The Future of Gun Control Laws Post-McDonald and Heller and the Death of One-Gun-Per-Month Legislation Note

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In McDonald v. Chicago, the Supreme Court incorporated the Second Amendment individual right to bear arms elucidated in District of Columbia v. Heller, and made the right applicable to state action. While Heller defined the right, McDonald clarified some of the justifications for limiting that right through appropriate government regulation.

However, because Second Amendment jurisprudence is still in its infancy, the Court conspicuously left many questions unanswered. Included amongst those questions is: What is the exact breadth and depth of the right to bear arms?; To what extent may the government permissibly restrict the right to bear arms?; and, What is the level of scrutiny that ought to apply when courts consider the constitutionality of restrictive regulatory schemes that seek to abridge the right to bear arms?

Through a comprehensive and in-depth analysis of Heller and McDonald, as well as an overview assessment of the history of the right to bear arms in Colonial America and British common law, this Note argues that the right to bear arms is a pre-existing right held by all Americans, predating the Second Amendment, and is a broad right to possess any firearm not specifically designed for military use, at most times and places except those proscribed for a compelling governmental purpose, and for any lawful purpose, as defined by permissible government regulation.

Lastly, this Note argues that the Second Amendment does not fit squarely within the established levels of scrutiny. Rather, the Court ought to apply an ill-defined and rarely-utilized modus operandi of judicial scrutiny that the author calls "sliding-scale scrutiny," where the level of scrutiny varies depending on the effect of the regulation on the core of the right. Under such a level of scrutiny, many restrictive regulatory schemes, such as one-gun-per-month laws, which strike directly at the core of the right, should be held unconstitutional.
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THE FUTURE OF GUN CONTROL LAWS POST-MCDONALD AND HELLER AND THE DEATH OF ONE-GUN-PER-MONTH LEGISLATION

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I. INTRODUCTION

The Second Amendment right to bear arms has been a source of confusion, debate, and, occasionally, litigation, legislation, and regulation, since the adoption of the Bill of Rights in 1791. Recently, the U.S. Supreme Court, in McDonald v. City of Chicago,2 overruled almost two hundred years of case law,3 holding that the Second Amendment right to bear arms is applicable to the states by virtue of the Fourteenth Amendment.4

* American University of Beirut, Lebanon, 2006; Suffolk University, B.S., summa cum laude, 2009; University of Connecticut School of Law, Juris Doctor Candidate, 2012. This Note would not have been possible without the guidance, support, and advice of my advisor, Professor Richard S. Kay. Also, special thanks to Professor Constance Rudnick and Massachusetts State Senator Steven A. Baddour for reviewing this Note, Dean Erwin Chemerinsky for his assistance with the constitutional analysis, Patrick J. Charles for his critique of my historical analysis, and my fellow colleagues from the Connecticut Law Review for their tireless efforts and feedback. All errors contained herein are mine alone.

1 I make no judgment as to whether Heller and McDonald were properly decided in light of the history of colonial laws regulating gun possession and the evidence surrounding the adoption of the Second Amendment. This Note assumes, arguendo, that the historical analysis of the Supreme Court in both the Heller and McDonald decisions is correct. The focus of this Note is the effect of these decisions on future gun control regulations, not whether the decisions are correct or historically factual. Several noted academics and historians, including Patrick J. Charles, dispute the veracity of the Supreme Court's recitation of Second Amendment history. For a thorough history of the right to bear arms, see generally PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT (2009); Patrick J. Charles, "Arms for Their Defence"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should be Incorporated in McDonald v. City of Chicago, 57 CLEV. ST. L. REV. 351 (2009). But see JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1996) (providing an historical analysis of the English influence on the addition of the right to bear arms to the Bill of Rights).

2 130 S. Ct. 3020 (2010). After McDonald, Chicago revised its gun laws to permit the lawful ownership of handguns, but also to prohibit the sale of firearms within the city limits. CHICAGO, ILL. MUN. CODE §§ 4-144-010, 8-20-100 (2010). In light of McDonald, the new Chicago gun laws are now the subject of ongoing litigation. See Complaint for Declaratory Judgment and Injunctive Relief at ¶¶ 18–20, Benson v. City of Chicago, No. 1:10CV04184, 2010 WL 2796263 (N.D. Ill. July 7, 2010).

3 See Miller v. Texas, 153 U.S. 535, 538 (1894) (upholding the constitutionality of a state gun law on the basis that the Second Amendment restricts only federal, not state, power); Presser v. Illinois, 116 U.S. 252, 265 (1886) (holding that the Second Amendment limits the power of Congress and the national government, not the states); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that the Second Amendment restricts only the powers of the national government); see also Baron v. City of Baltimore, 32 U.S. 243, 247 (1833) (holding that the takings clause of the Fifth Amendment is not applicable to the states).
Amendment Due Process Clause. This is a remarkable deviation from previous holdings of the Supreme Court and lower courts, which refused to extend the right to bear arms to state gun control legislation.

This arguably significant decision will likely change the course of existing and future legislation relative to gun control on the federal and state levels. Existing gun control laws seek to limit—and at times entirely prohibit—access to firearms, the ability to purchase, carry, or use firearms, and the frequency with which one may procure firearms. It is the latter regulation that may be most suspect and ripe for constitutional review under the newfound fundamental right to keep and bear a handgun in the home for self-defense.

Currently, three states have enacted laws that restrict the lawful purchase of a handgun to one firearm per month. Massachusetts Governor Deval Patrick previously proposed similar legislation for the Commonwealth. These so-called one-gun-per-month laws have not been constitutionally challenged post-McDonald. While the proposed Massachusetts legislation failed to pass the legislature before the formal legislative session ended on July 31, 2010, a broad and expansive reading

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4 *McDonald*, 130 S. Ct. at 3026. It is worth noting that the opinion in *McDonald* was a plurality decision, where Chief Justice Roberts and Justices Alito, Kennedy, and Scalia agreed on incorporation through the Due Process Clause, while Justice Thomas, who concurred in the judgment in part, actually argued incorporation through the Privileges or Immunities Clause. This plurality split can be used to argue that the question about whether the Second Amendment is incorporated via the Due Process Clause or the Privileges or Immunities Clause is still unresolved. I would argue that, because Justice Thomas concurred in the judgment, while he disagreed with the use of the Due Process Clause, the Second Amendment is nonetheless incorporated through the Due Process Clause because every enumerated right that has been incorporated has been through the Due Process Clause. This Note accepts this assumption.

5 See *Charles*, supra note 4, at 10 (“[T]he McDonald decision did little to change the legal landscape of 'gun rights' as we know them . . . .”).


8 See H.B. 2012, Rule 12A, at 25, 186th Gen. Ct., 1st Ann. Sess. (Mass. 2009) (stating that “all formal business of the second annual session shall be concluded no later than the last day of July of that calendar year”). At all times, even after the end of formal sessions, the Senate and House of Representatives of the Massachusetts General Court are required by Part II, ch. 1, § 3, art. VI and art. VIII of the Massachusetts Constitution to meet once every seventy-two hours in informal sessions. However, during informal sessions, no controversial matters may be considered and a unanimous vote of the members present is required for all matters. H.B. 2011, Rule 44, 186th Gen. Ct., 1st Ann. Sess. (Mass. 2009); S.B. 5, Rule 5a, 186th Gen. Ct., 1st Ann. Sess. (Mass. 2009).
of the *McDonald* decision calls into question the constitutionality of existing and proposed one-gun-per-month laws. Massachusetts, with some of the most restrictive gun control laws in the nation, will likely be the springboard for significant litigation relative to the extent to which states may limit the constitutional right to bear arms. The Supreme Court in *District of Columbia v. Heller* and *McDonald* did not fully define the scope of the right to bear arms and did not establish a level of scrutiny for challenges to gun control laws. This leaves open the possibility that this Second Amendment right will be afforded the same strict scrutiny as other fundamental constitutional rights; or, perhaps more likely, the level of scrutiny will be something less than strict scrutiny, with the possibility for stringent regulation and restriction of gun ownership but not its absolute prohibition.

After a review of Second Amendment jurisprudence over the past two hundred years, this Note will define the constitutionally protected right to bear arms as a right to possess almost any firearm, at most locations, for any lawful purpose in accordance with state and federal law; will establish that the level of scrutiny for laws that abridge the Second Amendment right to bear arms should be a “sliding-scale” review, where the level of scrutiny changes with the effect the regulation has on the right; and that the proposed Massachusetts one-gun-per-month law, as well as existing one-gun-per-month laws, will likely be held to violate the Second Amendment when properly assessed under a strict-scrutiny analysis.

II. THE BILL OF RIGHTS

A. Incorporation of the Bill of Rights

Incorporation is the process adopted by the Supreme Court after ratification of the Fourteenth Amendment, by which certain federal rights are made applicable to the state action on an individual basis by virtue of the Due Process Clause of the Fourteenth Amendment. The first eight amendments of the United States Constitution establish the protection of certain, identified (enumerated) individual rights that the federal government may not infringe. With one notable exception, it was not until 1833 that the Supreme Court took the opportunity to address whether

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9 Massachusetts, even dating to the early days of this country and the colonial period, has had some of the nation’s most restrictive gun-control regulations, including when and where guns could be discharged. See Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 162–63 (2007) (detailing the regulation of guns by Massachusetts’ colonial legislature).


11 *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 52–53 (1820) (noting that the Second Amendment does not prohibit a state from raising a militia).
the protections of these rights applied only to the federal government or to state and local governments as well. In Barron v. Mayor of Baltimore, Chief Justice John Marshall held that because the framers had not indicated in "plain and intelligible language" that the Bill of Rights applies to the states, the restrictions of the first ten amendments only apply to the federal government. It is worth noting that the First Amendment is the only amendment in the Bill of Rights that begins with the words "Congress shall make no law . . ." None of the other amendments in the Bill of Rights has such a preamble restricting the protection of those rights to the actions of Congress only. However, when faced with this linguistic and textual argument, Chief Justice Marshall flatly rejected it, claiming that the "limitations on power . . . are . . . applicable to the government created by the instrument," in this case, the federal government. Consequently, one would expect that the duty was left to individual state constitutions to limit the power of state governments. With the adoption of the Fourteenth Amendment forty-five years later, the possibility arose that the protections of the Bill of Rights may apply to state and local governments. Justice Hugo Black, in his famous dissent in Adamson v. California and concurrence in Duncan v. Louisiana, argued that the first eight amendments to the Constitution apply to the states because of the Privileges or Immunities Clause of the Fourteenth Amendment. In the Slaughter-House Cases, decided over half a century before Justice Black's statements, the Supreme Court had rejected such an argument, querying:

[w]as it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? . . . We are convinced that no such results were intended by the

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14 Id. at 250.
15 Id. at 247, 250–51.
16 U.S. CONST. amend. I.
18 Id.
21 Id. at 166.
22 83 U.S. (16 Wall.) 36 (1873).
Congress which proposed these amendments, nor by the legislatures of the States which ratified them.23

Fifty-years later,24 in Gitlow v. New York,25 the Supreme Court began to use the concept of selective incorporation26 to make provisions of the Bill of Rights applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment.27 Since that time, the Court has slowly incorporated most of the provisions of the Bill of Rights as applicable to the states.28

B. The History of Second Amendment Jurisprudence

1. Refusal to Incorporate

On numerous occasions before McDonald, the Supreme Court refused to incorporate the Second Amendment right to bear arms. Before the ratification of the Fourteenth Amendment, in Dred Scott v. Sandford,29 Chief Justice Taney opined (ad horribilis) that, if African Americans were considered citizens, they would be “entitled to the privileges and immunities of citizens . . . . [A]nd it would give them the full liberty . . . to

23 Id. at 77–78.
24 One can argue that the doctrine of selective incorporation actually began in 1897 with Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897), where the Court upheld a land-taking by the city of Chicago where just compensation was paid to the owner. Id. at 235–36, 257–58. The Court held that a land-taking by a city or state, for public use, without just compensation, would be repugnant to the Fourteenth Amendment due process clause. Id. at 241. However, there was a state constitutional provision that guaranteed due process and just compensation for land-takings and the Court upheld compensation of just one dollar, which was awarded after a trial. Id. at 241, 247. Indeed, the case was more about whether due process was afforded, rather than whether it required just compensation under the Fifth and Fourteenth Amendments.
26 Selective incorporation is the process by which the Supreme Court decides, on a case-by-case basis, whether a constitutionally protected right is applicable to state action by virtue of the Fourteenth Amendment Due Process Clause. See, e.g., Michael Kent Curtis, The Fourteenth Amendment: Recalling What the Court Forgot, 56 Drake L. Rev. 911, 961–64 (2001).
27 Gitlow, 268 U.S. at 666.
28 To date, the Supreme Court has either refused to incorporate, or has not had the opportunity to rule on incorporating, the Third Amendment freedom from quartering soldiers, the Fifth Amendment right to an indictment by grand jury, and the Seventh Amendment right to a jury trial in civil cases. See Minneapolis & St. Louis R.R. Co. v. Bombolisi, 241 U.S. 211, 217 (1916) (refusing to incorporate the Seventh Amendment right to a jury trial in civil cases); Hurtado v. California, 110 U.S. 516, 538 (1884) (refusing to incorporate the Fifth Amendment right to indictment by a grand jury). While the Supreme Court has not ruled on incorporating the Third Amendment freedom from quartering soldiers, the Second Circuit, in Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982), held that “the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.” For an extensive discussion of the historical debate over selective incorporation, the rights that have been incorporated, and by which cases, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 511–19 (4th ed. 2011).
29 60 U.S. (19 How.) 393 (1856).
keep and carry arms wherever they went." It appears that at that time Chief Justice Taney considered the right to bear arms to be an individual right afforded to all the citizens of the United States through the Privileges and Immunities Clause of Article IV of the Constitution. However, the Court never adopted this interpretation.

After adoption of the Fourteenth Amendment, in United States v. Cruickshank, the Supreme Court held that the Second Amendment "declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . . ." Similarly, in Presser v. Illinois, the Supreme Court relied on Cruickshank in holding that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States." Between Presser, in 1886, and Heller, in 2008, the Supreme Court rarely revisited Second Amendment incorporation.

2. The Collective-Right and Individual-Right Theories

While the issue of Second Amendment incorporation was not fully revisited until Heller and McDonald, much of Second Amendment jurisprudence has revolved around whether the right is a collective or an individual right. Because the Second Amendment right is enforceable against the federal government, courts sought to define whether the right is a collective right to bear arms with respect to a well-regulated militia, or if it is an individual right to keep and bear arms for lawful, personal purposes.

The collective-right theory was gleaned from Presser and United States v. Miller. In Miller, the Court held that the right to bear arms must bear "some reasonable relationship to the preservation or efficiency of a well regulated militia" with the "obvious purpose to assure the continuation and render possible the effectiveness of [Congress' power to raise a militia] . . . ." Based on this collective-right view that has gained

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30 Id. at 416–17.
31 U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").
32 92 U.S. 542 (1875).
33 Id. at 553.
34 116 U.S. 252 (1886).
35 Id. at 265.
36 I say "rarely" because on two post-Presser occasions the Supreme Court reaffirmed that the right to bear arms was not applicable to the states. See Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897); Miller v. Texas, 153 U.S. 535, 538 (1894).
38 Id. at 178; accord U.S. Const. art. I, § 8, cl. 15 ("The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel
support since \textit{Miller}, the Court has held that a states’ right to raise a militia may not be infringed by the federal government because the Second Amendment protects it.\textsuperscript{39} In addition, myriad state courts and every federal appellate court, with the exception of the Fifth Circuit,\textsuperscript{40} have relied on \textit{stare decisis} in holding that the right to bear arms is a collective right vis-à-vis maintaining a well-regulated militia.\textsuperscript{41}

Complementing the judicial interpretation, there is a large body of scholarly work dedicated to the collective-right theory. One scholar asserts that, based on an historical analysis of the drafting and ratification of the Second Amendment, the well-regulated militia clause is a textual introduction to the right to bear arms, explicitly modifying its purpose to permit the possession of firearms only as “necessary to maintain the well-regulated militia.”\textsuperscript{42}

Conversely, several courts and scholars have advanced the theory that the right to bear arms is an individual, fundamental right protected by the Constitution and applicable to the states by virtue of the Fourteenth Amendment. The Second Amendment clearly states that the “right of the people to keep and bear Arms, shall not be infringed.”\textsuperscript{43} The phrase “shall not be infringed” implies that there is a pre-existing right to keep and bear arms that predates the Constitution and the government may not infringe upon that right. However, the exact breadth of this pre-existing right is unclear. Indeed, many state constitutions that pre-date the U.S. Constitution (and some subsequently authored) guarantee a right to bear arms; some guarantee an individual right; some guarantee a right to bear arms explicitly for self-defense; and others guarantee a collective-right.\textsuperscript{44}

\textsuperscript{40} United States v. Emerson, 270 F.3d 203, 232 (5th Cir. 2001) ("The plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard.").
\textsuperscript{41} For a list of cases by various state courts and each federal appellate court, see Brief of the American Bar Association as Amicus Curiae Supporting Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 136349 at *10 n.3.
\textsuperscript{43} U.S. CONST. amend. II.
\textsuperscript{44} See District of Columbia v. Heller, 554 U.S. 570, 600–03 (2008) (noting that pre-Second Amendment, the Massachusetts, North Carolina, Pennsylvania, and Vermont constitutions guaranteed an individual right to bear arms, and the post-Second Amendment constitutions of Alabama, Connecticut, Indiana, Kentucky, Maine, Mississippi, Missouri, Ohio, and Tennessee guaranteed a similar, individual right). \textit{But cf.} Charles, \textit{supra} note 4, at 41–56 (arguing that many pre-Second
It was with this background in mind that some courts and scholars developed the individual right theory.

Several state courts have interpreted the Second Amendment to bestow an individual right to bear arms, though a state court's interpretation of a federal Constitutional right has no legal precedent on federal courts. On the federal level, the United States District Court for the Northern District of Illinois held that "whenever required by the federal government or absent any regulation whatsoever, an individual has the right to keep and bear arms." Similarly, the Fifth Circuit, in United States v. Emerson, held that "[t]he plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service . . . ." In addition, Justice Scalia wrote (extra-judicially) that the Founding Fathers "thought the right of self-defense to be absolutely fundamental" and that, in codifying the right to bear arms in the Bill of Rights, "sought to protect those liberties" for fear that some "future generation might wish to abandon liberties that they considered essential."

In addition to the judicial support for an individual-right theory, there is also significant practical and academic support for such a reading. In 1934, U.S. Attorney General Homer S. Cummings testified before the House Committee on Ways and Means in support of the National Firearms Act of 1934. Attorney General Cummings testified to the committee that an outright prohibition of firearms would pose a possible constitutional issue. Attorney General John Ashcroft, in a 2001 letter to National Rifle Association Institute for Legislative Action Executive Director James Jay Baker, stated that it was his "unequivocal . . . view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms." Furthermore, even Congress has

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Amendment state constitutional provisions, while securing some right to bear arms, do not bestow as broad and encompassing right as Justice Alito argues in Heller.


47 270 F.3d 203, 232 (5th Cir. 2001).


declared, "[t]he Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." 52

III. INCORPORATION OF THE SECOND AMENDMENT

A. District of Columbia v. Heller

In 2008, the Supreme Court adopted the individual-right theory, creating the necessary precursor for full incorporation of the Second Amendment, though incorporation did not occur until 2010. In Heller, the Court granted certiorari to assess the constitutionality of District of Columbia laws that essentially prohibited the possession of loaded, usable handguns, even in the home for purposes of self-defense. 53

The Supreme Court undertook a comprehensive, linguistic analysis of the Second Amendment, holding that the amendment is comprised of a prefatory clause ("A well regulated Militia") and an operative clause ("the right of the people to keep and bear Arms"). 54 Following the cannons of statutory interpretation, the prefatory clause does not limit the operative clause, but rather resolves any ambiguities. 55 In interpreting the meaning of the operative clause, the Court held that the phrase "right of the People" must be read as it is in other parts of the Constitution, as an individual right. 56 In interpreting the phrase "to keep and bear Arms," the Court held that "Arms" means "weapons that were not specifically designed for military use," 57 "to keep" means an individual right "to possess[] arms, for militiamen and everyone else," 58 and "bear Arms" refers to the "carrying of weapons outside of an organized militia." 59 In so reasoning, the Court held that the Second Amendment grants an "individual right to possess and carry weapons in case of confrontation." 60

1. Scope of the Holding in Heller

The Supreme Court proffered that the right to bear arms is not an absolute right and is subject to some restriction. The Court held that the

52 15 U.S.C. § 7901(a)(2) (2006). The purpose of this statute, under Congress’ Commerce Clause power and in the interest of protecting free enterprise, is to protect lawful gun manufacturers from liability for harm caused by individuals who own guns. Id. § 7901(a)(3)–(8).
53 See D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).
54 Heller, 554 U.S. at 577.
55 Id. at 577–78.
56 Id. at 579–80.
57 Id. at 581.
58 Id. at 583.
59 Id. at 584.
60 Id. at 592.
type of weapons protected by the Second Amendment is restricted to those “in common use at the time,” which means the government may restrict the possession of “sophisticated arms that are highly unusual in society at large.” The Court further held that the opinion should not be read to “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” These evinced, presumptively permissible restrictions indicate that the Court believes that some reasonable restrictions on the Second Amendment are constitutional. However, as a matter of law, all that is known for certain is that the Second Amendment protects the right of individuals to keep and bear a handgun, in the home, for self-defense.

The second limit to the right recognized in *Heller* is based on the reach of the statutes in question and the scope of the constitutional review of District of Columbia laws. The laws in question, in the words of the Court, “totally ban[] handgun possession . . . [and] amount[] to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense],” which is an “inherent right . . . central to the Second Amendment . . . .” Furthermore, the statute in question contained a licensing mechanism in addition to the nearly outright ban on weapons possession; however, the plaintiffs did not specifically challenge the licensing mechanism and therefore the Court did not assess the constitutionality of such restrictive licensing schemes. Based on this language, the scope of the holding is further limited to the possession of handguns for the purpose of self-defense and bears no precedential value as to the constitutionality of gun-licensing schemes.

The third limit of the holding in *Heller* is the location where one may possess a handgun for self-defense purposes. The Court found that the District of Columbia “prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute.” The Court also held that “handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid,” thereby suggesting a limitation of their holding to prohibitions on handguns in the home, or alternatively, proffering that statutes which restrict the right to possess a (hand)gun in the home will be more suspect than those that restrict the right to possess a (hand)gun elsewhere.

61 *Id.* at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).
62 *Id.* at 626–27.
63 *Id.* at 628.
64 *Id.* at 630–31.
65 *Id.* at 628.
66 *Id.* at 629.
2. Allusions to a Level of Scrutiny

Notwithstanding the holding that the Second Amendment right to bear arms is a fundamental, individual, constitutional right, the Court nonetheless failed to establish a level of scrutiny to guide future courts, legislators, and litigants as to how gun-control legislation will be assessed with respect to the validity of limitations on the right. Indeed, the Court held that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,’ . . . would fail constitutional muster.” Generally, assuming rights are not absolute and may be abridged to pursue a public objective, courts will use varying levels of scrutiny to assess the constitutionality of laws abridging constitutional rights. However, the Court failed to elucidate which of the standards of scrutiny should apply.

Justice Breyer in his dissent opined that the law in question would certainly pass a rational-basis test, and further criticized the majority for failing to establish any standard of scrutiny to guide future courts. While the majority agreed that the law would pass a rational-basis test (note that this is not contrary to the Court’s statement above that an absolute ban on handguns in the home for self-defense would fail under any of the levels of scrutiny previously applied to enumerated rights, because rational-basis scrutiny has never been applied to a fundamental right), it readily dismissed the possibility that the Second Amendment will be subject to rational-basis scrutiny, because rational-basis scrutiny cannot “be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . . [including] the right to keep and bear arms.”

Justice Breyer also discussed the possibility of a strict-scrutiny analysis for gun-control legislation, writing that such a level of scrutiny “would require reviewing with care each gun law to determine whether it is narrowly tailored to achieve a compelling governmental interest.” If the courts were to try to apply strict scrutiny, “almost every gun-control regulation will seek to advance . . . a primary concern of every government—a concern for the safety and indeed the lives of its citizens.” Therefore, in Justice Breyer’s view, a strict-scrutiny review
would be superfluous because protecting the safety of citizens is always a compelling state interest.

Lastly, Justice Breyer suggested that none of the traditional levels of scrutiny is satisfactory to assess the constitutionality of laws restricting the Second Amendment right. Instead, he proposed an interest-balancing inquiry, where judges weigh whether a "statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests." However, once again the majority dismissed Justice Breyer’s attempt to assign a level of scrutiny, explaining that no other enumerated constitutional right . . . has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. . . . The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very product of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

With these words, the Court held the District of Columbia laws unconstitutional, but left unanswered the level of scrutiny to be used by future courts in determining the constitutionality of laws that restrict the Second Amendment right to bear arms.

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75 See id.
76 Id. at 689–90.
77 Id. at 634–35 (majority opinion).
B. McDonald v. City of Chicago

During the 2009–2010 term, the Supreme Court granted certiorari to review the Seventh Circuit’s holding in McDonald v. City of Chicago that the individual right to bear arms defined in Heller does not apply to a municipal law and is not incorporated by the Fourteenth Amendment Due Process Clause. Finding that the right to bear arms is incorporated, the Supreme Court elucidated the incorporation ambiguity left in the wake of the Heller decision. The Court still failed, however, over the objection of several Justices and amici, to establish a level of scrutiny to guide future courts and legislators in assessing the constitutionality of existing and proposed municipal, state, and federal gun-control legislation.

As in Heller, the City of Chicago had an ordinance that effectively prohibited the possession of a firearm, requiring that every handgun must be registered, but essentially prohibiting the registration of most handguns. McDonald and several other litigants challenged the law as repugnant of the Second Amendment because it infringed their right to keep a firearm in their homes for self-defense purposes and argued that handguns are actually necessary to protect them from criminals. The petitioners proffered two arguments for incorporation: (1) that the right to bear arms is one of the privileges or immunities protected by the Fourteenth Amendment and the very narrow reading of that clause in the Slaughterhouse Cases should be overturned; or, (2) that the Fourteenth Amendment Due Process Clause incorporates the Second Amendment right identified in Heller. The Court ultimately incorporated the Second Amendment right to bear arms and held it applicable to the states by virtue of the Due Process Clause.

1. Procedural Posture

McDonald is the consolidation of several lawsuits that were filed after the decision in Heller. Otis McDonald and others (the “Chicago Petitioners”) filed suit in the United States District Court for the Northern District of Illinois challenging the constitutionality of Chicago’s aforementioned restrictions on the possession of firearms in the home for self-defense purposes. In addition, the National Rifle Association

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78 NRA v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009), rev’d McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).
79 CHICAGO, ILL., MUN. CODE §§ 8-20-040(a), 8-20-050(c) (2009), invalidated by McDonald, 130 S. Ct. 3020.
80 McDonald, 130 S. Ct. at 3026.
81 Id. at 3028.
82 Id. at 3026.
83 Id. at 3020, 3027.
84 Complaint at 9, McDonald v. City of Chicago, 2008 WL 2626944 (N.D. Ill. 2008) (No. 08CV03645), 2008 WL 2571757.
("NRA"), in conjunction with several residents of Chicago and Oak Park, Illinois, filed two lawsuits in the same District Court—one against the City of Chicago and one against the Village of Oak Park—challenging their prohibitions on the possession of handguns for self-defense.\(^\text{85}\)

The Chicago Petitioners were all lawful gun owners, residing in Chicago but forced to keep their firearms elsewhere due to Chicago laws that effectively prevented the registering of a handgun.\(^\text{86}\) In their initial filing with the district court, the Chicago Petitioners expressed a desire to possess a handgun for self-defense, and alleged that they were prohibited from doing so for fear of arrest and prosecution.\(^\text{87}\) They filed suit the same morning the *Heller* decision was announced,\(^\text{88}\) alleging that the Second Amendment "[a]t a minimum . . . guarantees individuals a fundamental right to possess a functional, personal firearm, including a handgun, within the home,"\(^\text{89}\) and that the Chicago handgun registration laws deprived citizens of their right to bear arms, which is incorporated against the states by virtue of the Fourteenth Amendment Due Process Clause or Privileges or Immunities Clause.\(^\text{90}\)

The NRA lawsuit against Chicago named the NRA and four individuals as plaintiffs. Similar to *McDonald*, two of the plaintiffs lawfully owned guns that they stored outside of Chicago, but wished to store in their Chicago homes, and two of the plaintiffs resided in Chicago and wished to obtain a handgun for self-defense purposes.\(^\text{91}\) Like the plaintiffs in *McDonald*, the *Heller* plaintiffs expressed a fear of arrest and prosecution.\(^\text{92}\) The NRA lawsuit against the Village of Oak Park, Illinois is substantially similar, though the named-plaintiffs are residents of Oak Park, and the Oak Park ordinance explicitly prohibited the possession of firearms.\(^\text{93}\)

The District Court Judge denied the *McDonald* plaintiffs' motions for summary judgment and motion to narrow the legal issues, reasoning that the Seventh Circuit had previously held that the Second Amendment is not incorporated and that judicial precedent prohibits the district court from drawing an opposite conclusion.\(^\text{94}\) Consolidating the two NRA suits, the
same district court Judge likewise rejected the request for declaratory and injunctive relief for the same reasons stated in *McDonald*.\(^{95}\) All three groups of plaintiffs sought appellate review from the Seventh Circuit.

In affirming the district court’s rejection of the plaintiff’s claims, the Seventh Circuit carefully noted that many of the cases that they were forced to rely on in holding that the Second Amendment is not incorporated are now “defunct.”\(^{96}\) Nevertheless, the court followed precedent with “direct application” and affirmed the lower court decision.\(^{97}\)

From this ruling, McDonald petitioned for certiorari, which was granted on September 30, 2009.\(^{98}\)

2. *Holding in McDonald*

The appeal to the Supreme Court raised two primary issues of law: (1) whether the right to keep and bear arms is one of the “privileges or immunities” of citizenship that cannot be denied because of the Fourteenth Amendment; or (2) whether the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to bear arms.\(^{99}\)

The Court summarily refused to consider the first issue on the basis that it would unnecessarily disturb the Court’s earlier holding in the *Slaughterhouse Cases*, since the question of state infringement of Constitutional rights protected by the Fourteenth Amendment has consistently been analyzed under the Due Process Clause, rather than the Privileges or Immunities Clause.\(^{100}\)

The Court next sought to determine whether the Second Amendment right to bear arms is one of the rights that can and should be incorporated. As discussed previously, the modern theory of selective incorporation, which began around 1963,\(^{101}\) incorporates a Bill of Rights guarantee if the Court deems it “fundamental [to the] principles of liberty and justice which lie at the base of all our civil and political institutions.”\(^{102}\) Relying on its earlier decision in *Heller*, the Court held that self-defense is the “central component” of the Second Amendment right to bear arms, and that self-defense is a basic right that is recognized in our legal system and many of

\(^{95}\) *Oak Park*, 617 F. Supp. 2d at 754.

\(^{96}\) *NRA v. City of Chicago*, 567 F.3d 856, 858 (7th Cir. 2009), *rev’d* *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

\(^{97}\) *Id.* at 857.

\(^{98}\) *McDonald v. City of Chicago*, 130 S. Ct. 48 (2009).

\(^{99}\) *McDonald*, 130 S. Ct. at 3028.

\(^{100}\) *Id.* at 3030–31.

\(^{101}\) *See* *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (“In many cases . . . this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory to the States.”).

those that came before us. Furthermore, the right to bear arms is deeply rooted in American history and, amongst the Founding Fathers, was considered one of those fundamental principles worthy of constitutional protection. Based on this analysis, the Court held that the Second Amendment right to bear arms recognized in *Heller*, and presumably subject to the very same limitations as outlined in *Heller*, is incorporated through the Due Process Clause of the Fourteenth Amendment. However, as in *Heller*, the Court again failed to establish the level of scrutiny that should be employed by lower courts in assessing the constitutionality of laws that abridge the right to bear arms.

IV. THE POST-MCDONALD SECOND AMENDMENT

The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection . . . it represents . . . power coupled with the exercise of a certain jurisdiction. . . . [I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed.

The holdings in *Heller* and *McDonald* may have an incredible impact on constitutional law jurisprudence for decades to come, and may even signal the demise of the *Slaughterhouse Cases*, a result many constitutional law scholars are acutely interested in. However, it is likely that the majority of litigation and legislation in the very near future will revolve around three primary issues: (1) What is the scope of the Second Amendment right to bear arms?; (2) What reasonable restrictions on one’s right to bear arms are constitutionally permissible?; and (3) What level of scrutiny must the Supreme Court and lower courts apply when assessing the constitutionality of laws that restrict the right to bear arms?

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103 *McDonald*, 130 S. Ct. at 3036 (internal quotation marks omitted).
104 *Id.* at 3036–37. For an historical analysis of the Second Amendment, see for example *id.* at 3036–42; District of Columbia v. *Heller*, 554 U.S. 570, 605–34 (2008).
105 See also supra Section III.A.1.
106 *McDonald*, 130 S. Ct. at 3050.
108 See Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 35, *McDonald*, 130 S. Ct. at 3020 (No. 08-1521), 2009 WL 2028912. Because nearly every provision of the Bill of Rights has been incorporated, and Justice Black argued in *Adamson and Duncan* for full incorporation because of the Privileges or Immunities clause, as we near universal incorporation the Court may be willing to revisit Justice Black’s arguments and overrule or minimize *Slaughterhouse*. However, given the reluctance of the Court to revisit *Slaughterhouse*, this is unlikely.
A. Scope of the Right to Bear Arms

Based on the facts alleged, the Court in *Heller* and *McDonald* recognized a fundamental, individual right to keep and bear arms—i.e., the possession of a handgun, in the home, for self-defense purposes—that is constitutionally protected and is equally immune from unreasonable state, local, or federal restriction.\(^{109}\) It is also clear that some limitations on the right are justified. While *Heller* defined the right, *McDonald* incorporated it and clarified some of the justifications for limiting that right through government regulation. Based on the foregoing analysis of the *Heller* and *McDonald* decisions, however, the Supreme Court has not rejected the assertion that the right to bear arms protected by the Second Amendment is an individual right to carry most types of weapons for any lawful purpose.

A handgun may be the most convenient and widely chosen weapon for self-defense, but that does not mean it is the only weapon to achieve such an end. The issues in *Heller* and *McDonald* were framed as government restrictions on a citizen’s right to possess a handgun, in the home, for self-defense. Pursuant to long-standing judicial precedent, the Court did not reach questions that were not raised on appeal and therefore did not address all of the possible limitations on the right that might be justified. It is clear that the right to possess a handgun, in the home, for self-defense was the gravamen of the *Heller* and *McDonald* decisions, but it is not the end of the discussion and the Supreme Court will undoubtedly be called on to clarify its holding in the future.

That the Court did not explicitly assess all limitations on the right to bear arms that may pass judicial scrutiny does not mean that the right is only protected to the extent recognized by the Court. The Court clearly does not believe this to be the outer limits of the constitutionally protected right. As noted above, the Court specifically framed the right as one to possess a weapon in cases of confrontation in the home. The obvious implication is that such confrontation can happen within the home, but does not have to, and the weapon of choice for self-defense may be a handgun, but is not necessarily limited to handguns alone.

The right to bear arms surely extends beyond the home and beyond the mere possession of handguns. The Court in *Heller* and *McDonald* undertook a comprehensive analysis of the scope and extent of the right. Quoting *Heller*, the *McDonald* Court noted that its holding that the Second Amendment right to bear arms is incorporated does not cast doubt upon longstanding regulatory schemes such as “prohibitions on the possession of

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\(^{109}\) See, e.g., Malloy v. Hogan, 378 U.S. 1, 10–11 (1964) (holding that the Fourteenth Amendment does not apply to the states “only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .’”) (quoting Ohio ex. rel. Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).
firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." In addition, the Court did not overrule Presser, which upheld a state law prohibiting private, paramilitary organizations, nor did it overrule Miller, which held that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." While the Court was not clear on where and to what extent the right to bear arms extends, the very fact that the Court took the time to assess existing case law and statutes restricting the right to bear arms suggests that the Court accepts that there are constitutionally protected uses for weapons (other than just handguns) outside of the home. However, in non-self-defense situations, we will not know for certain the scope of the right until the Supreme Court provides further guidance.

Nevertheless, is the right, no matter where recognized and regardless of the type of weapon employed, only a right to bear arms vis-à-vis a confrontation or self-defense purpose? The Court in Heller framed the right as one "in case of confrontation" and, in McDonald, noted that self-defense is a "basic right" and is the "central component" of the Second Amendment right. Furthermore, the Court in McDonald held that "the need for defense of self . . . is most acute in the home . . . [and] this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family." These statements could lead some to believe that the right to bear arms is only for self-defense purposes.

Conversely, in McDonald, the Court actually phrased its holding in Heller as: "the Second Amendment protects a personal right to keep and bear arms for lawful purposes," strongly implying that even the Justices view their holding in Heller as more than just a protection of the right to bear arms for self-defense purposes—indeed, the right extends to all lawful purposes. Later in the McDonald decision, the Court stated that the Second Amendment protects, inter alia, "the right to possess a handgun in the home for the purpose of self-defense," and it is this right that is incorporated by the Due Process Clause of the Fourteenth Amendment.

10 McDonald, 130 S. Ct. at 3047 (quoting Heller, 554 U.S. at 626–27) (internal quotations marks omitted).
11 Presser, 554 U.S. at 620–21.
12 Id. at 625.
13 Id. at 592.
14 Id. at 592.
15 McDonald, 130 S. Ct. at 3036.
16 Id. at 3036 (quoting Heller, 554 U.S. at 599) (internal quotations omitted).
17 Id. at 3036 (quoting Heller, 554 U.S. at 628–29) (internal quotations omitted).
18 Id. at 3044.
19 Id. at 3050.
However, in so holding, it does not necessarily follow that the right is restricted solely to this purpose.

Since the *Heller* and *McDonald* decisions are not exactly clear as to the scope of the right that is protected, we must turn to other, less authoritative sources, to define the right. Justice Stevens, in his *McDonald* dissent, claimed that the right asserted in the petition for certiorari is an "interest in keeping a firearm of one’s choosing in the home," which would indicate that the right is limited to possession in the home. However, as Justice Scalia noted in his concurring opinion, and as the petitioners posited in their petition for certiorari, the question presented to the Court was “[w]hether the Second Amendment right to keep and bear arms is incorporated . . .” The posture of the issue presented to the Court suggests that the right protected by the Second Amendment, whatever the extent of that right may be, is incorporated.

As Justice Stevens stated in his *Heller* dissent:

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case.

Justice Stevens identified and recognized that the Court left the scope of the right ambiguous, which lends credence to the argument that the right is broader than the Court specifically identified. Indeed, the Court did not adopt the U.S. Court of Appeals for the District of Columbia’s expansive scope of the Second Amendment, bestowing a right to carry arms for “lawful, private purposes.” The *Heller* Court instead narrowed that definition to cases of confrontation.

Most recently, several lower courts have taken the opportunity to assess the scope of the right protected by the Second Amendment in light

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119 *Id.* at 3109 n.36 (Stevens, J., dissenting).
120 *See id.* at 3054 n.5 (Scalia, J., concurring).
121 Petition for Writ of Certiorari at i, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 WL 1640363.
123 *Id.*
125 *Heller*, 554 U.S. at 584.
of the *Heller* and *McDonald* decisions. An overwhelming number of courts have elected to read the decisions very narrowly to protect only a right to have a gun in the home for self-defense.

Since the question presented to the Court did not specifically limit the right to the possession of a handgun, in the home, for self-defense purposes, it would be incongruous (and indeed a flagrant misrepresentation of the Court’s opinion) to limit the extent of the Second Amendment right to that purpose. Following centuries of tradition, the Court assessed the specific constitutionality of the statutes in question, as posed by the petitioners, which prohibited them from keeping handguns in their homes for self-defense. Therefore, while incorporating a general right to bear arms, the Court also held that the particular statutory scheme in question is a violation of that constitutional right, but is not the only constitutionally permissible exercise of that right. Neither the text of the amendment nor the text of the *Heller* and *McDonald* decisions indicate or suggest that the actual right enumerated is inherently limited in time, location, or manner. The Court held that there is a right to bear arms, and included in that right is the ability to have a handgun, in the home, for self-defense. In the final analysis, the right protected by the Second Amendment is most likely broader than that recognized specifically by the Court, and this Note argues that the right is an individual right to carry most arms (except those specifically designed and created for military use), at most times and places (except certain, sensitive locations where the government has a legitimate interest in preventing the possession of firearms, such as schools, federal buildings, courthouses, or post offices), for almost any lawful purpose (as defined by state, local, or federal law after balancing the right with the government interest in restricting the exercise of that right).

### B. Constitutionally Permissible Restrictions

Implicit in the discussion of the scope of the right to bear arms is the government's power to restrict that right. Every constitutional right, even the most fundamental of rights such as this, is subject to some form of regulation. Chief Justice Parker, of the Massachusetts Supreme Judicial Court, stated in 1825 that, “[t]he liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for...”

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126 See infra note 127.
129 Id. at 635.
130 Id.
annoyance or destruction." Today, the Court is equally clear that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table ... includ[ing] the absolute prohibition of handguns held and used for self-defense in the home." However, the Court also stated that the right is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Therefore, as with most constitutionally protected rights, there must be a middle ground where the government may restrict the exercise of the right in a constitutionally permissible manner.

As previously noted, the Court gave a non-exhaustive (and non-affirmative, because the particular regulatory schemes have not been assessed post-McDonald) list of regulations that are likely to be constitutionally reconcilable with the Second Amendment right to bear arms. Those regulations include prohibiting the possession of weapons by felons and the mentally ill, forbidding carrying in schools and government buildings, and restricting the commercial sale of firearms. Indeed, the right to bear arms uniquely implicates social and public safety concerns to a greater extent than most other fundamental rights, making this right particularly open to regulation. Nonetheless, the Court need not carve out a particular methodology for regulating the right to bear arms (nor need this Note exhaustively examine whether one should be devised).

At least one scholar has suggested that the qualifying phrase "well-regulated militia" in the Second Amendment creates implied textual support for regulatory authority. Lawrence Rosenthal argues that, since the Heller Court defined "militia" as all those individuals able to carry arms and act in concert for the common defense, and the Court held that the preamble should be consulted to clarify the meaning of the right, the militia preamble "envisions comprehensive regulation of all who possess

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132 Heller, 554 U.S. at 636.
133 Id. at 626.
134 See supra Section IV.A.
135 See Lawrence O. Gostin, The Right to Bear Arms: A Uniquely American Entitlement, 304 J. AM. MED. ASS’N 1485, 1485 (2010) (noting that freedom of speech, press, religion, assembly, and petition are critical to the fulfillment of personal autonomy, dignity, and political equality; whereas, the right to bear arms does not have the same intrinsic value and is instead a right to possess and use an inherently dangerous consumer product).
and carry firearms."†137 The militia qualifier is unique amongst enumerated rights. No other right has such a perambulatory statement attached. When read in conjunction with Rosenthal's article, some may surmise that the Second Amendment is uniquely crafted to allow more government interference than other enumerated rights. This assertion seems foreclosed by the Court's decisions in both *Heller* and *McDonald*.

Since the Court used a textual and historical analysis to interpret and incorporate the Second Amendment, perhaps a similar historical analysis will shed light on which reasonable government restrictions will be permissible. There were myriad constitutional restrictions in effect prior to the Fourteenth Amendment which were struck down post-incorporation doctrine;†138 however, the fact that the federal government has permissibly regulated gun ownership notwithstanding the Second Amendment's enforceability against the federal government, and has left to the states the opportunity to further regulate gun ownership and use, means this legislative history may be indicative of the kinds of restrictions that will be permitted. Congress generally legislates with knowledge of its limitations and courts in turn give great deference to congressional acts. Of course, this assumes that the enunciation of the protected right in *McDonald* and *Heller* will not affect the constitutionality of existing federal gun-control regulations—a question outside of the scope of this Note, but likely to arise in future litigation.

The analysis of the Second Amendment must naturally begin before its passage; the question, then, is what was the original understanding of the right to bear arms that the Founding Fathers sought to enshrine in the Second Amendment? The pre-America English Bill of Rights recognized the "true, ancient and indubitable right" of (Protestant) English subjects to "have Arms for their Defence and suitable to their Condition."†139 Similarly, William Blackstone, the famed British jurist often cited by the Supreme Court, noted that English subjects were entitled to the right of having and using arms for self-preservation and defense.†140

Revolutionary War-era Americans were heavily influenced by the English common law and, in adopting the Bill of Rights, "held the individual right to have and use arms against tyranny to be fundamental."†141 Similarly, the *Federalist* papers also speak of the right to bear arms. In *The Federalist No. 28*, Hamilton opined, "[i]f the

†137 Rosenthal, *supra* note 136, at 81.
†138 See Chemerinsky, *supra* note 28, at 515–17 (discussing cases in which the Court held that the Due Process Clause of the Fourteenth Amendment prohibited states from certain actions).
†139 An Act declaring the Rights and Liberties of the Subject and Setting the Succession of the Crowne, 1 Gul. & Mar., Sess. 2, c. 2 (1689).
†140 1 William Blackstone, Commentaries *139.
representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government.... While these historical references speak most acutely to the right to bear arms to defend against a tyrannical government, there is an inherent right to have arms for other purposes as well.

The initial proposal of a bill of rights, offered in the House of Representatives by James Madison on June 8, 1789, included the following proposal: “The right of the people to keep and bear arms shall not be infringed....” Writing about the proposed Bill of Rights, Congressman Fisher Ames wrote that “[t]he rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people.” Similarly, Senator William Grayson wrote that “a string of amendments were presented to the lower House; these altogether respected personal liberty.” Indeed, when Samuel Adams brought the proposed amendments to Massachusetts, he noted that the Constitution should never be “construed to authorize Congress... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms....”

Shortly after ratification of the Second Amendment in 1791, Congress passed a standing militia statute, which required most able-bodied (white) men, ages eighteen to forty-five, to be enrolled in a “Uniform Militia” and to present themselves with “a good musket or firelock.” The very passage and wording of this statute indicates that Congress expected that every (white, male) citizen, of proper age and maturity, already possessed a firearm. Indeed, at that time, in an agrarian culture, it may have been expected that firearms were used for purposes other than self-defense, such

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142 THE FEDERALIST NO. 28 (Alexander Hamilton).
143 See HALBROOK, supra note 141, at 69 (“[T]he right to have weapons for nonpolitical purposes, such as... hunting... appeared so obvious to be the heritage of free people as never to be questioned.”). Contra CHARLES, supra note 1, at 71-94; WARREN FREEDMAN, THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION 21-22 (1989). Charles and Freedman make very compelling arguments in opposition to my historical analysis. While their analyses as respected legal historians are not without merit, I do not read the Heller and McDonald decisions to support their well-founded opinions, and therefore do not address the veracity of their arguments.

144 1 ANNALS OF CONG. 434 (1789).
145 1 WORKS OF FISHER AMES 54 (Seth Ames ed., 1854) (1809).
146 3 WILLIAM WIRT HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 391 (1891).
as hunting.\textsuperscript{149}

At that time, myriad state legislatures enacted laws that restricted the private use and ownership of firearms in conformity with existing state constitutional guarantees of a right to bear arms (not surprising, considering the Court had not yet incorporated the Second Amendment). During colonial times, several urban municipalities had laws that restricted the discharge of a firearm within the city bounds or during certain days.\textsuperscript{150} Other laws, such as those challenged in \textit{Miller} and \textit{Presser}, prevented the transportation of unregistered firearms across state lines and the creation of paramilitary, extra-governmental militias, respectively. However, none of these laws, and no colonial or early American laws, \textit{entirely} prohibited the ownership, possession, or use of firearms for self-defense, hunting, or recreation.\textsuperscript{151} Indeed, the Georgia Supreme Court readily held an early Georgia law that prohibited the open carrying of pistols unconstitutional as repugnant to the Second Amendment and the Louisiana Supreme Court assessed a Louisiana law that prohibited the concealed carry of weapons for Second Amendment constitutionality.\textsuperscript{152} These early state supreme courts, circa 1850, did, in fact, believe that the Second Amendment applied to the states.

The first federal statutes to regulate the civilian possession of firearms came over 130 years after adoption of the amendment.\textsuperscript{153} These laws restricted the mailing of firearms capable of being concealed on the person and prohibited the possession of sawed-off shotguns and machine guns.\textsuperscript{154} Given the history of the time, and the rise of organized crime, it is likely that such laws were adopted as crime-control measures;\textsuperscript{155} however, they

\textsuperscript{149} Halbrook, supra note 141, at 69.


\textsuperscript{151} Contra Charles, supra note 4, at 23 n.77 (identifying several British laws, colonial and early American state-laws that regulated and restricted the carrying or discharge of firearms and the possession of gunpowder; however, none of the laws identified actually amount to an outright prohibition on keeping arms).

\textsuperscript{152} Nunn v. State, 1 Ga. 243, 250 (1846) ("The language of the second amendment is broad enough to embrace both Federal and State governments . . . . [D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? . . . We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures."); State v. Chandler, 5 La. Ann. 489, 490 (1850) (holding that the law does not interfere with "man's right to carry arms in full open view, which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary . . . .") (citation omitted).

\textsuperscript{153} An Act Declaring pistols, revolvers, and other firearms capable of being concealed on the person nonmailable and providing penalty, 44 Stat. 1059 (1927); National Firearms Act, ch. 757, 48 Stat. 1236, 1236 (1934) (codified at 26 U.S.C. § 5861 (2006)).

\textsuperscript{154} Ch. 757, 48 Stat. 1236, 1236–40.

did not relate to or speak of the possession or carrying of handguns or other rifles, granting de facto recognition of the right to possess them. Indeed, for the most part, the regulation of private ownership and firearm use was left pointedly to the states for over one hundred years, and yet, as mentioned above, not one state actually outright prohibited the private ownership, possession, or carrying of firearms. Similarly, because the Second Amendment enshrines and protects a right that pre-dates the Constitution,\(^{156}\) and history suggests that early Americans viewed the right to bear arms as one that extended beyond the possession of a handgun, in the home, for self-defense, the pre-existing right is much broader than that specifically recognized in *Heller* and *McDonald*—just how broad remains unanswered.

More than 170 years ago, the Supreme Court of Alabama recognized that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."\(^{157}\) However, a regulation that falls short of wholly rendering the purpose of the right useless—thereby not entirely prohibiting the exercise of the constitutionally protected right—would be permissible under the Court's analysis in *McDonald*. The Court even held to this effect, noting that "if a Bill of Rights guarantee is fundamental . . . then . . . that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values."\(^{158}\) Therefore, there are strong indications in the *McDonald* and *Heller* decisions that some reasonable restrictions on the right to bear arms are constitutionally permissible. Unfortunately, the Court gave little guidance as to which level of scrutiny ought to apply when determining whether a regulation will pass constitutional muster.

C. *Level of Scrutiny*

For decades, the Supreme Court has defined, revised, and refined the levels of scrutiny used to assess the constitutionality of state and federal laws that infringe on a constitutional right.\(^{159}\) The Court has established levels of scrutiny to guide lower courts in determining how to evaluate the means-ends nexus between a right and government action that restricts that right. The Court has primarily implemented three separate tests for


\(^{157}\) State v. Reid, 1 Ala. 612, 616–17 (1840).

\(^{158}\) McDonald v. City of Chicago, 130 S. Ct. 3020, 3046 (2010).

determining whether restrictions on constitutional rights are proper: rational-basis scrutiny, intermediate scrutiny, and strict scrutiny; each requires a more compelling demonstration of the need for the limitation in question than the prior does. However, the Court has selectively used different levels of scrutiny that do not fall within these three categories, depending on the right itself, the interest asserted in restricting that right, and the degree of invasiveness of the restriction. This Note argues that it is one of these alternative tests, referred to herein as the “sliding scale test,” that should be the proper level of scrutiny for regulations restricting the Second Amendment right to bear arms.

Rational-basis scrutiny is the least restrictive level of scrutiny and requires only that the legislative restriction on the right be “rationally related to a legitimate state interest.” In order to pass intermediate scrutiny, the law “must serve important governmental objectives and must be substantially related to achievement of those objectives.” Historically, intermediate scrutiny has been employed for equal protection challenges, particularly gender-based classifications, illegitimacy, and First Amendment regulations that target the time, manner, and place, but not content, of speech. Lastly, strict scrutiny requires that, in order for a law to be upheld, it must be necessary to achieve a “compelling state interest.”

Rather unusually, the Court in Heller explicitly refused to establish a level of scrutiny, even at Justice Breyer’s insistence, and the Court in McDonald did not even mention levels of scrutiny in its majority opinion. This is unusual because the possession of firearms is likely to be one of the select-few constitutional rights that is heavily regulated and restricted. If restriction and regulation is not constitutionally permissible, then the Heller and McDonald decisions call into question every state and federal gun-control law in existence.

While the Court did not establish what the level of scrutiny is, it did tell us what it is not. The Court summarily rejected a rational-basis test. Citing the famous footnote four in Carolene Products, the Court opined that a rational-basis test cannot be used “to evaluate the extent to which a

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160 See, e.g., United States v. Caroleene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (identifying a new level of review comprised of “more searching judicial inquiry” than rational basis, but not rising to the level of intermediate scrutiny).
161 Dukes, 427 U.S. at 303.
162 Craig, 429 U.S. at 197.
163 Reed v. Reed, 404 U.S. 71, 75 (1971).
legislature may regulate a specific, enumerated right." The Court’s holdings in *Heller* and *McDonald* leave no doubt that the Second Amendment right to bear arms is a specific, enumerated right, and therefore will not be subject to rational-basis scrutiny.

As mentioned above, only one justice, Justice Breyer in *Heller*, suggested a standard of review, and he lambasted the majority for not establishing one in their opinion. In fact, the Court faced Justice Breyer’s dissent directly, and flatly rejected his proposed “interest-balancing” approach, but still refused (or neglected) to affirmatively establish a level of scrutiny. Justice Breyer’s approach would leave the balancing of the citizen’s constitutional right and the government’s interest in restricting that right to the judiciary, where the judge weighs “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” The majority rejected this approach because it calls on the judiciary to decide, on a case-by-case basis, whether a constitutional right is actually worth insisting upon, and no other enumerated right has been subjected to such an interest-balancing test.

Conversely, as also described above, the Court mentioned some specific, presumptively lawful, regulations and restrictions on the right to bear arms—including prohibitions on carrying firearms in sensitive locations, amongst others. However, it is difficult to undertake a complex, contextual analysis of these regulations to see if they would withstand a high degree of scrutiny, such as strict or intermediate scrutiny. Moreover, even if one could undertake such an analysis and find that both regulations satisfy the requirements of strict scrutiny, that still leaves little indication of what level of scrutiny is required of the regulation.

Intermediate scrutiny is used with regard to First Amendment regulations that target the time, manner, and place, but not content, of speech. This means that, at least for purposes of the First Amendment freedom of speech, which is undoubtedly a fundamental right, there are multiple levels of scrutiny that may apply, at least one of which falls outside of the presumption that all enumerated, fundamental rights must only be reviewed under strict scrutiny.

None of the Second Amendment challenges to-date have been Fourteenth Amendment Equal Protection challenges, so the Court has not

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169 *Heller*, 554 U.S. at 628 n.27.
170 *Id.* at 687 (Breyer, J., dissenting).
171 *Id.* at 689–90.
172 *Id.* at 634 (majority opinion).
173 *Id.* at 626–27.
174 See City of Renton v. Playtime Theatres, Inc., 475 U.S. at 46–47 (1986) (“[S]o-called ‘content-neutral’ time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and not unreasonably limit alternative avenues of communication.”).
yet had the opportunity to determine if, under an Equal Protection analysis, the Second Amendment can be subjected to an intermediate-level scrutiny. This means that, if a constitutional challenge to a gun control law arises through the Equal Protection Clause, the regulation might not be held to strict scrutiny. However, in Renton v. Playtimes Theatres, Inc.,\textsuperscript{175} the Supreme Court held that “regulations enacted for the purpose of restraining” a right will “presumptively violate the” right,\textsuperscript{176} an indication that if the primary purpose of the law is to restrain a fundamental right, that statute will be held to a strict scrutiny standard of review. Therefore, any regulation with the primary purpose (or effective result) of restraining the right to bear arms, will be held to the highest level of judicial scrutiny, strict scrutiny. Conversely, any challenge that arises under the Equal Protection Clause of the Fourteenth Amendment (to wit, prohibiting non-citizens, felons, the mentally ill, or the immature from possessing weapons), presumably will not be held to a strict scrutiny standard.

The application of two different levels of scrutiny for one fundamental constitutional right will be a rather novel departure from judicial precedent, and one only seen in the case of “time, manner, and place” First Amendment regulations,\textsuperscript{177} in right to privacy cases,\textsuperscript{178} and sexual liberty/privacy between persons of the same sex.\textsuperscript{179} Generally, limitations of a fundamental right will be subjected to strict-scrutiny review, where the government must show a compelling interest in restricting the right, must show that the law is narrowly tailored, and must show that the law is the least restrictive means possible for achieving the interest.\textsuperscript{180} Under this very thorough and exacting level of scrutiny, most (but by no means all) laws tend to be deemed unconstitutional if they severely restrict a fundamental right.

Such a result would be disastrous for the firearm regulatory schemes already in existence at the federal, state, and local levels. The Due Process Clause of the Fourteenth Amendment “forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”\textsuperscript{181} The government bears the burden of proving

\textsuperscript{175} 475 U.S. 41 (1986).
\textsuperscript{176} Id. at 46–47.
\textsuperscript{177} See supra note 174 and accompanying text.
\textsuperscript{179} See, e.g., Lawrence v. State of Texas, 539 U.S. 558, 574–75, 578 (2003) (holding that state sodomy laws prohibiting sexual intercourse between same-sex couples, if raised under the Equal Protection clause, are subject to rational-basis scrutiny, but if raised under the Due Process clause, are subject to a higher level of scrutiny). The right to sexual privacy and liberty is a fundamental constitutional right. See Planned Parenthood, 505 U.S. at 847 (holding that fundamental rights are not limited to those rights expressly created by the first eight Amendments to the Constitution).
\textsuperscript{180} Johnson v. California, 543 U.S. 499, 505 (2005).
that a regulatory scheme can meet the very stringent requirements of the strict-scrutiny test.\textsuperscript{182} Folding the Second Amendment in with those fundamental rights already afforded strict scrutiny would require the government to prove the constitutionality of each and every gun control law. Therefore, it is very unlikely that \textit{all} infringements on the right to bear arms will be held to a strict scrutiny analysis. Indeed, the Court has already held that preventing crime and protecting the safety and lives of its citizens is a compelling government concern.\textsuperscript{183} Thus, even under a strict-scrutiny standard (after every gun control law is needlessly and wastefully challenged), there is a de facto presumption that a narrowly-tailored regulatory scheme devised for the purpose of public safety furthers a compelling government interest. That leaves the government to prove that the regulation is narrowly tailored and is the least restrictive means necessary to achieve that interest.

Such a tortured review of every gun-control regulation seems irrational, wasteful, and imprudent. Instead, the Court should, and likely will, evolve a pre-existing, but infrequently invoked, level of scrutiny that falls somewhere between strict scrutiny and intermediate scrutiny.

In recent years, the Court has increasingly decided due process and equal protection cases based on a list of factors that do not fit neatly within the established levels of scrutiny.\textsuperscript{184} As discussed below, while often speaking of the levels of scrutiny directly, the Court employs gradations within the levels of scrutiny on a case-by-case basis. The proffered sliding scale scrutiny will balance the burden of government regulation in the interest of public safety with the fundamental right to bear arms, and will be a simpler and more fitting level of scrutiny for this unique right.

**D. The Sliding Scale Test**

The idea of a "sliding scale" test is not exactly new to judicial philosophy, but has never been explicitly named or applied by the Court. Likewise, the Second Amendment right to bear arms is the quintessential clean slate for a sliding scale test. No constitutional right, even the most precious and savored rights such as freedom of speech and assembly, is absolute. As evidenced by history, and the \textit{Heller} and \textit{McDonald} opinions, a constitutional right is always subject to some level of reasonable government restriction. The level of scrutiny applied by the courts in assessing the constitutionality of regulatory schemes that abridge constitutional rights realistically assesses what degree of deference the court will give to legislative judgment. The higher the level of scrutiny,

\textsuperscript{182} \textit{Johnson}, 543 U.S. at 505.
\textsuperscript{184} See infra Section IV.D.
the less deference accorded legislative prerogative and the more "weighty" the governmental interest required to withstand constitutional scrutiny.\textsuperscript{185}

The proposed level of scrutiny is, by no means, a cookie-cutter test that can be extracted from specific cases, as can be more clearly done with strict and intermediate scrutiny. Instead, it is a hybrid level of scrutiny, building off that used by the Court in abortion (privacy) and ballot access cases, combined with what Lawrence Rosenthal refers to as an "undue burden test,"\textsuperscript{186} what Justice Breyer calls an "interest-balancing test,"\textsuperscript{187} and what Patrick J. Charles calls an "historical guideposts" test.\textsuperscript{188}

The idea of a "sliding scale" standard of review can, at the very least, be traced back to the Supreme Court about thirty years ago. In \textit{Regents of the University of California v. Bakke},\textsuperscript{189} the famed graduate school affirmative action case, Justice Brennan mentioned in a footnote to his concurring opinion that there is another type of constitutional analysis on a sliding scale basis that may be supported by established precedent.\textsuperscript{190} That same year, Justice Brennan equated the Court's treatment of First Amendment protections, where some speech is afforded almost absolute protection, some speech is entirely prohibited, and some speech is afforded some protection in between, i.e., to "a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content."\textsuperscript{191} However, no Supreme Court decision has explicitly applied sliding scale scrutiny nor called it such.

Eight years after \textit{Bakke}, Justice Stevens revived the sliding scale criticism, equating the Court's treatment of constitutional values in a hierarchal manner,\textsuperscript{192} rather than with equivalent value, to a relegation of some First Amendment rights to the "low end of the sliding scale."\textsuperscript{193} While Justice Stevens was referring to a sliding scale of rights rather than a sliding scale of review, it seems apparent that the two must go hand-in-hand. Similarly, Justice O'Connor has written about "a sliding-scale test for determining whether a particular set of procedures was constitutionally

\textsuperscript{186} Rosenthal, \textit{supra} note 136, at 82.
\textsuperscript{188} Charles, \textit{supra} note 4, at 17.
\textsuperscript{189} 438 U.S. 265 (1978).
\textsuperscript{190} Id. at 357 n.30 (Brennan, J., concurring in judgment).
\textsuperscript{192} See \textit{Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.}, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States."). While \textit{Valley Forge} was about taxpayer standing to sue, the majority opinion rejected the proposition that for standing purposes under Article III of the Constitution, some fundamental rights are more or less important than other fundamental rights. \textit{Id}.
adequate," a clear indication that, at least for procedural due process claims, the Court is already using a form of “sliding scale” review, while not specifically calling it such.

The most illuminating example of sliding scale judicial scrutiny is the Court’s treatment of ballot access cases. In 2008, Justice Souter characterized the Court’s approach to laws burdening voting rights as a “sliding-scale” approach, where “the scrutiny varies with the effect of the regulation at issue.”

There is no doubt that the right to vote, like the right to bear arms, is a fundamental constitutional right inherent in the history of ordered liberty in this nation. As such, restrictions on an individual’s right to vote must necessarily serve a “compelling [governmental] interest” and any “severe restriction [must be] narrowly drawn to advance a state interest of compelling importance,” indicative of strict scrutiny. However, the Court has also held that a state has a “legitimate interest in regulating the number of candidates on the ballot,” indicating that, when the issue is the right to appear on a ballot and the voters’ right to cast a ballot for a particular candidate, that right is subject to rational-basis review.

In ballot access and election-related cases, the Court has applied varying standards depending on whether the restriction is a “severe restriction” or a “reasonable, non-discriminatory restriction.” Therefore, based on the means sought to exercise the right, and the degree of the state’s subsequent restriction of the right, the Court has assessed the end-result with varying levels of judicial scrutiny, what this Note calls the “sliding scale.”

Abortion provides a second example of the Court effectively using, and explicitly proscribing, a “sliding scale” to assess the constitutionality of laws restricting the right to privacy, particularly a woman’s right to an abortion. A woman’s right to an abortion falls under the purview of “personal privacy,” a “fundamental” right “implicit in the concept of ordered liberty." However, a woman’s right to an abortion is not “absolute” and is subject to some reasonable regulation to further the state’s interest “in safeguarding health, in maintaining medical standards, and in protecting potential life.” As the pregnancy progresses, according to the court, the weightiness of these interests becomes compelling enough

197 Id.
199 Id. at 184–85.
203 Id. at 153–54.
to warrant state regulation, an interest-balancing test that cannot be more aptly named than a sliding scale test.

The state has a “legitimate” interest in maintaining medical standards, preserving the “health of the mother” and in protecting “potential life,” indices of a rational-basis test. However, it is not until a specific point in the pregnancy that the “legitimate” interest becomes “compelling” enough that the state may interfere with the fundamental right to privacy and abridge a woman’s right to an abortion. The interest in maintaining medical standards is always a legitimate interest and a state may prescribe regulations in order to further that interest. However, the state may not exercise its interest in preserving the health of the mother until the end of the first trimester, when the state may “regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.” This “reasonable relation” standard alludes to a level of scrutiny above rational-basis (i.e., rational relation), but below intermediate scrutiny (i.e., substantially related). Lastly, the state’s interest in protecting prenatal life does not become compelling enough to warrant state interference until the end of the second trimester, when the fetus becomes viable. At this point, a state may entirely proscribe abortion, except when “necessary” to preserve maternal life. Therefore, in the interest of protecting prenatal life, the state may entirely prohibit abortion during the last trimester, but the interest never outweighs the mother’s life.

The cases of ballot access and abortion rights provide paradigmatic examples of a sliding scale standard of review, based on an analysis of the means sought to exercise the right. Application of this sliding scale review is well suited to the Second Amendment right to bear arms because some methods of exercising the right should be afforded higher constitutional protection than others. Indeed, while many courts will likely try to assess laws restricting the right to bear arms under the pre-existing levels of scrutiny, at least one federal court has identified that a new test may be

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204 Id. at 154. Note, however, that the Roe v. Wade decision has been substantially abridged by Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), which holds that “[o]nly where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.” Id. at 874.

205 Roe, 410 U.S. at 163.

206 Id. at 164–65.

207 Id. at 163.

208 Id.

209 Id. at 163–64.

210 Id. at 164–65 (“[S]ubsequent to viability, the state . . . may . . . even proscribe[] abortion except where it is necessary . . . for the preservation of the life or health of the mother.”).
This sliding scale review, as applied to the Second Amendment, is not the interest-balancing test advocated by Justice Breyer in his *Heller* dissent, where the interest of the government in seeking to restrict the right is balanced with the interest protected by the right. Instead, the sliding scale test, congruous with the Court's holding that the central component (but certainly not the only component) of the right to bear arms is the right to defend one's self and home, will weigh the *means* by which and for which one seeks to exercise his or her right to bear arms with the *end result* that the regulation will have on the interests protected by the right.

Since the *Heller* and *McDonald* decisions, some lower courts have assessed the constitutionality of gun laws and addressed the standard of review quagmire. Several of these courts have adopted or utilized a standard of review that is similar to the sliding scale that this Note advocates. To date, the Fourth Circuit, the Seventh Circuit, and the District Court for the Southern District of West Virginia have all assessed the constitutionality of federal laws prohibiting persons convicted of domestic violence from having a firearm. In all three cases, the courts chose to use intermediate scrutiny in light of the circumstances as a whole and because of the defendants' status of having previous domestic violence convictions. In each instance, the court has ordered that an independent analysis of the constitutional right asserted, the historical necessity for regulation in the particular area, and the status of the defendant must all be considered in determining the appropriate level of constitutional scrutiny. Similarly, the Third and Tenth Circuits have both recently adopted a similar independent analysis of whether a law burdens a right within the scope of the Second Amendment and whether it passes muster under some "form of means-end scrutiny." In addition, after this Note began to take shape, the United States District Court for the Southern District of West Virginia proffered a sliding scale-type review, where the proper approach is an "individual analysis of the statutory section at issue, a determination of the appropriate level of constitutional scrutiny to be applied, and careful scrutiny of the statute in light of the facts before the court." Following

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211 United States v. Oppedisano, No. 09-CR-0305 (JS), 2010 WL 4961663, at *2 n.2 (E.D.N.Y. Nov. 30, 2010) ("Neither *Heller* nor *McDonald* specifies whether intermediate or strict scrutiny applies to gun dispossession laws, and it is possible that an entirely new test will develop.").


213 See infra note 214.


215 United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); accord United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

this approach, the court opined that statutes that affect a right that is
removed from the core of Second Amendment protections should be
subject to intermediate scrutiny, though the court failed to address whether
rights that are not removed from the core of constitutional protections
should conversely be subject to strict scrutiny.\footnote{Id. at 866–67 & n.9.}

As an example of the sliding scale test, since the central component of
the right to bear arms is the right of self-defense,\footnote{District of Columbia v. Heller, 554 U.S. 570, 628 (2008).} any law that infringes
the right to bear arms for self-defense purposes should be necessary,
narrowly tailored, and serve a compelling government interest,\footnote{While I argue that strict scrutiny should be applied, I do note that no court to date has explicitly applied strict scrutiny to any Second Amendment challenge.} i.e., strict scrutiny must apply. However, since activities such as hunting, target
shooting, or gun collecting are not central components of the right to bear
arms (as of yet), laws that abridge the right to bear arms vis-à-vis these
means of exercising that right should be held to a lower level of scrutiny
that is more deferential to legislative judgment. Likewise, it seems that the
central privileges of the right to bear arms are available most acutely to
"law-abiding, responsible citizens."\footnote{Heller, 554 U.S. at 635.} Therefore, when regulatory
schemes seek to regulate or restrict the exercise of the right to bear arms by
citizens who are not law-abiding and responsible, such regulations will be
reviewed with a level of scrutiny below strict scrutiny, but above rational-
basis. This Note recognizes that, in this application, activities such as
hunting, gun collecting, or target shooting can be ancillary to owning a
firearm for self-defense, or can be a separate means of exercising the right
to bear arms. In these cases, laws infringing the right to bear arms must be
narrowly tailored to not unduly restrict the self-defense purpose of gun
ownership while also serving the purported governmental interest in
regulating hunting, collecting, or recreational gun ownership and use.

V. THE DEATH OF ONE-GUN-PER-MONTH LEGISLATION

Statutory schemes restricting the lawful purchase of a handgun to one
purchase every thirty days can be traced back to a South Carolina law
(1996, though the statute grants the Secretary of the State Police the power
to grant exceptions),\footnote{MD. CODE ANN., PUB. SAFETY § 5-128(b) (LexisNexis 2011) (setting thirty-day restriction); id. at § 5-129(a)(1) (setting power of Secretary of the State Police to grant exceptions).} California (2000),\footnote{CAL. PENAL CODE §§ 26835(f), 27535(a) (West 2012).} and New Jersey (2010).\footnote{In}
addition, Massachusetts Governor Deval Patrick filed legislation in mid-2009 for a one-gun-per-month law that went considerably further than any one-gun-per-month law currently in force anywhere in the nation. Governor Patrick proposed legislation that would prohibit the sale, rent, or lease of more than one "rifle, shotgun, firearm, machine gun, large capacity weapon or large capacity feeding device in any 30-day period." The one-gun-per-month laws in the aforementioned four states only apply to handguns.

Unlike most gun-control laws, which seek to ensure that a potential gun owner is fit, capable, and properly trained to own, possess, and utilize a firearm in a safe and lawful manner, one-gun-per-month legislation bears no relationship to the lawful possession or use of a firearm. On the contrary, one-gun-per-month laws have the express purpose of limiting the frequency with which a licensed, lawful gun owner or potential gun owner can procure a firearm for a lawful purpose. They are restrictions on how often one may exercise his or her Constitutional right to keep and bear arms, and no other enumerated Constitutional right has been or can be limited in this manner. The choice of a thirty-day time period is arbitrary at best, without any justification for why limiting the purchase of handguns to twelve-per-year is any different than limiting it to 365 per-year, fifty-two per-year, or two per-year. Indeed, query whether a law could limit an accused to one jury trial per month or limit a woman to one child per year; the government could never impose such a restriction on these rights that would pass constitutional muster.

This is not to say that any regulatory scheme that places numerical restrictions on the exercise of a right is per se unconstitutional. Rather, the restrictions must be tailored to further a government interest to the extent necessitated by the level of scrutiny applied to the restriction. Under a strict scrutiny analysis, one-gun-per-month laws do not satisfy this weighty burden. As such, in the wake of *Heller* and *McDonald*, one-gun-per-month laws should, and likely will, be held unconstitutional as unduly burdensome on the constitutional right to bear arms.

In order for one-gun-per-month legislation to pass judicial scrutiny, the laws must, at the very least, serve some important governmental objective, must be substantially related to achievement of that objective, and must not unduly burden the lawful exercise of the right. There are myriad governmental interests implicated in the right to bear arms—the most notable and compelling being public safety and crime prevention. It is

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227 See supra notes 222–25.
228 The Court has held that the right to bear arms will not be subject to rational basis scrutiny. See supra note 72.
clear that a state may restrict convicted felons and the mentally ill from possessing firearms for this reason. However, it is far less clear whether a competent, sufficiently trained, and properly licensed citizen can be restricted in the frequency with which they exercise their constitutionally-protected right to purchase, own, and possess a firearm.

One-gun-per-month laws are particularly suspect because they overwhelmingly target handguns, the most widely chosen means of self-defense due to their size and ease of use. Since the Supreme Court has established that the primary component of the right to bear arms is the right to self-defense, under the sliding scale test, any law that restricts the very essence of this right should be held to the highest level of judicial scrutiny. This begs the question, how much of an impact on the right to self-defense is allowed? The newly licensed gun-owner may wish to purchase a handgun for the bedroom, one for the study, and one to carry on his or her person. Perhaps he or she wishes to have a small handgun or revolver to carry on the person, but a larger-capacity, semi-automatic handgun for the home. Any of these hypothetical situations would require the gun owner to purchase more than one firearm. As such, limiting the gun owner to one purchase every thirty days effectively prevents the gun owner from fully exercising his or her right for at least thirty days. The ultimate test in this application is how much of an impact the regulation has on the right, and in some circumstances, it seems the impact is significant, and therefore should be unconstitutional under strict scrutiny.

In light of *Heller* and *McDonald*, it is well within a state’s police power and the federal government’s Commerce Clause power to regulate and restrict the sale of firearms. The Supreme Court proffered presumptive constitutionality for various regulatory schemes that prevent convicted felons, the immature, and the mentally ill from purchasing firearms. However, each of these presumptively constitutional restrictions on the right to bear arms seeks to “keep firearms out of the hands of irresponsible

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229 See McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) ("[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller."); District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("[N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .").


231 See *Heller*, 554 U.S. at 635 ("[W]e hold that the . . . ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

232 Id. at 626–27.
Likewise, licensing schemes that require firearm classes, on-range instruction, and background checks seek to verify that applicants for firearm licenses are responsible and qualified to carry a firearm, and are also likely to be held constitutional unless they effectively prohibit or prevent qualified individuals from exercising their right to bear arms. These laws provide criteria necessary to exercise one’s right to bear arms, much like there are criteria to vote, to get an abortion, and to exercise other fundamental constitutional rights. However, query whether a statute imposing a very large fee on obtaining a gun license, or requiring prohibitively expensive pre-application training, would be constitutionally permissible. This is the case with the existing Massachusetts gun-licensing scheme, which requires citizens to obtain two separate and expensive licenses in order to carry a handgun—an issue well beyond the scope of this Note, but ripe for constitutional review nonetheless. Under strict scrutiny, such a licensing scheme is probably unconstitutional.

Conversely, one-gun-per-month laws do not represent criteria to exercise a right; they are a limitation on the free exercise of the right for citizens who may have already met the other statutory criteria necessary to obtain a license or permit to carry a weapon. Since existing one-gun-per-month laws overwhelmingly target handguns in particular—the “most preferred firearm in the nation to keep and use for protection”—the laws act as an outright prohibition on the purchase of a second firearm for self-defense within thirty days of purchasing the first firearm. Therefore, one-gun-per-month laws not only restrict the core component of the right to bear arms, they also act as an effective prohibition on the exercise of that right vis-à-vis the ability to purchase more than one firearm for self-defense in a particular period of time. Like abortion laws during the first trimester, one-gun-a-month laws, because they directly implicate the core principles of a fundamental constitutional amendment, must be strictly examined. As such, it becomes abundantly clear that, at the very least, one-gun-per-month laws should be reviewed with strict scrutiny, regardless of whether the Supreme Court adopts a sliding scale test for the Second Amendment or utilizes the existing levels of scrutiny.

Having established that one-gun-per-month laws must be reviewed with strict scrutiny, a court will next have to weigh the constitutionally protected right against the governmental interest asserted in the regulation.

235 Parker, 478 F.3d at 400 (citing Kleck & Gertz, supra note 230, at 182–83).
236 See Roe v. Wade, 410 U.S. 113, 152–53 (1973) (characterizing a woman’s right to privacy in deciding whether or not to terminate her pregnancy as fundamental).
The purpose of one-gun-per-month laws is to limit the flow of illegal firearms from states with relatively lax gun laws to states with more restrictive gun regulations. As noted above, the prevention of crime and gun violence is, without a doubt, a compelling government interest inherent in the states’ police power. Indeed, gun violence is a major problem in America, where someone dies by gun violence every seventeen minutes and over 70,000 Americans are shot non-fatally every year. However, does the necessary nexus exist between the regulation and the compelling governmental interest? More specifically, do one-gun-per-month laws actually further the government’s interest in preventing crime and violence, while only burdening the right to bear arms in a constitutionally permissible manner?

All legal gun sales in this nation require the completion of a pre-purchase instant background check to ensure the purchaser is not prohibited from owning a firearm, effectively preventing some convicted felons and other statutorily defined criminals from legally purchasing firearms. Among states with one-gun-per-month laws, California, Maryland, and New Jersey all require a permit to purchase and carry a firearm, though Virginia only required a permit for concealed carry, which was also required to purchase more than one handgun in any 30-day period. Therefore, one-gun-per-month laws merely prevent licensed (or qualified) citizens from purchasing more than one handgun in a short period of time. Facially, this limitation would seem to have some effect on preventing the purchase of multiple firearms for resale to individuals who will then transport them illegally to other states. Indeed, recent research shows that one-gun-per-month laws have had marginal success in reducing the flow of illegal firearms from Virginia. Additionally, it is also worth

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242 MD. CODE ANN., PUB. SAFETY § 5-308 (LexisNexis 2011).
245 Id. § 18.2-308:2:2(P)(2)(h) (repealed 2012).
246 Douglas S. Weil & Rebecca C. Knox, Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms, 275 JAMA 1759, 1759–61 (1996) (noting a 44% decrease, from 34.8% to 15.5%, in firearms recovered in the Northeast originating in Virginia after Virginia’s one-handgun-per-month law). However, for a thorough and comprehensive criticism of the data collection methods that
noting that, of states with one-gun-per-month laws, only Virginia and California are large providers of guns used in crimes in other states, notwithstanding their gun laws.\textsuperscript{247} Indeed, California has some of the most restrictive gun laws in the nation, and yet it remains one of the top-five sources of guns recovered in crimes in other states.\textsuperscript{248}

While one-gun-per-month laws have shown some marginal success,\textsuperscript{249} a showing of some success does not make the laws constitutional; but the failure of the laws to achieve their purpose may be indicative of a break in the nexus between the compelling government interest and the means sought to further that interest. In addition, as stated earlier, the very purpose of one-gun-per-month laws is to prevent the flow of firearms into the hands of unlicensed citizens. In order to withstand strict scrutiny, the laws must also be \textit{necessary} to achieve the goal, must be narrowly tailored, and must be the least restrictive means to achieve the end result.

These requirements lead to the next question: are there other, less restrictive means to achieve the same end-result? One-gun-per-month laws effectively prohibit the purchase of firearms for twenty-nine out of every thirty days or about 353 out of every 365 days, which is essentially 96\% of the time. The laws are not merely restrictions on the period in which one may purchase a firearm; they are also a restriction on quantity. While not an outright prohibition on the purchase of a handgun, which would undoubtedly be unconstitutional under any level of scrutiny, one-gun-per-month laws seem so cumbersome and invasive of the right to bear arms that they serve as a de facto prohibition. Such de facto prohibitions have previously been held sufficient to implicate the Supremacy Clause\textsuperscript{250} and should likewise be sufficient to show an impermissible restriction on a fundamental constitutional right, because it is not the least restrictive means possible to achieve the end-result.

There are numerous mechanisms that have been proposed to reduce the flow of firearms into the hands of criminals, most of which involve strengthening federal laws and the enforcement power of the Bureau of Alcohol, Tobacco, and Firearms ("BATF"), rather than restricting the rights of gun purchasers. For example, BATF may only conduct one unannounced inspection of a gun dealer per-year, even if they identify

\begin{footnotesize}
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\item \textsuperscript{248} Id.
\item \textsuperscript{249} See Weil & Knox, supra note 246, at 1759–61.
\item \textsuperscript{250} E.g., Coal. of N.J. Sportsmen v. Florio, 744 F. Supp. 602, 608 (D.N.J. 1990).
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violations of firearm laws. In addition, to bring legal action against a dealer, BATF must prove that the dealer willfully violated the law—a high burden that requires years of habitual violations to prove. More shockingly, serious record keeping violations at gun dealerships are merely misdemeanors—which federal prosecutors rarely choose to pursue. Furthermore, BATF gun tracing data is not public information, meaning it cannot even be revealed to a member of Congress as part of a congressional investigation. For years, the Brady Center to Prevent Gun Violence, a gun-industry watchdog group, has advocated for changes to these policies, as well as to existing gun control regulations to ensure that firearms do not easily reach the hands of unlicensed individuals. Carefully and prudently modifying these regulatory schemes would serve to stymie the flow of illegal weapons without unduly restricting one’s Second Amendment right to bear arms.

Lastly, to overcome the burden of proving the regulation is narrowly tailored, a substantial portion of the burden on the right must advance the state’s goal. If a substantial portion of the burden does not serve or advance the goal of preventing firearms from reaching the hands of unlicensed or unauthorized individuals, then the law will be unconstitutional under strict scrutiny. Research shows that only about eighteen percent of firearms manufactured in the U.S. are used in a crime and a very small number of the nation’s 77,000 gun shops sell the majority of firearms used in crime. Furthermore, while multiple-purchases of firearms are a source of guns used in crime, it is not the only source. Other sources include straw purchasers and “private” sales at gun shows, which do not require background checks under federal law. Therefore, only a small percentage of guns manufactured and sold in the United States enter the world of violent crime, and an even smaller percentage is protected from use in violent crimes through one-gun-per-

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252 Id.
253 Id. at 25.
254 Id. at 25, 28.
255 Id. at ii, 1–3.
256 E.g., Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). The Supreme Court granted certiorari to clarify the level of scrutiny for government regulation of the time, manner, and place of protected speech. Id. at 789–90. The Court held that the “[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” Id. at 799. From this decision, this Note contends that when a regulation infringes a fundamental right, a substantial portion of the burden on the right must advance the compelling state interest.
258 SIEBEL & HAILE, supra note 251, at 8–9.
259 Id. at 17, 20.
month laws. Consequently, there is a strong likelihood that a “substantial portion” of the burden on the right to bear arms may not advance the state’s goal, and as such, the law would fail to pass constitutional muster. This does not foreclose all gun regulations, since there may be other compelling government interests that can be effectuated through reasonable, narrowly tailored regulation. Furthermore, restrictions that only touch upon the penumbras of the right, rather than its core principles, may be held to a less demanding level of scrutiny.

VI. CONCLUSION

For over 200 years, the Supreme Court has taken myriad opportunities to define, refine, and elucidate those rights guaranteed by the Constitution. The Court has also strived to balance important government interests against the rights of the people by creating and applying varying levels of scrutiny when reviewing legislation. For almost every right protected by the Constitution, and made applicable to state action through incorporation, the state and federal governments have sought to restrict the exercise of those rights in order to further some government interest.

Many rights have been incorporated against the states over the past eighty-five years, and the Second Amendment right to bear arms is the most recent addition to that family. Like many rights that are newly incorporated, Second Amendment jurisprudence is in its infancy and will continue to evolve throughout the years to come. Some of the questions left unanswered by the *Heller* and *McDonald* decisions include: What exactly is the right protected by the Second Amendment? To what degree, and for what purposes, may the government (state and federal) abridge the right to bear arms? Moreover, what is the proper level of scrutiny for assessing the constitutionality of laws that impinge upon the right to bear arms?

By means of a thorough and comprehensive evaluation and interpretation of the majority, concurring, and dissenting opinions in *Heller* and *McDonald*, this Note concludes that the right to bear arms is an historical right that pre-dates the Constitution. Enactment of the Second Amendment, then, was a means to secure the right for future generations of Americans. Like the pre-independence colonists, Americans today have a guaranteed right to bear arms that extends well beyond a collective right vis-à-vis a well-regulated militia or simply a right to possess a firearm for self-defense. Instead, the right enshrined in, and protected by, the Second Amendment is a right to purchase, own, and carry almost any commonly available weapon, in almost any locale, and for any lawful purpose.

Of course, like every other fundamental constitutional right, it is not unlimited and unqualified. The *Heller* and *McDonald* Courts were clear that some government regulation of, and restriction on, the right to bear arms is appropriate and necessary. The government has a compelling
interest in protecting the safety and security of the free state, and in exercising that interest, may restrict the sale of certain firearms to minors, convicted felons, and the mentally ill. Additionally, the government may entirely prohibit the sale, possession, and use of certain arms used specifically for military purposes. The government may also establish criteria for citizens wishing to exercise their Second Amendment right, including licensing schemes that require training, safety examinations, and licensing by state officials.

However, the extent to which the government may restrict the right to bear arms is a question the Court conspicuously left unanswered, giving no guidance to aid future courts in assessing the constitutionality of laws that restrict the right to bear arms. Traditionally, such guidance is found in the level of scrutiny assigned to the right, which establishes how weighty the government’s interest must be to restrict constitutionally a fundamental right. Because of the nature of the right to bear arms, a fundamental right that uniquely implicates the government’s public safety and security interests in a manner unseen in any other constitutional right, this Note proffers that the Court must invoke a little defined and rarely applied modus operandi of judicial scrutiny, herein called a sliding scale level of review. Under sliding scale scrutiny, courts must assess the constitutionality of a regulatory scheme restricting the right to bear arms in light of the effect it has on the exercise of the core right. The Supreme Court has identified the right of self-defense as the central component of the right to bear arms. Any regulation that infringes on a citizen’s right of self-defense must be reviewed with the highest degree of suspicion and subjected to the most stringent level of scrutiny—strict scrutiny. Conversely, when a regulation does not touch upon the core principles of the right to bear arms, but instead merely restricts the penumbras of the right, such regulations should be granted more deference with regard to the government’s important interests, warranting a lesser level of scrutiny.

In the final analysis, it is only through significant litigation that the Supreme Court will have the opportunity to refine and clarify the breadth, depth, and limits of the right to bear arms. However, under no circumstances should the government’s interests ever entirely outweigh and abridge this core, fundamental constitutional right. As the Supreme Court takes the opportunity to develop Second Amendment jurisprudence, it should proceed carefully in weighing the importance of the right to bear arms, a right so compelling that the Founding Fathers saw fit to secure its protection in the Bill of Rights. Such guidance is sufficiently and adequately found in applying sliding scale scrutiny, which will satisfactorily protect the right to bear arms for future generations while also allowing the government to continue its important role in protecting the safety and security of our nation.