

# Another Shot at Rectifying the *District of Columbia v. Heller* Ambiguities: The Constitutional Right to Arms, the Nonconstitutional Right to Arms, and the Commerce Clause

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## I. INTRODUCTION

In an article for *The New Yorker* titled *Active Shooter*, David Sedaris quipped that, in preparing for the potential that a psychopath might break into his home, he would just as soon have a back door as a gun.<sup>1</sup> Sedaris wrote the article after visiting a shooting range in North Carolina.<sup>2</sup> Before, during, and after the writing of the article, Sedaris lived in the United Kingdom and noted that in the United Kingdom, it is nearly impossible to acquire a handgun let alone fire a handgun for sport.<sup>3</sup>

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1. David Sedaris, *Active Shooter*, NEW YORKER, July 9 & 16, 2018, at 32, 34.  
2. *Id.* at 32.  
3. *Id.* at 34.

Conversely, in the United States, a citizen has a right to a handgun.<sup>4</sup> Proponents of the right defend it atavistically, leaning on tradition and history<sup>5</sup> and asserting—if not explicitly, then implicitly—that the right to bear arms defines their identity as Americans.<sup>6</sup> Those opposed to the right to own an arm, a handgun, point to the United States' problems with gun violence.<sup>7</sup>

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4 District of Columbia v. Heller, 554 U.S. 570, 595 (2008). In general, states place more procedural restrictions on acquiring a handgun than they do on acquiring a long gun. See *Gun Laws by State: The Complete Guide*, GUNS TO CARRY (2018), <https://www.gunstopcarry.com/gun-laws-state/#states> [<https://perma.cc/BP5J-8Z4K>]. States also restrict handgun purchases by age, varying from eighteen, in gun-friendly states such as Alabama, to twenty-one, in gun-restrictive states such as California. Brianna Stone, *Here Are the Gun Laws for All 50 States in the U.S.*, DAILY DOT (Apr. 5, 2018, 4:02 PM), <https://www.dailydot.com/layer8/gun-laws-by-state> [<https://perma.cc/6T9K-9BRV>].

5. See, e.g., *Heller*, 554 U.S. at 627; Sam Zuidema, Note, *Raising Heller: Constitutional Scrutiny in a New Age of Second Amendment Rights*, 2018 U. ILL. L. REV. 813, 840.

6. See Larry Donnelly, *America's Gun Culture: What Makes Americans So Attached to Their Weapons?*, JOURNAL.IE (Mar. 4, 2018, 9:45 AM), <https://www.thejournal.ie/readme/americas-gun-culture-3877087-Mar2018> [<https://perma.cc/GFX9-BLGG>]. Larry Donnelly, a lecturer at NUI Galway, an Irish University, answers the question he poses in the title of his article by pointing to gun-owning Americans' "rugged individualism." *Id.* He describes this as the desire both to assert an ability to survive on the frontier and to stand up against an oppressive government. *Id.* Donnelly posits that gun ownership represents this "rugged individualism." *Id.* He argues that, to the gun owner, gun ownership is a sort of individual triumph over the government, an expression of the fighting spirit that makes one American. *Id.*

The website on which Donnelly wrote his article has a comments section. Two comments support Donnelly's contention that "rugged individualism" defines gun ownership. In the first comment, a reader muses that taking away guns is like "asking us to give up beer and whiskey." Donnelly, *supra*. In the second, the reader explains that to live without a gun in the wilds of Wyoming would be "insane." *Id.* Each comment demonstrates one of Donnelly's points. The first illustrates both a sort of dislike or distrust of a potentially oppressive government and the notion that guns occupy a place in American culture akin to other equally American items like beer and whiskey. The second demonstrates the necessity of guns in certain rural areas of America.

Both of these comments also demonstrate a conception of arm ownership that this Comment will explore: arms as a good versus arms as a right. The first unintentionally compares gun ownership to owning alcoholic goods. The second explains the importance of the utility of guns and not so much the value of claiming a right to a gun. In both, there is an implied conflict between guns protected by the Second Amendment and guns to which one has the nonconstitutional right to own and use.

7. See generally *America's Gun Culture in 10 Charts*, BBC NEWS (Oct. 27, 2018), <https://www.bbc.com/news/world-us-canada-41488081> [<https://perma.cc/JK22-RLMC>].

Consequently, the debate over gun control and gun ownership has created a political chasm.<sup>8</sup> This Comment aims to set aside politics and engage in legal analysis. At times it may seem that this Comment leans to the left of the aforementioned chasm, but it does so on the backing not of statistics and rhetoric but on legal fact and interpretation. Hopefully, this Comment can narrow, and not amplify, the chasm.

Before continuing, it will be helpful to briefly describe three premises under which this Comment analyzes the Second Amendment. The first is the simplest. This Comment distinguishes between the individual right to bear arms and the right to bear arms to form a militia.<sup>9</sup> Of course, the latter implies that the individual will need to bear at least some kind of arm.<sup>10</sup> However, the individual right to bear arms is distinct because it is the right to bear arms absent any relationship to forming a militia. Therefore, the individual has a right to bear arms for the purpose of forming a militia and the right to bear arms for individual purposes.<sup>11</sup> This Comment focuses on the latter and will refer to it as the individual right.

The second premise is that there are two distinct groups of arms: arms to which one now has a constitutional right and arms to which one has had—and continues to have—a nonconstitutional right.<sup>12</sup> The importance of this premise is the result of widespread arm ownership with varied use prior

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8. See Matt Laslo, *Get Ready for a Massive Fight over Gun Control in Congress in 2019*, VICE NEWS (Dec. 31, 2018), [https://news.vice.com/en\\_us/article/kzvjyz/get-ready-for-a-massive-fight-over-gun-control-in-congress-in-2019](https://news.vice.com/en_us/article/kzvjyz/get-ready-for-a-massive-fight-over-gun-control-in-congress-in-2019) [<https://perma.cc/L6FC-SMZH>]. The article explains that a recent bill demanding a limited reform to background check measures did not receive enough votes to even be debated. *Id.* The bill died by filibuster. *See id.* The article notes, however, that some Democrats have recently won in GOP strongholds when running on strict gun-control platforms. *See id.* Yet, these Democrats recognize that rapid change is not plausible. *See id.*

9. Compare *Heller*, 554 U.S. at 595 (codifying the individual right to bear arms), with *United States v. Miller*, 307 U.S. 174, 178 (1939) (affirming that the Second Amendment protects the right to form a militia).

10. See *infra* Section I.B. See generally George A. Moscaro, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *FORDHAM L. REV.* 2113, 2174 (2008) (“The individual right model is a better interpretation of the Second Amendment than the collective right model because it accounts for and reconciles both halves of the Amendment.”).

11. See *infra* Sections I.B.1, I.B.2.

12. For a discussion of the tension between the Bill of Rights with other legal rights, see generally Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 *NOTRE DAME L. REV.* 585, 585 (2004) (“Did adopting the Bill of Rights affect other legal rights that Americans possessed at the Founding and possess today?”). This distinction is not made to subordinate one kind of a right to the other, but it is uncontroversial that constitutional rights trounce nonconstitutional rights. See Michael Coenen, *Constitutional Privileging*, 99 *VA. L. REV.* 683, 684 (2013). The constitutional law restricts the nonconstitutional law, and it is the constitutional law that prevails in a conflict between the two. *See id.*

to the codification of the individual right. For example, before the codification of the individual right, one had the nonconstitutional right to hunt using a hunting rifle.<sup>13</sup> Now, one still has the nonconstitutional right to own and use a hunting rifle but not necessarily the right to own and use a hunting rifle under the Second Amendment individual right.<sup>14</sup> Conversely, a court ruling restricting the individual right does not imply that the arms at issue lose all legal protections—only the protection of a constitutional right.<sup>15</sup>

The third premise follows from the second. The third premise distinguishes the right to bear arms from other constitutional rights on the basis that arms are—potentially dangerous<sup>16</sup>—goods and thus, present unique regulatory issues. Therefore, in the context of Second Amendment adjudication, arms can be subject to a Commerce Clause analysis.<sup>17</sup> This analysis will further distinguish the two categories of arms described in the second premise. Of course, any arms regulation—dealing with the constitutional right or not—may violate the Equal Protection Clause, Due Process Clause, or any other constitutional protection. However, this Comment will not consider those potentialities because a due process or equal protection claim is not inherently related to a Second Amendment claim.<sup>18</sup> To the contrary, the

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13. See Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 176 (2015). This Article explains that hunting will receive protection, not from the Second Amendment, but from the political process. *Id.* Further, Blocher's analysis reveals a key distinction that this Comment hopes to reinforce: gun ownership can be, and in fact is most often, distinct from the Second Amendment individual right to bear arms. *See id.*

14. See *Caba v. Weaknecht*, 64 A.3d 39, 59 (Pa. Commw. Ct. 2013) (asserting that the right to carry a weapon for self-defense is “worthy of more protection than an interest in engaging in the sport of hunting”); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 597 (2000) (arguing that hunting is not an interest supported by the history of the Second Amendment). *But see* *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., concurring) (concluding that the Second Amendment protects the right to bear arms not only in self-defense but also in forming a militia and for hunting).

15. See *infra* Part VI.

16. See German Lopez, *Study: Where Gun Laws Are Weaker, There Are More Mass Shootings*, VOX (Mar. 8, 2019, 8:00 AM), <https://www.vox.com/2019/3/8/18254626/mass-shootings-gun-violence-laws-study> [<https://perma.cc/J6TS-LXW8>].

17. See *infra* Sections II.B.1, II.B.2.

18. Compare the court's handling of an equal protection claim in the context of arm ownership in *United States v. Chovan*, 735 F.3d 1127, 1132–33 (9th Cir. 2013), with the court's handling of the Commerce Clause in *United States v. Henry*, 688 F.3d 637, 640–42 (9th Cir. 2012). In *Chovan*, the equal protection claim had little to do with either the arms at issue or the Second Amendment. 735 F.3d at 1132–33. The analysis centered on an unfair

Commerce Clause could apply to all Second Amendment claims because arms are goods that are potentially either in or affecting interstate or intrastate commerce.<sup>19</sup> The relationship to the Commerce Clause is of special importance because arms—as goods—generally fall under the Commerce Clause’s purview.<sup>20</sup> This analysis is doctrinally separate but practically, inextricably related to the Second Amendment.<sup>21</sup>

Overall, these three premises will guide this Comment’s analysis. The following hopes to present a reconceptualization of the Second Amendment—at least to some degree.

### A. *The Inception of the Second Amendment*

The protections of the Second Amendment were neither original nor unique. Many state constitutions included a bill of rights provision guaranteeing a militia.<sup>22</sup> The states added these provisions, in part, to protect the citizens from a potentially oppressive *state* government.<sup>23</sup> In turn, the Second

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difference of treatment between ex-felons and ex-misdemeanants with regard to firearm possession. *See id.* In essence, had the law treated both groups the same, the plaintiff would not have invoked the equal protection claim. The plaintiff still would have invoked a Second Amendment right to bear arms. *See id.* at 1133. In *Henry*, the Commerce Clause authorized a ban on machine gun possession. 688 F.3d at 641. The court analyzed the Second Amendment claim and the Commerce Clause claim separately. *Id.* at 639–42. It would seem that here, too, the Commerce Clause analysis had little to do with the Second Amendment analysis, and it does from a doctrinal perspective. However, any Second Amendment claim could involve a claim that an arm—a good—is being regulated in an unconstitutional manner. A Commerce Clause claim would argue that a good is being regulated in an unconstitutional manner. *See infra* Sections II.B.1, II.B.2. In this way, the Commerce Clause is practically linked to almost any Second Amendment claim. In other words, the regulation at issue in *Henry* cannot invoke the Second Amendment without invoking the Commerce Clause. It cannot because the regulation deals with goods and, as such, inherently invokes the Commerce Clause. The regulation at issue in *Chovan* can be modified, as indicated, to remove an equal protection claim while maintaining a Second Amendment claim. It can because the Equal Protection Clause has no inherent connection to the Second Amendment.

19. *See infra* Sections II.B.1, II.B.2.

20. *See supra* discussion accompanying note 18.

21. *See supra* discussion accompanying note 18.

22. DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS IN COMMENTARIES ON LIBERTY, FREE GOVERNMENT AND AN ARMED POPULACE 1787–1792, at xxvi (David E. Young ed., 2d ed. 1995).

23. *See id.* Pennsylvania’s early constitution provided that the people have the right to bear arms “for the defence of themselves and the state.” PA. CONST. of 1776, art. XIII. Similarly, Massachusetts’s early constitution provided that the people have the “right to keep and bear arms for the common defence.” MASS. CONST. of 1780, art. XVII. Pennsylvania’s constitution implies that the people have the right to both bear arms to defend the state against some foreign force and defend themselves against the state. Massachusetts’s constitution was not as explicit as Pennsylvania’s, but it did imply a similar duality. The people could bear arms in common defense; the common defense would be the people against the state or the state, as the common, against a foreign force.

Amendment grew out of the antifederalists' desire that the new Constitution provide a similar protection against the federal government.<sup>24</sup> John DeWitt, the penname of an ardent, if not extreme, antifederalist,<sup>25</sup> believed that Congress assumed the power to "raise and support [a]rmies"<sup>26</sup> so that it could destroy the states' strength and the states' "respective Governments."<sup>27</sup> To ensure that this did not happen, the people needed the assurance that they could form their own fighting force, a militia.<sup>28</sup> The framers understood militia to mean every able-bodied citizen in each state.<sup>29</sup> Able-bodied citizens consisted only of property-owning males.<sup>30</sup> In order for a group of citizens to be properly considered a militia, those citizens needed training in the "use of arms for the purposes of war."<sup>31</sup> Therefore, the Second Amendment, at inception and at face value, seems to protect the war-trained, property-owning male's ability to form a militia with other war-trained, property-owning males. Facially, this does not imply that the individual had the right to bear arms for the sake of the individual.<sup>32</sup> Although many citizens might have owned arms at the founding, these citizens did not have a constitutional

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24. YOUNG, *supra* note 22, at xxvi.

25. Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHL.-KENT L. REV. 195, 233 (2000).

26. U.S. CONST. art. 1, § 8, cl. 12.

27. YOUNG, *supra* note 22, at 131.

28. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) ("It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.").

29. EARL R. KRUSCHKE, *GUN CONTROL: A REFERENCE HANDBOOK* 382 (1995).

30. 2 JAMES BURGH, *Of the Army*, in *POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES*, bk. III, ch. III, at 389, 402 (London, E. & C. Dilly 1774).

31. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 153 (Law Exch. Ltd., 2d ed. 2014) (1829).

32. *See id.* It implies that the individual has the right to bear arms for proper military use. A completely disarmed citizenry would violate that right. *See United States v. Emerson*, 270 F.3d 203, 235 (5th Cir. 2001). However, because the individual has a right to bear arms to fulfill the right to form a well-regulated militia does not in turn imply that the individual has the right to use that arm for individual purposes. The *Emerson* court makes the opposite claim in support of an individual right. *Id.* at 259–60. This logic fails under a historical analysis because the arm-bearing populace at the founding exceeded the arm-bearing citizens that could form, and thus have a right to form, a militia. *See supra* notes 29–31 and accompanying text. Therefore, the individual right does not relate to the right to form a militia because, at the founding, bearing arms needed no constitutional protection except to ensure that the citizenry—with limitations, of course—could use those arms in furtherance of an organized militia.

right to those arms in the same way that war-trained, property-owning males had a constitutional right to bear arms in furtherance of a militia.<sup>33</sup>

Regardless of the initial impetus of the Second Amendment, it now protects an individual's right to bear arms.<sup>34</sup> Although this Comment will not dispute this point, it is worthwhile to consider where, how, and why the Second Amendment originated when trying to grapple with the complexities it currently presents.

### B. *The Two Defining Cases of the Second Amendment's Relatively Quiet Life*

The Second Amendment protects not only the citizen's right to bear arms for the purpose of forming a "well regulated militia"<sup>35</sup> but also the citizen's right to bear arms in defense of "hearth and home" absent the purpose of forming a militia.<sup>36</sup> The 1939 case *United States v. Miller* affirmed the former.<sup>37</sup> Nearly seventy years later, the 2008 case *District of Columbia v. Heller* affirmed the latter.<sup>38</sup>

#### I. *United States v. Miller*

In *Miller*, the Supreme Court concluded that any interpretation or application of the Second Amendment must keep the preservation of the

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33. See RAWLE, *supra* note 31, at 135. This distinction does not suppose that the Founders would dismiss the ability of other individuals to resist an oppressive government. It demonstrates that the right to bear arms to achieve that purpose is limited to war-trained, property-owning males who have come together to form a militia. Any other citizen could resist an oppressive government, but the Second Amendment does not, on its face, protect that citizen's right to achieve that resistance by bearing arms.

34. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

35. *United States v. Miller*, 307 U.S. 174, 178 (1939). Note that this is *not* the collective rights theory. See William Don Edwards & Phillip B. Rose, *A Matter of Standing: A Recap of Second Amendment Developments*, 35 LINCOLN L. REV. 1, 2–3 (2007–2008). The collective rights theory limits the Second Amendment to the right of the states—not the citizens as a whole—to form a well-regulated militia. *Id.* This right does not protect the individual's possession of a weapon. *Id.* at 3. It protects only the state's right to form a well-regulated militia that could oppose a potentially tyrannical federal government. *Id.* at 2–3. Consequently, under the collective rights theory, an individual would not have standing to bring a Second Amendment claim. *Id.* at 3. Furthermore, courts adhering to the collective rights theory would uphold nearly any regulation enacted by a state unless such a regulation also violated the Due Process or Equal Protection Clauses. *Id.* at 3.

36. *Heller*, 554 U.S. at 635.

37. *Miller*, 307 U.S. at 178–79. For a brief description of courts' reactions to *Miller*, see Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL'Y 17, 28–29 (2016).

38. *Heller*, 554 U.S. at 635–36.



states' militias as its end goal.<sup>39</sup> With that goal in mind, the Court determined that certain provisions of the National Firearms Act (NFA), which restricted selling and transferring sawed-off shotguns, did not violate the Second Amendment.<sup>40</sup> The Court reasoned that owning or using "such an instrument" bears no "reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>41</sup> Interestingly, the Court engaged in a sort of balancing test wherein it balanced the NFA's restrictions against its infringement upon a citizen's ability to form a well-regulated militia; Justice Scalia would later disavow such a balancing test in his *Heller* opinion.<sup>42</sup>

The *Miller* holding does not rest on air. A linguistic analysis of the Second Amendment and a historical analysis of the political climate at the Second Amendment's inception confirm the holding.<sup>43</sup> A plain reading

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39. *Miller*, 307 U.S. at 178.

40. *Id.*

41. *Id.* Not every commentator agrees that *Miller* implies that the Second Amendment right does not extend to non-militia, individual activities. Some commentators believe that the Court did not focus on the scope of the right but on the scope of the weapons used to act on that right. See T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 782 (1995) ("[N]othing in the holding on the merits focuses on whether *the accused* were within the Amendment; the holding instead focuses on whether *the weapon* was within the Amendment. . . . [T]he holding in *Miller* does . . . support the proposition that the Second Amendment protects an *individual's* right to . . . bear arms."); Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. C.R.L.J. 105, 165 (1995) (arguing that the *Miller* Court did not question the "private, individual character" of the Second Amendment right and did not "suggest that the possessor must be a member of the militia"). *But see* United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (asserting that *Miller* dealt with the right to possess a double-barreled, sawed-off shotgun). Funk and Halbrook's analyses assume that if the Second Amendment protects an individual's right to bear arms for the purpose of forming a militia, the individual, thus, has a right to keep and bear arms. In part, each argues that if one has a right to form a militia, one has a right to the items necessary to form a militia. But each does not stop there; each asserts that the right to items necessary to form a militia confers the right to bear those arms on the individual. This is problematic when considering the nature of the individual right created in *Heller*. 554 U.S. at 595. Consider Congress's ability to regulate interstate commerce. U.S. CONST. art. 1, § 8, cl. 3. That ability implies that Congress can use the necessary means to regulate interstate commerce. It does not imply that Congress has the ability use those means absent a connection to interstate commerce. Similarly, an individual can have the right to form a militia. An individual can have the right to the means necessary—arms—to forming that militia. But this does not imply that, absent the purpose of forming a militia, the individual has a right to bear arms.

42. *Heller*, 554 U.S. at 634.

43. See generally Jeffrey P. Kaplan, *Unfaithful to Textualism*, 10 GEO. J.L. & PUB. POL'Y 385 (2012) (explaining that a linguistic approach to reading the Second Amendment does not allow for an individual right); Finkelman, *supra* note 25 (explaining that the Second

of the Second Amendment supports the Court's insistence on the importance of the relationship between the regulations imposed by the NFA and the ability to preserve a well-regulated militia.<sup>44</sup> Jeffrey P. Kaplan, a professor of linguistics, argues that a purely textualist reading of the Second Amendment supports only the right to bear arms insofar that a "state depends for its security on a well-regulated militia."<sup>45</sup> The *Miller* Court asserts that such a relationship exists between the citizenry and its ability to form a well-regulated militia rather than between the state and its ability to do so.<sup>46</sup> Further, the tension between the federalists and antifederalists<sup>47</sup> in 1789 supports the conclusion that the Second Amendment's purpose and intent protects the citizens from the power, or potential power, of the federal government by allowing those citizens to maintain armed militias.<sup>48</sup>

## 2. District of Columbia v. Heller

Neither the tension between the federalists and antifederalists nor the plain language of the Second Amendment directly endorses the individual right advanced by *Heller*.<sup>49</sup> However, this Comment will not attempt to rectify the *Heller* right with the plain, historical, or contemporary meaning

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Amendment's protection of a well-regulated militia was the result of debates between the federalists and antifederalists during the founding).

44. See U.S. CONST. amend. II; *Miller*, 307 U.S. at 178.

45. Kaplan, *supra* note 43, at 427–28. This assertion is in line with the collective rights theory. See Edwards & Rose, *supra* note 35, at 2–3 (providing a discussion on the collective rights theory as it pertains to the Second Amendment). Although that theory is suspect, the force of Kaplan's statement does not change when the relationship invokes the citizens' right as a whole and not the states' rights individually.

46. *Miller*, 307 U.S. at 178–79.

47. See *supra* Section I.B. The antifederalists worried that the new Constitution would threaten the sovereignty that the states enjoyed under the Articles of Confederation. See Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 241 (2004). In a speech, Patrick Henry questioned the language of the Constitution's preamble: "We, the people." PATRICK HENRY, SPEECHES OF PATRICK HENRY IN THE VIRGINIA RATIFYING CONVENTION (June 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST 211 (Herbert J. Storing, ed. 1981). Henry believed the Constitution's preamble should have read, "We, the States," because states are "the soul of the confederation." *Id.* The federalists, on the other hand, supported a strong national government, albeit to different degrees. See Smith, *supra*, at 234–35 ("Some of the Federalists . . . wanted to abolish the states, while others believed that the proposed Constitution's national government was too strong and should be limited in authority by subsequent amendment." (footnotes omitted)).

48. See Finkelman, *supra* note 25, at 233.

49. *Id.*; see Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 499–500 (2004) ("Even if one includes the Revolutionary Era and the federalist era, references to anything that might be construed as a constitutional right of individual self-defense are exceedingly rare, and almost always turn out to be statements from dissenting constitutional texts that expressed the point of view of the losers . . .").

of the Second Amendment. This Comment will accept the individual right to bear arms as law no matter how questionable and controversial it may be.

The issue in *Heller* was whether or not a handgun ban in the District of Columbia could pass constitutional muster.<sup>50</sup> In deciding that such a ban was unconstitutional, Justice Scalia reasoned that the Second Amendment confers an individual right to bear arms.<sup>51</sup> In his opinion, Justice Scalia explained that the Court will continue to modify and explore the extent of this individual right but that, at the very least, the Second Amendment protects the right of the law-abiding citizen to use a firearm in defense of the home.<sup>52</sup> Along with failing to consider the scope of the right he defined, Justice Scalia admits that he, and his majority, did not set a level of scrutiny to use when an issue of the individual right to bear arms comes before a court.<sup>53</sup> Justice Scalia did note that rational basis scrutiny would not suffice.<sup>54</sup>

In a dissenting opinion, Justice Breyer noted the majority's failure to specify a proper level of scrutiny, so he proposed an interest-balancing test.<sup>55</sup> Justice Breyer believed that the court should ask whether "the statute burdens a protected interest . . . out of proportion to the statute's salutary effects upon other important governmental interests."<sup>56</sup> Justice Scalia explicitly rejected Justice Breyer's interest-balancing approach because no other constitutional right is subject to "a freestanding" interest-balancing test.<sup>57</sup>

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50. *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008). This would not be the last time that the District of Columbia tried to regulate handgun ownership. See Daniel Trotta, *U.S. Appeals Court Blocks D.C. Law Restricting Gun Rights*, REUTERS (July 25, 2017), <https://www.reuters.com/article/us-usa-guns-washingtondc-idUSKBN1AA27U> [<https://perma.cc/W9WF-PWNZ>].

51. *Heller*, 554 U.S. at 595.

52. *Id.* at 635; see cases discussed *infra* Part IV; see also *People v. Cisneros*, 356 P.3d 877, 886 (Colo. App. 2014) (quoting *Heller*, 554 U.S. at 635).

53. *Heller*, 554 U.S. at 634.

54. *Id.* at 628 n.27.

55. *Id.* at 689–90 (Breyer, J., dissenting). Justice Breyer's test asserts that the other governmental interests must be important. *Id.* The phrase "important governmental interest" evokes intermediate scrutiny. See *infra* Section I.B.2.a. Justice Breyer's interest-balancing test asks a court to determine if the other governmental interest is important and, if it is, whether the benefit afforded to the important interest outweighs the burden imposed on the Second Amendment individual right. *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

56. *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

57. *Id.* at 634 (majority opinion); see also Benjamin A. Ellis, Note, "Time Enough" for Scrutiny: The Second Amendment, Mental Health, and the Case for Intermediate Scrutiny, 25 WM. & MARY BILL RTS. J. 1325, 1349 (2017) ("Strict scrutiny involves interest balancing as

However, it seems that *Miller* applied an interest-balancing test to the Second Amendment, without issue, seventy years earlier.<sup>58</sup> Perhaps Justice Scalia's concern lay not in the test itself but in the possible results of such a test: Justice Scalia believed that application of the interest-balancing test would deem the District of Columbia handgun ban constitutional.<sup>59</sup> In the end, Justice Scalia did not indicate under which level of scrutiny the handgun ban would or would not be constitutional; courts have still yet to settle on the proper test.<sup>60</sup> *Heller* created an individual right to bear arms but failed to define the scope of that right or indicate which level of scrutiny to apply when that right comes before a court.<sup>61</sup>

*a. Constitutional Levels of Scrutiny Described but not Defined*

A brief foray into the levels of scrutiny and their relationship to the Second Amendment is necessary before continuing.

Levels of scrutiny crop up in a range of constitutional subjects: free speech, substantive due process, free exercise of religion, among others—including the Second Amendment.<sup>62</sup> There are three traditional levels of scrutiny: rational basis, intermediate, and strict scrutiny.<sup>63</sup>

Although constitutional levels of scrutiny are often applied and studied legal concepts, there remain pertinent ambiguities surrounding each with regards to the Second Amendment. These ambiguities make it difficult to

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well. That is, the basic 'logic' of intermediate scrutiny and strict scrutiny analysis is very similar.').

58. *United States v. Miller*, 307 U.S. 174, 178 (1939).

59. Ellis, *supra* note 57, at 1334. Presumably, Justice Scalia came to this result because even he could admit that the government's interest in ensuring the safety of its citizens outweighs the right to own a specific kind of gun in a specific place. Note, however, that this would not be the case under this Comment's three-prong test. The solution acknowledges a limited individual right; the limited right includes the arms protected by *Heller*—handguns and other arms necessary to protect the home. Thus, once a court has determined that the regulation infringes upon that right, it would not engage in interest-balancing. See *infra* Part VI for a full discussion of the solution.

60. See generally Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018) (canvassing the Second Amendment tests applied across circuit and federal courts and the relative success of such claims under each test).

61. *Heller*, 554 U.S. at 634–35.

62. See R. George Wright, *What if All Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 165–66 (2014). For discussions of the levels of scrutiny in other constitutional contexts, see James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 509–15 (1996); Eric A. Roberts, Note, *Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 DRAKE L. REV. 485, 495–96 (1993); Whitney Travis, Note, *The Religious Freedom Restoration Act and Smith: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1705–11 (2007).

63. Wright, *supra* note 62, at 169.

define what exactly each level entails and what differentiates one from another; the levels of scrutiny are ambiguous themselves. This lack of clarity mars these supposedly algorithmic rules.<sup>64</sup>

### I. Rational Basis Review

Rational basis review requires a “rational relationship”<sup>65</sup> between the regulation and “some legitimate governmental purpose.”<sup>66</sup>

*Heller* excluded the possibility of subjecting Second Amendment claims to a rational basis review because to do so would deem the Second Amendment redundant;<sup>67</sup> the Constitution already protects against irrational laws.<sup>68</sup> In *United States v. Skoien*, the court affirmed *Heller*’s reasoning for rejecting a rational basis test by explaining that a “rational basis is essential for legislation in general,” which would, again, render the Second Amendment pointless.<sup>69</sup>

The interpretation of rational basis review by these courts falls short because it fails to consider the role rational basis review could play when a regulation implicates the fringes of the right. For example, a regulation could infringe on the distribution of an arm necessary to protect the home but not on the ability to use an arm to protect the home.<sup>70</sup> In this case,

64. See *id.* at 171.

65. See *Roberts*, *supra* note 62, at 495–96. A rational relationship requires less than a reasonable relationship. See *id.* In corporate law, the business judgment rule requires directors’ decisions to be “attributed to any rational business purpose.” *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 954 (Del. 1985) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). The court does not measure reasonability when considering directors’ judgments. See *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000). Further, a definition of rational per *Merriam Webster* explains it as “having reason or understanding” and “relating to, based on, or agreeable to reason.” *Rational*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003). Therefore, a rational decision or law can have some reason or be related to reason, but it need not be reasonable.

66. *Heller v. Doe*, 509 U.S. 312, 320 (1993). This case discusses rational basis review in the context of the Equal Protection Clause. *Id.*; see U.S. CONST. amend. XIV, § 1. Nonetheless, application of rational basis review in the context of the Second Amendment would follow the same logic.

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

68. *Id.* For a discussion of the implications of footnote 27 in *Heller*, see generally H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217 (2011).

69. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010).

70. Of course, if the regulation restricted distribution in such a way that precluded use, the regulation would violate the right to bear arms—both with regard to forming a militia and to defending the home.

perhaps, the Second Amendment could serve a purpose under rational basis review—or under a review of a similar nature.<sup>71</sup> However, until the courts and legal community define the scope of the individual right protected by the Second Amendment, an assertion that rational basis review would deem the Second Amendment pointless seems, at least at this point in the history of Second Amendment jurisprudence, too strong.

## 2. *Intermediate and Strict Scrutiny*

This Section purposefully deals with both intermediate and strict scrutiny; an understanding of one depends on an understanding of the other.

In general, intermediate scrutiny requires the government to show that the challenged regulation serves an important interest and that the means used are substantially related to that interest.<sup>72</sup> Strict scrutiny requires the regulation to be “narrowly tailored to serve a compelling [state] interest.”<sup>73</sup>

Courts apply intermediate scrutiny when the regulation does not infringe on the core right of the Second Amendment but does place a substantial burden on the right.<sup>74</sup> Courts apply strict scrutiny when the regulation infringes on the core right of the Second Amendment.<sup>75</sup> Oddly, from 2008 to 2016, challenges reviewed under strict scrutiny had a higher success rate than challenges reviewed under intermediate scrutiny.<sup>76</sup> This calls into question

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71. See the discussion of the Commerce Clause *infra* Sections II.B.1, II.B.2. The Commerce Clause analysis required by the solution’s third prong can act as an effective substitute for rational basis review by ensuring that a regulation at the very fringes of the individual right receives a level of review beyond mere legislative rationality.

72. *Skoiien*, 614 F.3d at 641.

73. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007) (plurality opinion).

74. See *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). It appears that only federal courts engage in a core analysis on a regular basis. Ruben & Blocher, *supra* note 60, at 1500. This is the result, perhaps, of a move away from the *Marzzarella* two-part test at the state level. *Id.*; see also *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (asking a court to evaluate whether a law burdens some Second Amendment conduct, and, if it does, to “evaluate the law under some form of means-end scrutiny”). This difference might explain why more federal Second Amendment claims have success than do their state counterparts. See Ruben & Blocher, *supra* note 60, at 1475–77. For example, the success rate of Second Amendment claims in the Ninth Circuit was 13%, 4/31, while the success rates of Second Amendment claims in the state courts of states that make up the Ninth Circuit was 0%, 0/75. *Id.*

75. *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195 (5th Cir. 2012). Note, however, that this is not as binary a rule as it may seem. See Ruben & Blocher, *supra* note 60, at 1500 (showing that not every determination that a regulation burdened the core right led to a strict scrutiny review; of the six regulations surveyed that burdened the core right, four received strict scrutiny while two received intermediate scrutiny). This, in turn, demonstrates the manipulability of the levels of scrutiny and, consequently, a reason for moving toward this Comment’s proposed balancing test.

76. Ruben & Blocher, *supra* note 60, at 1495. The success rate for strict scrutiny was 19%, 5/27. *Id.* The success rate for intermediate scrutiny was 10%, 24/242. *Id.* Admittedly,

the effectiveness, from a doctrinal standpoint, of applying levels of scrutiny to Second Amendment claims. The data indicates that the courts are more likely to accept a regulation infringing on the core right than they are to accept a regulation not burdening the core right.<sup>77</sup> For example, imagine a court that deals with fifty Second Amendment challenges. It considers ten challenges under strict scrutiny and forty challenges under intermediate scrutiny. It chooses which level of scrutiny based on the distinction described above. Of the forty reviewed under intermediate scrutiny, the court accepts eight as having a substantial relationship to an important interest, or 20%. Of the ten reviewed under strict scrutiny, the court accepts three as having a narrowly tailored, compelling interest, or 30%. Therefore, the court views regulations infringing on the core right more favorably than it does regulations not burdening the core right. To debunk this interpretation, one has to assume that the legislature wrote the regulations subject to intermediate scrutiny more ineffectively than it wrote the regulations subject to strict scrutiny—a questionable assumption at best. Or, one has to assume the false premise that more compelling reasons exist to infringe on the core right than important reasons to place a substantial burden on the right.<sup>78</sup> Otherwise, the courts' actions, like the example above, are perplexing and indicative of a misunderstanding, or misapplication, of these two levels of scrutiny.

Further, the preceding discussion assumed courts could determine whether to apply intermediate or strict scrutiny based on the regulations' infringement on the core right. However, defining intermediate and strict scrutiny on this basis creates problems because courts have yet to concretely and adequately define the core right.<sup>79</sup>

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the difference in the number of suits brought under each level is quite large. However, a reasonable person would infer that if 10% of the suits brought under intermediate scrutiny passed, regulations challenged under strict scrutiny would pass at a rate lower than 10%, regardless of the number of suits.

77. See *supra* notes 74, 76 and accompanying discussion.

78. This is a false premise because all compelling interests are important but not all important interests are compelling. Further, all interests pertaining to the core of the right apply to a substantial burden on the right but not all interests pertaining to a substantial burden on the right apply to the core of the right.

79. See, e.g., *Glass v. Paxton*, 900 F.3d 233, 244 (5th Cir. 2018) (discussing the concealed carry of weapons on the University of Texas campus and holding that because the phrase “well-regulated” cannot limit the individual right, there can be no restriction that individuals carrying concealed weapons be “well-regulated”); *Peruta v. County of San Diego*, 824 F.3d 919, 939–40 (9th Cir. 2016) (en banc) (holding that the Second Amendment individual right does not protect any member of the general public to carry concealed firearms in any degree); *Drake v. Filko*, 724 F.3d 426, 431–32 (3d Cir. 2013) (“[E]ven if some

Overall, the application of intermediate and strict scrutiny to the Second Amendment individual right is as unclear as it is problematic.

### 3. *The Result: No Clarity*

In the end, the levels of scrutiny appear clear but lack clarity when applied to most constitutional rights.<sup>80</sup> This lack of clarity becomes fully exposed when dealing with the Second Amendment and, thus, supports a narrow conception of the individual right and a move toward a balancing test.

#### C. *A Brief Answer to the Heller Ambiguities*

This Comment will seek to answer the two ambiguities left unanswered in *Heller*: the scope of the right and the proper level of scrutiny to apply to the right. With regards to the scope of the individual right, this Comment demands a narrow reading that limits the right to arms necessary to defend the home. It will reach this conclusion by demonstrating, first, that any reading of the right otherwise will open up the potential for nearly all arms to receive the protection of the individual right<sup>81</sup> and, second, that at least some courts have already adopted the narrow right. With regards to the proper level of scrutiny, this Comment proposes a move away from the traditional levels of scrutiny. It proposes a three-prong test. Prong one will ask whether or not the proposed regulation infringes upon one's right to arms necessary to defend the home. If the right is infringed, prong two will ask whether or not the benefit of such a regulation outweighs the burden on the right.<sup>82</sup> Prong three will come into effect when the court determines

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protected right to carry arms outside the home exists, the challenged requirement that applicants demonstrate a 'justifiable need' to obtain a permit to carry a handgun for self-defense qualifies as a 'longstanding,' and 'presumptively lawful' regulation."); *infra* Part III.

80. The line between rules and standards is blurred, if not nonexistent. An argument for one becomes an argument for the other in another context. For an analysis of the pros and cons of rules and standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992) (choosing between rules and standards affects costs, which in turn "illuminates concerns about the over- and under-inclusiveness of rules relative to standards").

81. This Comment posits that this is a bad result. To argue otherwise, one has to assert that protecting arms such as machine guns with the protection afforded by a constitutional right is facially good. Further, even if the Second Amendment right does not protect a certain arm, this Comment does not purport that one could not own that arm via another legal right.

82. Levels of scrutiny involve similar balancing tests. See Ellis, *supra* note 57, at 1349. However, this proposed balancing test does not muddle with levels of scrutiny language or supposed formality. Its goal is clarity of application. See *infra* Part IV for a discussion of why a balancing approach absent any relationship to a purported level of scrutiny will lead to such clarity.



that the individual right has not been infringed—much like traditional rational basis review. This prong asks the court to engage in a Commerce Clause, or Dormant Commerce Clause, analysis to determine whether or not a challenged regulation exceeds Congress’s or a state’s power to regulate interstate commerce.<sup>83</sup> If a regulation does, it cannot stand. This prong effectively asks a court to begin differentiating between arms to which one has a constitutional right and arms to which one has a nonconstitutional right. The success of the three-prong test turns on a concrete, narrow conception of the individual right. The three-prong test will continue to take shape as the analysis unfolds.

To fully explain the ideas and proposals explained above, this Comment will consist of five additional parts. Part II will provide a brief history of the treatment of the Second Amendment over the years. It will examine several cases before *Miller* and several pre-*Miller* cases that explicitly reject the notion that the Second Amendment creates an individual right to bear arms. Also, it will briefly present noteworthy Second Amendment and Commerce Clause cases between *Miller* and *Heller*. Lastly, it will canvas the legal landscape post-*Heller*. Part III will argue for a narrow reading of the *Heller* individual right; courts should limit the right to those arms necessary to defend the home. Part IV will analyze cases that unknowingly follow aspects of the proposed solution. Part V will engage with other proposed solutions to ascertain where each falls short and where each provides valid points. Part VI will flesh out the proposed solution and consider future steps.

## II. THE SECOND AMENDMENT OVER THE YEARS

The following Sections will explore the prevalence and interpretations of Second Amendment analysis over three key periods: before *Miller*, after *Miller* but before *Heller*, and after *Heller*. This background will demonstrate the confusion and inconsistency that have plagued Second Amendment jurisprudence. Furthermore, this discussion will introduce the concepts necessary to support this Comment’s construction of the narrow individual right.

### *A. The Second Amendment Before Miller*

During the period before *Miller*, the Second Amendment did not dominate the decisions of the Supreme Court, and it certainly remained on the periphery

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83. See *infra* Sections II.B.1, II.B.2.

of any decision that did make note of it.<sup>84</sup> When mentioned, the Court would discuss the Second Amendment either as lacking a protection for the individual right to bear arms or as a means to explain that constitutional rights are generally limited.<sup>85</sup>

For example, in the 1894 case *Miller v. Texas*, the Court affirmed the limits of the Second Amendment.<sup>86</sup> The Court found that a Texas law that forbade carrying a weapon on a public street did not violate the Second Amendment.<sup>87</sup> In its analysis, the Court defined the Second Amendment right as “the right of the people to keep and bear arms.”<sup>88</sup> However, the Court did not construe the presence of that phrase to create an unbridled individual right. Similarly, the 1897 case *Robertson v. Baldwin* reaffirmed *Miller v. Texas* when the Supreme Court determined that “the right of the people to keep and bear arms is *not infringed* by laws prohibiting the carrying of concealed weapons.”<sup>89</sup> Again, the Court framed the Second Amendment as the right of the people to “keep and bear [a]rms”<sup>90</sup> but did not use that phrase to create an unbridled individual right. Each case implies that although an individual may own an arm, the Second Amendment does not necessarily protect the right to an arm outside of using that arm in furtherance of a forming a militia.<sup>91</sup> That right does not extend to individual use that one would gain from carrying a concealed weapon or from carrying a weapon not with the aims of forming a militia.

The reasoning adopted by each case supports a narrow reading of the individual right. The basis for creating the individual right in *Heller* rests

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84. See, e.g., *Maxwell v. Dow*, 176 U.S. 581, 597 (1900) (asserting that the Second Amendment does not apply to the states), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970); *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (concluding that the Second Amendment does not protect a right to concealed carry); *Miller v. Texas*, 153 U.S. 535, 538 (1894) (concluding that the Second Amendment does not protect a right to concealed carry); *Logan v. United States*, 144 U.S. 263, 287 (1892) (invoking the Second Amendment to declare its limited scope), *abrogated by Witherspoon v. Illinois*, 391 U.S. 510 (1968); Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 730–37 (2002).

85. See Nosanchuk, *supra* note 84, at 730–37.

86. *Miller*, 153 U.S. at 538.

87. *Id.* The Court notes that even if the Second Amendment applied, the Second Amendment only restricts federal power and not “proceedings in state courts.” *Id.* The Court would not incorporate the Second Amendment until 2010. *McDonald v. City of Chicago*, 561 U.S. 742, 746 (2010). This delay supports the conclusion that, for most of its history, the Second Amendment acted as a check on a potentially tyrannical federal government; it did not act as a check on oppressive state governments because state constitutions already had provisions securing the right to form a militia. See YOUNG, *supra* note 22, at xxvi.

88. *Miller*, 153 U.S. at 538.

89. *Robertson*, 165 U.S. at 281–82 (emphasis added) (citation omitted).

90. U.S. CONST. amend. II.

91. See *Miller*, 153 U.S. at 538; see also *Robertson*, 165 U.S. at 282.

in the phrase “the right of the people to keep and bear [a]rms.”<sup>92</sup> If that phrase can also support an argument for the lack of an individual right,<sup>93</sup> then any attempt to expand that right beyond the narrow right identified in *Heller*<sup>94</sup> would collapse for lack of concrete support.<sup>95</sup> Further, these two cases also show that *Heller* deviated from precedent, which can provide additional support for using a balancing test even if disallowed by Justice Scalia.<sup>96</sup>

### B. After *Miller*, but Before *Heller*

The Supreme Court did not make any decision changing the scope of the Second Amendment between the *Miller* and *Heller* decisions.<sup>97</sup> However, the 2001<sup>98</sup> Fifth Circuit case *United States v. Emerson* expressed in dicta that the Second Amendment protected the individual right to bear arms.<sup>99</sup> The court asserted that this conclusion did not conflict with the *Miller* holding because the arm at issue, a pistol, was not “of the general kind or

92. U.S. CONST. amend. II.

93. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

94. *Id.* at 635.

95. For a complete discussion of the reason for construing the *Heller* right narrowly, see *infra* Part IV.

96. For a complete discussion of the validity of the balancing test, see *infra* Parts V, VI. Further, *Heller* deviated from precedent by creating an individual right unrelated to forming a militia. *Heller*, 554 U.S. at 634–35; *United States v. Miller*, 307 U.S. 174, 178 (1939). In general, precedent carries value but it does not shield a decision from modification or abrogation. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (rejecting the separate but equal doctrine established by *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896)); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 413–14 (1937) (overruling the freedom to contract established by *Lochner v. New York*, 198 U.S. 45 (1905)). However, the Court does not deviate from precedent without careful consideration because “[l]iberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992). This justification for adhering to precedent also justifies disregarding precedent that creates confusion.

97. See Roland K. Weekley, *This Powder Keg Is About to Explode: The Lack of Standards in Reviewing Second Amendment Cases*, 10 ALB. GOV'T L. REV. 496, 498 (2017).

98. This would be the first instance in the 210 year history of the Second Amendment that a court would recognize an individual right to bear arms, albeit in dicta. See Robert Hardaway, Elizabeth Gormley & Bryan Taylor, *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 43 (2002). Prior to this, courts adhered to the reasoning advanced by *Miller* that there existed no right to bear arms absent a relationship to forming a militia. *Id.*

99. 270 F.3d 203, 260 (5th Cir. 2001).

type excluded by *Miller*.”<sup>100</sup> *Miller* explained that the sawed-off shotgun was not “any part of the ordinary military equipment [and] that its use could [not] contribute to the common defense.”<sup>101</sup>

In a way, both Courts’ analyses turn on the Blackstonian<sup>102</sup> concept that prohibits carrying or using “dangerous or unusual weapons.”<sup>103</sup> The *Miller* Court does so to reject the notion that a sawed-off shotgun found usual use in military service.<sup>104</sup> The *Emerson* court manipulated the phrase to suppose that the *Miller* Court opposed the individual right, not because the Second Amendment supports the right of the individual to bear arms only in furtherance of forming a militia, but because a sawed-off shotgun is unusual and dangerous.<sup>105</sup> In other words, the *Emerson* court inferred that the *Miller* Court believed in the presence of an individual right in the Second Amendment but that the right would not extend to a dangerous or unusual arm; however, the *Miller* Court based its decision on the premise that the unusual and dangerous classification limits the right to form a militia and not on the premise that the Second Amendment protects the individual’s use of all arms but protects those that are unusual and dangerous.<sup>106</sup> One can then argue that the *Emerson* court concluded that there is an individual right to a pistol because pistols are ordinary and not dangerous when compared to more advanced guns. Therefore, although *Emerson* claimed not to conflict with the *Miller* holding, an analysis of the underlying arguments reveals that the *Emerson* court misinterprets, or at least misreads, the *Miller* Court’s reason for deeming constitutional the regulation restricting the sale or transfer of sawed-off shotguns.

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100. *Id.* Some commentators agree with *Emerson*’s description of the holding in *Miller*. See, e.g., Funk, *supra* note 41, at 782; Halbrook, *supra* note 41, at 165.

101. *Miller*, 307 U.S. at 178 (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)); see also Whet Moser, *Gun Control in the Age of Al Capone*, CHI. MAG. (July 25, 2012), <https://www.chicagomag.com/Chicago-Magazine/The-312/July-2012/Gun-Control-in-the-Age-of-Al-Capone> [<https://perma.cc/KC2M-HLWZ>] (asserting that *Miller* would have come out differently had the citizens used sawed-off shotguns at the founding). Note that this assertion omits to consider the second half of the Court’s argument: an arm must be in common use but must also be rationally related to military service. *Miller*, 307 U.S. at 178. Arguably, a sawed-off shotgun fails prong two when owned by someone not in the military because an arm cannot be rationally related to military service if the arm-bearer has no relationship to the military.

102. William Blackstone served on the English Court of Common Pleas, lectured on the common law, and, most famously, wrote a series of commentaries on the law. Emily Kadens, *Justice Blackstone’s Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1554 (2009). Blackstone believed in the authority of the past, held an unwavering commitment to precedent, and did not endorse judicial discretion. *Id.* at 1585, 1589, 1592.

103. 4 WILLIAM BLACKSTONE, COMMENTARIES \*148–49.

104. *Miller*, 307 U.S. at 178.

105. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

106. See *Miller*, 307 U.S. at 178; *infra* Section III.A.

Interestingly, Justice Scalia would later use the same logic as that of *Emerson* when explaining how the individual right does not conflict with *Miller*.<sup>107</sup> Justice Scalia proposed that *Miller* merely held that the Second Amendment did not protect “those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short barreled shotguns.”<sup>108</sup> The *Miller* Court did hold that the Second Amendment did not protect “unusual and dangerous”<sup>109</sup> weapons, but to insist that the Court did not relate that to the formation of a well-regulated militia ignores the very language the Court used.<sup>110</sup>

*Emerson* did not share *Miller*’s disdain for the individual right.<sup>111</sup> However, before the decision in *Emerson*, several circuit court cases did find, in accordance with *Miller*, that the Second Amendment supports only a right to form a militia and not an individual right to use arms otherwise.<sup>112</sup> These cases use both the plain language of the Second Amendment and the relationship espoused in the *Miller* holding to reach their conclusions.<sup>113</sup> Without much deliberation or consternation, these cases assert that the Second Amendment affirms only a right to form a militia. The cavalier nature with which these cases accept as fact that the Second Amendment protects only a right to form a militia demonstrates that the individual right exists more readily for those parties looking for it. This is not to say that the

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107. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

108. *Id.* at 625.

109. *Miller*, 307 U.S. at 178.

110. *Id.* Some scholars argue that the right of the individual to bear an arm for the purpose of forming a militia implies that the individual has a right to bear arms. *See supra* references at note 41. However, that analysis makes a logical leap, which is explained *supra* note 32.

111. *See* *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). Do note that some cases agree with *Emerson* that *Miller* did not support the right to form a militia but instead implied an individual right. *See* *Parker v. District of Columbia*, 478 F.3d 370, 393 (D.C. Cir. 2007), *aff’d*, 554 U.S. 570 (2008). However, the discussion above should demonstrate that such a reading is generally unfounded.

112. *See, e.g.,* *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (“Whatever questions remain unanswered, *Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of a gun might play in maintaining a state militia.” (citing *United States v. Wright*, 117 F.3d 1265, 1271–72 (11th Cir. 1997))); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“[E]ven as against federal regulation, the [Second] [A]mendment does not confer an absolute individual right to bear any type of firearm.”); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“It is clear that the Second Amendment guarantees a collective right rather than an individual right.”).

113. *See* discussion *supra* note 43.

individual right does not exist, just that it may be harder to find. It may require, though, a narrow reading of the right.

### 1. *The Commerce Clause's Relationship to the Second Amendment*

Because the third prong of this Comment's proposed solution asks courts to engage in a Commerce Clause analysis<sup>114</sup> when a regulation does not infringe upon the right to use an arm necessary to defend the home, it is important to briefly discuss two Commerce Clause cases decided before *Heller*. Neither *United States v. Lopez*,<sup>115</sup> nor *Gonzales v. Raich*,<sup>116</sup> deal with the Second Amendment, but a comparison of each case's interpretation of the Commerce Clause demonstrates how a court could apply the Commerce Clause to a Second Amendment regulation.

*Lopez* determined that the Gun Free Schools Act violated the Commerce Clause.<sup>117</sup> The Gun Free Schools Act prohibited an individual from possessing a firearm in a school zone.<sup>118</sup> The Petitioner did not raise Second Amendment claims at the appellate level,<sup>119</sup> so such claims were not before the Supreme Court. In a rare instance in the history of Commerce Clause jurisprudence,<sup>120</sup> the Court found that Congress had overstepped its authority because possessing a firearm at a school does not have a substantial effect on interstate commerce.<sup>121</sup> But, such strict interpretation did not last. In *Raich*, the Supreme Court held that the intrastate production of marijuana fell under the purview of

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114. Commerce Clause analysis asks whether “the regulated activity ‘substantially affects’ interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 559 (1995), *superseded by statutes*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125–26 (codified as amended at 18 U.S.C. § 922(q)(1)); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009, 269–71 (codified as amended at 18 U.S.C. § 922(q)(2)). Interstate commerce includes the channels of interstate commerce. *United States v. Darby*, 312 U.S. 100, 113–14 (1941). It also includes those intrastate activities that affect interstate commerce. *Shreveport Rate Cases*, 234 U.S. 342, 360 (1914). Further, the Dormant Commerce Clause doctrine provides that a state may not create a law that “intrudes upon Congress’s constitutional prerogative to regulate trade between the states and with foreign nations.” *Rousso v. Washington*, 204 P.3d 243, 246 (Wash. Ct. App. 2009). In essence, the Dormant Commerce Clause means that the states cannot restrict interstate trade. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986).

115. 514 U.S. 549 (1995).

116. 545 U.S. 1 (2005).

117. *Lopez*, 514 U.S. at 551.

118. 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988).

119. *United States v. Lopez*, 2 F.3d 1342, 1364 n.46 (5th Cir. 1993), *aff’d*, 514 U.S. 549 (1995).

120. *See* Alex Kreit & Aaron Marcus, Raich, *Health Care, and the Commerce Clause*, 31 WM. MITCHELL L. REV. 957, 964 (2005) (“The last time the Supreme Court held a federal action unconstitutional under the Commerce Clause before *Lopez*, was 1936.” (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936))).

121. *Lopez*, 514 U.S. at 551.

Congress's Commerce Clause authority,<sup>122</sup> which reaffirmed the strength of the Commerce Clause.

It is important to differentiate between *Lopez* and *Raich*. *Lopez* dealt with a sort of time, place, and manner restriction on the use of guns.<sup>123</sup> *Raich* dealt with the manufacture and distribution of marijuana.<sup>124</sup> Therefore, the Commerce Clause seems to allow Congress to regulate manufacturing and distribution activities but not where, when, and how an item is used. This may seem problematic under this Comment's solution, but it is not. The narrow individual right will determine where, when, and how one can use an arm.<sup>125</sup> Therefore, the third prong, the Commerce Clause prong, will deal with arms regulations falling outside of the individual right; it will deal with the regulation of arms unnecessary to the defense of the home and with regulations pertaining to the manufacture and distribution of arms protected by the narrow individual right.<sup>126</sup>

For example, consider a regulation that limits the legal carrying capacity of a semiautomatic rifle to ten rounds.<sup>127</sup> This regulation does not infringe upon the narrow conception of the individual right because ten rounds are not necessary—assume—to defend the home. Therefore, the court would have to consider whether the Commerce Clause would permit this regulation by asking if the regulation is substantially related to interstate commerce.

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122. *Gonzales v. Raich*, 545 U.S. 1, 15–33 (2005).

123. The time, place, and manner doctrine allows for reasonable regulation of speech when the regulation is concerned with the time, place, and manner of the speech and not the content of the speech. *See Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 98–99 (1972). Such a distinction does not translate to the Second Amendment because the time, place, and manner in which one uses an arm are the essence of the right. If the time, place, and manner doctrine were transplanted into Second Amendment cases, a court would need to distinguish between a time, place, and manner regulation and a regulation infringing on the abstract protection of the right—to defend one's self or to stand up against oppressive governments. In the case of the Second Amendment, this distinction is hard to define because the time, place, and manner in which one uses an arm is inextricably linked to the right's prevailing theme.

124. *Raich*, 545 U.S. at 3.

125. *See infra* Part IV.

126. *See infra* Part IV.

127. *See Duncan v. Becerra*, 742 F. App'x 218, 221 (9th Cir. 2018). In this case, plaintiffs challenged a California law that would have limited magazine capacity to ten rounds. *Id.* The court issued an injunction because it believed that such a law would likely violate plaintiffs' Second Amendment rights. *Id.* Note that this court does not adhere to the narrow conception of the right advanced in *infra* Part III.

Also, consider a regulation mandating that one cannot transport, via car, a loaded handgun from one residence to another.<sup>128</sup> This regulation does not infringe on where, when, and how one can use an arm protected by the narrow individual right but rather on the movement of that arm through commerce. The court would then consider whether or not the regulation substantially relates to interstate commerce in such a way that precludes using arms protected by the narrow right.<sup>129</sup>

In the end, these two Commerce Clause cases present a relevant distinction between regulations regarding when, where, and how to use a good and regulations regarding the manufacture and distribution of goods. This framework is of special importance when applied to the narrow individual right. This framework will force the courts to clarify two distinctions: first, between the right to use arms necessary to defend the home but not to purchase or distribute those arms at will and, second, between arms to which citizens have an individual, constitutional right and the arms to which citizens have the nonconstitutional, legal right to own—like a hunting rifle.<sup>130</sup>

## 2. *The Dormant Commerce Clause's Relationship to State Regulation of the Second Amendment*

The preceding discussion of the Commerce Clause assumes a federal regulation. The Commerce Clause does not explicitly affect the states' ability to regulate goods.<sup>131</sup> However, the Dormant Commerce Clause, in effect, does.<sup>132</sup> A court confronted with a state regulation would ask whether or not such a regulation would extend beyond the federal government's ability to impose such a regulation.<sup>133</sup> For example, a state regulation that invokes the Dormant Commerce Clause might disallow the importation of handguns and allow only state-made handguns.<sup>134</sup> This regulation does not infringe on the

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128. This is the effect of the regulation at issue in *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 51–52 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

129. *See id.* The court decided that the regulation was related to interstate commerce and, thus, did not violate the Commerce Clause. *Id.* at 68.

If a regulation substantially relates to interstate commerce but, by virtue of regulating interstate commerce, precludes using an arm protected by the narrow right, the court would have to reject that regulation. If, like the situation at issue here, the regulation does not preclude the use of an arm protected by the narrow right, the court should uphold the regulation so long as it substantially relates to interstate commerce.

130. *See* Blocher, *supra* note 13, at 176; *infra* Part VI.

131. The Commerce Clause grants Congress the power to regulate interstate commerce “among the several States.” U.S. CONST. art. I, § 8, cl. 3.

132. *See* discussion of *Rousso v. Washington*, 204 P.3d 243, 246 (Wash. Ct. App. 2009), in *supra* note 114 for a brief description of the Dormant Commerce Clause doctrine.

133. *See, e.g.,* *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

134. *See generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986)



narrow right because one could still buy a handgun and use it to defend the home. However, the regulation would work against the open boundaries—that the Commerce Clause purports to foster—between states.<sup>135</sup> Such an application of the Dormant Commerce Clause also preserves the distinction between regulations dealing with when, where, and how one can use an arm necessary to defend the home and regulations dealing with the manufacture and distribution of those, and other, arms.

Overall, this Comment’s solution does not suffer at the level of state regulation because of the Dormant Commerce Clause.

### C. *The Post-Heller Legal Landscape*

Seven years after *Emerson* expressed in dicta an individual right to bear arms,<sup>136</sup> *Heller* held that the Second Amendment protected an individual right to bear arms.<sup>137</sup> Justice Scalia’s majority held that the Second Amendment protected, at least, the right to defend the home.<sup>138</sup> Justice Scalia, however, failed to adequately define the scope of that right and failed to indicate the proper level of scrutiny with which to review individual right cases.<sup>139</sup>

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(“[T]he Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism.”). State protectionism refers to a state imposing a tariff, or the like, on certain goods with the purpose of promoting domestic producers of that good; the state protects the economic interests of the domestic producer at the expense of the foreign producer. *See id.* at 1094–95.

135. *See generally* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 43 (1988) (describing the purpose of the Commerce Clause as “the promotion of integration and interstate harmony”). Also, note that the example does not imply that a state could not regulate the process for acquiring a handgun; perhaps a state could require potential buyers to purchase from in-state dealers to ensure that the buyer adheres to the state’s rules on acquiring a handgun. However, a state’s outright ban on imported handguns for sale by licensed dealers presents a different issue than the federal regulation discussed at length in *Mance v. Sessions*, 896 F.3d 699, 701 (5th Cir. 2018).

136. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). After *Emerson*, the Fifth Circuit upheld three challenges to gun control where the regulation could have been viewed as overbroad. *See United States v. Patterson*, 431 F.3d 832, 835–36 (5th Cir. 2005); *United States v. Darrington*, 351 F.3d 632, 633–34 (5th Cir. 2003); *United States v. Herrera*, 313 F.3d 882, 889 (5th Cir. 2002) (DeMoss, J., dissenting); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 729–30 (2007).

137. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

138. *Id.* at 635.

139. *See id.* at 634.

Because of these ambiguities, confusion and inconsistency have marred the post-*Heller* legal landscape.<sup>140</sup> For nearly two years after *District of Columbia v. Heller*, it was unclear if the individual right applied to the states. In a lengthy and dense decision, *McDonald v. City of Chicago* ultimately incorporated the *Heller* Second Amendment right to bear arms via the Fourteenth Amendment.<sup>141</sup> Incorporating the right to bear arms makes it ever more imperative to settle on a proper interpretation of that right and the correct test to apply to that right.

Initially, courts followed a two-prong test promulgated by the Third Circuit case *United States v. Marzzarella*.<sup>142</sup> This test asks whether the regulation burdens Second Amendment conduct and, if it does, to “evaluate the law under some form of means-end scrutiny.”<sup>143</sup> If the regulation does not impose a burden on Second Amendment conduct, the court need do nothing.<sup>144</sup> This approach fails to clarify effectively the distinction between arms as a right and as a good.

The Seventh Circuit has entirely disregarded *Heller*’s prohibition of a balancing test.<sup>145</sup> The Seventh Circuit explained that regulations that place a heavier burden on the right would require more justification than those laws imposing a lesser burden on the right.<sup>146</sup> This test balances the burden on the right against the reason for the law, which the second prong of this Comment’s solution aims to do. A recent Article proposed a similar approach to the Seventh Circuit’s, wherein the court’s application of intermediate or strict scrutiny depends on how much the restriction burdens the individual right.<sup>147</sup> However, that same Article admits that very little differentiates intermediate

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140. See generally Aryn Sedore, Comment, *Moving Targets: Roving Standards of Review in Second Amendment Cases*, 11 J. MARSHALL L.J. 60 (2017–2018) (exploring the varied standards of review in Second Amendment cases). Interestingly, the issue of what level of scrutiny to apply to Second Amendment individual right cases predated *Heller* but existed more as a thought experiment than as a concrete legal question; each writer would have to assume an individual right. See Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 189 (1999); Winkler, *supra* note 136, at 685.

141. *McDonald v. City of Chicago*, 561 U.S. 742, 746 (2010).

142. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); see *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 347–56 (3d Cir. 2016) (en banc); *United States v. Chester*, 628 F.3d 673, 680–83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–04 (10th Cir. 2010).

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

144. *Id.*

145. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

146. *Id.*; see Ellis, *supra* note 57, at 1349.

147. Elke C. Meeus, Article, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts’ Standards of Scrutiny*, 45 W. ST. L. REV. 29, 73 (2017).

and strict scrutiny, and a court could use either level of scrutiny to reach the same results.<sup>148</sup>

Four years after the Seventh Circuit presented its balancing test, it proclaimed that searching for the proper level of scrutiny would not “resolve any concrete dispute.”<sup>149</sup> Instead, the court adopted the *Miller* relationship test with an additional prong that asked whether, under the regulation, citizens would “retain adequate means of self-defense.”<sup>150</sup> The court also believed it important to ask whether the regulation banned weapons common at ratification.<sup>151</sup> Therefore, the Seventh Circuit’s new test determines whether or not the regulation would infringe on the right to adequate self-defense with an ill-advised<sup>152</sup> history element. The adjective “adequate” implies that although the individual right is limited by the defense of self and home, that limited right of self-defense is in itself limited.<sup>153</sup> This is a narrow reading of the narrowest version of the individual right permitted by *Heller*. Interestingly, the Seventh Circuit has not viewed Second Amendment challenges as unfavorably as other circuits.<sup>154</sup>

In general, the application of intermediate versus strict scrutiny varies across the circuit courts without much predictability or reason.<sup>155</sup> The inconsistency in both the tests applied and the outcomes of similar cases is the result of the failure to define basic Second Amendment issues,<sup>156</sup> such as the scope of the individual right. Thus, a successful argument for a revised approach to Second Amendment individual right cases must first concretely define the scope of that right.

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148. *Id.* at 70; *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (“When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.”).

149. *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015).

150. *Id.*

151. *Id.*

152. *See infra* Section V.A for a discussion of the issues inherent in a history test.

153. *See infra* Section V.A for a discussion of the issues inherent in a history test.

154. *See* *Ruben & Blocher*, *supra* note 60, at 1475. Second Amendment challenges in the Seventh Circuit had a 16% success rate. *Id.* It trailed only the D.C. Circuit, 64%, and the Second Circuit, 18%. *Id.*

155. *See id.* at 1507–08.

156. *See* *Sedore*, *supra* note 140, at 76.

### III. A NARROW CONCEPTION OF THE *HELLER* INDIVIDUAL RIGHT

*Heller* left the scope of the individual right undetermined.<sup>157</sup> However, it asserted that the right should at least encompass the right of “law-abiding, responsible citizens” to use arms to defend the home.<sup>158</sup> When pressed about the vagueness of the individual right by Justice Breyer, Justice Scalia explained that, in the past, the Supreme Court failed to completely define the scope of certain First Amendment rights when engaging with them for the first time.<sup>159</sup> Although Justice Scalia’s assertion is true, he fails to recognize that First Amendment rights generally work from maximum protections and impose limits rather than work from minimum protections and grant expansions.<sup>160</sup> In other words, a First Amendment right protects abstract ideas that courts pare down and mold with case law.<sup>161</sup> Justice Scalia asks courts to build from the ground up to the individual right rather than to define that right by paring down a general right.<sup>162</sup> Consequently, Section III.C of the following discussion will demonstrate that the courts deal not with the individual right to bear arms but deal with the individual right to defend the home. Section III.C will show that this distinction demands adherence to a narrow conception of the individual right.

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

158. *Id.*

159. *Id.* (comparing the Court’s first attempt to define the Free Exercise Clause in *Reynolds v. United States*, 98 U.S. 145 (1879)).

160. *See Reynolds*, 98 U.S. at 167. This case works from a maximum right of the complete free exercise of religion and pares that down to exclude the free exercise of religion with regards to polygamy because of a pressing governmental interest. *See id.*

Further, the First Amendment protects the right to free speech. U.S. CONST. amend. I. Subsequent decisions by the courts have qualified that otherwise absolute protection of free speech. Also, the Fourteenth Amendment provides for “equal protection of the laws.” U.S. CONST. amend. XIV. Subsequent decisions have explained situations where that seemingly absolute protection does not apply. Comparatively, the Second Amendment individual right advanced by Justice Scalia protects at least the right to bear arms in defense of the home. Justice Scalia then asks the courts to expand on the otherwise qualified individual right to bear arms. *See Heller*, 554 U.S. at 635. This asks courts to perform a fundamentally different function than when they analyze other constitutional rights. It asks judges to determine the general right that extends from, supposedly, a subsidiary of that right and to not determine what comes within an already determined general right.

This is somewhat analogous to the difference between positive and negative rights. For a brief description of positive versus negative rights, see Richard E. Myers, *Adversarial Counsel in an Inquisitorial System*, 37 N.C. J. INT’L L. & COM. REG. 411, 429–30 (2011) (explaining that a negative right demands a court find violations and that a positive right demands a court to provide a good or service). Similar to the distinction between positive and negative rights, Justice Scalia asks the courts to provide the boundaries of a right rather than interpret that which falls within or outside the boundaries of a predetermined general right.

161. *See Reynolds*, 98 U.S. at 167.

162. *See Heller*, 554 U.S. at 635.

Overall, this Comment will argue that courts should adopt a narrow reading of the individual right limited to a constrained version of the right explained by Justice Scalia in *Heller*.<sup>163</sup> It will argue that the right should be limited to those arms necessary to defend the home. It will reach this conclusion by demonstrating, first, that any reading of the right other than a narrow view of the right will open up the potential for nearly all arms to receive constitutional protection<sup>164</sup> and, second, that courts have already adopted the narrow right.

#### A. An Argument Against the “Common Use” Argument

Limiting the individual right to the arms necessary to defend the home<sup>165</sup> will ensure that the right does not balloon to protect all arms. Of course, all arms does not include the “absurd,” like tanks, nuclear bombs, or cannons.<sup>166</sup> All arms refers to all arms, both lethal and nonlethal,<sup>167</sup> that are in “common use among the citizenry.”<sup>168</sup> Some scholars assert that this, in turn, means that the Second Amendment individual right should protect all arms in

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163. *See id.*

164. This Comment is aware of the limitations set out in *Heller*. *Id.* at 626; *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413–16 (2009) (explaining the groups that the majority decision excluded from the individual right to bear arms). Blocher questions why the majority would exclude certain groups of people when it relies on an “all-inclusive reading of ‘the people’” in the text of the Second Amendment to create an individual right. Blocher, *supra*, at 414. In a First Amendment setting, members, such as the mentally ill and felons, who are excluded by *Heller*, retain some, if not all, rights. *Id.* (citing *Heller*, 554 U.S. at 721 (Stevens, J., dissenting)) In at least this way, the Second Amendment presents a unique situation where the right at issue, if used by a certain group of people, can cause situations so adverse to the public good that they must be excluded.

165. *Heller*, 554 U.S. at 635.

166. Glenn Harlan Reynolds, *Second Amendment Limitations*, 14 GEO. J.L. & PUB. POL’Y 233, 233–34 (2016). Reynolds uses the word “absurd” to describe these types of arms. *Id.* at 233. Reynolds correctly asserts that the use of a *reductio ad absurdum* argument is out of place in current Second Amendment disputes. *Id.* at 233–34. This Comment does not support a narrow reading of the individual right on the grounds that it could lead to individual citizens owning arms as extreme as tanks, nuclear bombs, and cannons.

167. *See generally* Craig S. Lerner & Nelson Lund, *Heller and NonLethal Weapons*, 60 HASTINGS L.J. 1387 (2009), for a discussion on how to treat nonlethal weapons under *Heller*. The article uses Tasers as an example of a nonlethal weapon and discusses how *Heller*’s emphasis on arms in common use at the time creates complications when considering arms that may be developed in the future and may, like the Taser, be nonlethal. *Id.* at 1413; *see also* Caetano v. Massachusetts, 136 S. Ct. 1027, 1033 (2016) (implying that a stun gun could receive protection under the Second Amendment).

168. *See Reynolds, supra* note 166, at 235.

common use.<sup>169</sup> Defining the scope of the right by what is in common use is problematic for two reasons.

First, the breadth of other constitutional rights does not depend on what is and what is not in common use at the time. The scope of the First Amendment right to free speech does not ebb and flow depending on the vernacular of the citizenry.<sup>170</sup> The First Amendment right to free speech stands for more than the words themselves; it stands for the ideas the words express and the importance of free thought. The Second Amendment may stand for more than the right to own a good—an arm—but that purpose is arguably more closely aligned with the right of the people to form a militia than it is to the individual right to bear arms for self-use.<sup>171</sup> After all, the government ensures citizens' safety in their homes through means outside of the Second Amendment, such as through law enforcement and criminal statutes.

Second, even if an arm is common, it does not follow that such an arm is either necessary to defend the home or not unusually dangerous. Consider the AR-15, the gun often used in recent mass shootings<sup>172</sup> and the most popular rifle.<sup>173</sup> The AR-15 is in common use, but the AR-15 is not necessary for defense of the home, and it could easily be argued that the AR-15 has no place outside of the militia or military.<sup>174</sup>

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169. *Id.*

170. Fighting words could present a situation wherein speech protected by the First Amendment shifts with what language is likely to incite an “imminent breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (citing ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 503 (Harvard Univ. Press 1967) (1941)). However, citizens rarely use the word *cicisbeo* to describe a married woman’s lover, but this does not mean that the First Amendment right to free speech does not protect using that word.

171. See Finkelman, *supra* note 25, at 233.

172. Kate Irby, *Nobody Knows Exactly How Many Assault Rifles Exist in the U.S.—by Design*, McCLATCHY DC BUREAU (Feb. 23, 2018, 6:21 PM), <https://www.mcclatchydc.com/news/nation-world/national/article201882739.html> (last visited Sept. 29, 2019).

173. NRA BlogStaff, *Why the AR-15 Is America’s Most Popular Rifle*, NRABLOG (Jan. 20, 2016), <https://www.nrablog.com/articles/2016/1/why-the-ar15-is-americas-most-popular-rifle> [<https://perma.cc/SNP3-DPKT>].

174. The AR-15 is designed for assault style attacks. See Greg Myre, *A Brief History of the AR-15*, NPR (Feb. 28, 2018, 12:07 PM), <https://www.npr.org/2018/02/28/588861820/a-brief-history-of-the-ar-15> [<https://perma.cc/5KWP-WF5Y>]. The AR-15 is not the same weapon used by the military, but it is very similar. *Id.* The AR-15 has been used in almost all of the deadliest shootings over the last ten years. *Id.* In *Heller*, Justice Scalia implied that a complete ban of M-16s would not violate the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). An M-16 is very similar to an AR-15. See Kastalia Medrano, *What’s the Difference Between an AR-15 & an M-16? They’re Frighteningly Similar*, BUSTLE (June 16, 2016), <https://www.bustle.com/articles/167436-whats-the-difference-between-an-ar-15-an-m16-theyre-frighteningly-similar> [<https://perma.cc/RV7Y-CK4U>].

Therefore, for these two reasons, the phrase “in common use at the time”<sup>175</sup> should not create an unbridled right to whatever arms the majority of arm-bearing citizenry decide to use for whatever lawful purpose. To consider it otherwise would allow for “dangerous and unusual”<sup>176</sup> weapons to earn the protection of a right and for potentially all arms to receive constitutional protection.

*B. The Interaction of the Individual Right with Other  
Nonconstitutional Areas of Law*

The preceding discussion may have prompted the following question: But why could the right not include the right to bear arms in defense of the home, the right to bear arms to hunt, or the right to bear arms to practice at a shooting range?

The simple answer is that other areas of the law already protect those activities. Custom protects the right to hunt using firearms,<sup>177</sup> and zoning statutes protect shooting ranges.<sup>178</sup> Castle Statutes previously protected the individual right created in *Heller*.<sup>179</sup> But the District of Columbia ban threatened this,<sup>180</sup> so the Court protected it with the label of a right.<sup>181</sup> Therefore, until other actions by the legislature threaten that which citizens have a legal, but nonconstitutional, right to do, courts need not take any protective measures.<sup>182</sup> In fact, even if a piece of legislation threatened an activity like hunting or a place like a shooting range, the cause of action would likely implicate environmental and property laws, respectively, and not constitutional law. Of course, constitutional law may exist at the

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175. See Lerner & Lund, *supra* note 167, at 1392–94 (providing analysis of “in common use at the time” versus “dangerous and unusual weapons”).

176. See *id.* at 1392, 1406, 1408.

177. See Blocher, *supra* note 13, at 176.

178. See, e.g., *Platform I Shore, LLC v. Vill. of Lincolnwood*, 17 N.E.3d 214, 217 (Ill. App. Ct. 2014). This case used zoning laws to permit a shooting range, not the Second Amendment. See *id.* In fact, the Second Amendment was not even mentioned in the opinion.

179. See Spearlt, *Firepower to the People! Gun Rights & the Law of Self-Defense to Curb Police Misconduct*, 85 TENN. L. REV. 189, 214–17 (2017). This Article explains that most states have some version of a castle statute. See *id.* at 214. These statutes sometimes take on other names like “Make My Day” and “Stand Your Ground” laws. *Id.* Further, this Article asserts that a state like Virginia that does not have a castle statute, or anything of that nature, would be unable to prosecute a citizen for using a handgun in defense of home because of *Heller*. *Id.* at 217.

180. *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

181. *Id.* at 635.

182. See Spearlt, *supra* note 179, at 214–15.

fringes of such an action, but the individual right to bear arms would not prohibit a legislature from outlawing hunting in a certain spot with the goal of protecting a species or citizens. Perhaps the individual right could extend to hunting activities if the legislature banned the use of arms in hunting—but playing that game verges on the ridiculous. This relates back to the idea that the individual right works from a minimum right as opposed to a maximum right. This is partly because the Court created the individual right after individual gun ownership and use were accepted activities.<sup>183</sup> Therefore, an interpretation that limits the right to those arms necessary to defend one’s home makes sense. This is similar to the conclusion that the Seventh Circuit reached in *Friedman v. City of Highland Park*, discussed in Part IV.<sup>184</sup>

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183. See generally TOM W. SMITH & JAESOK SON, NORC AT THE UNIV. OF CHI., GENERAL SOCIAL SURVEY FINAL REPORT: TRENDS IN GUN OWNERSHIP IN THE UNITED STATES, 1972–2014 (Mar. 2015), [http://www.norc.org/PDFs/GSS%20Reports/GSS\\_Trends%20in%20Gun%20Ownership\\_US\\_1972-2014.pdf](http://www.norc.org/PDFs/GSS%20Reports/GSS_Trends%20in%20Gun%20Ownership_US_1972-2014.pdf) [<https://perma.cc/6XYW-SZQ8>]. This Article demonstrates that gun ownership actually decreased—as a percentage—after 2008, the year of the *Heller* decision. *Id.* at 4. If anything, this further demonstrates the oddity of affording the protection of a constitutional right to a good that people already have the nonconstitutional right to own and use. One would expect that after the implementation of the First Amendment there would be more, not less, speech criticizing the government. However, *Heller* claims that it “codified a *pre-existing* right,” just like the First and Fourteenth Amendments. *Heller*, 554 U.S. at 592. However, the right to free speech, to the equal protection of the laws, and of the individual to bear arms have no authority without affirmation from the Court and enforcement by the executive. Simply writing down the words does not imbue them with authority. This does not mean that for those words to have authority, it does not matter that they were written down or who wrote them. It means that a latent, uncodified constitutional right is not a constitutional right at all because it could be revoked without much, if any, deliberation. See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1942 (2008) (“[A] lower court judge who accepts the authority of precedent . . . and a Supreme Court Justice who accepts the authority of previous Supreme Court decisions . . . are expected to conclude that advocacy of racial hatred is constitutionally protected even if they believe that such a conclusion is legally erroneous.”). When *Heller* codified the individual right to bear arms, it forced recognition of this right by all courts, even those in disagreement. Therefore, before the codification of the right, certain courts could choose not to enforce, or read, an individual right to bear arms. See *Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir. 2002) (affirming that the Second Amendment does not protect an individual right). However, after the codification, all courts needed to accept the right, even if they had previously found it not to exist. See *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) (citing *Heller*, 554 U.S. 570). Overall, although a right may exist in theory before the Court or legislature codifies it, the force of the constitutional right—what makes a constitutional right a constitutional right and not just a general legal right—exists only after codification.

184. *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015).



### C. The Adoption of the Narrow Right by the Courts

Perhaps for the reasons noted above, the courts do not deal with the individual right to bear arms but instead deal with the individual right to defend the home. The latter implicates arms, but the courts have generally limited the arms one can use to those necessary to defend the home. For example, *New York State Rifle & Pistol Ass'n v. City of New York* determined that a restriction prohibiting the transfer of a handgun from one home to another did not substantially burden the individual right because the restriction did not limit one's right to acquire a handgun for the second home.<sup>185</sup> The court treated the individual right narrowly. It did not extend the right to defend one's home to the right to defend all of one's homes.<sup>186</sup> It bound the specific handgun to the specific house.<sup>187</sup>

Similarly, *United States v. Henry* limited the arms that one could use in defense of the home.<sup>188</sup> The Court concluded that a machine gun was a "dangerous and unusual weapon[]" and, thus, unprotected under *Heller*.<sup>189</sup> Although the phrase "dangerous and unusual" is not an ideal way to frame the issue, the court still stood by a narrow reading of the individual right—a machine gun had to be necessary for defense of the home—and limited the type of arms covered by that right.<sup>190</sup> Both a handgun and a machine gun could defend a home, but only the handgun is necessary; thus, only the handgun receives the protection of the right.<sup>191</sup> In both cases, the courts approach the individual right as the right to defend the home and not as the right to bear arms.

In general, courts refer to the individual right only as the right to defend the home.<sup>192</sup> Even in *New York State Pistol & Rifle Ass'n v. Cuomo*, the court did not construe the individual right to encompass anything more than

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185. 883 F.3d 45, 57 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019) (mem.).

186. *Id.*

187. *Id.*

188. 688 F.3d 637, 638 (9th Cir. 2012).

189. *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

190. *Id.*

191. A handgun is potentially more dangerous outside of the home because it can be used in closer quarters, can be more easily concealed, and can fire more rounds quickly. See David LaPell, *Shotguns vs Handguns for Home Defense: Which Is the Better Fit?*, GUNS.COM (Aug. 31, 2017, 3:44 PM), <https://www.guns.com/news/review/shotguns-vs-handguns-for-home-defense-which-is-the-better-fit> [<https://perma.cc/M5G5-86HM>]. However, this is not a huge concern if the individual right is limited to using arms inside the home in defense of the home.

192. See cases cited *supra* at notes 185–88.

the right to defend the home.<sup>193</sup> In that case, the court determined that a New York law restricting magazine capacity to seven rounds violated the Second Amendment.<sup>194</sup> The Court molded its discussion about the magazine rounds to fit within the narrow right even when it would have presumably been easier to extend the individual right to include the right to load a magazine with more than seven rounds.<sup>195</sup> This indicates an unwillingness to extend, or discomfort with extending, the individual right. Perhaps, the court felt more comfortable parsing out the details of a right from a general protection rather than building a general right out of a specific protection.<sup>196</sup> In essence, the court dealt not with an individual right to bear arms but with an individual's right to defend the home. If the latter is construed as the blanket, general right, a court or challenger could imagine any number of scenarios wherein the right to defend the home demanded any number and type of arms. Of course, a court could limit that unbridled right.<sup>197</sup> Therefore, because the courts seem inclined to view the individual right to defend the home as the general right and not the individual right to bear arms, this Comment proposes limiting the right to defend the home to those arms necessary to do so. Arguably, this more accurately reflects the right at issue and is more closely

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193. 804 F.3d 242, 258 (2d Cir. 2015).

194. *Id.* at 264.

195. *See id.*

196. *See* discussion *supra* note 160. Courts do not traditionally have to create general rights out of specific protections. One may argue that the Court created a right of privacy from the “Bill of Rights or its penumbras.” *Roe v. Wade*, 410 U.S. 113, 129 (1973). However, the Court derives the right to privacy from the right to liberty; the court did not create the right to liberty from a right to privacy. Similarly, the court in *New York State Pistol & Rifle Ass’n v. Cuomo* could have created the right to use a seven-round magazine from a right to defend the home. It could have asserted that the right to more than seven rounds in a magazine is part of a more general right to bear arms, which includes both the right to more than seven-round magazines and the right to defend the home. However, it approached the issue like the Court in *Roe v. Wade* and tried to wedge the right to own a more than seven-round magazine within the right to use arms to defend the home. The problem is that the two rights are linked only by perverse situations wherein an individual would require not more than seven rounds of total ammunition but more than seven rounds in a single magazine to effectively defend the home. With that logic, one could potentially argue that any situation could arise and that any number or type of arms be required by the situation to defend the home. Therefore, the *Cuomo* court’s unwillingness to expand the right but to instead derive from the right an unrelated protection—in nearly all situations—demands a narrow reading of the individual right.

197. This is essentially the approach that the *Miller* Court takes in upholding the National Firearms Act. A sawed-off shotgun is not part of usual military services, so it is unprotected by the Second Amendment. *United States v. Miller*, 307 U.S. 174, 178 (1939). A court could say that an AK-47 is not usually used to protect the home, so it is unprotected by the Second Amendment. This Comment argues that the question should not be whether an arm is usually used to protect the home but whether an arm is necessary to protect the home.

aligned with the historical impetus of the Second Amendment—allowing the citizen to protect his or her person.<sup>198</sup>

In the end, the case law demonstrates that the courts construe the individual right as the right to defend the home and not as the individual right to bear arms.

*D. Conclusion: A Narrow Interpretation of the Individual Right*

Courts should apply only a narrow interpretation of the individual right for two reasons. First, the structure of the individual right requires a limited reading or else the right could balloon to protect all arms that one could use to defend the home and not only the arms necessary to defend the home. The construction of the right, beginning at a minimum and working towards a maximum, demands strict adherence to this distinction. *New York State Pistol & Rifle Ass’n v. Cuomo* demonstrates how a failure to limit the right by this distinction could allow for many arms that are sufficient, but not necessary, to the defense of the home to receive the protection of a right.<sup>199</sup> Second, because the right begins at a minimum and hopes to work towards a maximum, courts already limit the interpretation of the individual right to the right to defend the home. Effectively, the courts deal not with the individual right to bear arms but with the individual right to defend the home. Therefore, the individual right—which is really the individual right to defend the home—should be limited to those arms necessary to defend the home.

#### IV. THE “THREE-PRONG TEST” IN ACTION

This Comment’s three-prong test asks a court to employ a narrow reading of the *Heller* individual right, balance the benefit of the challenged regulation against its infringement on the narrow individual right, and engage in a Commerce Clause analysis should the regulation not infringe on the individual right. This Part will examine four instances wherein courts have unknowingly, or without acknowledging as such, approached Second Amendment issues by applying the proposed three-prong test or parts thereof.

As a practical legal matter, this Part aims to demonstrate that the three-prong test is administratively easier for judges to apply than traditional

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198. See *supra* Section I.B.

199. *Cuomo*, 804 F.3d at 264.

levels of constitutional scrutiny.<sup>200</sup> The administrative ease of the three-prong test compared to the traditional levels of constitutional scrutiny will become clear in the following comparison of two Second Circuit cases.<sup>201</sup>

As a matter of legal theory, this Part will argue that an efficient rule of law<sup>202</sup> requires consistency between the court's interpretation of the law and the expression of that law.<sup>203</sup> This symmetry can help to promulgate a better understanding of the scope of the Second Amendment individual right, not only for the courts who create, examine, and modify the law, but also for the public to whom the laws apply.<sup>204</sup> Further, when courts achieve the appropriate consistency, when their interpretations align with legal norms,<sup>205</sup> their deliberations can guide action.<sup>206</sup> However, in this regard, the Second Amendment individual right poses a special challenge because of its indeterminacy.<sup>207</sup> The lack of clarity in the initial expression of the Second Amendment individual right allows the courts to carve out a new, clearer rule that will be better able to reach the symmetry between the courts' interpretation and ultimate expression of the law.<sup>208</sup> Therefore, the courts have a duty to develop Second Amendment jurisprudence determinately

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200. See Wright, *supra* note 62, at 184.

201. See *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 45–46 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019) (mem.); *Cuomo*, 804 F.3d at 242–43.

202. The rule of law is an ideal that, in its most basic form, requires people with authority to exercise that authority in accordance with the expressed law and not in accordance with personal belief or preference. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008). In a system built on the discretion of judges, the rule of law will never be fully articulated because the high court's decision will be interpreted not by the high court but by any number of lower courts. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989).

203. See Waldron, *supra* note 202, at 6. Essentially, the courts should not purport to use different levels of scrutiny when they are actually applying a balancing test to all regulations. A balancing test is different than a level of scrutiny analysis because it has no threshold. Its analysis starts from the same point for all regulations.

204. See Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1121.

205. H.L.A. Hart argues that the law derives from patterns of accepted, standard conduct. See Stephen Perry, *Hart on Social Rules and the Foundations of the Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171, 1171 (2006). However, as society develops it becomes increasingly more difficult to describe patterns of standard conduct where there is common disagreement as to what the standard conduct should be—as in the context of the Second Amendment. In this sense, a judicially created legal rule can act as a placeholder for a legal norm when a lack of consensus threatens to derail, to some degree, a society's functionality. A legal rule, unlike a legal norm, is judicially designed rather than judicially enforced. When the judiciary designs a rule, it has a continuing duty to clarify it. See Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693 (1999).

206. See Waldron, *supra* note 202, at 57.

207. See discussion *supra* Parts II, III.

208. See generally Waldron, *supra* note 202.

and clearly when faced with the opaque and vague aims of Justice Scalia's opinion.<sup>209</sup>

Four cases and courts have embraced this duty—even if unrecognized and unacknowledged—and have begun crafting new, clearer rules to apply to the Second Amendment individual right. In some respects, the courts' interpretive techniques mirror this Comment's three-prong test.

A. *United States v. Colon-Quiles: A Balancing Test and a Case for Abandoning the Traditional Levels of Scrutiny*

In the first case, *United States v. Colon-Quiles*, the court used the proposed balancing test under the guise of constitutional levels of scrutiny.<sup>210</sup> The court concluded that Congress had the power, through the Commerce Clause, to criminalize the possession of a handgun with an obliterated serial number.<sup>211</sup> Importantly, the court also determined that the statute at issue did not violate the Second Amendment.<sup>212</sup> The court adopted a similar interpretation of the individual right to bear arms as the Seventh Circuit court in *Friedman v. City of Highland Park*.<sup>213</sup> The court's analysis implied that the individual right would only survive a regulation when the regulation completely prohibited "an individual's right to carry a firearm."<sup>214</sup> Like the *Friedman* court, the *Colon-Quiles* court examined the individual right as the right to own firearms necessary for the protection of self<sup>215</sup> and home and not as the right to firearms sufficient to defend one's self—which would include a handgun with an obliterated serial number and demand a different analysis. The court began with this narrow conception of the individual right.<sup>216</sup> It then applied intermediate scrutiny because the regulation did not infringe the right to own a firearm but the manner in which one could exercise that right.<sup>217</sup> By applying intermediate scrutiny, the court determined that the regulation would pass

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209. See Summers, *supra* note 205, at 1693, 1696.

210. *United States v. Colon-Quiles*, 859 F. Supp. 2d 229, 231–33 (D.P.R. 2012).

211. *Id.* The Commerce Clause applies to Puerto Rico because it is economically integrated into the United States economy and retains autonomous power. See David M. Helfeld, *Understanding United States-Puerto Rico Constitutional and Statutory Relations Through Multidimensional Analysis*, 82 REVISTA JURÍDICA U. P.R. 841, 862 (2013); see also *Trailer Marine Transp. Corp. v. Rivera Vasquez*, 977 F.2d 1, 8 (1st Cir. 1992).

212. *Colon-Quiles*, 859 F. Supp. 2d at 235.

213. 784 F.3d 406, 410 (7th Cir. 2015).

214. *Colon-Quiles*, 859 F. Supp. 2d at 233.

215. *Id.* at 233–34.

216. *Id.*

217. *Id.* at 235.

constitutional muster because the regulation protected the governmental interest of promoting safety.<sup>218</sup> The court noted in passing that the regulation would also survive strict scrutiny.<sup>219</sup>

This case presents two interesting points. First, the court engages in a balancing test even if it does not acknowledge it as such.<sup>220</sup> It uses a balancing test under the guise of the levels of scrutiny.<sup>221</sup> It balances the regulation's benefits against its infringement on the narrow conception of the individual right and concludes that the value of safety outweighs the value of protecting the slightest infringement on the individual right.<sup>222</sup> Under the rule of law, it is important for the court to recognize this approach; it is important for the court to express the law as unambiguously as possible.<sup>223</sup> If it uses a balancing test but purports to be using some means-end scrutiny, it fails to express the law as clearly as it could. Lastly, it uses a Commerce Clause analysis to engage with arms that qualify only as goods and not as rights,<sup>224</sup> which helps to craft the scope of the individual right.

Second, the case demonstrates the ineffectiveness of the constitutional scrutiny approach,<sup>225</sup> especially when applied to the Second Amendment. Presumably, the Government will always have an interest in citizens' safety.<sup>226</sup> This ever present interest allows the court to assert that the regulation would also pass strict scrutiny.<sup>227</sup> Unlike in *Colon-Quiles*, First Amendment regulations rarely pass strict scrutiny.<sup>228</sup> Strict scrutiny does not permit abridgment of rights except in instances of a compelling, narrowly tailored governmental interest.<sup>229</sup> Safety of citizens, in the general sense, has not historically been compelling or specific enough to pass strict scrutiny.<sup>230</sup> Therefore, either

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218. *Id.*; see Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Regulation*, 58 MONT. L. REV. 79, 111 (1997). Dowd asserts that it would be rare for a piece of gun control legislation to have no relationship to public safety. *Id.* Dowd argues that such an argument by the government would not be overturned even if there were good arguments supporting a story where public safety was not an issue. *Id.* at 111–12.

219. *Colon-Quiles*, 859 F. Supp. 2d at 234.

220. *See id.* at 235.

221. *See id.*

222. *Id.*

223. *See supra* notes 202–09.

224. *See Colon-Quiles*, 859 F. Supp. 2d at 233.

225. *See Wright, supra* note 62, at 184.

226. *See Dowd, supra* note 218, at 111.

227. *See Colon-Quiles*, 859 F. Supp. 2d at 234; Dowd, *supra* note 218, at 111.

228. *See Burt Neuborne, Where's the Fire?*, 25 J.L. & POL'Y 131, 133–34 (2016). At the time Neuborne wrote his Article, only two cases passed the strict scrutiny test required by First Amendment free speech doctrine. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015); *Burson v. Freeman*, 504 U.S. 191, 193, 195 (1992); *Colon-Quiles*, 859 F. Supp. 2d at 234.

229. *See Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418–19 (1996).

230. *Id.* at 2421. *But see Dowd, supra* note 218, at 111.

the *Colon-Quiles* court did not know how to apply strict scrutiny in general or the court did not know how to apply strict scrutiny to the Second Amendment. It is probably a bit of both,<sup>231</sup> but the safety concern, and concerns of a similar nature, is not nearly as present with First Amendment cases.<sup>232</sup> The Second Amendment affords the protection of a right to a good that can cause extreme harm and, thus, becomes incomparable to the abstract concepts protected by the First Amendment.<sup>233</sup> Importing levels of scrutiny becomes problematic because they are designed to apply to rights inherently different from the individual right to bear arms.<sup>234</sup> Perhaps, it is this reason that turns courts to a Commerce Clause analysis even when discussing levels of scrutiny.<sup>235</sup> Because the courts can so easily manipulate the levels of scrutiny, or avoid applying them all together, it would behoove the development of Second Amendment individual right jurisprudence to openly adopt the balancing test so courts will more actively engage with the intricacies of the law rather than passively engage with airy levels of constitutional scrutiny.<sup>236</sup>

*B. United States v. Henry: Application of the Commerce Clause but Failure to Apply a Narrow Conception of the Individual Right*

The second case, *United States v. Henry*, demonstrates a situation where an acknowledged application of the narrow individual right leads to a clearer application of the law. The case does adeptly apply the Commerce Clause once it determines that the Second Amendment individual right has not been infringed.

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231. See Wright, *supra* note 62, at 171.

232. See Volokh, *supra* note 229, at 2418–19. There is, of course, the issue of incitement. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam). This presents a safety concern similar to that created by the Second Amendment. For an overview of the *Brandenburg* doctrine, see John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 39–41 (2014). One can argue that the safety concern in the Second Amendment context is incommensurable to the safety concern presented by the First Amendment.

For an interesting comparison of the safety issues present in the Second Amendment with those in abortion cases, see generally J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

233. See Dowd, *supra* note 218, at 109.

234. *Id.* at 109–10.

235. See *United States v. Henry*, 688 F.3d 637, 641–42 (9th Cir. 2012).

236. See Levin, *supra* note 204, at 1121–22.

In *Henry*, the court concluded that the Second Amendment individual right did not protect Henry’s right to own a homemade machine gun in his home.<sup>237</sup> The court engaged in an “unusual and dangerous” analysis, which certainly has its flaws.<sup>238</sup> The court finds machine guns outside of the scope of the protection of the Second Amendment because of *Heller*’s recognition that machine guns will not receive protection in most cases.<sup>239</sup> On one hand, this analysis merely demonstrates that a narrow conception of the individual right, limited to those arms necessary to defend the home, does not conflict with the underlying drive of *Heller*. On the other hand, *Heller* explained that Second Amendment protection of machine guns would be “startling.”<sup>240</sup> This does not mean it is forbidden. In *Henry*, Henry kept the machine gun in his home,<sup>241</sup> presumably for the purpose of protecting himself. Protection of the home lies at the core of the Second Amendment individual right.<sup>242</sup> However, the *Henry* court did not consider the possibility that a machine gun used to protect the home might qualify as the “startling” exception implied by *Heller*.<sup>243</sup> Even though the *Henry* court engages in an “unusual and dangerous” analysis, an application of the narrow individual right proffered in Part III would have yielded the same result. A machine gun might be sufficient to protect a home, but it is by no means necessary. Because the “unusual and dangerous” test has its flaws<sup>244</sup> and because the *Heller* right does not conflict with this Comment’s narrow reading of the individual right,<sup>245</sup> openly applying such a narrow reading will help all courts meet their duty

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237. *Henry*, 688 F.3d at 639–40.

238. *Id.* at 640; *see* discussion of unusual and dangerous *supra* Part III.

239. *Henry*, 688 F.3d at 639–40.

240. *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008); *see* Gun Control Act, 18 U.S.C. § 922(o) (2012). *But see* *United States v. One Palmetto Armory*, 822 F.3d 136, 142 (3d Cir. 2016) (holding that the Second Amendment does not protect the use of machine guns). *See generally* Peter J. Adonizio Jr., Comment, *Militias, Muskets, and Machine Guns? The Third Circuit Furthers Inapplicability of Second Amendment Protection to Machine Gun Protection in United States v. One Palmetto State Armory*, 62 VILL. L. REV. 483 (2017) (discussing the relationship between the Gun Control Act of 1968’s 1986 amendment and the holding of *Heller*).

241. *Henry*, 688 F.3d at 639.

242. *Heller*, 554 U.S. at 624–25; *United States v. Marzzarella*, 595 F. Supp. 2d 596, 599–600 (2009). *But see* Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1220 (2009) (“[O]ne might argue that the right to keep and bear arms for militia-service purposes constitutes the core of the right . . .”).

243. *Henry*, 688 F.3d at 639–40.

244. *See supra* discussion of unusual and dangerous in Part III.

245. *Heller*, 554 U.S. at 624–39.



to carve out new, clearer rules from the ambiguity that is the Second Amendment individual right.<sup>246</sup>

Interestingly, because the individual right was not implicated, the *Henry* court did not consider which level of scrutiny to apply.<sup>247</sup> Taking *Henry* and *Colon-Quiles* together, it would seem that a court could avoid the question of which level of scrutiny to apply regardless of whether or not the regulation infringes on the individual right.<sup>248</sup> The confusion surrounding the individual right could explain the courts' avoidance of the question, or perhaps, and more believably, the courts' engagement with the constitutional levels of scrutiny does not reflect the actual interpretive techniques used. As mentioned in the discussion of *Colon-Quiles*, levels of scrutiny seem ill-equipped to deal with the Second Amendment right to a good when traditionally levels of scrutiny have protected abstract, amorphous concepts.<sup>249</sup> Therefore, an application of levels of scrutiny to Second Amendment individual right cases fails to express the courts' interpretations of the law without ambiguity and is, thus, ineffective.<sup>250</sup>

After determining that the Second Amendment individual right did not apply, the *Henry* court analyzed *Henry's* right to own a homemade machine gun under the Commerce Clause.<sup>251</sup> The court found that the Commerce Clause afforded Congress the power to regulate homemade machine guns.<sup>252</sup> Importantly, the court notes that *Heller* did not mention the Commerce Clause,

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246. See *Summers*, *supra* note 205, at 1693. The judge-made rule is the placeholder for the legal norm, so to be effective and to be understood by the public, it must meet a certain level of clarity.

247. *Henry*, 688 F.3d at 640.

248. See *Wright*, *supra* note 62, at 184.

249. See U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1. The right to free speech, freedom of religion, freedom of association, and equal protection of the laws all protect abstract concepts. The Second Amendment may protect an abstract concept to stand up against an oppressive government, but that is arguably too general; the First Amendment also protects the citizens' right to stand up to an oppressive government. It protects a right to a concrete good that is but one way to stand up to an oppressive government. However, the First, Second, and Fourteenth Amendment rights are all abstract. An abstract right is one that is general and that, thus, comes into conflict with other abstract rights. See Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 YALE L.J. 118, 130–31 (1979) (explaining a situation wherein an abstract right to privacy could come into conflict with an abstract right to publish). Rights become concrete when a court determines which abstract right trumps another. *Id.* at 131. For example, does the right to life trump the right to bear arms?

250. See *Waldron*, *supra* note 202, at 34.

251. *Henry*, 688 F.3d at 640–41.

252. *Id.*

so the individual right should not modify analysis under the Commerce Clause.<sup>253</sup>

C. *A Comparison of Two Second Circuit Cases: Clarity Achieved with a Balancing Test and not with Purported Levels of Scrutiny*

Next, a comparison of two Second Circuit cases, *New York State Rifle & Pistol Ass'n v. City of New York* and *New York State Rifle & Pistol Ass'n v. Cuomo*, demonstrates that relying on the levels of scrutiny results in a muddled opinion and that an adherence to the three-prong test prompts a clearer opinion. Adherence to the three-prong test also results in a better defined expression of the individual right and illustrates the difference between arms as a good and arms as a right.

As mentioned in Part III, in *Cuomo*, the court determined that a New York law restricting magazine capacity to seven rounds violated the Second Amendment individual right.<sup>254</sup> The court adhered to the narrow conception of the individual right; it limited the individual right to protection of the home.<sup>255</sup> However, it diverged from the three-prong test and engaged in intermediate scrutiny.<sup>256</sup> Unsurprisingly, the court found that the regulations as a whole would pass intermediate scrutiny because of the government's interests in "public safety and crime prevention."<sup>257</sup> However, the specific portion of the regulation limiting the magazine capacity to seven rounds did not pass intermediate scrutiny for lack of specific evidence.<sup>258</sup> Yet, the court implied that a hypothetical ten-round restriction would be constitutional.<sup>259</sup>

This distinction creates two problems. First, it sheds more light on the manipulability of the levels of scrutiny. Second, it fails to clarify the scope of the individual right and the difference between that right and the nonconstitutional, preexisting right to own such an arm.

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253. *Id.* at 642.

254. 804 F.3d 242, 264 (2d Cir. 2015); see Tom Precious, *Appeals Court Upholds SAFE Act but Rules Against Seven-Bullet Limit*, BUFF. NEWS (Oct. 19, 2015), <https://buffalonews.com/2015/10/19/appeals-court-upholds-safe-act-but-rules-against-seven-bullet-limit> [<https://perma.cc/33BD-BJJ7>].

255. *Cuomo*, 804 F.3d at 258.

256. *Id.* at 260.

257. *Id.* at 261 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012)). For a discussion of the role of the public safety concern in Second Amendment regulation and jurisprudence, see generally Kevin Behne, *Packing Heat: Judicial Review of Concealed Carry Laws Under the Second Amendment*, 89 S. CAL. L. REV. 1343 (2016).

258. *Cuomo*, 804 F.3d at 269. For a discussion of the problems associated with requiring specific evidence in a Second Amendment case, particularly specific historical evidence, see Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819, 820–21 (2014–2015).

259. *Cuomo*, 804 F.3d at 264.

The court considered evidence of mass shootings and the role that large capacity magazines play in those events,<sup>260</sup> yet the court did not find that limiting ten round magazines to a load of seven rounds presented “reasonable inferences based on substantial evidence” of a governmental interest.<sup>261</sup> The court believed evidence was not presented that the load limit would not “convince” potential “malefactors” from loading more than seven rounds into a ten round magazine.<sup>262</sup> Intermediate scrutiny requires substantial evidence.<sup>263</sup> Thus, the court found that such a restriction would not pass intermediate scrutiny.<sup>264</sup> However, the court’s logic fails on two fundamental fronts.

First, many laws do not convince potential malefactors from committing the forbidden act. This becomes especially apparent when the law deals with numerical limits. For example, the speed limit does not convince potential speeders to not speed, but this does not imply that there should not be a speed limit. A car may have the potential to go one-hundred miles per hour, but setting the speed limit at seventy miles per hour will certainly not ensure that the driver does not speed. Such a limit does, however, create consequences that—if enforced consistently and intensely enough—will alter the behavior of those drivers contemplating speeding. Of course, irrational drivers would still speed no matter the consequence. Therefore, even though

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260. See *id.* at 249. The court discusses the Sandy Hook shooting in Newton, Connecticut. *Id.* In 2012, a gunman killed twenty school children and six teachers. German Lopez, *In the Year After Parkland, There Was Nearly One Mass Shooting a Day*, VOX (Feb. 14, 2019, 7:30 AM), <https://www.vox.com/2019/2/14/18223613/parkland-mass-shootings-gun-violence-map-charts-data> [<https://perma.cc/GH8B-2NHH>]. In 2018, a shooter killed seventeen people and injured seventeen others at Parkland High School in Parkland, Florida. *Id.* Since then and as of February 14, 2019, there have been 350 mass shootings. *Id.* And there have certainly been more since February 14, 2019, such as the Saugus High School shooting. See German Lopez, *Saugus High School Shooting in Santa Clarita, California: What we Know*, VOX (Nov. 15, 2019, 10:35 AM), <https://www.vox.com/2019/11/14/20964900/saugus-high-school-santa-clarita-california-shooting> [<https://perma.cc/5DYD-5MNI>].

261. *Cuomo*, 804 F.3d at 264 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)).

262. *Id.*

263. *Id.* It is unclear how the court equates substantial evidence with evidence that the law would convince potential wrongdoers. Substantial evidence in the context of intermediate scrutiny does not usually have such force. See *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (“To survive intermediate scrutiny, the fit between the challenged regulation need only be substantial, ‘not perfect.’” (quoting *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010))). The court here seems to ask for something closer to a perfect fit.

264. *Cuomo*, 804 F.3d at 264.

the seven round load limit may not stop malefactors from loading eight, nine, or ten rounds, the law should not lose validity under that logic. The court does acknowledge that a state should not be unable to enact a law because of the “mere possibility of criminal disregard.”<sup>265</sup> Yet, even though the court concedes this point, it still demands evidence of the connection between a load limit and increased safety to meet the requirements of intermediate scrutiny.<sup>266</sup> What evidence could be adduced? That criminals listen to laws? The court seems to contradict itself. Although it proposes that laws can be enacted in the face of “mere [] criminal disregard,”<sup>267</sup> it demands evidence that the law at issue will convince criminals to abandon that disregard. This is impossible and points to an inherent flaw in the application of levels of scrutiny to Second Amendment issues.

Second, a different story can easily make this restriction constitutional. A court might think that the government surely has an interest in ensuring that the fewest number of people are shot in a mass shooting. Although the seven round load limit might not persuade every potential mass shooter to use only seven rounds, it does not infringe on the individual right in such a way so as to deem it unconstitutional. Even without evidence, it takes no strained inference to conclude that limiting the amount of rounds in a gun will help promote a safer environment—in theory, at least. Yet, even this approach lacks clarity because it too can be manipulated to reflect the actual decision of the court.

Applying the three-prong test yields a much clearer result. A seven round load limit would not materially impede one’s ability to protect the home. Because of this limited infringement on the individual right, the court should have determined that a seven round load limit when balanced against the benefits of such a limit—increased safety—is constitutional. One could argue that the balancing test can yield the opposite result—much like the levels of scrutiny. However, such an argument would not consider that under the three-prong test, the court construes the individual right narrowly. Therefore, the balance could not shift in favor of striking down a regulation unless, like in *Heller*,<sup>268</sup> the regulation placed a burden on the individual right that did not outweigh the benefit. Here, one can still protect the home with seven rounds nearly as well as with ten.<sup>269</sup>

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265. *Id.*

266. *Id.*

267. *Id.*

268. *District of Columbia v. Heller*, 554 U.S. 570, 574–75 (2008).

269. A regulation limiting the load limit to one or two rounds may yield a different result because of a potential increased restriction on the individual right. This analysis does expose a potential shortcoming of construing the right as that which is necessary to defend the home. One could argue that necessary means different things for different homeowners. However, if an individual claims that ten rounds is necessary because of the neighborhood

The final case, also a Second Circuit case, *New York State Rifle & Pistol Ass'n v. City of New York*, unknowingly applied the three-prong test in full.<sup>270</sup> It illustrates how the test creates clear results and how it can be easily applied. As mentioned in Part III, the court determined that a regulation forbidding transferring a handgun from one home to another did not infringe on the individual right.<sup>271</sup> The court found that the regulation promoted public safety and so would pass intermediate scrutiny nonetheless.<sup>272</sup> The intermediate scrutiny analysis is not intermediate scrutiny at all but a balancing test, wherein the court balanced the limited infringement on the right against the benefit of public safety.<sup>273</sup>

After determining that the regulation did not infringe the narrow individual right, the court engaged in a Commerce Clause analysis and found that the regulation did not violate the Commerce Clause.<sup>274</sup> This endeavor delineated the extent of the constitutional right to own an arm, but it did not limit the nonconstitutional, legal ability to own arms outside of the constitutional right.

Unlike *Cuomo*, *City of New York* adheres to a narrow construction of the individual right and does not get bogged down in the convolutions of levels of scrutiny.<sup>275</sup> Even though the court purports to engage in an intermediate scrutiny analysis, it really only performs a balancing test. Because of this, the case is clearer; it would be even clearer if the court acknowledged that it was, in fact, using a balancing test and not the traditional levels of scrutiny.

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or size of the house in which the individual lives, the court would have to conclude that the police force or other safety measures are less effective in some areas and some situations than they are in others. Although this is certainly true, the answer to ineffective policing should not be to militarize the public.

There is still the question of how many rounds would be too few. Although courts may disagree about this number, it is far better for the courts to disagree about how many rounds constitute what is necessary to defend the home rather than to disagree about the general scope of the individual right.

270. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 55–66 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

271. *Id.* at 57.

272. *Id.* at 64.

273. *Id.* at 62–64; *see Ellis, supra* note 57, at 1349.

274. *City of New York*, 883 F.3d at 64–66.

275. *See Wright, supra* note 62, at 184.

*D. Conclusion: The Three-Prong Test Trumps  
Traditional Levels of Scrutiny*

Overall, these cases demonstrate two key points. First, constitutional levels of scrutiny are not easily or effectively applied to Second Amendment issues. Because the rule of law requires the courts to express their interpretive techniques as clearly as possible,<sup>276</sup> purporting to analyze Second Amendment issues under the guise of levels of scrutiny does not meet this duty. Second, the three-prong test allows for a clearer decision and a more nuanced understanding of the difference between the constitutional right to own an arm and the nonconstitutional, legal right to own an arm as a good.

V. OTHER PROPOSED SOLUTIONS TO THE *HELLER* AMBIGUITIES:  
PROBLEMS AND PROGRESS

This Part will briefly engage with three other proposed solutions to the *Heller* ambiguities.<sup>277</sup> Each alternative solution has its merits, but, ultimately, each approach has flaws that detract from its overall effectiveness.

*A. The History and Tradition Test*

First, Sam Zuidema<sup>278</sup> proposes an analysis “rooted in text, history, and tradition.”<sup>279</sup> He proposes a two-prong test to deal with categorical bans like that at issue in *Heller*.<sup>280</sup> Prong one requires the court to ask whether the firearms “have traditionally been banned,” and prong two asks whether or not those firearms are in “common use by citizens for lawful purposes.”<sup>281</sup> Although Zuidema’s solution avoids the usual levels of scrutiny, its focus on tradition and common use unleashes a host of problems. The focus on tradition creates problems because it fails to consider a situation where an arm at issue has no basis in tradition.<sup>282</sup> Although the problem of tradition

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276. See *supra* notes 202–209.

277. *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

278. When he wrote his Note, Mr. Zuidema was a J.D. Candidate 2018 at the University of Illinois College of Law. Zuidema, *supra* note 5, at 813. Interestingly, most scholarship dealing with the *Heller* ambiguities has been written by law students.

279. *Id.* at 840.

280. See *id.*

281. *Id.*

282. Consider how a court would deal with a regulation limiting the use of an AR-15 or a variant of such a rifle in the mid-1950s—the introduction of the AR-15. Myre, *supra* note 174. The court would not know if this gun had been traditionally banned because the gun had yet to develop a tradition.

Also, the problem of relying on history and tradition is particularly problematic when there is no indication of which side of the argument history supports. See Rostron, *supra* note 258, at 838 (“In short, when the historical record does not really contain any specific

can be averted by a comparison of similar arms, it is not unusual for an arm to be materially unlike any previous arm.<sup>283</sup> Even so, the real issue of this approach lies in the reliance on what is and what is not in “common use by citizens for lawful purposes.”<sup>284</sup> A discussion of the flaws of this approach appears in Part III. Therefore, Zuidema’s approach smartly avoids the muddled levels of traditional constitutional scrutiny but fails to clarify how a court should approach regulations that deal with either new arms or arms that are in common use but that should not be afforded the protection of a right.

### B. The “Wait for the Supreme Court” Solution

Second, Andrew Kimball<sup>285</sup> proposes adhering to an intermediate scrutiny standard until the Supreme Court determines otherwise.<sup>286</sup> Kimball proposes intermediate scrutiny because arms rights are ill-defined.<sup>287</sup> Although arms rights may currently be ill-defined, and Kimball is right to assert that strict scrutiny would be inappropriate for such a vague right,<sup>288</sup> the cases discussed in Part IV demonstrate that intermediate scrutiny does not work well with a vague understanding of the individual right, either.<sup>289</sup> Therefore, as mentioned at the end of Part III, a successful argument for a revised approach to Second Amendment individual right cases must define the right that it analyzes. As explained in Part III, a narrow conception of the right is both practical and consistent with *Heller*. Kimball’s assertion that arms rights are vague is true only if no effort is made to define that right. Further, Kimball’s proposition that lower courts should wait for a decision from the Supreme Court<sup>290</sup> is helpful only in theory. In *McDonald v. City of Chicago*, the Supreme Court had an opportunity to clarify *Heller*’s ambiguities but omitted,

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evidence one way or the other about the existence of a particular right, that lack of historical evidence can too easily be twisted into supporting any side of an issue.”).

283. Compare a rifle that fires one shot with an automatic rifle that can fire many shots in a short period of time. An analysis of the latter should not be informed by the tradition of the former.

284. See Zuidema, *supra* note 5, at 840.

285. When he wrote his Note, Mr. Kimball was a J.D. Candidate, 2018 at Brooklyn Law School. Andrew Kimball, Note, *Strictly Speaking: Courts Should Not Adopt Strict Scrutiny for Firearm Regulations*, 83 BROOK. L. REV. 441, 475 (2017).

286. *Id.* at 474–75.

287. *Id.*

288. *Id.*

289. See cases discussed *supra* Part IV.

290. See Kimball, *supra* note 285, at 475.

or decided not, to do so.<sup>291</sup> The recent addition of progun Justice Brett Kavanaugh<sup>292</sup> to the Court throws more uncertainty onto the effectiveness of Kimball's proposition. Kavanaugh favors *Heller's* history, text, and tradition test, much like Zuidema does.<sup>293</sup> Thus, it would be unwise to believe that the current Supreme Court would attempt to modify any of *Heller's* ambiguities in a way consistent with the narrow right. Therefore, Kimball's insistence on waiting on the Supreme Court could leave the legal community waiting in perpetuity or waiting for a ruling that creates more, rather than less, confusion.

### C. Sliding Levels of Scrutiny Dependent on Level of Infringement

Third, Aryn Sedore proposes that courts adhere to intermediate or strict scrutiny depending on the level of infringement on the right.<sup>294</sup> Sedore's approach focuses on whether or not the government can produce hard evidence, and not mere speculation, that the law at issue will serve the regulation's interest.<sup>295</sup> The emphasis on evidence solves, in some part, the flaws of the intermediate and strict scrutiny distinction. Courts have declared that a governmental interest in public safety would pass either intermediate or strict scrutiny.<sup>296</sup> Sedore points to the case *Kolbe v. Hogan*, which held unconstitutional a ban on semiautomatic weapons in the home despite evidence that mass shooters use those arms.<sup>297</sup> She asserts that such evidence does not indicate how removing those arms from the hands of law-abiding citizens will increase public safety.<sup>298</sup> This argument has its flaws. First, the government can enact laws aimed at making it more difficult for a criminal to commit a crime.<sup>299</sup> Second, and most importantly, the reasoning Sedore employs

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291. McDonald v. City of Chicago, 561 U.S. 742, 746 (2010).

292. German Lopez, *Brett Kavanaugh's 2nd Amendment Views, Explained*, Vox (Sept. 5, 2018, 2:22 PM), <https://www.vox.com/2018/9/5/17820310/brett-kavanaugh-second-amendment-guns-supreme-court> [<https://perma.cc/Y4LN-JZP5>].

293. *Id.*; see also Rostron, *supra* note 258, at 838.

294. Sedore, *supra* note 140, at 93.

295. *Id.*

296. See, e.g., United States v. Colon-Quiles, 859 F. Supp. 2d 229, 233 (D.P.R. 2012).

297. See *Kolbe v. Hogan*, 849 F.3d 114, 148–49 (4th Cir. 2017) (en banc); Sedore, *supra* note 140, at 93.

298. See Sedore, *supra* note 140, at 93.

299. See, e.g., *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016). The Court explained that a ten-day restriction was okay. *Id.* A ten-day restriction is unnecessary for those lawfully acquiring a gun. It is interested only in those attempting to illegally acquire a gun. One could argue that if an individual has no arms, then the right to defend the home is violated, in theory, by having to wait ten days. However, a court would balance the safety concerns protected by the ten-day waiting period against the infringement on the right. The court in *City of New York* accepted the argument that safety is increased by keeping guns out of the hands of individuals who could act brashly—when driving. See N.Y. State



could invalidate any regulation because law-abiding citizens, as such, do not contribute to a lack of general public safety. Imagine Sedore's approach under the facts of *New York Pistol & Rifle Ass'n v. City of New York* mentioned in Parts III and IV. The court noted that the regulation at issue—prohibiting the transfer of a handgun from one home to the other—would pass intermediate scrutiny.<sup>300</sup> The court considered evidence that one driving with a gun could become susceptible to road rage and could use the gun to satisfy that rage.<sup>301</sup> Yet, under Sedore's approach, a law-abiding citizen would not use a gun in any unlawful capacity. Thus, a limit on where a law-abiding citizen could take a gun would not pass constitutional muster because a law-abiding citizen would not break the law—fire the gun—no matter where the citizen was. This conflicts, at least in part, with *Heller*'s explicit mandate that schools and other protected areas remain no carry zones.<sup>302</sup> Therefore, for these two reasons, Sedore's approach falls short. However, it seems the most compelling of the approaches examined thus far.

#### D. Conclusion: Each Approach Has its Flaws

Overall, these three approaches demonstrate not only the difficulty of dealing with the *Heller* ambiguities but also the Second Amendment's ripeness for interpretation, analysis, and debate. Although each proposes intriguing solutions, flaws detract from the general effectiveness of each. In the end, the three-prong test seems better suited to deal with the Second Amendment's complexities.

### VI. THE “THREE-PRONG” SOLUTION

This Comment proposes a three-prong solution. Prong one asks whether or not a regulation infringes on a narrow reading of the individual right. If the right is infringed, prong two asks whether or not the benefit of the regulation outweighs the burden on the right. If the right is not infringed,

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Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 63 (2d Cir. 2018), cert. granted, 139 S. Ct. 939 (2019). But see Brian Burns, Note, *Holding Fire: Why Long Waiting Periods to Buy a Gun Violate the Second Amendment*, 7 CHARLESTON L. REV. 379, 381 (2013) (concluding that any waiting period longer than twenty-four hours is unconstitutional).

300. *City of New York*, 883 F.3d at 57.

301. *Id.* at 63.

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

prong three asks the court to determine if the regulation violates the Commerce Clause or Dormant Commerce Clause.

Prong one is of the utmost importance. It is also the prong that will receive the most pushback. At first glance, prong one seems to limit the individual right in a nearly debilitating manner. One may argue that the narrow right protects only the right to bear a handgun in the home for purposes of self-defense. And in part, this argument is right; prong one does ask the court to limit an interpretation of the *Heller* individual right. But although the constitutional right may be so limited, it does not imply that there does not exist a nonconstitutional right to bear other arms. This difference should help those supporters of an expanded individual right come to terms with the narrow conception advanced here.

The narrow right, as explained in the Sections above, includes one's right to defend the home but does not include defending one's home by any means. It is limited to those means necessary to defend the home. This distinction will create some concern. What is and is not necessary to defend the home? In some cases, defense of the home may require more than *Heller*'s handgun. In some cases, less than *Heller*'s handgun may be necessary. But this detracts from the key point of the narrow reading. It is not about limiting the right but about thinking about the right with the proper mindset. This mindset requires an understanding of the difference between an arm as a right and an arm as a good. With this mindset, limiting the right becomes a matter of legal interpretation as opposed to political interpretation. One could own a gun like an AR-15 that is not necessary to the defense of the home via one's nonconstitutional right to own an AR-15 as a good.

The prong two balancing test requires little explanation. If the benefit outweighs the burden, the regulation will survive. Although this may reflect the traditional levels of scrutiny in some respects, it is at least clearer. It reflects the actual interpretive techniques used by the courts. It is also an approach that clarifies the inherent ambiguity in applying traditional levels of scrutiny, which protect abstract concepts like free speech, to a concrete good, like a handgun. As a result, the public will have a better understanding of the courts' interpretive methods and, thus, a better understanding of the Second Amendment individual right.

In prong three, the court will ask if the regulation would violate the Commerce Clause. These regulations will often deal with the production or distribution of arms protected by the individual right or with arms unnecessary to the defense of the home. The purpose of the last prong is to help differentiate between the arms that one has a right to own and the arms that one has the nonconstitutional legal ability to own—hunting rifles and the like. This distinction bears on the inherent regulatory difference between a right to an abstract concept, like free speech, and a right to a concrete good.

Hopefully, over time, the third prong will separate from the first two prongs. Ideally, the public will begin to understand the scope of the Second Amendment individual right so as to bring a Second Amendment claim only when a regulation infringes on when, where, and how one can use an arm necessary to the defense of the home. In some ways, this will reflect the public's enhanced understanding of the difference between arms as goods and arms as a right. Ultimately, it is this distinction that can bridge the political chasm between those equally fervent for and against arms.

#### *A. Conclusion*

To conclude, this solution's overarching goal is to find a medium between arms ownership and arms rights. It does not propose that the Second Amendment protects all arms, but it also does not propose making all arms nearly impossible to obtain like they are in the United Kingdom—at least according to David Sedaris.<sup>303</sup> It proposes that the law reflect the interpretive techniques of the courts and that the courts refrain from making the law overly complex for the sake of complexity. In the end, the Second Amendment individual right requires simplification and clarification if there is any hope of moving beyond the arms problems that currently plague the United States.

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303. Sedaris, *supra* note 1, at 34.

