

2014

The Right to Arms and Standards of Review: A Tale of Three Circuits Symposium Article

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Hardy, David T., "The Right to Arms and Standards of Review: A Tale of Three Circuits Symposium Article" (2014). *Connecticut Law Review*. 245.

https://opencommons.uconn.edu/law_review/245

CONNECTICUT LAW REVIEW

VOLUME 46

MAY 2014

NUMBER 4

Article

The Right to Arms and Standards of Review: A Tale of Three Circuits

DAVID T. HARDY

In District of Columbia v. Heller and McDonald v. Chicago, the U.S. Supreme Court recognized an individual right to arms. The Court offered limited guidance as to standard of review, only ruling out rational basis.

This Article takes a pragmatic approach to the standard of review issue. First, it explores the practical basis for heightened scrutiny. Judicial review is, at its base, anti-majoritarian. It is therefore often appropriate to employ the loose standard of rational basis. In some contexts, however, majoritarianism is less dependable: the majority may be tempted to unfairly burden the interests of the minority. Here, courts properly employ heightened standards of review.

I suggest that this rationale is applicable in the context of firearms control. While, on a national basis, firearms owners are a sufficiently large group to legislatively defend their legitimate interests, the story is different at the state level. The strictest forms of gun control originate in states where gun owners comprise only one-eighth to one-fifth of the population, and have little legislative influence. The result is legislation that is unsupported by existing criminological data, and sometimes serves no demonstrable purpose other than burdening or annoying gun owners.

This Article closes by suggesting that varying levels of scrutiny, drawn from election-law cases, are appropriate. The least burdensome legislation is weighed under a near-rational basis standard. Other measures are properly weighed under intermediate review—genuine intermediate review, where the legislation must be supported by hard data, or under stricter exacting scrutiny. Finally, measures regulating what the Court has termed the “core right” to arms—possession by law-abiding citizens in the home—should be evaluated under strict scrutiny.

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The Right to Arms and Standards of Review: A Tale of Three Circuits

DAVID T. HARDY*

I. INTRODUCTION

The Supreme Court's recognition of an individual right to arms in *District of Columbia v. Heller*,¹ and its incorporation of the right in *McDonald v. Chicago*,² have been followed by a considerable number of challenges to federal and state firearm laws. Since the Court declined to identify any applicable standard of review in *Heller*,³ and the standard employed determines who bears the burden of proof as well as how great that burden is, a threshold issue in those challenges has become the determination of the standard.

This Article examines the origins of standards of review to seek a theory that explains their bases, and applies that theory to the legal issues now pending. It will then outline how three chosen circuit courts of appeals have applied standards of review to challenges against firearm regulations. Finally, it will chart a possible course for the future while avoiding foreseeable pitfalls.

II. BACKGROUND TO STANDARDS OF REVIEW

Standards of review are traditionally divided into three, perhaps four, levels:

- (1) **Strict Scrutiny**, which requires the government to prove that a law serves a "compelling" government interest and is "narrowly tailored," such that it does not unnecessarily burden exercises of the underlying right.⁴ Strict scrutiny has been called "strict in theory and fatal in fact," although

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¹ 554 U.S. 570, 592 (2008).

² 130 S. Ct. 3020, 3036, 3042 (2010).

³ See *Heller*, 554 U.S. at 628–29 ("Under 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 the protection of one's home and family,' would fail constitutional muster." (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007))).

⁴ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007).

this is actually not quite the case; when it is applied, challenged restrictions have about a thirty percent survival rate.⁵

- (2) **Intermediate Review** requires a showing that a challenged law is “substantially related to an important governmental objective.”⁶ As with strict scrutiny, the government bears the burden of proof, and its “justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”⁷
- (3) **Exacting Scrutiny** can be seen as a subset of intermediate review, although it comes closer to strict scrutiny. This test requires the challenged law to have “a substantial relation” to “a sufficiently important governmental interest,” which “must reflect the seriousness of the . . . burden” on the exercise of a constitutional right.⁸
- (4) **Rational Basis Review** presumes the constitutionality of the law,⁹ and only requires the court to find that the legislature could have had a rational basis for enacting the statute.¹⁰ Under this standard, a challenged regulation will usually survive, unless the government interest asserted is not legitimate.¹¹

Standards of review are judicial creations, and some Justices have rejected them entirely.¹² Justice Scalia has wittily suggested that “[t]hese

⁵ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Court*, 59 VAND. L. REV. 793, 794, 814–15 (2006).

⁶ *Clark v. Jeter*, 486 U.S. 456, 461 (1998).

⁷ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁸ *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008)) (internal quotation marks omitted).

⁹ *See Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (employing the presumption of constitutionality).

¹⁰ *Id.*

¹¹ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 437, 442 (1985) (holding that accommodating residents’ irrational fears of the mentally retarded is not a legitimate government interest).

¹² *See id.* at 451 (Stevens, J., concurring) (“I have never been persuaded that these so-called ‘standards’ adequately explain the decisional process.”); *see also* Memorandum from Potter Stewart to Harry Blackmun (Feb. 6, 1980) (on file with Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 1409) (“Since I think a ‘rational basis’ test is a fallacious and artificial construct, and since I do not understand what ‘fundamental interest’ means, I could not join the first sentence of that footnote.”) While Justice Kennedy expressly applied standards of review in certain opinions, *see Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (using strict scrutiny); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661–62 (1994) (using intermediate scrutiny), in others he did not employ them where such use might have been expected, *see United States v. Windsor*, 133 S. Ct. 2675, 2682, 2693 (2013) (holding that the Defense of Marriage Act violates the Equal Protection Clause, without

tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.”¹³

An examination of the rationale underlying the levels of review may, however, demonstrate some recurring themes that at least shed light upon which standard should be applied in a given case.

III. SEEKING THE PRAGMATIC BASIS OF HEIGHTENED REVIEW

The concept of heightened review originated in the most famous footnote in constitutional law, footnote four of *United States v. Carolene Products Co.*¹⁴ There the Court applied rational basis to a commercial restriction, but noted:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect

identifying a standard of review). In *Republican Party of Minnesota v. White*, Justice Kennedy observed, “I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.” 536 U.S. 765, 793 (2002) (Kennedy, J., concurring); see also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124–25 (1991) (Kennedy, J. concurring) (“Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resorting to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so.”).

¹³ *United States v. Virginia*, 518 U.S. 516, 567 (1996) (Scalia, J., dissenting).

¹⁴ 304 U.S. 144, 152 n.4 (1938); see also Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (calling footnote four “the most celebrated footnote in constitutional law”).

minorities, and which may call for a correspondingly more searching judicial inquiry.¹⁵

It was a modest beginning, with the Court reserving, rather than exercising, judgment. The footnote can, however, be distilled into a simple principle: judicial review is fundamentally anti-majoritarian. As a general rule, the Court should not interfere with decisions reached by a majority unless they are completely unjustifiable. *But* the Court also has an expanded constitutional role where majoritarian institutions fail to observe the rights of a minority, specifically when a majority might subvert the political process to ensure its continuation in power or focus upon and seek to disadvantage a minority as such.¹⁶ In these settings, majoritarian institutions are apt to reach unjust results, and it is appropriate for the one branch of the government that does not answer to the majority to play an expanded role.

The Court has sometimes adverted to this underlying principle. In *Anderson v. Celebrezze*,¹⁷ it struck down an electoral restriction whose burden fell most heavily on small political parties, writing that “because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny.”¹⁸ Along the same lines, Justice O’Connor noted in a different case that “heightened scrutiny helps to ensure that . . . the State’s asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions.”¹⁹

Heightened scrutiny applies when majoritarianism is an especially weak protection for minority interests.²⁰ This understanding also informs the choice between degrees of heightened scrutiny. Racially discriminatory measures receive strict scrutiny, while gender discrimination is subject to intermediate review²¹—perhaps because African-Americans comprise only twelve percent of the American

¹⁵ *Carolene Products*, 304 U.S. at 152 n.4 (citations omitted).

¹⁶ *See id.* (addressing the “narrower scope for operation of the presumption of constitutionality” in the context of treatment by the majority of religious, racial, and national minorities).

¹⁷ 460 U.S. 780 (1983).

¹⁸ *Id.* at 793 n.16.

¹⁹ *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring).

²⁰ *See id.* (describing how a majority might fail to protect a minority).

²¹ *Compare Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“[T]he Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny.’” (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944))), *with United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (describing the “heightened review standard” under which the Court has, “[w]ithout equating gender classifications . . . to classifications based on race or national origin, . . . carefully inspected official action that closes a door or denies opportunity to women (or to men)”).

population, whereas women comprise a slight majority.²² Thus, state discrimination against legal aliens, who cannot vote, is also subject to strict scrutiny,²³ while discrimination against the mentally disabled, whose supporters have secured enactment of protective legislation for them, is not.²⁴

In sum, the Court's standards of review reflect a pragmatic basis. When a segment of the American population can use the democratic process to defend its interests and avoid injustice, courts should not second-guess the result; a rational relationship to a legitimate interest suffices. Where that process cannot be relied upon to prevent inequities, the judiciary must play a greater role through heightened review.

IV. APPLICATION OF THE PRAGMATIC STANDARD IN SECOND AMENDMENT CASES

The *Heller* Court quite properly ruled out rational basis review²⁵ because, as the *Carolene Products* footnote suggested, restrictions of Bill of Rights guarantees are subject to heightened review.²⁶ After all, those guarantees reflect areas of liberty that the Framers specifically meant to protect against majoritarian processes. But questions remain regarding which of the heightened standards of review should be employed and, if intermediate review is chosen, how strictly it should be applied. To answer these questions, we must depart from law and turn to politics.

On a national basis, gun owners are hardly a minority against whom unjust laws can be passed with impunity. Last year, Congress voted against some very modest gun control measures.²⁷ As this Article was being written, Colorado voters recalled their senate president and another state senator due to their support for gun legislation.²⁸ Recent polls indicate that around thirty-nine percent of American households have a

²² LINDSAY M. HOWDEN & JULIE A. MAYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010, at 2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>; SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

²³ *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

²⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 444–46 (1985).

²⁵ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

²⁶ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . .”).

²⁷ See *Roll Call Votes 113th Cong.—1st Session, on S. Amdt. 715 to S. 649*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00097 (last visited Apr. 15, 2014) (rejecting an amendment on April 17, 2013, that would require background checks for private gun sales at gun shows and over the Internet).

²⁸ T.M. Fasano, *Gun Control Laws Still Hot Topic in Colorado*, GREELEY TRIB., Jan. 19, 2014, at State & Regional News.

firearm,²⁹ which may be a low estimate since respondents might have been wary about disclosing gun ownership to a stranger. Accordingly, it appears that the political process can protect against enactment of unwarranted laws and secure the repeal of existing ones.

The picture is different, however, in certain portions of the nation. In 2001, a nationwide survey found that 8.7% of Hawai'i households, 12% of Massachusetts households, and 21.3% of California households contained a firearm.³⁰ Whether these lower rates of household firearm ownership are a cause or effect of regulation—or perhaps both—most would agree that these states have the most extensive firearm controls.³¹

The association of “small minority” status with stricter gun control does not, of course, prove that the result is discriminatory or unjust. There are, however, three indications that the majority is misusing its powers: (1) the tendency of these state laws to exempt the politically and economically powerful from their restrictions; (2) indications of animus toward the class of persons being restricted; and (3) the willingness of legislatures to enact laws which serve no apparent purpose except to burden or annoy the affected class.³²

A. *The Exemption of the Politically or Economically Powerful from Gun Control Regulations*

Like the First Amendment's neutral time, manner, and place restrictions,³³ if firearm regulations apply equally to the powerful and their allies, they will tend to be reasonable; if the powerful and their allies can exempt themselves, there is no such check. The Court has most clearly recognized this principle in the electoral arena, where the two largest

²⁹ *The Economist/YouGov Poll*, YOUGOV 15 (Jan. 5, 2014), http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/tkzv4c1e8v/econTabReport.pdf.

³⁰ *BRFSS Survey Results 2001 for Nationwide Firearms*, N.C. ST. CENTER FOR HEALTH STAT., <http://www.schs.state.nc.us/schs/brfss/2001/us/firearm3.html> (last visited Apr. 15, 2014). At the other end of the scale, guns are found in 50.7% of North Dakota households and in 57.8% of Alaska households. *Id.* Nearly identical results were reported in a 2007 survey, which found household gun ownership at 6.7% in Hawai'i, 12.6% in Massachusetts, and 21.3% in California. Deborah White, *Gun Owners as a Percentage of Each State's Population*, ABOUT.COM, <http://usliberals.about.com/od/Election2012Factors/a/Gun-Owners-As-Percentage-Of-Each-States-Population.htm> (last visited Apr. 15, 2014).

³¹ The Brady Campaign Against Gun Violence counts California as having the strictest controls in the nation, followed by New Jersey, Massachusetts, New York, Connecticut, and Hawai'i. *Brady Issues 2011 Scorecards*, WCTV, http://www.wctv.tv/news/headlines/Brady_Campaign_Issues_2011_Sate_Scorecards__139446468.html (last visited Feb. 4, 2014).

³² See *infra* Parts IV.A–C (explaining indication of a misuse of powers in depth).

³³ See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (“[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests . . .”).

parties are apt to collude against smaller parties.³⁴

Firearms laws commonly exempt police officers, security guards, and other governmental employees.³⁵ These laws often can be understood, but less explicable are exemptions for *retired* officials,³⁶ who have no duties.³⁷ Sometimes, private bodyguards are likewise exempted,³⁸ enabling the powerful to employ armed escorts. Paradoxically, some of these bodyguards are forbidden to possess arms off-duty—they can protect their patrons but not themselves.³⁹

Where firearm permits are required and issued at the discretion of

³⁴ See *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (holding that a law requiring 25,000 signatures to start a new political party was unconstitutional because it was not the least restrictive way to eliminate frivolous parties); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (recognizing that Ohio laws “give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate”); *Patriot Party v. Allegheny Cnty. Dep’t of Elections*, 95 F.3d 253, 261 (3d Cir. 1996) (recognizing that minor parties are constitutionally protected); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y. 1970), *aff’d*, 400 U.S. 806 (1970) (recognizing the effect of New York election provisions as the denial of independent or minority parties and equal opportunity to win).

³⁵ See, e.g., CAL. PENAL CODE §§ 25450, 26300 (West 2012); D.C. CODE § 7-2502.01(b)(1) (LexisNexis 2012); N.J. STAT. ANN. § 2C:39-6(1) (West 2005). At the national level, the Gun Control Act exempts law enforcement from most of its provisions. 18 U.S.C. § 925(a)(1) (2012). The one exception is possession of a firearm by a person convicted of a domestic violence misdemeanor. See, e.g., 18 U.S.C. § 922(s)(3)(B) (requiring evidence that transferees have not been convicted of a misdemeanor crime of domestic violence). Conversely, federal law allows the armament of employees of some rather unexpected organizations. The EPA has 202 armed employees; the FDA has 183; the Federal Reserve Board has 141; and the various Offices of Inspectors General, charged with preventing fraud, waste, and abuse, have over 3500. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 5–6.

³⁶ D.C. CODE § 7-2502.01(a)(2); see also CAL. PENAL CODE § 25450 (exempting honorably retired officers from restrictions on concealed carrying); *id.* § 26015 (exempting them from the ban on open carrying); N.Y. PENAL LAW § 265.20.e (McKinney 2008) (exempting retired peace officers from the ban on large-capacity magazines). The Federal Assault Weapon ban, now expired, also exempted retired police. 18 U.S.C. § 922(v)(4)(C) (2000).

³⁷ It is worth noting that if a law enforcement official becomes too emotionally unstable for duty, he or she often qualifies for a disability retirement. See, e.g., *State Police Disability (Section 363-b)*, OFF. ST. COMPTROLLER, N.Y. ST. & LOCAL RETIREMENT SYS., http://www.osc.state.ny.us/RETIRE/publications/vo1518/disability_ret_benefits/ (last visited Jan. 30, 2014) (noting that a state police officer is entitled to disability benefit if he or she is, among other requirements, “[p]hysically or mentally unable to perform [his or her] duties as the natural and proximate result of a disability sustained in service”); *Retirement Estimate Calculator: For Police and Firemen’s Retirement System (PFRS) Members*, ST. N.J., DEP’T TREASURY, <http://www.state.nj.us/treasury/pensions/pfrstimate.shtml> (last updated Apr. 18, 2013) (explaining that an individual can qualify for “Accidental Disability” if he or she is “physically or mentally incapacitated from performing [his or her] normal or assigned job duties”).

³⁸ See D.C. CODE § 7-2502.01(a)(1)(A) (permitting organizations to register guns if it requires employees to be armed on duty); CAL. PENAL CODE § 26015 (exempting armored vehicle guards from the ban on the carrying of loaded firearms).

³⁹ This was the situation in which Dick Heller, respondent in *District of Columbia v. Heller*, found himself. He could possess a handgun in Washington, D.C., while protecting others, but not while protecting himself. *District of Columbia v. Heller*, 554 U.S. 570, 575–76 (2008).

licensing authorities, similar disparities often emerge. For example, in New York City, as recently as the 1970s, it was common to pay police precinct officials a \$100 bribe to obtain a permit.⁴⁰ The City responded by centralizing the pistol permit process.⁴¹ But with bribery removed as an incentive, licensing authorities had no reason at all to grant permits. In December 1978, the NYPD administrators decided to slow down processing by requiring applicants to make an appointment to present their applications.⁴² By March 1979, the pistol licensing office was setting appointments for a year down the road.⁴³

Filing an application, however, would not do the average citizen much good. When forty black and Puerto Rican women sought permits to protect their families against an outbreak of muggings they were informed that it was “the policy of this department not to give out permits for people who want to protect themselves.”⁴⁴ But a different policy seemingly applies to the rich and famous: New York City pistol permits have been issued to Donald Trump, Don Imus, Sean Hannity, Howard Stern, Robert De Niro, and others with clout.⁴⁵

The same experience has been noted in California. For nineteen years, Los Angeles had a simple policy: no permits to carry a concealed weapon shall be issued to anyone, no matter how sterling the applicant or demonstrable the need.⁴⁶ Between 1974 and 1993, exactly one concealed carry permit was issued—to the City’s new police chief, to tide him over until he was certified as a California law enforcement official.⁴⁷

Los Angeles County did issue some permits during the same timeframe, but in utterly arbitrary fashion. “For many years, campaign contributors to Sheriff Brad Gates enjoyed an almost 100% chance of obtaining a permit to carry a concealed weapon if they applied.”⁴⁸ Persons whom his office had rejected for permits ultimately sued and won under the Equal Protection Clause.⁴⁹ Sheriff Gates’s successor has continued to

⁴⁰ GEORGE BRAZILLER, *THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION* 188–89 (1972).

⁴¹ *Id.*

⁴² *Fed’n of N.Y. State Rifle & Pistol Clubs, Inc. v. McGuire*, 420 N.Y.S.2d 602, 603 (N.Y. Sup. Ct. 1979).

⁴³ *Id.*

⁴⁴ *40 in Bronx Seek Gun Permits for Protection Against Addicts*, N.Y. TIMES, Sept. 26, 1969, at 31.

⁴⁵ Reuven Blau, *Madoff Son of a Gun*, N.Y. POST, Dec. 27, 2009, at 9; Rocco Parascandola & Alison Gendar, *Lifestyles of the Rich and Packin’: High-Profile Celebrities Seeking Gun Permits on the Rise*, N.Y. DAILY NEWS (Sept. 27, 2010), http://www.nydailynews.com/ny_local/2010/09/27/2010-09-27_celebrities_seeking_pistol_permits_on_the_rise_in_the_city_lifestyles_of_rich_n_.html.

⁴⁶ J. NEIL SCHULMAN, *STOPPING POWER: WHY 70 MILLION AMERICANS OWN GUNS* 111 (1999).

⁴⁷ *Id.*

⁴⁸ Dan Weikel, *12 Year Gun Permit Cases Nearing Trial*, L.A. TIMES, Sept. 4, 1990, at B4.

⁴⁹ Dan Weikel, *Gates Off Hook in Suit: County to Pay \$616,000*, L.A. TIMES (Nov. 17, 1990), http://articles.latimes.com/1990-11-17/news/mn-4314_1_gun-permits; Dan Weikel, *Lawyers Take*

reward campaign donors with permits.⁵⁰

In short, the wealthy, the politically powerful, and their allies tend to exempt themselves from the restrictions considered necessary for the rest of the citizenry.

B. *Indications of Animus Toward the Class or Some of Its Members*

Firearm restrictions sometimes appear to be based on little more than a desire to burden or annoy firearm owners. When Chicago's handgun ban was struck down in *McDonald v. Chicago*,⁵¹ city officials responded by creating a restrictive permit system requiring that the applicant prove a certain amount of training at a firing range—while at the same time retaining its ban on firing ranges.⁵² In a sharply worded opinion, the Seventh Circuit struck down the City's firing range ban.⁵³ In a similar vein, after the Supreme Court voided the District of Columbia's handgun ban, the District required a permit to possess a handgun.⁵⁴ A reporter found that the process to obtain a permit took months and required her “to take a five-hour class that is only taught outside of the District, pay \$465 in fees, sign six forms, pass a written test on gun laws, get fingerprinted, be subject to a police ballistics test and take days off work.”⁵⁵

The categories of persons forbidden to possess firearms often reflect prejudice toward certain groups. For example, New York's Sullivan Act forbade carrying of weapons by unnaturalized aliens, no matter how law-abiding.⁵⁶ Massachusetts likewise banned legal aliens from securing permits to possess handguns, until the law was stricken in 2012.⁵⁷ The sponsor of a similar law in California from 1924 explained that it would have a “salutary effect in checking tong wars among the Chinese and

Final Shots in Gates Gun Permit Case, L.A. TIMES (Sept. 28, 1990), http://articles.latimes.com/1990-09-28/local/me-1390_1_gun-permits.

⁵⁰ See Gene Maddaus, *Sheriff Lee Baca and the Gun-Gift Connection*, L.A. WKLY. (Feb. 14, 2013), <http://www.laweekly.com/2013-02-14/news/sheriff-lee-baca-concealed-weapons-permit/> (drawing connections between those who donated to Sheriff Lee Baca's campaign and those who received gun permits).

⁵¹ 130 S. Ct. 3020, 3026, 3050 (2010).

⁵² *Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011).

⁵³ *Id.* at 711.

⁵⁴ D.C. CODE § 7-2502.02(a)(4) (LexisNexis 2012).

⁵⁵ Emily Miller, *Emily Got Her Gun*, WASH. TIMES (Feb. 8, 2012, 3:23 PM), <http://www.washingtontimes.com/blog/guns/2012/feb/8/miller-emily-got-her-gun/>.

⁵⁶ See N.Y. PENAL LAW § 1897 (Consol. 1909) (making it a felony for any “person not a citizen of the United States” to carry a weapon); REPORT OF COMMITTEE ON A UNIFORM ACT TO REGULATE THE SALE AND POSSESSION OF FIREARMS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 711, 728–29 (1924) (stating that “[n]o unnaturalized foreign-born person and no person who has been convicted of a felony” may possess a handgun).

⁵⁷ *Fletcher v. Haas*, 851 F. Supp. 2d 287, 303 (D. Mass. 2012).

vendettas among our people who are of Latin descent.”⁵⁸ At the federal level, the Gun Control Act of 1968⁵⁹ forbids firearm possession by those who have renounced U.S. citizenship, been dishonorably discharged from the military, or are aliens visiting the U.S. on a “nonimmigrant visa,”⁶⁰ none of which seems to have correlation with violent tendencies.⁶¹

C. *Arbitrary Enactment or Retention of Restrictions*

California illustrates the difficulties of dealing with unjustified restrictions via majoritarian processes. In 1923, when there were no federal firearm laws worth mentioning, the state required handgun dealers to be licensed.⁶² The California requirement remains on the books today,⁶³ and, in 2002, the state forbade California dealers from selling handguns that had not been approved for safety by the state, necessitating extensive laboratory testing paid for by the manufacturer.⁶⁴ An exemption for law enforcement officers and prosecutors⁶⁵ indicates that safety was not actually the primary objective.

That the gun-owning minority (and, as noted above, it is indeed a small minority in the states under discussion) cannot count upon majority protection against arbitrary laws is demonstrated by “one-gun-a-month” laws, which forbid a person from purchasing more than one firearm, or one handgun, in a given thirty-day period.⁶⁶ The rationale is to prevent gun traffickers from purchasing large numbers of guns where firearm laws are less restrictive, and then illegally selling the firearms in states where firearm laws are strict.⁶⁷ Yet such laws have been enacted in California,

⁵⁸ *New Firearms Law Effective on August 7*, S.F. CHRON., July 15, 1923, available at <http://www.claytoncramer.com/primary/other/SFChronicle1923.PDF> (internal quotation marks omitted).

⁵⁹ Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 (2012)).

⁶⁰ 18 U.S.C. § 922(g)(5)–(7).

⁶¹ See James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the “Wrong” Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 95, 98 n.42, 120 (1995) (arguing that the Brady Law’s efforts to keep guns out of the “wrong” hands, such as aliens or those dishonorably discharged, has little effect on disarming violent offenders). The author has a friend, an enlistee who became a conscientious objector and who refused to serve in Vietnam. He received a less-than-honorable discharge, but fortunately not a dishonorable one. Otherwise, he would be barred from gun possession—precisely because he refused to shoot at people.

⁶² 1923 CAL. STAT. 701-02 (codified at CAL. PENAL CODE § 26500 (West 2012)).

⁶³ *Id.* §§ 26500, 26520, & 26700.

⁶⁴ 2002 CAL. STAT. 5787 (codified at CAL. PENAL CODE § 32010(c)).

⁶⁵ *Id.* § 32000(b)(4).

⁶⁶ See *infra* note 68 (citing examples of states that currently have one-gun-per-month legislation).

⁶⁷ See Michael J. Habib, *The Future of Gun Control Laws Post-McDonald and Heller and the Death of One-Gun-Per-Month Legislation*, 44 CONN. L. REV. 1339, 1379 (2012) (arguing that “the very purpose of one-gun-per-month laws is to prevent the flow of firearms into the hands of unlicensed citizens”).

Maryland, and New Jersey,⁶⁸ three of the strictest states in the nation when it comes to gun laws. It is hard to understand why a gun-runner would choose to buy in New Jersey, where he must obtain a Firearm ID card plus a police permit for each handgun and wait thirty days for that to be granted,⁶⁹ so that he can sell the firearm in a state where he could have purchased one without any of these procedures. It is hard to explain these states' imposition of a "one-gun-a-month" rule except in terms of the majority's desire to impose one more restriction upon the minority.

In sum, there appear to be three factors that counsel heightened levels of review: (1) exemption of the rich and politically powerful from the restrictions imposed upon all others; (2) indications of animus toward the gun-owning minority; and (3) the seemingly irrational enactment or retention of laws affecting it. The majoritarian process is an ineffective protection for minority rights in these areas.

This understanding also serves as a limiting principle. There are other minorities that have been singled out for exceptional regulatory attention. Those who smoke tobacco come immediately to mind, but laws burdening smokers that do not exempt the powerful and well-connected (even the President of the United States has to step outside the White House to light up⁷⁰), appear far less motivated by animus and (despite tobacco's death toll being forty times that of firearms⁷¹) rarely take irrational forms. Anyone of legal age may smoke, just not inside (or sometimes near an entrance).

We turn now from theory to practice.

V. JUDICIAL APPROACHES TO STANDARD OF REVIEW IN RIGHT TO ARMS CASES: A TALE OF THREE CIRCUITS

All circuit court decisions post-*Heller*⁷² have opted to apply an intermediate standard of review, rather than strict scrutiny, albeit with occasional dicta invoking either rational basis or strict scrutiny.⁷³ It should

⁶⁸ CAL. PENAL CODE § 27535(a); MD. CODE ANN. PUB. SAFETY § 5-128(b) (LexisNexis 2011); N.J. STAT. ANN. § 2C:58-3(i) (West 2005).

⁶⁹ N.J. STAT. ANN. § 2C:58-3(a), (b), (i).

⁷⁰ *Why Is Obama Still Smoking?*, THE WEEK (Mar. 3, 2010), <http://theweek.com/article/index/200270/why-is-obama-still-smoking>.

⁷¹ The CDC estimates that smoking causes 440,000 deaths annually. *Tobacco-Related Mortality*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/ (last visited Jan. 28, 2014). It calculates the same figure for firearms homicides as 11,078. *Assault or Homicide*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/homicide.htm> (last visited Jan. 28, 2014).

⁷² A pre-*Heller* Fifth Circuit ruling, *United States v. Emerson*, applied strict scrutiny. 270 F.3d 203, 261 (5th Cir. 2001). *Emerson* was the first circuit court ruling that the Second Amendment protected an individual right unrelated to militia duties. *Id.* at 264.

⁷³ *See, e.g.,* *Kachalsky v. County of Westchester*, 701 F.3d 81, 93–94 (2d Cir. 2012) (drawing a comparison to First Amendment cases that apply differing levels of scrutiny); *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012) (describing the government's interest in protecting people from

be recognized that, when firearms laws are at issue, the first element of intermediate review becomes of little importance. None would dispute that minimizing homicide and violent crime is a valid and substantial governmental interest. The remaining issues are those of “fit”; how well does the regulation serve that interest, and how much does it burden activities whose restriction would not impair that interest. Here, we may examine the treatment of the right to arms in three circuits that have to date produced the more interesting results: the Second, Fourth, and Seventh Circuits.

A. *The Second Circuit*

The Second Circuit applies the right to arms in a narrow fashion: “[H]eighted scrutiny is triggered only by those restrictions that (like the complete prohibition of handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).”⁷⁴ Under the Second Circuit approach, burdens that are less than substantial are subject only to rational basis review.⁷⁵ This is difficult to reconcile with *Heller*, which expressly ruled out rational basis review,⁷⁶ and with the Supreme Court’s First Amendment precedent. In the area of election-related regulations for instance, the Court applies different tests to substantial and insubstantial burdens on the affected right—but the tests employed are strict scrutiny and intermediate review,⁷⁷ rather than intermediate review and rational basis. In the case of commercial speech, the Court has held that deceptive or crime-inducing advertisements are entirely outside First Amendment protections⁷⁸ (just as *Heller* ruled that “dangerous and unusual” arms were outside those of the Second Amendment⁷⁹), and that all other expression was subject to a strict form of intermediate scrutiny.⁸⁰

Even where the impairment is found to be substantial, the Second Circuit applies a limited version of intermediate review. In *Kachalsky v.*

crime as an important governmental interest); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261–64 (D.C. Cir. 2011) (discussing the appropriateness and applicability of intermediate scrutiny in the context of gun regulations); *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011) (noting that intermediate scrutiny does not require use of the least intrusive means); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (recognizing that opposing parties “champion competing” strict and intermediate scrutiny standards).

⁷⁴ *United States v. DeCastro*, 682 F.3d 160, 166 (2d Cir. 2012).

⁷⁵ *Id.*

⁷⁶ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

⁷⁷ See *infra* notes 123–25 and accompanying text (describing differing tests applied to differing circumstances in the area of election law).

⁷⁸ *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980).

⁷⁹ 554 U.S. at 627.

⁸⁰ *Cent. Hudson Gas & Elec.*, 447 U.S. at 564.

County of Westchester,⁸¹ the court faced a New York statute that required a permit to carry a firearm, with the permit issued in the sole discretion of a licensing authority.⁸² The opinion suggested that the applicable test depends on the nature of the restricted gun-ownership right, with strict scrutiny used for regulations that significantly burden the “core” right of self-defense in the home⁸³ (a later ruling renders this questionable⁸⁴); intermediate scrutiny for other “substantial” burdens;⁸⁵ and presumably rational basis for insignificant encroachments.

Kachalsky found that the New York licensing statute substantially burdened a non-core aspect⁸⁶ of the right and nominally applied intermediate scrutiny.⁸⁷ But its reasoning gave only lip service to intermediate scrutiny. As noted previously, intermediate scrutiny presumes that a challenged regulation is unconstitutional.⁸⁸ The *Kachalsky* opinion only devoted four sentences to the key issue of whether there was a reasonable fit between the legislation and the governmental goal.⁸⁹ The court merely noted that both sides had submitted data indicating that firearm ownership by lawful citizens was, or was not, related to levels of crime. Under intermediate scrutiny, the court should then have weighed the data, and declared a tie if the government had failed to meet its burden. But the *Kachalsky* court simply deferred to the legislature: “It is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments.”⁹⁰ The possibility of less-arbitrary alternatives (e.g., a permit system with specific criteria) was left unexplored.

B. *The Fourth Circuit*

The Fourth Circuit has taken a more stringent approach to intermediate

⁸¹ 701 F.3d 81 (2d Cir. 2012).

⁸² *Id.* at 85–86. The applicant must demonstrate “proper cause” to obtain a license to carry a concealed firearm. *Id.* at 86.

⁸³ *Id.* at 93.

⁸⁴ See *Kwong v. Bloomberg*, 723 F.3d 160, 172 (2d Cir. 2013) (applying intermediate review to a pistol permit requirement for possession in the home, and upholding a \$340 permit fee).

⁸⁵ *Kachalsky*, 701 F.3d at 96–97.

⁸⁶ That is, it regulated carrying a firearm outside of the home. *Id.* at 94.

⁸⁷ *Id.* at 96–97.

⁸⁸ See *supra* notes 6–7 and accompanying text.

⁸⁹ See *id.* at 98–99 (“But, as explained above, New York’s law need only be *substantially related* to the state’s important public safety interest. A perfect fit between the means and the governmental objective is not required. Here, instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere. That New York has attempted to accommodate certain particularized interests in self defense does not somehow render its concealed carry restrictions unrelated to the furtherance of public safety.”).

⁹⁰ *Id.* at 99.

review, if not always with consistency. In *United States v. Chester*,⁹¹ it reviewed a challenge to 18 U.S.C. § 922(g)(9), which generally prohibits firearm possession by persons convicted of a domestic violence misdemeanor.⁹² The court declined to apply strict scrutiny because the defendant's acts were "not within the core right identified in *Heller*—the right of *law-abiding, responsible* citizens to possess and carry a weapon for self-defense," and the defendant was decidedly not "law-abiding."⁹³ Then it applied intermediate review and concluded that a remand was necessary in light of the government's failure to develop its empirical record and proffer "sufficient *evidence* to establish a substantial relationship between § 922(g)(9) and an important governmental goal."⁹⁴

The Fourth Circuit subsequently considered *United States v. Masciandaro*,⁹⁵ which involved a traveling salesman cited for possessing a loaded firearm while sleeping in his car in a National Park. The court noted that, unlike *Chester*, the defendant was a law-abiding citizen, but also unlike *Chester*, he was in a public park rather than his home.⁹⁶ The divided court did not examine empirical evidence, but the impairment of the right to arms was minimal: the National Park regulation allowed possession of a firearm so long as it was unloaded.⁹⁷

These promising beginnings were rendered doubtful by *Woollard v. Gallagher*,⁹⁸ which involved a challenge to Maryland's permit system for carrying handguns. The system forbade (with a number of exceptions) carrying a handgun without a permit, and permits were restricted to those who could prove "good and substantial reason" for carrying.⁹⁹ The Fourth Circuit wrote at some length regarding the state's evidence in support of its system, which argued (in seemingly general terms) that restricting the carrying of firearms would reduce the chances of criminals stealing them, lessen the chance of a confrontation becoming lethal, and reduce the need to investigate reports of a person seen with a firearm.¹⁰⁰ Reconciling these

⁹¹ 628 F.3d 673 (4th Cir. 2010).

⁹² 18 U.S.C. § 922(g)(9) (2012).

⁹³ *Id.* at 683.

⁹⁴ *Id.* On remand, the District Court found that the government had met its burden, and the Fourth Circuit affirmed in an unpublished opinion. *United States v. Chester*, 847 F. Supp. 2d. 902 (S.D. W. Va. 2012), *aff'd*, No. 12-4146, 2013 WL 1189253 (4th Cir. 2013).

⁹⁵ 638 F.3d 458 (4th Cir. 2011).

⁹⁶ *Id.* at 470.

⁹⁷ *Id.* at 474. An automatic handgun can be loaded, and a round chambered, in two seconds or less. See Brian Palmer, *How Many Times Can You Shoot a Handgun in Seven Minutes?*, SLATE (Nov. 9, 2009), http://www.slate.com/articles/news_and_politics/explainer/2009/11/how_many_times_can_you_shoot_a_handgun_in_seven_minutes.html ("FBI studies have shown that a novice can fire three shots in less than a second, and a trained shooter can double that.").

⁹⁸ 712 F.3d 865 (4th Cir. 2013).

⁹⁹ *Id.* at 868.

¹⁰⁰ *Id.* at 879–80.

arguments with *Heller* does seem problematic, especially because they suggest that a law-abiding citizen poses an indirect risk.

The *Woollard* appellees, however, raised another “reasonable fit” argument and suggested that a different permit system with clearer criteria be implemented¹⁰¹—perhaps requiring applicants to have a criminal record, other indicia of stability, a fixed amount of training, and a demonstrable need for self-defense. At this point the Circuit simply deferred to the legislature: “[W]e cannot substitute those views for the considered judgment of the General Assembly that the good-and-substantial-reason requirement strikes an appropriate balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets of Maryland.”¹⁰² As the Second Circuit had done in *Kachalsky*, the Fourth Circuit appears to have applied intermediate scrutiny in name only.

C. *The Seventh Circuit*

The Seventh Circuit has taken a considerably more vigorous approach to intermediate review than the Second and Fourth Circuits, but it has more reason to do so. After all, the court has jurisdiction over Chicago, which was reacting to the *McDonald* holding that the City’s handgun possession ban was unconstitutional.¹⁰³

In *Ezell v. City of Chicago*,¹⁰⁴ decided a year after *McDonald*, the Seventh Circuit confronted a Chicago ordinance that permitted handgun possession permits, but only under a restrictive system that required the applicant to be trained on a shooting range.¹⁰⁵ Meanwhile, the City retained its ban on indoor shooting ranges.¹⁰⁶ Chicago advanced a number of reasons for its ban—danger of accidental discharges, risk of firearm theft, and lead contamination of the range’s users.¹⁰⁷ The Seventh Circuit held that “exacting scrutiny” governed review, since Chicago banned rather than regulated ranges:

This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense. That the City conditions gun possession on range training is an additional reason to closely scrutinize the range ban. All this suggests that a . . . rigorous

¹⁰¹ See *id.* at 881 (arguing that a “shall issue” regime would better serve to protect public safety).

¹⁰² *Id.*

¹⁰³ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026, 3050 (2010).

¹⁰⁴ 651 F.3d 684 (7th Cir. 2011).

¹⁰⁵ *Id.* at 689.

¹⁰⁶ *Id.* at 690.

¹⁰⁷ *Id.* at 692.

showing . . . should be required, if not quite “strict scrutiny.”¹⁰⁸

Under this standard, the Seventh Circuit explained:

[T]he City bears the burden of establishing a strong public-interest justification for its ban on range training: The City must establish a close fit between the range ban and the actual public interests it serves, and also that the public’s interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights. Stated differently, the City must demonstrate that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified.¹⁰⁹

The *Ezell* court concluded that Chicago “ha[d] not come close” to meeting its burden: it had presented speculation rather than hard data, and had not shown that its concerns could not be addressed through zoning and other regulatory measures.¹¹⁰

Ezell was no fluke, as demonstrated the following year by *Moore v. Madigan*,¹¹¹ which struck down Illinois’s ban on carrying handguns.¹¹² Interestingly, the opinion was written by Judge Posner, who is one of the strongest critics of the *Heller* ruling.¹¹³ After reviewing the inconclusive empirical evidence on the relationship between carrying firearms and crime, the Seventh Circuit reasoned that it “fails to establish a pragmatic defense of the Illinois Law.” The court concluded that Illinois must provide “more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It . . . failed to meet this burden.”¹¹⁴

* * *

Overall, these three circuits have taken different approaches to evaluating the constitutionality of firearm regulations. The Second Circuit has applied a weak form of intermediate scrutiny and even suggested that some regulations might be evaluated under rational basis review. The Fourth Circuit has applied intermediate scrutiny, but inconsistently. The

¹⁰⁸ *Id.* at 708.

¹⁰⁹ *Id.* at 708–09.

¹¹⁰ *Id.* at 709.

¹¹¹ 702 F.3d 933 (7th Cir. 2012).

¹¹² *Id.* at 942.

¹¹³ See Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32 (describing *Heller* as a “snow job[.]”).

¹¹⁴ *Moore*, 702 F.3d at 939, 942.

Seventh Circuit has vigorously applied intermediate, or even exacting scrutiny, carefully examining the empirical arguments advanced by the defenders of the laws and holding them to their burden of proof.

VI. STANDARDS OF REVIEW: A SUGGESTED APPROACH

Having examined the empirical basis for standards of review, and how the courts have handled the issue in the past, we can turn to evaluating possible future approaches.

A. *The Law Does Not Concern Itself with Trifles*

Certain regulations burden the right to arms so little that rational basis review might be justified. Examples of such regulations could include the requirement that firearms be stamped with their makers' names and serial numbers,¹¹⁵ be made of materials visible on x-rays,¹¹⁶ not be carried into narrowly defined areas such as federal courthouses,¹¹⁷ and be carried openly, absent a concealed carry permit.¹¹⁸ These restrictions are so nominal that a court should not have to review empirical data proving that these measures have an impact on crime.

B. *The Possibility of Strict Scrutiny*

As noted above, several rulings have, in dicta, suggested that the "core right" to arms (generally seen as that of law-abiding persons to own arms for defense in their own homes) should be protected by strict scrutiny.¹¹⁹ This approach has merit. *Heller* itself entirely rules out a *prohibition* of the core right;¹²⁰ *restrictions* on it should be required to meet the highest standard of review.¹²¹

C. *A Blind Alley: "Substantial Burden"*

As noted above, the Second Circuit suggests in dicta that intermediate scrutiny may be limited to restrictions which "substantially" burden the

¹¹⁵ *E.g.*, 27 C.F.R. § 478.92(a)(1) (2013).

¹¹⁶ *E.g.*, 18 U.S.C. § 922(p)(1)(B) (2012).

¹¹⁷ *E.g.*, 18 U.S.C. § 930(e)(1).

¹¹⁸ Alabama is one example of a state that employs such a scheme. *See* ALA. CODE § 13A-11-50 (2013) (prohibiting concealed carrying of firearms without a permit).

¹¹⁹ *See supra* note 73 and accompanying text.

¹²⁰ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

¹²¹ *See United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008) ("The individual right to bear arms might well be a fundamental right, the restriction of which requires strict scrutiny. This conclusion is supported by the placement of [the] Second Amendment within the Bill of Rights alongside this Country's most precious freedoms.")

right to arms.¹²² It is difficult to see any basis for this in *Heller* or in *McDonald*. The Supreme Court has employed a standard resembling this in election-law cases.¹²³ First, the Court in the election law cases uses the standard to differentiate between laws that merit strict scrutiny and those requiring intermediate review, but not to differentiate between intermediate review and rational basis.¹²⁴ Second, election regulations pose a unique problem. Voting is protected by the First Amendment, but it is impossible to meaningfully vote without governmental restrictions. The government must establish the time and place where ballots are cast, determine which parties and candidates have sufficient public support to warrant listing on them, set deadlines for candidate selection, and so on. Many of these restrictions will extensively regulate the right, but without them, exercise of the right becomes impossible.¹²⁵ While it makes sense to screen out challenges to trifling restrictions of the right to arms, as suggested above,¹²⁶ an effort to screen out all challenges but “substantial” ones lacks merit.

D. *The Degree of Intermediate Scrutiny Applied*

Intermediate scrutiny is the most indeterminate of the standards of review and, as has been seen, can be applied in many degrees. By presuming constitutionality with almost unlimited deference to the legislative process, and accepting justifications based upon speculation rather than evidence, some courts have sometimes applied the standard so loosely to firearm cases that it takes on the attributes of rational basis review. In *Kachalsky*, the Second Circuit accorded “substantial deference to the predictive judgments”¹²⁷ of legislators, even though the only proof of their predictive judgments was their act of passing the law.¹²⁸ In *Schrader v. Holder*,¹²⁹ the D.C. Circuit upheld a Maryland statute because “plaintiffs . . . offered no evidence” that the persons restricted by the

¹²² See *supra* Part V.A; see also *Nordyke v. King*, 644 F.3d 776, 784 (9th Cir. 2011), *vacated en banc*, 681 F.3d 774 (9th Cir. 2012) (“We are satisfied that a substantial burden framework will prove to be far more judicially manageable than an approach that would reflexively apply strict scrutiny to all gun-control laws.”).

¹²³ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997) (discussing different standards of scrutiny for different types of election regulations).

¹²⁴ See *id.* at 358 (setting forth the relevant levels of scrutiny).

¹²⁵ See *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”).

¹²⁶ See *supra* Part VI.A.

¹²⁷ 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)) (internal quotation marks omitted).

¹²⁸ *Id.* at 97, 101.

¹²⁹ 704 F.3d 980 (D.C. Cir. 2013).

statute posed “an insignificant risk” of violence,¹³⁰ essentially putting the burden of proof on the law’s challengers rather than on its defenders. In *In re Pantano*,¹³¹ a New Jersey appellate court upheld a denial of a handgun permit under the state’s strict permitting system, citing “the presumption of [the] law’s constitutionality,”¹³² which is inapplicable under heightened review. All of these approaches are consistent with rational basis review, not with intermediate scrutiny.

A stricter application, resembling that used by the Seventh Circuit, appears warranted here. As shown above, significant restrictions on the right to arms are associated with indications that majoritarianism is little protection for the rights of a minority. Such restrictions tend to be found in states where gun owners form an exceptionally small minority of households. They frequently exempt those in power, their agents, and those with political sway such as retired law enforcement or (in practice, if not in law) campaign contributors.¹³³ If the powerful can exempt themselves and their friends from the law, they need not concern themselves about its burdens. Some laws even appear to have features that serve no apparent purpose other than burdening a disfavored minority.¹³⁴

In applying a strict version of intermediate review, courts should demand that empirical data be presented that supports a gun restriction. As might be expected, given that the relationship between guns, gun control, and crime has been a contentious issue for around half a century, there is a considerable body of sophisticated analysis on the subject.

At the broadest level, Professor David J. Bordua undertook to analyze data from Illinois’s 102 counties, which varied widely in levels of firearm ownership and crime rates.¹³⁵ He employed three measures to determine firearm ownership—the number of Firearm Owner Identification (“FOID”) cards (required by state law before a person can possess a firearm), the results of three telephone surveys regarding firearms ownership, and a combination of FOID cards and survey results.¹³⁶

Working with the raw data, Bordua found that total gun ownership was negatively related to violent crime.¹³⁷ Male gun ownership had a strong negative relationship, while female gun ownership had a positive

¹³⁰ *Id.* at 990.

¹³¹ 60 A.3d 507 (N.J. Super. Ct. App. Div. 2013).

¹³² *Id.* at 514.

¹³³ See *supra* Part III (discussing the need for heightened review in cases where majoritarian values infringe on minority rights).

¹³⁴ While such laws should undoubtedly be held unconstitutional, states with strict gun control laws continue to employ laws, such as “one-gun-a-month” laws, that serve no purpose. See *supra* text accompanying notes 66–69.

¹³⁵ David J. Bordua, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in *THE SOCIAL ECOLOGY OF CRIME* 156 (James M. Bryne & Robert J. Sampson eds., 1986).

¹³⁶ *Id.* at 156 n.1.

¹³⁷ *Id.* at 169.

relationship to violent crime levels.¹³⁸ Since surveys had shown female firearm owners were much more likely than male owners to own for self-protection, the latter statistic was more likely a matter of crime-causing gun ownership than the other way around.¹³⁹ The same held true for handgun ownership.¹⁴⁰

These data were not too surprising. They were, after all, raw data, and firearms ownership tends to be higher in rural areas, while violent crime tends to occur more in urban environments.¹⁴¹ So Bordua proceeded to apply multivariate tools, compensating for a number of other factors found in other studies to affect violent crime rates, such as urbanization, population density, age, and race.¹⁴² He further analyzed data on firearms ownership based on gender and broke down gun ownership into total ownership, handgun-only ownership, long gun-only ownership, and ownership of both.¹⁴³ Combining these variables with various types of violent crime yielded 165 equations. The results:

Two findings leap out of the table. First, there is *no general relationship at all* between firearms ownership and violent crime rates comparing these Illinois counties. Generally speaking, *both* the negative male and positive female relationship disappear. Second, there *is* a positive relationship with firearms murder but not with criminal homicide generally.¹⁴⁴

This would be consistent with the idea that “where firearms are available, killers will use them; where they are not available, they will use something else.”¹⁴⁵ But Bordua proceeded to further analyze and conclude that based on gender, the association between female gun ownership and gun homicide rates was attributable to violent-crime-causing female gun ownership.¹⁴⁶ “Causally, only one plausible interpretation survives the analysis. At least one form of crime causes at least one kind of firearms ownership. Firearms murder increases female gun ownership.”¹⁴⁷

Bordua’s work is by no means the alpha and the omega of the studies on firearms and crime, which have become so voluminous that Professor

¹³⁸ *Id.* at 171.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 172.

¹⁴² *Id.* at 172–73.

¹⁴³ *Id.* at 174.

¹⁴⁴ *Id.* at 173.

¹⁴⁵ *Id.* at 170.

¹⁴⁶ *Id.* at 177.

¹⁴⁷ *Id.*

Gary Kleck has devoted two books to summarizing their findings,¹⁴⁸ one of which won the American Society of Criminology's Michael J. Hindelang award for the most outstanding contribution to research in criminology.¹⁴⁹

To highlight a few of Kleck's points:

- There have been numerous studies regarding the frequency with which victims of crime use firearms in self-defense. Kleck's own survey was the most comprehensive, and estimated 2.5 million such uses per year.¹⁵⁰ Twelve other surveys have focused on the same question: ten found at least a million uses per year, and the remaining two found over 700,000.¹⁵¹
- Criminal use of "assault weapons" is a very small part of criminal firearms use. Forty studies, mostly local, found such weapons to form 0–4.3% of crime guns. Twenty of those studies found they formed 1% or less of crime guns.¹⁵²
- Permissive licensing of concealed firearms carrying has no discernable negative effects. In Florida, the first state to adopt such a system, the fraction of permit holders who are convicted of any offense involving a gun is 0.03% per year.¹⁵³
- There is some reason to believe that prohibitions on gun possession by convicted criminals and the mentally ill, and background checks or permit systems to enforce these restrictions, have beneficial effects. Beyond this, gun control measures have no discernable effect on violent crime rates.¹⁵⁴

Narrower studies on specific topics may be added to Kleck's work.

1. *Concealed Carry Regulations*

Most states require a permit for concealed carrying (and sometimes all

¹⁴⁸ GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* (1991); GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* (1997) [hereinafter KLECK, *TARGETING GUNS*].

¹⁴⁹ *ASC Award Winners*, AM. SOC. CRIMINOLOGY, <http://www.asc41.com/awards/awardWinners.html#michael> (last visited Jan. 30, 2014).

¹⁵⁰ KLECK, *TARGETING GUNS*, *supra* note 148, at 150–51. For other studies worthy of mention, see DON B. KATES, JR., *FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY* (1984), and JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* (1983). For a more controversial addition to this literature, arguing that increasing the number of guns carried by law-abiding citizens will lead to a subsequent decrease in criminal activity, see JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 19 (1998).

¹⁵¹ KLECK, *TARGETING GUNS*, *supra* note 148, at 187–88.

¹⁵² *Id.* at 41, 141–42.

¹⁵³ *Id.* at 370.

¹⁵⁴ *Id.* at 377.

or most carrying) of a firearm.¹⁵⁵ The permit systems generally fall into two categories: “may issue” and “shall issue.” In a “may issue” state, the permitting authority has complete or almost complete discretion in deciding whether to issue the permit.¹⁵⁶ In a “shall issue” state, the permitting authority must issue the permit if the applicant meets certain broad criteria, such as passing a background check and attending a training course.¹⁵⁷

The effects of going from “may issue” to “shall issue”¹⁵⁸ are subject to serious dispute. Economist John Lott has devoted articles, and ultimately an entire book, to his argument that the effect is to reduce crime by making self-defense more available to potential victims.¹⁵⁹ As might be expected his work was criticized,¹⁶⁰ and Lott devoted a chapter of his book to answering the critics.¹⁶¹

2. *Specific Forms of Firearms Control*

There have also been studies assessing the impact of specific forms of gun control. One study undertook to determine the relationships between firearm homicide, firearm suicide, total homicide, and total suicide, and age requirements for handgun purchase and possession, “one-gun-a-month” laws, “shall issue” carry permits, and bans on cheap handguns.¹⁶² No relationships could be found between these laws and homicide or suicide, except that “shall issue” permits were associated with higher firearm homicide and homicide rates, but not at a statistically significant level.¹⁶³

Another study sought to determine the effect of waiting periods and background checks upon homicide and suicide, as judged by the impact of the 1993 Brady Handgun Violence Prevention Act.¹⁶⁴ At the time of its

¹⁵⁵ See Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1497 (2014) (noting that Alaska, Arizona, Vermont, and Wyoming are the only four states that do not require a permit to carry a concealed weapon).

¹⁵⁶ See *id.* at 1498 (explaining that “may issue” states require “good character, good reason, or both, as judged by state or local officials, to carry a weapon”).

¹⁵⁷ See *id.* (noting that “shall issue” states give “states and municipalities no choice but to issue a permit so long as the person is not a felon, a domestic violence offender, or seriously mentally ill”).

¹⁵⁸ I am unaware of any state that has gone from “shall issue” to “may issue.”

¹⁵⁹ LOTT, *supra* note 150, at 19–20.

¹⁶⁰ See, e.g., Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1201 (2003) (acknowledging Lott’s important contribution to this issue, but finding that statistical evidence that these laws have reduced crime is limited, sporadic, and extraordinarily fragile”).

¹⁶¹ LOTT, *supra* note 150, at 122–57.

¹⁶² M. Rosengart et al., *An Evaluation of State Firearms Regulations and Homicide and Suicide Death Rates*, 11 INJ. PREVENTION 77, 77 (2005).

¹⁶³ *Id.* at 77, 79.

¹⁶⁴ Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 JAMA 585, 586 (2000).

enactment, some states had background check and/or waiting period requirements,¹⁶⁵ while others did not. The 1993 federal statute required a background check for sales by licensed dealers nationwide and, for a time, imposed a de facto waiting period of up to five business days.¹⁶⁶ In some jurisdictions the waiting period and background check requirement changed, while in others (the jurisdictions that already had these) there was no change.

The study concluded that no relationship could be found between imposition of the waiting period, or of the background check, and firearms homicide and suicide, with one exception—that of suicide victims aged fifty-five or older.¹⁶⁷ That finding was somewhat offset by a rise in non-firearm suicides, leaving a “modest (though not statistically significant) reduction.”¹⁶⁸

These data have been supplemented by two surveys of the literature in the area. The first survey was conducted by the Task Force on Community Preventive Services of the Centers for Disease Control and Prevention, which appraised fifty-one existing studies of firearms legislation and violent crime.¹⁶⁹ The Task Force found that studies produced inconsistent results when measuring the effects of firearms or ammunition bans.¹⁷⁰ Similarly, other studies analyzing restrictions on firearms acquisition were plagued by inconsistency—the Task Force highlighted one study, however, that observed a statistically significant reduction in firearms suicide (but not total suicide) among persons aged fifty-five years or older.¹⁷¹ Moreover, it cautioned that studies of enacting “shall issue” concealed carry permit regimes were badly flawed.¹⁷² Finally, out of three states that had enacted “child access prevention laws,” the Task Force called attention to one study that found a reduction of accidental deaths in one state, but it advised that “too few studies of [child access prevention] laws ha[d] been done, and the findings of existing studies were inconsistent.”¹⁷³

¹⁶⁵ For example, some states had a requirement that when a dealer sold a firearm or a handgun, he had to delay its delivery by a certain number of days. For an analysis of which states had such requirements, see *id.* at 586.

¹⁶⁶ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102(a)(1), 107 Stat. 1536, 1536–37 (1993). The interim statutory system required local officials to perform the background check and set a maximum three day period for its performance. *Id.* § 102(b), 107 Stat. at 1539. The actual waiting period thus varied depending upon the officials’ willingness and workload.

¹⁶⁷ Ludwig & Cook, *supra* note 164, at 588.

¹⁶⁸ *Id.*

¹⁶⁹ ROBERT A. HAHN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS 2, 14 (2003).

¹⁷⁰ *Id.* at 14.

¹⁷¹ *Id.* at 17.

¹⁷² *Id.*

¹⁷³ *Id.*

The second survey was undertaken by the National Research Council's Committee to Improve Research Information and Data on Firearms.¹⁷⁴ One study found that Virginia's "one-gun-a-month" law indirectly reduced gun violence by minimizing gun smuggling to New York and Massachusetts,¹⁷⁵ while another study concluded that the Brady Act's background check requirements and waiting periods had no significant impact on homicide and suicide rates, except for persons aged fifty-five and older.¹⁷⁶ Beyond that, there was little evidence that firearms restrictions affected violence. Assault weapon bans would have an effect so small that it would be "difficult to disentangle [them] from chance yearly variation."¹⁷⁷ With regard to John Lott's contention that "shall issue" concealed weapons permit laws are associated with reductions in violence, the committee concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates."¹⁷⁸

Yale sociologist Andrew V. Papachristos has recently published a pair of studies that, while not directly addressing the issue of guns and violence, can advise us regarding that issue. The first study looked at two high-crime Boston neighborhoods and found that 85% of gunshot victims were found within the same social network.¹⁷⁹ Within that network, interpersonal relationships could be assessed by police reports mentioning sighting or questioning individuals together.¹⁸⁰ By that measure, every network step away from a shooting victim (i.e., from having been questioned with the victim to having been questioned with someone else who was questioned with the victim) decreased a person's chance of

¹⁷⁴ CHARLES F. WELLFORD ET AL., FIREARMS AND VIOLENCE: A CRITICAL REVIEW 13 (2005).

¹⁷⁵ *Id.* at 92.

¹⁷⁶ *Id.* at 94.

¹⁷⁷ *Id.* at 97.

¹⁷⁸ *Id.* at 150. This conclusion drew a dissent from political scientist James Q. Wilson, who contended that Lott's data had proven a relationship between "shall issue" permits and murder rate reductions. *See id.* at 269–70 (arguing that the committee confirmed Lott's finding that "murder rates decline after the adoption of [right-to-carry] laws," and expressing his confusion over the committee's characterization of Lott's claim as "fragile"). Wilson contended that Lott's critics "do not show that the passage of [right-to-carry] laws drives the crime rates up." *Id.* at 270. One commentator has even remarked that the fear that "concealed carry laws would lead to carnage in the streets, with otherwise law-abiding people suddenly becoming murderers" is no longer on the table. Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1597 (2013). Ultimately, Wilson concluded that "the best evidence we have is that [right-to-carry] impose no costs but may confer benefits." WELLFORD ET AL., *supra* note 174, at 270.

¹⁷⁹ Andrew V. Papachristos et al., *Social Networks and the Risk of Gunshot Injury*, 89 J. URBAN HEALTH 992, 997 (2012).

¹⁸⁰ *See id.* at 994 (explaining that data came from "non-criminal encounters or observations made by the police," which could include the "reason for the encounter, location, and the names of all individuals involved" or even just the observation of "two or more individuals . . . in each other's presence").

becoming a victim by approximately 25%.¹⁸¹

The second study focused upon a Chicago neighborhood that had a homicide rate of 55 per 100,000 individuals.¹⁸² The study tracked individuals over a five-year period and focused on whether they had been “coarrested” (arrested along with another person, for the same offense) during that timeframe.¹⁸³ At the outset, it was apparent that 41% of gun homicides occurred within a network comprising about 4% of the community.¹⁸⁴ Further analysis showed even stronger patterns: “Simply being arrested during this [five year] period increases the aggregate homicide rate by nearly 50%, but being in a network component with a homicide victim increases the homicide rate by a staggering 900%.”¹⁸⁵

Papachristos’s findings suggest that the key issue in gun control (and issuance of firearms permits) is not so much ensuring that guns are restricted to the best of citizens, but rather that a person’s social network can increase the vulnerability of becoming a murder victim. It seems that a more targeted approach to individuals who associate with murder victims and are constantly surrounded by gun violence will most effectively reduce the risk of violence.

VII. CONCLUSION

Standard of review is the key threshold issue in a challenge to the constitutionality of a statute. In the developing Second Amendment context, all courts have chosen intermediate review as the appropriate standard, but how that is applied is subject to wide variations between the circuits, with some applying it exactly and others treating it as if it were rational basis review.

The best approach involves application of genuine intermediate review, with the government bearing the burden of proof; requiring justification by hard data, rather than speculation; and restricting unjustified overbreadth. As auxiliary tests, rational basis might be applied to measures that impose no real burden on the right to arms, and strict scrutiny to those that burden possession in the home by law-abiding citizens.

¹⁸¹ *Id.* at 999.

¹⁸² Andrew V. Papachristos & Christopher Wildeman, *Network Exposure and Homicide Victimization in an African American Community*, 104 AM. J. PUB. HEALTH 143, 144 (2014).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 145.

¹⁸⁵ *Id.*