STANDARDS OF REVIEW, THE SECOND AMENDMENT, AND DOCTRINAL CHAOS

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The determination of standard of review is a standard threshold to arguing, and to deciding, a constitutional challenge asserting a substantive right. It determines, after all, whether the law at issue will be presumed valid or invalid, and, if the latter, the quantum and quality of evidence necessary to justifying it.

The concept of standards of review dates to the famous footnote four in *Carolene Products*, where the Court applied rational basis, presuming the challenged law to be constitutional, but acknowledged, "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth," or when a law was directed at a discrete minority that could not defend its interests through the political process.[1]

Six years later, in *Korematsu v. United States*, the Court gave some detail to the exception, noting that "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify" the exclusion of Japanese-American citizens from the West Coast.[2] As eventually formulated, "strict scrutiny" required proof that there was "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate"[3] and that the law was "narrowly tailored" to protect that interest while having little or no unnecessary impact.[4]

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1 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

2 323 U.S. 214, 218 (1944).

3 NAACP v. Button, 371 U.S. 415, 438 (1963).

4 Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984). ("Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.") For an interesting criticism of this component of strict scrutiny, *see* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1997).

For decades, the choice in standard of scrutiny was binary: strict scrutiny or rational basis. Then, in 1968, the Court announced a third standard of review which came be known as intermediate scrutiny. *United States v. O'Brien*[5] involved a prosecution for burning a draft card during a protest against the Vietnam War, with the defense being freedom of expression.[6] Since the statute prohibiting burning such cards did not infringe freedom of speech on its face, a standard of review less than strict scrutiny was applied: a law of this type was "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[7] The same standard was later applied to restriction of commercial speech, whose justification required proof that there was a "substantial interest" of the state, that the restriction was "in proportion to that interest," and could not be "served as well by a more limited restriction."[8] The Court later described the last element as requiring a "reasonable fit" between the restriction and the interest asserted.[9] Intermediate review thus differs from strict scrutiny in that the government interest must be "important or substantial" rather than "compelling," and the fit between the means employed and the end sought must be "reasonable" or no greater than necessary, rather than "narrowly tailored."

The Court's "strict scrutiny" jurisprudence has been criticized as involving varying and unclear articulation;[10] the same might be said with greater force of its intermediate review jurisprudence.[11] What is a "substantial interest" of the state? How close is a "close fit"? Does "served as well" mean that a narrower alternative must be completely as effective as the challenged law?

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5 391 U.S. 367 (1968).

6 For the sake of the younger readers: during that conflict, men of military age were subject to being drafted and were required to register for the draft and keep in their possession a card certifying their registration. After demonstrators started burning their cards, Congress added to the statute a prohibition against destroying draft cards.

7 United States v. O'Brien, 391 U.S. at 377.

8 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980). Or, as said elsewhere in the opinion, whether the communication was truthful, whether a substantial interest is shown, and "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* at 566. The phrasing of the same test in alternate and distinct ways does not promote clarity. *See also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

9 City of Cincinnati v. Discovery Network, 507 U.S. 410, 416 (1993).

10 *See* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285 (2015).

11 Indeed, in *Central Hudson* the Court phrased the intermediate review components in two different ways in the same opinion. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. at 564.

I. WHAT IS THE CURRENT STANDARD OF REVIEW FOR SECOND AMENDMENT CASES?

The Supreme Court declined to specify a standard of review in *Heller*, other than ruling out rational basis, and failed to specify one in *McDonald*.[12] Its more recent per curiam decision in *Caetano v. Massachusetts* left standard of review unmentioned.[13] Indeed, since *McDonald*, the Court has repeatedly denied certiorari in Second Amendment petitions, with several of the denials generating spirited dissents.[14] What is astonishing is that there clearly *are* the four votes needed to grant certiorari. The Court's Order List of June 26, 2017 reflects Justices Thomas and Gorsuch dissenting from the denial of certiorari in *Peruta v. California*, which upheld firearms restrictions, and Justices Ginsburg and Sotomayor dissenting from the denial of certiorari in *Sessions v. Binderup*, which struck firearms restrictions down.[15] One can only assume that neither group of justices genuinely wants to grant review, from which we can infer that even the Court itself does not know which side has five votes.

Against this background, it is not surprising that the lower courts have sharply divided in applying standards of review to Second Amendment cases. The division is so deep that some circuits apply strict scrutiny or something very close to it, while others apply what is in practice rational basis. Indeed, one circuit expressly applies rational basis in most situations![16]

A. Is a Second Amendment Challenge Subject to One or Two (or Perhaps to No) Standards of Review?

It is traditional to apply a single standard of review to a constitutional challenge. The standard applied may vary across the categories of challenges – content-neutral time and place restrictions may draw intermediate scrutiny,

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12 *See* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).

13 136 S. Ct. 1027 (2016) (per curiam). The Court reversed a ruling upholding a ban on possession of non-lethal "stun guns." *See id.*

14 *See* Silvester v. Becerra, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting) ("In the Ninth Circuit, it seems, rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text. Our continued refusal to hear Second Amendment cases only enables this kind of defiance. We have not heard argument in a Second Amendment case for nearly eight years."); Peruta v. California, 137 S. Ct. 1995 (2017) (Thomas, J., dissenting); Friedman v. City of Highland Park, 136 S. Ct. 447 (2015) (Thomas, J., dissenting); Jackson v. City & Cty. of S.F., 135 S. Ct. 2799 (2015) (Thomas, J., dissenting).

15 *See Order List: 582 U.S.*, SUP. CT. U.S. (June 26, 2017), https://www.supremecourt.gov/orders/courtorders/062617zor_8759.pdf.

16 *See* n.20-74 and accompanying text, *infra.*

while content-based censorship may have to withstand strict scrutiny – but each case, and each category, has but one standard of review.

Yet, in the Second Amendment context, many courts have applied a dual standard of review, applying a higher standard to "serious" infringements or, alternately, to infringements of the "core" right, the right of law-abiding citizens to keep arms in their houses for self-defense.[17]

This two-tiered standard of review is taken from the Supreme Court's rulings regarding state powers to regulate elections and the content of ballots, where severe infringements of the underlying rights merit strict scrutiny and lesser infringements are evaluated under intermediate review.[18] This import from First Amendment case law is quite questionable, because the interaction of election law with the First Amendment involves a unique situation. The electoral process is at the core of the First Amendment, yet the rights protected would be useless without extensive governmental control. Governmental decision-makers must fix the date and time of the election, determine how votes will be cast, limit which parties and candidates can be listed on the ballot, and so on. It is hard to imagine any other First Amendment activity where courts would uphold a statutory regime limiting its exercise to one day every few years, only at locations chosen by the government, with expression limited to taking a government form and checking a box to indicate one's position. Indeed, First Amendment activities *other than* casting a vote are limited by restrictions forbidding electioneering actions within so many feet of the polling place; the polling place thus is a "no *other* free speech" zone.[19]

The electoral law arena is thus completely unique in terms of First Amendment jurisprudence; it is anything but clear why it should become the centerpiece of Second Amendment standard of review.

Yet even these considerations understate the degree of circuit divisions. Among the circuits that employ two-level review, there are divergences on the dividing line between more and less heightened scrutiny. Opinions speak of the higher level as applicable to *Heller's* "core right," but define that right differently. In the Third Circuit, the core right is "the defense of hearth and home. . . ."[20] The Fifth Circuit standard is similar: "for example, the right of a law-abiding, responsible adult to . . . use a handgun to defend his or her

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17 *See* United States v. Decastro, 682 F.3d 160, 166 (2d Cir. 2012); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 93 (2d Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011); Jackson v. City & Cty. of S.F., 746 F.3d 953, 968 (9th Cir. 2014).

18 *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

19 To be sure, polling-place restrictions are limited by the First Amendment. *See* Burson v. Freeman, 504 U.S. 191 (1992); Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

20 United States v. Marzzarella, 614 F.3d 85, 94 (3d Cir. 2010). The Illinois Supreme Court likewise takes a broad view of the core right. In *Chairez*, it struck down a statute which "prohibits the carriage of weapons in public for self-defense, thereby reaching the core of the second amendment." People v. Chairez, 2018 IL 121417, *48 (2018).

home and family . . . ."[21] The difference is not merely one of wording: the Third Circuit phrasing covers only the home, suggesting that carrying outside the home would be outside the core right, while the Fifth Circuit's wording would cover self-defense outside the home.

The Fourth Circuit started out with a broad approach, treating the core *Heller* right as "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense . . . ."[22] In this formulation, the core right included carrying as well as possession. But, a year later, the issue of carrying came before the same court, and the Circuit characterized the core rights as limited to the home, describing it as the "core right of self-defense in the home by a law-abiding citizen . . . ."[23]

To further complicate the dual-standard approach, the Second Circuit maintains that serious infringements are subject to a manner of intermediate review and non-serious ones are subject to rational basis,[24] the Ninth Circuit sees the choice as between strict scrutiny and intermediate review,[25] and the Seventh Circuit sees it as more of a sliding scale or balancing test.[26] The Second Circuit's position appears the most questionable for two reasons: (1) the Circuit imports the test from the Supreme Court's rulings on electoral regulations which apply strict scrutiny, not intermediate review;[27] and (2) *Heller* specifically held that rational basis is inapplicable to the Second Amendment right and, indeed, any enumerated right.[28]

So, does the Second Amendment get one standard of review or two? Actually, there is a third alternative: might the Second Amendment be applied with no standard of review at all? This approach has been taken by a district court,[29] by a dissent in *Heller II*,[30] and has attracted support in the literature.[31] Judge Kavanaugh's dissent in *Heller II* best explains the

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21 Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012).

22 United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (emphasis removed).

23 United States v. Masciandro, 638 F.3d 458, 470 (4th Cir. 2011).

24 *See* United States v. Decastro, 682 F.3d 160, 166-67 (2d Cir. 2012) (declining to specify what heightened standard would apply); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 93-94 (2d Cir. 2012) (suggesting strict scrutiny would be inappropriate).

25 Jackson v. City & Cty. of S.F., 746 F.3d 953, 968 (9th Cir. 2014).

26 Ezell v. City of Chicago (*Ezell II*), 846 F.3d 888, 899 (7th Cir. 2017) (Rovner, J., dissenting).

27 *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

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

29 *See* Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1118–19 (N.D. Ill. 2012).

30 *See* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

31 *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013); Linday Colvin, *History, Heller, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1044 (2014) ("[T]he Kavanaugh approach is flexible, predictable, easy to apply, and faithful to the core principles articulated by the Supreme Court."). *But see* Nelson

approach. He begins by noting that the Court does not use standard of review analysis for all constitutional rights:

> Strict and intermediate scrutiny today are primarily used in substantive due process and equal protection cases, and for certain aspects of First Amendment free speech doctrine. Strict and intermediate scrutiny tests are not employed in the Court's interpretation and application of many other individual rights provisions of the Constitution. For example, the Court has not typically invoked strict or intermediate scrutiny to analyze the Jury Trial Clause, the Establishment Clause, the Self-Incrimination Clause, the Confrontation Clause, the Cruel and Unusual Punishments Clause, or the Habeas Corpus Clause, to name a few.[32]

He reasons that the teachings of *Heller* and *McDonald* is that courts "are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[33] The "tradition" he refers to is explained as "post-ratification history,"[34] to be considered because the uses of language soon after ratification shed light on the understanding of the ratifiers.

B. The Standard of Review as (Nominally) Applied.

We need not here survey in detail the standards of review applied by each circuit, as that has already been done in an encyclopedic article by David Kopel and Joseph Greenlee.[35] It suffices here to note the extreme variations between the methods employed by different circuits.

1. Strict Scrutiny

As noted above, several circuits have indicated they will apply strict scrutiny to infringements of the "core right," varyingly defined, of Heller.36 The list of Circuits applying strict scrutiny across-the-board is short and uncertain. In a pre-Heller case, the Fifth Circuit found the Second Amendment guaranteed an individual right.37 It applied strict scrutiny but

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Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1626-32 (2012).

32 *Heller II*, 670 F.3d at 1283 (Kavanaugh, J., dissenting).

33 *Id.* at 1271.

34 *Id.* at 1272. This distinguishes consideration of post-ratification history from consideration of post-passage legislative "history." It also narrows the field of consideration. For the Fourteenth Amendment, 1870 would be permissible, but 1970 would not be.

35 David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS UNIV. L.J. 193 (2017).

36 *See supra* notes 23-25 and accompanying text.

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

upheld the challenged law.[38] In a more recent ruling, however, the Circuit noted that it was assuming, without deciding, that strict scrutiny applied.[39]

2. Intermediate Review Applied in an Elevated Form.

Largely as a result of Chicago's passive-aggressive trait approach to firearms ownership, the Seventh Circuit has developed the most extensive body of Second Amendment precedent.

Chicago began with a complete ban on handgun ownership, which the Supreme Court struck down in *McDonald v. Chicago*.[40] Shortly after that ruling, Chicago adopted a system that allowed handgun ownership if a permit was obtained.[41] But, securing a permit required (among many other things) hands-on training at a firing range,[42] and the city retained its complete ban on non-governmental shooting ranges.[43] In *Ezell v. City of Chicago* (*Ezell I*),[44] the Seventh Circuit invalidated the shooting range ban, applying a tight version of intermediate review, which it described as "rigorous" "if not quite strict scrutiny."[45] The Seventh Circuit explained:

> The City must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights. Stated differently, the City must demonstrate that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified.[46]

Chicago responded by allowing shooting ranges, but under such tight restrictions as to make them almost impossible to establish. The requirements were invalidated in *Ezell v. City of Chicago* (*Ezell II*).[47] The Circuit treated the regulations as implicating the core of the right to arms and noted that this required "a very strong public-interest justification and a close means-ends fit . . . ."[48]

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38 Id.

39 Mance v. Sessions, 880 F.3d 183, 188 (5th Cir. 2018) ("Because we conclude that the laws and regulations at issue withstand strict scrutiny . . . . We will also assume, without deciding, that the strict, rather than intermediate, standard of scrutiny is applicable.").

40 561 U.S. 742 (2010).

41 CHI. MUN. CODE § 8-20-110(b) (repealed 2013).

42 CHI. MUN. CODE § 8-20-110(a)(7) (repealed 2013).

43 CHI. MUN. CODE § 8-20-280 (repealed 2011).

44 651 F.3d 684 (7th Cir. 2011).

45 Id. at 691–92, 708.

46 Id. at 708-09.

47 846 F.3d 888, 895-99 (7th Cir. 2017).

48 Id. at 892.

The Seventh Circuit capped its vigorous application of intermediate review with *Moore v. Madigan*,[49] a challenge to the Illinois restrictions on carrying a loaded firearm other than for sporting purposes. The court carefully analyzed the evidence advanced to justify the ban; a study claiming that increased gun ownership caused increased crime had flaws, and in any event related to ownership, not carrying, a study suggesting the states with liberal carrying permit systems had higher assault rates was countered by critics who argued the data would support the opposite conclusion. The Seventh Circuit struck the law, noting:

> A blanket prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would.[50]

3. Intermediate Review Applied in a Very Lax Form

In contrast to the Seventh Circuit, the Ninth Circuit has applied intermediate review in a way that makes it rational basis under a different title. In *Jackson v. City & County of San Francisco*,[51] the challenge was to a law almost identical to the handgun law struck down in *Heller*. The ordinance forbade the possession of a handgun in a residence unless it was stored in a locked container, disabled with an approved trigger lock, or carried on the person (the last provision being the sole distinction from the District of Columbia law struck down by *Heller*).[52]

The Ninth Circuit had to agree that what was at issue was the "core right" described in *Heller* but declared that since the ordinance burdens only the "*manner*" in which Second Amendment rights were exercised, it did not substantially burden the right, and the court would apply intermediate review.[53] It upheld the ordinance, noting that the county had asserted "an interest in preventing firearms from being stolen and in reducing the number of handgun-related suicides and deadly domestic violence incidents."[54] It

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49 702 F.3d 933 (7th Cir. 2012).

50 *Id.* at 940 (emphasis in original).

51 746 F.3d 953 (9th Cir. 2014).

52 In addition to striking down the District's ban on possession of handguns, *Heller* also struck down its prohibition on carrying, as applied inside a home. "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

53 Jackson v. City & Cty. of S.F., 746 F.3d at 961.

54 *Id.* at 966.

cited no empirical evidence that the ordinance was likely to serve these ends. Moreover, three sentences later, it undermined its own claim, when it asserted that the ordinance imposes only a "minimal burden" on self-defense "because it causes a delay only of a few seconds" in retrieving or unlocking the firearm.[55] It seems doubtful that a delay of a few seconds would have a measurable impact either on suicide or on domestic violence homicide. The Ninth Circuit nonetheless concluded that the ban was "substantially related to the important government interest of reducing firearm-related deaths and injuries," and upheld a denial of a preliminary injunction.[56]

The Ninth Circuit continued on its course with *Silvester v. Harris*,[57] a challenge to California's ten-day waiting period for handgun purchases, as applied to persons who already possessed firearms. The state asserted as a rationale that the waiting period served as a "cooling off" period that might reduce impulsive crime-of-passion homicides.[58] But how could this serve any purpose if the buyer already owned firearms, and just wanted to add one more?

While claiming to apply intermediate review, the Ninth Circuit solved the question with speculation: a purchaser who already owns a gun might "want to purchase a larger capacity weapon that will do more damage when fired into a crowd."[59]

4. Even Rational Basis?

As noted above, the Second Circuit has held that non-serious infringements of the Second Amendment are subject to rational basis review,[60] notwithstanding *Heller*'s teaching that rational basis cannot be applied to an expressly-recognized constitutional right. As the *Heller* Court noted, "Obviously, [rational basis] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms."[61]

Indeed, the Second Circuit only applies heightened scrutiny where the challenged law *both* affects the core of the Second Amendment *and*

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55 Id.

56 Id.

57 843 F.3d 816, 828 (9th Cir. 2016).

58 Id. The rationale itself does seem doubtful. It assumes that a person who is consumed by a homicidal rage, unable to reflect that he will almost certainly be caught and imprisoned, would yet be clear-headed enough to think that the homicide would better be accomplished with a gun, locate a gun dealer, go to the store, make a buy, pass the background check, and return to the scene to commit the killing.

59 Id.

60 See supra note 23 and associated text.

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

substantially burdens it. "Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny."[62] Since the Circuit views the "core right" as concerned with defense of the home,[63] under this approach, all arms laws that apply outside the home, and all arms laws that do not substantially impair rights within the home – that is to say, virtually all gun laws will receive rational basis review.[64]

C. Does *Heller*'s Cautionary Language Make As-Applied Challenges Impossible?

The issue here is the meaning to be given a paragraph of *Heller*:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[65]

A footnote added: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[66] But what was meant here? The paragraph can either be (1) an assurance that *Heller* will not invalidate limited firearm regulations of the sort to which we have become accustomed ("longstanding"), because those would likely pass muster under whatever level of review is adopted, or (2) a designation of statutes that fall entirely outside the Second Amendment, just as obscenity, fraud, and facilitation of crime fall outside the First Amendment.[67]

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62 N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 56 (2d Cir. 2018).

63 *Id.* ("[A] statute can 'implicate the core of the Second Amendment's protections by extending into the home, 'where the need for defense of self, family and property is most acute.'").

64 The Seventh Circuit has expressly rejected the position taken by the Second Circuit: "In [Chicago's] view only laws that substantially or 'unduly' burden Second Amendment rights should get any form of heightened judicial scrutiny. This is an odd argument; we specifically addressed and rejected that approach in *Ezell I*." Ezell v. City of Chicago (*Ezell II*), 846 F.3d 888, 893 (7th Cir. 2017).

65 District of Columbia v. Heller, 554 U.S. at 626-27 (citations omitted).

66 *Id.* at 626 n.26.

67 *See* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 196 (2013). ("It is difficult to discern whether [the listed categories] . . . either (i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny.").

A very good case can be made for the first proposition. *Heller* was the first Supreme Court case to explicitly rely upon originalism, specifically original public understanding.[68] The relevant periods for such an approach are (at least approximately) 1789-91 for the Second Amendment and 1866-68 for the Fourteenth. The statutes *Heller* describes as "longstanding" are much more recent, dating mostly to the mid-20th century.[69] There seems little basis to believe the Court was employing the term "longstanding" to signify a legal test, as opposed to a comforting description of the laws. This is underscored by *Heller*'s description of such laws as "presumptively lawful."[70] Laws against obscenity or facilitation of crime are not "presumptively" lawful under the First Amendment; they are not within the freedom of expression guarantee at all.[71]

Nonetheless, the majority of circuits have adopted a two-part test for a Second Amendment challenge, in which the statutes described above are treated as exceptions to the constitutional right. A challenge to a statute thus begins by inquiring whether the statute falls within the above categories. Only if the challenge survives this first stage does the court proceed to determine whether the statute at issue passes muster under whatever standard of means-end review is applicable.[72]

One practical result of the two-part test is to rule out, or at least hinder, as-applied challenges. If a class of persons (say, those convicted of old, nonviolent felonies, or with a record of a mental commitment) is entirely

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68 District of Columbia v. Heller, 554 U.S. at 625 ("our adoption of the original understanding of the Second Amendment."). *See* Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 246 (2008) (describing *Heller* as "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.").

69 The earliest form of "strict" gun control, New York's 1911 Sullivan Law, forbade possession of weapons by non-citizens and those under sixteen, but not by felons. The Sullivan Act, 1911 N.Y. LAWS ch.195, sec. 1 (codified as amended at N.Y. PENAL LAW § 265 (LexisNexis 2018)). Federal law did not prohibit possession by violent felons until 1934, Federal Firearms Act, Pub. L. No. 75-785, § 2(d), (e), (f), 52 Stat. 1250, 1250-51 (1938), and nonviolent felons and the mentally ill until 1968. 18 U.S.C. § 922(d), (g) (2018). *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 709-10, 714 (2009). "Sensitive place" regulations may have been in place but were meaningless until metal detectors became popular. The author remembers that metal detectors in airports were a bit of a novelty in the early 1970s, and were unknown in courts and government buildings. Department of Interior headquarters installed its first sometime after the author left there in 1992. Regulation of the commercial sale of arms for the most part dates to the Uniform Firearm Act of 1925. *See* Second Report of the Committee on a Uniform Act to Regulate the Sale and Possession of Firearms (1925).

70 District of Columbia v. Heller, 554 U.S. at 626–27.

71 *See* Miller v. California, 413 U.S. 15, 23 (1973 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."); Ashcroft v. Free Speech Coalition, 495 U.S. 103 (2002); Brandenburg v. Ohio, 395 U.S. 444 (1969).

72 *See, e.g.*, Jackson v. City & County of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014); United States v. Chovan, 735 F.3d 1127, 1137 (9th Cir. 2013); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); United States v. Chester, 628 F.3d 673, 681–82 (4th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

outside the Second Amendment's protection, whether a firearm restriction can be applied to them is a moot point. This has resulted in an incredible circuit split, with five circuits allowing as-applied challenges,[73] five circuits ruling them out,[74] and the Sixth Circuit coming down on both sides![75]

In short, to say the state of Second Amendment law is in disarray would be a massive understatement. Multiple circuit splits have reduced it to something closer to anarchy.

II. THE CASE FOR HEIGHTENED REVIEW OF SECOND AMENDMENT CHALLENGES

Heightened review originates in "the most famous footnote in constitutional law," footnote four of *United States v. Carolene Products*.[76] While applying rational basis review, the Supreme Court noted that it might be inapplicable to "legislation [which] appears on its face to be within a specific prohibition of the Constitution" or resulting from "prejudice against discrete and insular minorities" who could not rely upon "the operation of those political processes ordinarily to be relied upon to protect minorities . . . . "[77] The footnote stands for a simple principle: judicial review is anti-majoritarian; courts should have an expanded constitutional role when majoritarianism can become a flawed process.

In *Anderson v. Celebreeze*,[78] for example, the Court struck down an electoral restriction whose burden fell most heavily on small political parties: "because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking [sic] may warrant more careful judicial scrutiny."[79] Thus, state restrictions upon legal aliens, who may reside here but cannot vote, are also subject to strict scrutiny.[80]

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73 Binderup v. Attorney Gen. U.S., 836 F.3d 336 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323 (2017); United States v. Woolsey, 759 F.3d 905, 909 (8th Cir. 2014); Schrader v. Holder, 704 F.3d 980, 990–91 (D.C. Cir. 2013); United States v. Moore, 666 F.3d 313, 320 (4th Cir. 2012); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).

74 United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1114 (9th Cir. 2010) *(*en banc); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam).

75 *Compare* United States v. Carey, 602 F.3d 738, 741 (6th Cir. 2010) *with* Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016) (en banc). The latter, as an en banc, could have overruled *Carey*, but instead gave an explanation which is hard to follow. 837 F.3d at 688.

76 304 U.S. 144, 152 n.4 (1938).

77 *Id.* (citations omitted).

78 460 U.S. 780 (1983).

79 *Id.* at 793 n.16.

80 *See* Graham v. Richardson, 403 U.S. 365 (1971).

Heller was true to this legacy. The majority's conclusion that heightened scrutiny is required in the context of a right expressly reserved by the Bill of Rights fits squarely within *Carolene Product*'s first category. It remains to explore the case's other category, that of minorities who cannot expect the ordinary protections of political processes.

Gun owners are a modest minority nationwide: 31.7% of households surveyed reported firearm ownership,[81] and the real number may well be higher, as some may be reluctant to disclose ownership to a stranger.[82] Nationally, then, only gun owners in otherwise-disfavored classes are at risk for irrational restrictions. The list of persons forbidden gun possession by federal law includes the obvious choices of those with felony convictions or past mental commitments, who are fugitives from justice or users of illegal drugs.[83] It is much harder to understand, though, why possession by aliens here on a nonimmigrant (*i.e.*, tourist) visa, those with a dishonorable military discharge, and those who have renounced American citizenship, are likewise regarded as too dangerous to possess a firearm.[84]

Firearms owners are thus generally able to defend their interests at the national level. But within certain states, firearms owners are a small enough minority to where they have little protection from majoritarian whims. Firearms are owned by only 3.8% of Washington DC households, 8.7% of Hawaiian ones, 12.6% of those in Massachusetts and 21.3% of those in California.[85] Within those areas, the majority is free to do as it wills with regard to firearms, and the political force that would repeal unnecessary or unjust laws simply does not exist.

California gives a prime example. The state began in 1917 with a requirement that firearms dealers be licensed and report sales to police.[86] The dealer licensing was hardly unreasonable; there were at the time no federal standards for gun dealers. Federal licensing of such dealers originated in 1938, and was greatly tightened in 1968.[87] Yet the requirement of state licensing remains to this day.

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81 Laura Cochran, *Gun Ownership by State*, WASH. POST, http://www.washingtonpost.com/wp-srv/health/interactives/guns/ownership.html (last updated May 26, 2006).

82 The limited data available suggests that 3-13% of known firearm owners will tell a telephone pollster that they own no guns. David T. Hardy, *Criminology, Gun Control and the Right to Arms*, 58 HOW. L.J. 680, 686-87 (2015).

83 18 U.S.C. § 922(g)(1)-(4) (2018).

84 18 U.S.C. § 922(g)(5)-(7) (2018). The author's recollection is that the first category came into being because some of the 9/11 hijackers had nonimmigrant visas, and the latter two were enacted in an unsuccessful attempt to ensure that the law could be said to have prohibited Lee Harvey Oswald from possessing a gun legally. (Oswald in fact had secured a "hardship" discharge, and while he tried to renounce his citizenship did not follow the required procedure).

85 *See* Laura Cochran, *supra* n. 81.

86 1915 CAL. STAT. 651, 652 (Supp. 1917).

87 *See* 18 U.S.C. §§ 922, 923 (2018).

A 1923 law imposed a one-day waiting period for handgun sales,[88] on the theory that "crimes of passion" might be reduced if an angry person had time to cool down overnight.[89] But, in 1955, it was extended to three days, in 1965 to five days, and in 1975 to ten days.[90] Either Californians' homicidal rages were becoming long lasting affairs, or the purpose was simply to burden potential gun owners.

Open (as opposed to concealed) carry of firearms was initially unrestricted. Then, in 1967, open carrying of loaded guns was made a felony.[91] In 2011, open carrying of *unloaded* handguns was forbidden in incorporated areas.[92] And, in 2018, open carrying of unloaded shotguns and rifles was forbidden there as well.[93]

In 2001, dealers were forbidden to sell handguns that did not pass expensive safety testing, which had to be paid for by the manufacturer, with the result that many models of handguns ceased to be sold in the state.[94] But the requirement exempted guns being purchased by members of law enforcement and of prosecutors' offices.[95] Either California wished its law enforcement officers and prosecutors to possess unsafe firearms, or the supposed safety requirement was simply meant to burden all gun owners who were not in those classes.[96]

The California exemptions illustrate an aspect of arms laws that makes it less likely that majoritarianism will prevent or repeal useless and unduly burdensome laws: the tendency to exempt the wealthy and powerful from their scope. Dick Heller, the respondent in *Heller*, was motivated to file by the knowledge that as a security guard he could possess a handgun to protect other's property, but could not legally possess one to protect his own life.[97] New York's permit requirement is so burdensome that at times an applicant must wait a year for an appointment to apply.[98] But when Steven Tyler and Joe Perry of the band Aerosmith sought pistol permits in New York City, the head of the License Division fingerprinted them at Madison Square Garden

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88 1923 Calif. L. ch. 339, §§5, 9, 10.

89 *See supra* n.58 and accompanying text.

90 CAL. PENAL CODE § 27540(a) (Deering 2018).

91 CAL. PENAL CODE § 25850(a) (Deering 2018).

92 CAL. PENAL CODE § 26350(a) (Deering 2018). Most populous California counties are incorporated.

93 *See* Ryan Sabalow, *New Gun Restrictions Are Coming to California in 2018*, SACRAMENTO BEE (Dec. 11, 2017, 1:28 PM), https://www.sacbee.com/news/state/article189213039.html.

94 CAL. PENAL CODE § 32000 (Deering 2018).

95 CAL. PENAL CODE § 32000(b)(4) (Deering 2018).

96 Since the law prohibited sale of untested firearms by dealers, but did not prohibit their resale by non-dealers, for a time some law enforcement officials made a side income off using their power to buy untested guns from dealers and reselling them at a mark-up to non-LEOs. Communication from attorney Don Kilmer to the author, April 2, 2018.

97 Law Officer, *Dick Heller and the Supremes*, LAW OFFICER (Jun. 30, 2008), http://lawofficer.com/archive/dick-heller-and-the-supremes/.

98 *See* Fed'n of N.Y. State Rifle & Pistol Clubs, Inc. v. McGuire, 420 N.Y.S.2d 602 (N.Y. App. Div. 1979).

before one of Aerosmith's shows. In return for the favors, Petrofsky received a limo ride and a ticket to the show.[99]

CONCLUSION

The law of the Second Amendment is in chaos. Where a person comes into court will determine:

1. Whether there is a one-stage test or a two-stage test, *i.e.* whether the *Heller* reassurance regarding "long standing" laws marks a threshold screening or not;
2. whether the means-end assessment has one or two components, one for core rights and the other for lesser aspects of the right;
3. If so, whether the "core right" is limited to defense in the home;
4. whether the standard of review is strict scrutiny, almost-strict scrutiny, intermediate review, or rational basis,
5. if intermediate review, whether it is "almost strict scrutiny," or rational basis by another name; and
6. whether as-applied challenges are allowed or forbidden.

In the midst of this judicial chaos, the vigorous dissents from denials of certiorari lodged by Justices Thomas, Gorsuch, and the late Justice Scalia are readily understandable.

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[99] Jon Wiederhorn, *Janie's Got A Gun Permit? Aerosmith Flap Lands Cop In Hot Water*, MTV (Dec. 19, 2002), http://www.mtv.com/news/1459226/janies-got-a-gun-permit-aerosmith-flap-lands-cop-in-hot-water/.