation over alleged violations of the rights protected by the First Amendment.[189] Continued litigation over the rights protected by the Second Amendment in the wake of *Heller* will likely result in a similar development of categories. However, as many gun regulations will likely be challenged in the near future, lower courts need a workable solution as to how to determine the constitutionality of gun regulations now. As a result, the Supreme Court's application of the reasonableness review of intermediate

185. *See* White, *supra* note 184.
186. Klukowski, *supra* note 159, at 186–87.
187. *Id.*
188. *Id.* at 187–88.
189. *See generally* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

scrutiny in other constitutional contexts, such as substantive due process, serves as a more practical example of this level of review.

b. Fundamental Rights

The Supreme Court has also utilized a balancing test in cases involving fundamental rights specifically enumerated within the Constitution.[190] One such precedent is *Burdick v. Takushi*, in which the Supreme Court articulated a balancing test for considering the reasonableness of a regulation that allegedly violates a plaintiff's right to vote.[191] In fact, the Court phrased the issue in the case as follows: "[W]hether Hawaii's prohibition on write-in voting *unreasonably* infringes upon its citizens' right under the First and Fourteenth Amendment."[192] Burdick was a citizen of Hawaii who wanted to vote for a person who had not filed nominating papers in the primary and general elections.[193] He was informed by an opinion letter from the Hawaii Attorney General's office that such "write-in voting" was not permitted under current state election law.[194] While acknowledging that the right to vote is a fundamental right, the Court maintained that the right to vote is not a right without limitations.[195] The Court specifically rejected the application of strict scrutiny to all voting regulations and adopted a more flexible approach.[196] The Court established a reasonable regulation balancing test, weighing the injury imposed by an alleged violation of the First and Fourteenth Amendments against the purported government interests in limiting an individual's constitutional rights.[197] The Court held that only a minimal burden was imposed on Burdick's First and Fourteenth Amendment rights by the state's denial of his request for write-in voting.[198] Rather, the ballot access system already in place in accordance with state law provided ample opportunity "to make free choices and to associate politically through the vote."[199]

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190. *See generally* NOWAK & ROTUNDA, *supra* note 129, § 14.3 (describing the standard of review used by the Supreme Court in cases involving fundamental rights).
191. 504 U.S. 428 (1992).
192. *Id.* at 430 (emphasis added).
193. *Id.*
194. *Id.*
195. *Id.* at 433–34.
196. *Id.*
197. *Id.* at 434.
198. *Id.* at 438–39.
199. *Id.*

Burdick demonstrates the advantages of applying a similar reasonableness review to gun regulations. Like the right to vote, the individual right to keep and bear arms is subject to some limits.[200] A reasonable regulation balancing test is particularly appropriate for fundamental rights because it ensures that an individual fundamental right is infringed upon only if the government's interests are considered more important than the individual's right. For example, in *Burdick* a plaintiff's right to vote in *any* conceivable manner was infringed upon because the state's interest in having an efficient democracy was more important.[201] The same analysis could be applied to a statute prohibiting citizens from carrying a firearm into a federal courthouse. As indicated by *Heller*, an individual has a right to keep and bear arms for self-defense; however, the need for self-defense is arguably less important in the context of a federal courthouse than it is in a person's own home.[202] As a result, a government's interests in public safety within its own buildings and the efficient administration of the law outweighs a citizen's individual right to keep and bear arms for self-defense in that particular situation.

Another case in which the Supreme Court used a balancing test to determine infringement of an individual right is *Planned Parenthood of Southeastern Pennsylvania v. Casey* (*Casey*), which arose from the constitutional challenge of several Pennsylvania statutes imposing limitations on a woman's ability to have an abortion.[203] In reaffirming *Roe v. Wade*'s basic holding that a woman has a right to an abortion before the point of viability, three Justices held that restrictions on a woman's right to have an abortion are constitutional provided that they do not impose an "undue burden" on such right.[204] The Court further explained that an undue burden is a state regulation that places a "substantial obstacle" in the path of a woman's choice to have an abortion of a nonviable fetus.[205]

The undue burden standard articulated in *Casey* could have potentially interesting effects in determining the constitutionality of gun regulations. First, whether a woman's right to an abortion is fundamental remains somewhat questionable after the Court's

200. District of Columbia v. Heller, 128 S. Ct. 2783, 2816 (2008).
201. *Burdick*, 504 U.S. at 441.
202. *Heller*, 128 S. Ct. at 2817.
203. 505 U.S. 833, 844 (1992).
204. *Id.* at 844, 874.
205. *Id.* at 877.

decision in *Casey*;[206] similarly, the Court has yet to explicitly state that the Second Amendment individual right to bear arms is a fundamental right.[207] While the Second Amendment right will likely be recognized as a fundamental right by the Supreme Court, the undue burden standard set forth in *Casey* serves as a legitimate standard of review until the Court makes such a determination.

In addition, the undue burden standard that the Court applied to a series of state abortion statutes is likewise applicable to state gun regulations. Applying the undue burden standard allowed the Court to evaluate a series of allegedly unconstitutional statutes within the greater body of laws governing that particular subject.[208] In short, this standard of analysis allows a court to determine whether any statute imposes an undue burden on a particular right in light of the other unchallenged restrictions on the same subject. One can infer that this type of analysis was utilized in the *Heller* opinion, which did not consider the constitutionality of firearm licensing requirements, but did find the blanket prohibition of handguns to be unconstitutional.[209]

c. Fourth Amendment

Finally, the Supreme Court's Fourth Amendment jurisprudence also provides excellent examples of the successful application of a reasonable regulation balancing test standard of review to an enumerated constitutional right. Because the Fourth Amendment, like the Second Amendment, is part of the Bill of Rights and is granted special protection as a result, Fourth Amendment jurisprudence is a particularly applicable analogy for the Second Amendment. In addition, the Fourth Amendment is unquestionably incorporated through the Fourteenth Amendment to be applicable to the states,[210] as the Second Amendment is expected to be in light of *Heller*.[211]

The Court uses a reasonable regulation balancing test to examine alleged violations of the individual right protected by the

206. *See id.* at 871–72 (declining to follow cases that applied strict scrutiny to a woman's right of abortion).

207. *See Heller*, 128 S. Ct. at 2821 (acknowledging that the parameters of the Second Amendment were not fully defined by the opinion).

208. *Casey*, 505 U.S. at 844.

209. *Heller*, 128 S. Ct. at 2819, 2821–22.

210. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) (holding the Fourth Amendment exclusionary rule applicable to state courts); Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating the Fourth Amendment so as to be applicable to state governments).

211. *See supra* note 124.

Fourth Amendment. *Delaware v. Prouse* (*Prouse*) is one of many precedents that demonstrates the effective application of reasonableness review to this enumerated constitutional right.[212] In evaluating whether the officer's search of the defendant's car was a violation of the Fourth Amendment, the Court developed the following reasonable regulation balancing test: "The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[213] First, the Court acknowledged that the state has a legitimate interest in ensuring that drivers are qualified to operate cars and that those cars meet minimum standards of safe operation.[214] Thus, the Court found that the state has a legitimate interest in checking drivers' licenses and registrations.[215] However, the Court held that this public safety interest did not justify the infringement of the defendant's Fourth Amendment rights through the arbitrary traffic stop administered in *Prouse*.[216] The Court ultimately held that the search at issue was unreasonable and violated the Fourth Amendment.[217]

Prouse demonstrates two major advantages of a reasonable regulation balancing test. First, a balancing test can provide significant protection of an individual's constitutional rights even when the government has a compelling interest. The government interest in Fourth Amendment jurisprudence is often public safety or crime investigation—both of which are considered compelling government interests. In the same manner, the government interest will always be compelling within the context of the Second Amendment. Despite the compelling government interest present in any action challenging a gun regulation, a balancing test prevents courts from automatically deferring to the government without giving proper consideration to the individual constitutional right to keep and bear arms. Second, it demonstrates that a balancing test can be appropriate for a variety of situations. For example, a court may apply the Fourth Amendment balancing test to a search of a defendant's car,[218] person,[219] or home.[220] The

212. Delaware v. Prouse, 440 U.S. 648 (1979).
213. *Id.* at 654.
214. *Id.* at 658.
215. *Id.*
216. *Id.* at 659.
217. *Id.* at 663.
218. *See id.* at 648; Chambers v. Maroney, 399 U.S. 42 (1970).
219. *See* Terry v. Ohio, 392 U.S. 1 (1968); Schmerber v. California, 384 U.S. 757 (1966).

inherent flexibility in a reasonable regulation balancing test is appropriate for the variety of gun regulations enacted at the federal, state, and local levels that control everything related to guns, including where guns can be used, what types of guns may be lawfully possessed, and the manner in which guns may be used.

2. Application by States

In addition to its strong presence in a variety of Supreme Court precedents, another benefit of adopting a reasonable regulation balancing test for evaluating the constitutionality of gun regulations is the states' continued application of this standard of review. Unlike the federal government, which has only recently recognized an individual right to keep and bear arms, states have long interpreted their constitutional equivalents of the Second Amendment to protect an individual right.[221] States have traditionally used a "reasonable regulation" standard in determining whether particular gun regulations infringe the individual right to keep and bear arms protected by their own constitutional provisions.[222] The reasonable regulation standard asks the basic question of "whether the challenged law is a reasonable method of regulating the right to bear arms."[223] Like the reasonable regulation balancing test proposed by this Note, the reasonable regulation standard applied by the states involves a balancing of the state government's objective and the degree to which an individual's rights are burdened.[224] For example, in *State v. Blanchard* the Louisiana Supreme Court addressed the proper interpretation of a statute that prohibits a person from possessing a firearm while also possessing a controlled dangerous substance.[225] The court found that the statute was not overbroad because it was "clearly reasonable for the legislature in the interest of the public welfare and safety to prohibit the constructive possession of firearms in connection with the commission of drug offenses."[226] The court then confirmed that this sort of reasonableness review is common in evaluating gun regulations: "This is consistent with our

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220. *See* Horton v. California, 496 U.S. 128 (1990); Mapp v. Ohio, 367 U.S. 643 (1961).

221. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2008).

222. Winkler, *supra* note 127, at 716.

223. *Id.* at 717.

224. *Id.*

225. State v. Blanchard, 776 So. 2d 1165, 1167 (La. 2001).

226. *Id.* at 1173.

prior holdings wherein we found that other statutes reasonably limiting a citizen's right to bear arms were constitutional."[227]

Under the reasonable regulation balancing test standard of review, most gun regulations survive constitutional challenges.[228] The most commonly challenged gun regulations that are upheld by state courts include prohibitions on the possession of sawed-off shotguns and so-called "assault weapons," prohibitions on the possession of firearms by felons, and deferential licensing requirements such as concealed weapon permits.[229] For example, the West Virginia Supreme Court recently decided whether a state law that prohibits felons from possessing firearms violates a state constitutional provision that protects an individual right to bear arms for self-defense, hunting, and recreational use.[230] In upholding the constitutionality of the statute at issue, the court held that "[t]he restrictions contained [within the statute prohibiting felons from possessing firearms] are a proper exercise of the Legislature's police power to protect the citizenry of this State and impose *reasonable* limitations on the right to keep and bear arms to achieve this end."[231] The court further found that the limitations imposed by the statute were not "unreasonable."[232] In fact, state courts have found gun regulations to be unconstitutional in only the most extreme circumstances—regulations that either completely destroy the individual right to keep and bear arms or limit the right to the point that it becomes nominal in nature.[233] In conclusion, state court jurisprudence addressing the constitutionality of gun regulations provides many examples of the effectiveness of a reasonable regulation balancing test standard of review.

3. Practicality

Finally, adoption of a reasonable regulation balancing test is a practical solution to the problem of determining the constitutionality of gun regulations. In light of the many questions left unanswered by *Heller*, one scholar offered the simple advice that litigants should be prepared to attack or defend Justice

227. *Id.*
228. Winkler, *supra* note 127, at 717.
229. *Id.* at 720–22.
230. Rohrbaugh v. State, 607 S.E.2d 404, 412 (W. Va. 2004).
231. *Id.* at 414 (emphasis added).
232. *Id.*
233. Winkler, *supra* note 127, at 722.

Breyer's interest balancing inquiry in future litigation.[234] Furthermore, a flexible approach to the constitutionality of gun regulations is necessary in light of the weighty interests on both sides of this balance—the fundamental individual right of self-defense versus the compelling government interest in public safety. This flexible approach prevents both of these important considerations from being infringed upon unnecessarily. The reasonable regulation balancing test proposed by this Note offers the most flexibility to courts and litigants as inevitable challenges to the constitutionality of gun regulations arise in the wake of *Heller*.

V. APPLICATION OF THE BALANCING TEST

In light of the landmark decision in *Heller*, opponents of gun control will likely challenge existing regulations on constitutional grounds. In anticipation of this increased litigation, this Note applies the proposed reasonable regulation balancing test to existing federal firearms provisions, gun regulations promulgated by the state of Louisiana, and gun laws of three significant urban areas in the United States: New Orleans, Chicago, and New York City.

A. Federal Gun Regulations

Federal legislation will likely be subject to constitutional review in light of *Heller*. Eighteen U.S.C. § 922 includes a long list of unlawful acts involving firearms.[235] One section of this statute provides a list of individuals to whom the sale of a firearm is prohibited, including persons who have been indicted or convicted of a crime punishable by a year imprisonment,[236] who are addicted to a controlled substance,[237] or who are mentally ill.[238] This approach to preventing certain persons from possessing firearms falls within the traditional prohibitions endorsed by *Heller*.[239] Applying the reasonable regulation balancing test, the federal government has interests in public safety and crime prevention.[240] On the other hand, the individuals in question have either done

234. Glenn Reynolds & Brannon Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406, 414 (2008).
235. 18 U.S.C. § 922 (2006).
236. *Id.* § 922(g)(1).
237. *Id.* § 922(g)(3).
238. *Id.* § 922(g)(4).
239. District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).
240. *Id.* at 2851 (Breyer, J., dissenting).

something to diminish their access to certain rights (such as convicted felons) or are not in an appropriate mental state to exercise certain rights (such as the mentally ill or people under the influence of drugs). Considering the danger associated with the improper use of firearms, the government's interests in public safety and crime prevention outweigh these particular individuals' right to keep and bear arms. Thus, this provision of federal firearm regulations will likely survive constitutional scrutiny.

In addition to proscribing certain acts involving firearms, § 922 also prohibits the sale of certain firearms, including machine guns, short-barreled shotguns, and short-barreled rifles.[241] Applying the reasonable regulation balancing test, the federal government has interests in public safety and crime prevention, especially because the prohibited firearms are extremely dangerous and often used in the perpetration of crimes.[242] The individual's interest could be potentially broad in this scenario and encompass the right of self-defense, recreational use, and hunting. However, it is unlikely that the prohibition at issue unreasonably burdens any of these potential individual rights because the prohibited weapons are not traditional means of exercising any of these rights. Once again, this provision of federal firearm regulation will likely survive constitutional scrutiny.

B. Louisiana Gun Regulations

The Louisiana Legislature has enacted regulations governing firearms statewide, which are addressed in a variety of state laws.[243] Like many states, Louisiana's constitution contains a provision addressing the right to keep and bear arms.[244] One Louisiana statute requires that every person who possesses a firearm register that firearm with the Department of Public Safety, provide basic identification information about himself, and identify the place where the firearm is usually kept.[245] Applying the proposed reasonable regulation balancing test, the conflicting interests of the state government and individual firearm owners must be examined. The state's interest, as it will be in virtually all gun regulations, is public safety. Registration of firearms promotes

241. 18 U.S.C. § 922(a)(4) (2006).

242. *See Heller*, 128 S. Ct. at 2855–57 (Breyer, J., dissenting) (providing statistical data on handgun related injuries and crimes).

243. *See* LA. CONST. art. 1, § 1; LA. REV. STAT. ANN. §§ 14:37.4, :64.3, :67.15, :69.1, :91, :94–95.2, :95.4–95.8 (2004); LA. REV. STAT. ANN. §§ 40:1379.3–.3.1, :1751–55, :1781–92, :1796–99, :1801–04 (2008).

244. LA. CONST. art. 1, § 11.

245. LA. REV. STAT. ANN. § 40:1783 (2008).

public safety by allowing the state to account for all legally owned firearms and prevent firearm ownership by unsafe persons (such as the mentally ill). The individual interest is broad in this situation; it encompasses a right to keep and bear arms for purposes of self-defense, hunting, and recreational use. Requiring the registration of all firearms does not unreasonably burden an individual's right to keep and bear arms for any of these purposes because the registration does not restrict an individual from owning a firearm or from using a firearm in the manner he wishes. Thus, the basic registration requirement imposed by Louisiana on individual firearms is constitutional because it does not unreasonably burden the individual right to keep and bear arms.

Louisiana also has more particular gun regulations regarding concealed handguns.[246] One statute provides that the pertinent state official must issue a concealed handgun permit to a qualified candidate.[247] The next part of the statute restricts certain persons from receiving a concealed handgun permit.[248] A person applying for a concealed handgun must comply with certain requirements: the person must be the minimum age of twenty-one, must not have any sort of physical or mental handicap or illness that would prevent the safe operation of a handgun, must not be a felon, and must prove competence with a handgun.[249] The statute also provides restrictions on where a concealed handgun may be carried, including police stations, courthouses, places of worship, and firearm-free school zones.[250] Louisiana's concealed handgun permit statute contains many of the categorical prohibitions that *Heller* suggests are constitutional, including prohibitions against handgun possession by felons and mentally ill persons as well as prohibitions against handgun possession in sensitive areas such as government buildings and schools.[251]

As indicated in *Heller*, these categorical prohibitions against certain types of firearm possession are constitutional because they do not unreasonably burden an individual's right to keep and bear arms for self-defense or recreational use.[252] First, regarding the categorical prohibitions as to who may not possess firearms, these people have either done something to diminish their access to certain rights (such as convicted felons) or are not in an appropriate position to exercise certain rights (such as mentally ill

246. *Id.* § 40:1379.3–.3.1.
247. *Id.* § 40:1379.3(A)(1).
248. *Id.* § 40:1379.3(C).
249. *Id.* § 40:1379.3(C)–(D).
250. *Id.* § 40:1379.3(N).
251. District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).
252. *See id.* at 2822.

people or minors). The dangers associated with the improper use of these firearms—potential commission of crimes by convicted felons and an increased chance of harm to self or family members by mentally ill people or minors—outweigh these particular individuals' right to keep and bear arms for purposes of self-defense, recreational use, or hunting. Second, regarding the categorical prohibition as to places where firearms may not be possessed, the government has particular interests in public safety or the efficient administration of the law. Once again, these government interests outweigh the individual right of self-defense in these particular areas.

Applying the proposed reasonable regulation balancing test, the statute's requirement that a permittee prove competence with a handgun also passes constitutional review. While a showing of handgun competence greatly promotes the state interest in public safety, it does not appreciably burden the individual right to keep and bear arms for self-defense. In fact, such a requirement enhances an individual's effective use of a handgun.

C. New Orleans Gun Regulations

Like many urban areas, the City of New Orleans has stricter gun regulations than those enacted by the state legislature. The first New Orleans gun regulation at issue provides for a blanket prohibition on the discharge of firearms within the city.[253] However, the statute contains many exceptions to this prohibition, including shooting galleries, target ranges, and hunting in certain areas.[254]

Under the reasonable regulation balancing test, the city's interest in enforcing this statute is public safety. At first glance, this blanket prohibition of firearm discharge may appear unconstitutional because it prohibits an individual's use of a firearm. However, the statute provides for several exceptions in which an individual can engage in the recreational use of a firearm, such as target practice and hunting. These statutory restrictions on the recreational use of a firearm appear to be reasonable in light of the urban nature of New Orleans. Yet, the statute does not include a self-defense exception to the blanket prohibition of firearm discharge within the city. On the face of the statute, a person who discharges a lawful firearm in self-defense within the city would violate this particular statute. If a court were to interpret the statute literally, it would substantially burden the lawful exercise of the

253. NEW ORLEANS, LA., CODE § 54–335(a) (2008).
254. *Id.* § 54–335(b).

individual right of self-defense as protected by the Second Amendment and should be struck down as unconstitutional.

D. Chicago Gun Regulations

Like Louisiana, the Illinois state constitution contains a provision addressing the right to keep and bear arms.[255] While the state constitution protects this right, the City of Chicago maintains its own set of gun regulations.[256] One Chicago ordinance requires that both a "safety mechanism" and a "load indicator device" must be placed on a handgun at the time of sale.[257] The ordinance then provides specific examples of safety mechanisms, including trigger locks, combination handle locks, and solenoid use-limitation devices.[258] Another Chicago ordinance requires that all firearms within the city be registered.[259] However, certain types of firearms are deemed to be "unregisterable."[260] Handguns, unless they were validly registered prior to the enactment of the statute, are banned from registration.[261] The owners of those handguns that were previously validly registered must also demonstrate that the handguns have both a safety mechanism and a load indicator device.[262]

The potential constitutional problems with these ordinances are compounded when examined together; as such, these ordinances would probably be found unconstitutional in light of *Heller*. The city's interest in enacting such stringent restrictions on handguns is the concern for public safety in the populous urban environment of Chicago. In addition to the blanket prohibition of handgun registration, handguns are rendered ineffective for self-defense purposes by the required attachment of a safety mechanism. Like the statute in *Heller*, the Chicago ordinance requiring registration essentially prevents an individual from using a handgun for self-defense within the home.[263] While Chicago residents are allowed to have firearms within their residence, they are not allowed to use handguns, which, as discussed in *Heller*, is the most effective means of self-defense.[264] As a result, these ordinances should be

255. ILL. CONST. art. 1, § 22.
256. *See* CHI., ILL., CODE §§ 4–144, 8–20, 8–24 (2008).
257. *Id.* § 4–144–062.
258. *Id.*
259. *Id.* § 8–20–040.
260. *Id.*; *id.* § 8–20–050.
261. CHI., ILL., CODE § 8–2–050(c)(1) (2008).
262. *Id.* § 8–20–050 (c)(1)(i)–(ii).
263. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2817–18 (2008).
264. *Id.* at 2818.

struck down as unconstitutional violations of the individual Second Amendment right of self-defense.

Chicago's Municipal Code also provides for a blanket prohibition against firearm possession on a person's body or in a vehicle.[265] However, this prohibition is not applicable to a person who is on his own property, in his residence, or in his place of business.[266] Applying the reasonable regulation balancing test to this ordinance, the city's interests in enacting this ordinance are public safety and crime prevention. While the ordinance does prevent an individual from carrying a firearm wherever he desires, it does not unreasonably burden the exercise of the individual right of self-defense under the Second Amendment. The ordinance at issue unequivocally allows individuals to possess firearms for self-defense within their homes and places of business, both of which are environments that an individual is mostly likely to exercise such a right, as recognized in *Heller*.[267] Thus, this ordinance will likely pass constitutional review.

E. New York City Gun Regulations

Unlike the Louisiana and Illinois constitutions, the New York Constitution does not address the right to keep and bear arms.[268] Not surprisingly, New York City, like New Orleans and Chicago, has its own set of provisions regulating firearms within city limits. New York City issues six different forms of handgun licenses; in light of *Heller*, the Premises-Residence or Business License is the most interesting to examine.[269] This license is issued strictly for the protection of the particular business or residence.[270] The same statute explains that the approved use of the handgun is limited to that particular location for which the license has been issued and that the handgun may be possessed only on the premises.[271] Applying the reasonable regulation balancing test to this license requirement, the city's interest is clearly public safety. The city furthers this interest only by requiring individuals to obtain a license for handguns.[272] This licensing requirement does not restrict the individual's exercise of his right of self-defense; it

265. CHI., ILL., CODE § 8–20–010 (2008).
266. *Id.*
267. *Heller*, 128 S. Ct. at 2817.
268. N.Y. CONST. art. XII, § 1 (protecting only the right to maintain and regulate a state militia).
269. NEW YORK CITY, N.Y., RULES OF NEW YORK 38 § 5–01 (2007).
270. *Id.* § 5–23(a).
271. *Id.* § 5–23(a)(1)–(2).
272. *See id.* § 5–23.

allows an individual to possess a handgun at his home or place of business without any restrictions on such possession through particular safety devices.[273] New York City's handgun licensing scheme will likely survive constitutional scrutiny.

Like New Orleans, New York City also has statutes that restrict the use of firearms within the city. In particular, New York has established strict regulations regarding activities that may be carried out on city property; such regulations are not limited to firearms, but include motor vehicles, animals, and posting of signs.[274] Specifically, one statute allows the use or carrying of handguns on city property only if those handguns have a valid hunt tag.[275] While this statute does restrict an individual's possession of firearms, the city has a strong interest in public safety on its own property that justifies the infringement of the individual right to possess firearms. Furthermore, this statute appears to fall into the "sensitive area" categorical exception to the individual right to keep and bear arms endorsed by *Heller*. Once again, this New York regulation seems to pass constitutional scrutiny.

After applying the proposed reasonable regulation balancing test, it is apparent that most gun regulations will pass constitutional scrutiny in the wake of *Heller*.[276] State gun regulations appear to be most resilient in the face of constitutional challenge because they impose only minimal licensing requirements that do not affect the way an individual can use his firearm or traditional prohibitions on gun possession that were approved in *Heller*. On the other hand, city regulations, especially in urban areas like Chicago, are more likely to fall to constitutional challenges because they impose more stringent restrictions on the manner in which a firearm can be used.

VI. CONCLUSION

Heller held that the Second Amendment protects an individual right to keep and bear arms. This interpretation of the Second Amendment invalidated a series of District of Columbia statutes prohibiting the use of handguns and requiring firearms to be kept essentially inoperable within the home. As a result, *Heller* promises to have a dramatic impact on the gun regulations of many cities throughout America. In order to determine the constitutionality of state and city gun regulations, courts should use the reasonableness review of intermediate scrutiny to achieve the

273. *Id.*
274. *Id.* § 16–17(b).
275. *Id.*
276. District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

proper balance between the government's interests in public safety and crime prevention and the individual right to keep and bear arms for self-defense. This balancing approach will likely uphold the constitutionality of most existing gun regulations while invalidating those firearm regulations that do not provide for a self-defense exception.

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