ARTICLES

THE TSUNAMI OF LEGAL UNCERTAINTY: WHAT'S A COURT TO DO POST-*MCDONALD?*

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The Article's title is taken from Justice John Paul Stevens's dissenting opinion in McDonald v. Chicago*, where he predicted that the decision would unleash a "tsunami of legal uncertainty, and thus litigation" because the Court failed to provide lower state and federal courts the appropriate standard of review to decide the constitutionality of Second Amendment cases. More than 190 judicial decisions have cited* McDonald *in the fourteen months since it was decided, with many more still being litigated. Without guidance in* McDonald *or its predecessor,* Heller v. District of Columbia*, the lower courts have been forced to find their own way, and these courts have used virtually every recognized standard of review to evaluate Second Amendment challenges. Unlike other constitutional provisions, exercising the Second Amendment right may result in the immediate harm to an individual's life. As a result, this Article proposes that Second Amendment cases should be reviewed under the test utilized in abortion cases: the undue burden test.*

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Some Second Amendment proponents lauded the United States Supreme Court's decisions in *District of Columbia v. Heller*[1] and *McDonald v. City of Chicago*[2] as strong affirmations of the right to bear arms in the United States.[3] These firearms supporters initially did not realize that the decisions left a number of critical issues unresolved, such as which standard of review to apply to Second Amendment[4] legal challenges under the Fifth[5] and Fourteenth Amendments.[6]

The Court's failure to provide lower state and federal courts with the necessary tools to decide the constitutionality of Second Amendment

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1 554 U.S. 570 (2008).

2 561 U.S. 3025, 130 S. Ct. 3020 (2010).

3 *See, e.g.*, Wayne LaPierre and Chris W. Cox, *Statement Regarding U.S. Supreme Court Decision* McDonald v. City of Chicago, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION (June 28, 2010), *available at* http://www.nraila.org/News/Read/NewsReleases.aspx?ID=13956 ("Today marks a great moment in American history. This is a landmark decision. It is a vindication for the great majority of American citizens who have always believed the Second Amendment was an individual right and freedom worth defending.").

4 U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

5 U.S. CONST. amend. V ("No person shall be . . .deprived of life, liberty, or property, without due process of law . . . .").

6 U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .").

claims has unleashed the "tsunami of legal uncertainty, and thus litigation"[7] predicted by Justice John Paul Stevens.[8] Justice Stevens wrote that "the Court could . . . moderate the confusion, upheaval, and burden on the States by adopting a rule that is clear and tightly bound in scope."[9] In the absence of such clarity, Justice Stevens opined that the "decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established."[10]

Part I of this Article reviews how the analytical issues related to the Second Amendment were created and how the Supreme Court has applied various standards of review to constitutional rights in the past. This section primarily examines Equal Protection and Due Process analyses due to the Court's focus on these tests in *Heller* and *McDonald* and the lower courts' interpretations of these cases.[11] Part II then looks at the language regarding standards of review used by the *Heller* and *McDonald* Courts in an effort to determine what standard may be acceptable to a majority of today's Court. Part III examines the standards of review that state and federal courts are relying upon in reviewing the constitutional validity of firearms regulations post-*McDonald*. Part IV proposes utilizing an undue burden test in Second Amendment cases and examines the impact of the undue burden test on the judicial review of firearm regulation in the United States.

I. DETERMINING A STANDARD OF REVIEW

The United States Constitution and its amendments provide guidance to the courts regarding protected rights and government limitations. The Constitution itself, however, does not provide information on how the judiciary should review or evaluate claims of unconstitutional

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[7] *McDonald*, 130 S. Ct. at 3105 (Stevens, J. dissenting) (citing Brief for Municipal Respondents at 20, n.11 (stating that at least 156 Second Amendment challenges were brought in the time between Heller 's issuance and brief's filing); Brady Center Brief at 3 (stating that over 190 Second Amendment challenges were brought in first 18 months since Heller)).

[8] In the first fourteen months after *McDonald*, more than 110 Second Amendment related challenges received written decisions citing to *McDonald*. This figure is based upon an analysis of cases citing to the *McDonald* decision as of September 27, 2011 (list on file with the author). The cases were reviewed to determine whether *McDonald* was cited for Second Amendment analysis purposes or for a different proposition.

[9] *McDonald*, 130 S. Ct. at 3105 (Stevens, J., dissenting).

[10] *Id.* at 3115 (Stevens, J., dissenting).

[11] Some scholars and judges have also looked at the applicability of First Amendment analysis to the Second Amendment, particularly in the area of time, place, and manner restrictions. *See* Nordyke v. King, 644 F.3d 776, 787 (9th Cir. 2011) (comparing Second Amendment analysis to First Amendment time, place, and manner restrictions requiring alternative channels of communication).

acts. Consequently, courts have had to create tests to determine the validity of governmental regulations.

A. The Path to Uncertainty

The Supreme Court has developed a number of jurisprudential analyses to determine whether a constitutional challenge meets the requirements of a particular constitutional right. Consequently, different standards of review have been developed to address issues such as Equal Protection, substantive Due Process, and freedom of speech and religion.[12] The Court has not created a similar framework to determine the constitutional validity of challenges to firearms regulations under the Second Amendment. *Heller* and *McDonald* present an unusual set of circumstances: a 220 year-old enumerated constitutional provision that has seen little Court analysis.[13]

While *Heller* addressed the right of individuals to bear arms for the narrow purpose of lawful self-defense in the home,[14] the decision's impact was limited because the Supreme Court did not address the applicability of the Second Amendment to the states.[15] After *Heller*, a number of cases were filed to address that specific issue.[16] In a plurality decision, the *McDonald* Court resolved the issue by holding that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment right recognized in *Heller*.[17]

More than 190 judicial decisions have cited *McDonald* in the fourteen months since it was decided, with many more still being litigated.[18] Most of these cases questioned the validity of existing firearms statutes or presented challenges to criminal penalties involving firearms.[19] The lower courts are presently applying different standards of review for Sec-

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12 *See* discussion *infra* Part I.B–E

13 *See* Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* MacDonald v. Chicago, 26 J. L. & POL. 273, 274–76 (2011) (explaining the lack of cases and scholarship related to the Second Amendment).

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

15 *McDonald*, 130 S. Ct. at 3026.

16 *See, e.g.*, Justice v. Town of Cicero, 577 F.3d 768, 773–74 (7th Cir. 2009) (holding that the Second Amendment does not apply to the states post-*Heller*); Nat'l Rifle Ass'n of Am. v. City of Chicago, 567 F.3d 856, 857–59 (7th Cir. 2009) (holding that it is the Supreme Court's duty, not an appellate court's, to incorporate the Second Amendment).

17 *McDonald,* 130 S. Ct. at 3050. The issue before the *McDonald* Court was whether the Second Amendment right would be applicable to the states due to incorporation through the Fourteenth Amendment. *See id.* at 3028. While incorporation has great significance for Second Amendment cases, this Article does not address incorporation related issues, but focuses solely on how courts should review the constitutionality of regulations under the Second Amendment post-*McDonald*.

18 This figure is based upon *Shepardizing* the *McDonald* decision on September 27, 2011 (list on file with author).

19 *See* discussion *infra* Part III.

ond Amendment cases, and it is likely that one of these cases will ultimately come before the Supreme Court for clarification on the appropriate legal standard. When the Court establishes a standard of review, it will encourage or discourage litigation depending on how stringent a test is selected.[20] Similarly, the lack of a standard of review will only continue to encourage litigation because neither side will be able to predict the case's outcome.[21] This lack of guidance is basically an open invitation to litigation.[22]

Without guidance in *Heller* and *McDonald*, the lower courts have been forced to find their own way. Many simply avoid standard of review issues if they can fit the instant regulation into one of the categorical bright-line exceptions handed down in *Heller*[23] or if they can demonstrate that the instant statute is sufficiently different from those in *Heller* or *McDonald.*[24] Other courts try to address the problem by picking and choosing from a variety of standards of review that the Court previously recognized in relation to other constitutional amendments.[25] The fact that most of the Justices in the *Heller* and *McDonald* decisions do a bit of mixing and matching from other tests complicates the matter for lower courts attempting to craft sound legal decisions.

Unlike other constitutional provisions, the use of the Second Amendment right may result in immediate harm to an individual's life. As a result, this Article proposes that Second Amendment cases be reviewed under the same test utilized in the Supreme Court's joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[26] and upheld by the majority in *Stenberg v. Carhart*[27]: the undue burden test.

The undue burden test may not satisfy Second Amendment proponents who advocate a restrictive strict scrutiny analysis for firearms regulations[28] or gun control advocates who believe that a rational relationship or reasonableness test should apply to these cases.[29] However, the undue

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20 *See* Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-*Heller *Standard of Review*, 41 U. TOL. L. REV. 43, 57–58 (2009) (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–15 (1993)).

21 *Id.* at 58 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1984)).

22 Michael C. Dorf & Erwin Chemerinsky, *Three Vital Issues: Incorporation of the Second Amendment, Federal Government Power, and Separation of Powers—October 2009 Term*, 27 TOURO L. REV. 125, 137 (2011) (comments of Erwin Chemerinsky).

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

24 *See* discussion *infra* Part III.A.1.

25 *See* discussion *infra* Part III.B.

26 505 U.S. 833, 876 (1992).

27 530 U.S. 914, 921 (2000).

28 *See* Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the* Heller *Paradox*, 33 HARV. J.L. & PUB. POL'Y 203, 205–08 (2010) (citing Respondent's Brief at 54–62; Brief for Amicus Curiae Goldwater Institute in Support of Respondent at 14).

29 *See id.* at 207 (citing Dennis A. Henigan, *Does* Heller *Point the Way to Victory for Reasonable Gun Laws?*, CATO UNBOUND, July 23, 2008, http://www.cato-unbound.org/2008/

burden test does take into consideration the various interests at stake and creates a meaningful test to review Second Amendment regulations.

Firearms regulations are not a recent invention,[30] and it is estimated that there are currently 20,000 gun control laws in the United States.[31] While the *Heller* and *McDonald* decisions state that local governments do not have carte blanche to regulate firearms, they do indicate that some regulations will be permissible.[32] Courts will inevitably be asked to determine which regulations are permissible and the appropriate way to evaluate these laws under the Second Amendment.

This Article attempts to provide direction to courts grappling with the responsibility of determining the validity of firearms regulations.

B. Equal Protection

In Equal Protection Clause[33] cases, the Court has developed different levels of review that apply specific tests based on the classification of the group affected by the government's actions. Discrimination on the bases of race or national origin, for example, faces the most exacting level of review in strict scrutiny.[34] In order for a regulation to be valid under strict scrutiny, a court must find that the regulation is "narrowly

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07/23/dennis-henigan/does-heller-point-the-way-to-victory-for-reasonable-gun-laws/ (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007) [hereinafter *Scrutinizing*])).

30 Patrick J. Charles, *Scribble Scrabble, The Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. 227, 228 (2010) (citing THE LAWS OF THE EARLIEST ENGLISH KINGS 69 (F.L. Attenborough ed., 1922)) (noting that "arms" regulations can be traced back to the time of the Norman Conquest when restrictions began on the carrying or use of "arms" as a means to prevent public injuries); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3131–32 (2010) (Breyer, J., dissenting) (stating that firearms were heavily regulated at the time of the constitution's framing); District of Columbia v. Heller, 554 U.S. 570, 683–86 (2008) (Breyer, J., dissenting) (asserting that colonial cities, including Boston, Philadelphia, and New York, began regulating the storage and discharge of guns in the eighteenth century); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 382 (2011) (explaining that forty-two states protect an individual right to bear arms and two states are equivocal on the matter (citing Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192 (2006); *Scrutinizing*, *supra* note 29, at 711 (discussing the uniform history of gun control among the states)).

31 Tina Mehr & Adam Winkler, Issue Brief, *The Standardless Second Amendment*, AM. CONST. SOC'Y FOR L. & POL'Y (Oct. 2010), *available at* http://www.acslaw.org/files/Mehr%20and%20Winkler%20Standardless%20Second%20Amendment.pdf.

32 *Heller*, 554 U.S. at 626–27; *McDonald*, 130 S. Ct. at 3045–56.

33 *See* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (noting that the federal government is similarly limited by the Fifth Amendment Due Process Clause).

34 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (asserting that race-based affirmative action programs must meet strict scrutiny); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (asserting that racial classifications are suspect and "subject to most exacting scrutiny").

tailored to achieve a compelling governmental interest,"[35] and it is no more restrictive than necessary to achieve the purported governmental interest.[36] Under this standard, the statute is presumptively unconstitutional,[37] and, in the Equal Protection context, the test is typically described as being "strict in theory and fatal in fact."[38]

The Supreme Court reserved intermediate scrutiny for discrimination on the bases of gender[39] and illegitimacy.[40] Under the intermediate level of scrutiny, a valid Equal Protection restriction "must serve important governmental objectives and must be substantially related to achievement of those objectives."[41] The burden of proof remains with the government, and it is "demanding" and not easily met.[42]

The lowest level of review is the rational basis test—a highly deferential form of scrutiny.[43] In order for a regulation to survive rational basis review, the challenger must prove that the regulation does not bear a "rational relationship" to a "legitimate governmental purpose."[44] Most Equal Protection challenges that are subject to the rational basis test fail because it is relatively easy to find a legitimate governmental interest, and courts generally give great deference to the government.[45] Despite the ease of meeting the rational basis standard, there are successful Equal Protection challenges, including cases where courts have applied what some consider to be a more stringent version of the rational basis test[46]—often referred to as rational basis with a bite.[47]

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35 *Heller*, 554 U.S. at 688 (Breyer, J., dissenting) (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)).

36 *Scrutinizing*, *supra* note 29, at 691 (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 416 (1997)).

37 *Id.* at 694–95.

38 Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

39 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

40 *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

41 *Craig*, 429 U.S. at 197.

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

43 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 677 (2006).

44 District of Columbia v. Heller, 554 U.S. 570, 687–88 (2008) (Breyer, J., dissenting) (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)); *see* F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993).

45 *See Beach Commc'ns, Inc.*, 508 U.S. at 314–15.

46 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632–636 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

47 *See* R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279, 1291 & n.47 (1994).

C. Due Process

Substantive Due Process[48] challenges may invoke both Fourteenth Amendment protections and Bill of Rights guarantees, which the Fourteenth Amendment incorporates to apply to the states.[49]

Equal Protection and Due Process analyses exist in somewhat parallel universes. While some constitutional challenges rely on both Equal Protection and Due Process claims, courts apply different tests to analyze the respective provisions. Equal Protection analysis focuses on whether the government can meet the appropriate interest level required to justify its discrimination against an individual or group based upon a group classification.[50] Due Process, on the other hand, looks at whether the government's infringement of an individual right is sufficiently justified.[51] Substantive Due Process claims may require courts to balance the respect for an individual's liberty and "the demands of organized society."[52] Unfortunately, the respective tests and their applications are sometimes interwoven without clarification.[53]

The Court's substantive Due Process jurisprudence includes strict scrutiny and rational basis standards of review, yet these analyses are not necessarily applied in the same manner as in Equal Protection Clause cases.[54] For example, Due Process strict scrutiny is not as "fatal in fact" as strict scrutiny under Equal Protection review, depending on the right at issue.[55] Similarly, Equal Protection strict scrutiny for race-based classifications is very exacting, but strict scrutiny analysis for fundamental rights under Due Process is not applied as rigidly.[56]

In applying a Due Process analysis to infringements of fundamental rights, courts often engage in the most stringent form of judicial re-

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48 *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . . ").

49 McDonald v. City of Chicago, 130 S. Ct. 3020, 3034–35 n.12 (2010) (citing examples of incorporation of the First, Fourth, Sixth and Eighth Amendments).

50 CHEMERINSKY, *supra* note 43, at 793.

51 *Id.*

52 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 834 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961)).

53 *See, e.g., McDonald,* 130 S. Ct. at 3115–16 (Stevens, J., dissenting); District of Columbia v. Heller, 554 U.S. 570, 629 (2008). *See also* discussion *infra* Part II.B.4 of United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

54 The comparative vigorousness of constitutional analysis is not limited to Equal Protection and Due Process claims. Many First Amendment free speech rights are more vigorously protected than Fourth Amendment search and seizure claims. *See* Denning & Reynolds, *supra* note 13, at 277 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. —, 130 S. Ct. 876 (2010) (holding campaign finance reforms violate free speech); United States v. Leon, 468 U.S. 897 (1984) (creating the "good faith exception" to exclusionary rule)).

55 Gunther, *supra* note 38, at 8.

56 *See* Burson v. Freeman, 504 U.S. 191 (1992) (applying strict scrutiny less rigidly when the compelling state interest is in preventing voter intimidation and election fraud).

view.[57] However, not all so-called "fundamental rights" receive strict scrutiny analysis; for example, there are a number of First,[58] Fourth,[59] Fifth,[60] and Sixth[61] Amendment standards of review that do not incorporate strict scrutiny in any way.

While Due Process decisions typically break standards of review into the strict scrutiny and rational basis categories, some cases or types of cases have carved out variations on the theme. There is no categorical intermediate standard of review in Due Process claims like there is in Equal Protection Clause cases, but the Court has fashioned at least one test under substantive Due Process that lies between strict scrutiny and rational basis analysis: the undue burden test.

The undue burden test is a heightened form of review, but it does not fit neatly into one of the above categories. In *Roe v. Wade*, the Court specifically stated that a woman has the right to an abortion and used the strict scrutiny framework.[62] The Court then began applying the undue burden test to reproductive rights cases post-*Roe*.[63]

Casey's joint opinion declared that the undue burden test was "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[64] The decision added that the use of

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57 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (fundamental right to marriage); Meyer v. Nebraska, 262 U.S. 390 (1923) (fundamental right of parents to make child-rearing decisions).

58 First Amendment cases utilize a wide variety of jurisprudential tests. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980) (holding that constitutionality of commercial speech is subject to a four-part test, including whether there is a "substantial governmental interest"); Miller v. California, 413 U.S. 15 (1973) (obscene material is not protected by First Amendment); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (using a variety of tests such as content neutral time, place, and manner restrictions to assess indirect or incidental burdens on speech as compared to cases that determine whether a restriction is narrowly tailored to a significant government interest and leaves open alternative channels of communication).

59 Fourth Amendment cases utilize a variety of jurisprudential tests. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (directing courts to consider the "totality of the circumstances" when determining whether there is probable cause to issue a search warrant); Terry v. Ohio, 392 U.S. 1 (1968) (requiring "reasonable suspicion" of criminal activity to briefly detain a suspect); Carroll v. United States, 267 U.S. 132 (1925) (holding that the legality of seizure depends on an officer having "reasonable and probable cause" to search).

60 The Fifth Amendment requires "custodial interrogation" and consideration of the totality of objective circumstances to determine if a suspect has been appropriately warned of their rights. *See* Yarborough v. Alvarado, 541 U.S. 652 (2004).

61 Courts use a four-part balancing test in analyzing the right to a speedy trial under the Sixth Amendment. *See* Barker v. Wingo, 407 U.S. 514 (1972) (considering the length of delay, reason for delay, time and manner defendant asserted their right, and the degree of prejudice to the defendant caused by the delay).

62 Roe v. Wade, 410 U.S. 113, 163–65 (1973).

63 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (citing a number of cases utilizing the undue burden test).

64 *Id.*

the undue burden test left *Roe's* central holding intact[65] and that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion . . . ."[66] The Court strengthened the precedential value of the undue burden test with majority support in *Stenberg v. Carhart*.[67] Almost all other Due Process challenges fall under a rational basis test that is similar to that followed in Equal Protection analyses. The rational basis test in both contexts is typically easy to achieve but has occasional bite.[68]

D. Reasonableness Test in State Courts

State courts overwhelmingly applied the reasonableness test in pre-*McDonald* cases to assess the constitutionality of firearm regulations under state constitutions.[69] While the reasonable regulation standard is similar to the rational basis test in terms of its relatively deferential nature, the reasonable regulation standard is more limited—arbitrary laws or laws that are so restrictive that they "destroy" or "nullify" the right will fail due to unreasonableness.[70] Few state gun laws limiting an individual's right to bear arms have been invalidated under this standard.[71]

E. Further Considerations

A court's work does not end once it knows the amendment at issue, group classification, or nature of the right allegedly being burdened. A court usually looks at other factors such as the public versus private nature of the right at issue in order to determine a standard of review. Under the Fourth and Fifth Amendments, courts consider privacy con-

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65 *Id.* at 879.

66 *Id.* at 878.

67 *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000).

68 *See* Lawrence v. Texas, 539 U.S. 558 (2003). The Court focused on the right to privacy, but failed to articulate which standard of review it used in determining that the law was invalid. *See id.* Even though the Court appeared to say that sexual privacy was a fundamental right, it utilized rational basis language by stating that the Texas law did not further a legitimate interest. *See id.* at 578. Some courts have interpreted this analysis as rational basis with bite and have utilized the rational basis test in *Lawrence's* wake. *See, e.g.*, Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004) (upholding law that prohibits sale, distribution, or possession of "sex toys").

69 *Scrutinizing*, *supra* note 29, at 686–87 (noting that state courts have never applied "strict scrutiny or any other type of heightened review to gun laws," and that state courts' uniformly applied standard permits constitutionally reasonable regulations of the right). *But see* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1119 (2010) (disputing Adam Winkler's statements that state courts do not apply strict scrutiny or any other type of heightened review to gun laws).

70 *Scrutinizing*, *supra* note 29, at 688.

71 *Id.* (finding only six published judicial opinions that have invalidated gun control laws).

cerns to be highest in the home,[72] but the Court does not prohibit all governmental intrusions of the home as a violation of these rights.[73] Similarly, individuals have the right to possess pornography in the home,[74] but there are still valid constitutional limitations of that right.[75] Further, timing may affect an individual's ability to engage in a right, such as the ability to choose an abortion before or after viability.[76] These factors show that even when a regulation appears to fit into a particular analytical rubric, courts will still look to other considerations to determine how or if the right is protected.

The *Heller* and *McDonald* opinions discuss many of the evaluative issues above, yet the Court failed to select a specific standard of review for Second Amendment issues. Part II below examines the language these decisions used in discussing the various levels of review and the implicated factors.

II. CLUES FROM *HELLER* AND *MCDONALD*

The Supreme Court's analyses in *Heller* and *McDonald* failed to set a clear standard of review for lower courts to follow in future cases. *Heller* avoided the issue by proclaiming that the District of Columbia's ban was unconstitutional under any standard of scrutiny previously applied to enumerated constitutional rights.[77] It does not appear that the Court in either case was concerned by the lack of direction provided to the courts.

There is, however, some language within the various *McDonald* and *Heller* opinions that provide clues as to what evaluative standard the Court may or may not find acceptable in future litigation.[78] While the decisions did not provide a standard of review for lower courts, they also did not incorporate an unqualified Second Amendment fundamental right. This section looks at *Heller* and *McDonald's* limiting language and then focuses on the various standards of review discussed in the cases.

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72 *See* Kyllo v. United States, 533 U.S. 27, 37–40 (2001).

73 *See* Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (recognizing that warrantless searches of homes are permissible if exigent circumstances exist).

74 Stanley v. Georgia, 394 U.S. 557, 568 (1969).

75 Osborne v. Ohio, 495 U.S. 103, 108–09 (1990) (holding that *Stanley* should not be read broadly and does not apply to child pornography).

76 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835–36 (1992).

77 District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

78 *See infra* Part II.A-B.

A. The Second Amendment Right Is Limited

The Court noted in both *Heller* and *McDonald* that incorporation of the Second Amendment did not prohibit all firearms regulations.[79] Justice Scalia's majority decision in *Heller* stated that: "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases . . . the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[80] The Court reasoned that even though a fundamental right's guarantee is fully binding on the states, it *limits*, but by no means eliminates, a sub-federal government's ability to devise solutions that suit local needs and values.[81] The *McDonald* Court noted that the thirty-eight amici states supporting the petitioners declared that state and local governments would continue to experiment with reasonable firearms regulations under the Second Amendment.[82] Justice Stevens agreed in his dissent that state and local governments should be able to "try novel social and economic policies" as long as they are not "arbitrary, capricious, or unreasonable."[83]

Some scholars have also focused on language in the cases recognizing types of presumptively valid firearms regulations:[84]

> [The *Heller* decision] did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of 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." We repeat these assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.[85]

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79 *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010); *see also* Denning & Reynolds, *supra* note 13, at 296.

80 *Heller*, 554 U.S. at 626 (citations omitted).

81 *McDonald*, 130 S. Ct. at 3046.

82 *Id.* (citing Brief for State of Texas et al. as Amici Curiae Supporting Petitioners at 23). The supporting amici further demonstrate this concept by citing to court decisions upholding state and local firearms regulations. *Id*. at 3047.

83 *Id.* at 3114 (Stevens, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

84 *See* Mehr & Winkler, *supra* note 31, at 2; *see also* Robert J. Cahall, Note, *Local Gun Control Laws After* District of Columbia v. Heller*: Silver Bullets or Shooting Blanks? The Case for Strong State Preemption of Local Gun Control Laws*, 7 RUTGERS J.L. & PUB. POL'Y 359, 384 (2010) (discussing the effect of *Heller* on certain state gun-regulation schemes).

85 *McDonald*, 130 S. Ct. at 3047 (citing *Heller*, 554 U.S. at 626–27).

Justice Scalia's concurring opinion and Justice Steven's dissent agreed that no fundamental right is absolute.[86]

The Court in *Heller*, however, noted that this list of presumptively valid regulations is not exhaustive.[87] The list may clarify the validity of some regulations, but it also leads to questions regarding why some regulations made the list and others did not and how those regulations that are not listed should be evaluated in the future.[88] For example, since not all of the presumptively valid regulations date back to the time of the Founders, it is unclear how a court should determine which regulations are longstanding.[89]

The Court also appeared to allow firearms that are commonly used by law-abiding citizens but prohibited regulations that would eviscerate the core right of self-defense in the home, such as those requiring firearms in the home to be dissembled or locked.[90] Consequently, future courts may need to address the validity of firearms regulations on a case-by-case basis depending on the type of gun that is subject to the particular regulation.

Heller and *McDonald* send the message that the Court will not prevent state and local governments from limiting the Second Amendment right in all circumstances. Because the Second Amendment right is not absolute, courts need a consistent framework to apply to the regulations that legislative bodies will inevitably pass. The Court will then be called upon to provide an analytical structure for lower courts to determine if non-presumptively valid firearms regulations not under *Heller* and *McDonald* are valid.

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86 *Id.* at 3056 (Scalia, J., concurring) ("The traditional restrictions go to show the scope of the right, not its lack of fundamental character."); *id*. at 3101 (Stevens, J., dissenting) ("More fundamental rights may receive more robust judicial protection, but the strength of the individual's liberty interests and the State's regulatory interests must always be assessed and compared. No right is absolute.").

87 *Heller*, 554 U.S. at 627 n.26.

88 Justice Breyer questioned the Court's haphazardly created rules relating to the firearms regulations of felons, the mentally ill, sensitive places like schools and government buildings, and the commercial sale of arms. *McDonald*, 130 S. Ct. at 3126–27 (Breyer, J., dissenting). Justice Breyer also queried why these regulations were valid but others were not. *Id.* (Breyer, J., dissenting) (referring to the list of longstanding valid firearms regulations in *Heller* and *McDonald*). Professor Mark Tushnet offers that these categories were tacked on to the *Heller* decision in order to secure the fifth vote. Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009).

89 Some argue that the Second Amendment protects only those firearms existing in the eighteenth century. *See Heller*, 544 U.S. at 582. But others suggest: "Just as the First Amendment protects modern forms of communications, *e.g.*, Reno v. American Civil Liberties Union, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, Kyllo v. United States, 533 U.S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.*

90 *Id.* at 628–30.

B. Standards of Review

Based upon the *McDonald* and *Heller* decisions, the Court appears unlikely to accept a number of proposed tests. By rejecting these tests, the Court limits itself to what it may be willing to support in the future. This process of elimination has led some scholars and judges to suggest that a form of intermediate or heightened scrutiny standard will be the only one available in the future.[91]

1. Rational Basis Rejected

The Court in *Heller* declined to use the most lenient test, the rational basis test, in Second Amendment cases:

> Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms . . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.[92]

Even though fundamental rights are not always analyzed under the same standard of review, it appears that the Court was not willing to accept any version of the rational basis test, even one with a bite. *Heller's* language demonstrates that the Court will accord more serious treatment to alleged violations of fundamental rights, including the right to keep and bear arms for self-defense in the home.[93]

2. Reasonableness Test Rejected

Justice Alito, writing for the *McDonald* plurality, rejected the municipal respondents' argument that state and local governments should be able "to enact any gun control law that they deem to be reasonable."[94]

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91 *See* Cahall, *supra* note 84, at 363 (citing Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. CAL. L. REV. 547 (2009)).

92 *Heller*, 554 U.S. at 628–29 n.27 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)). Justice Scalia explained that rational-basis scrutiny is used to evaluate laws "under constitutional commands that are themselves prohibitions on irrational laws." *Id.* (citing Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 601–03 (2008)). He further stated that for these types of laws, the rational basis test is not merely a standard of scrutiny, "but the very substance of the constitutional guarantee." *Id.*

93 *See Heller*, 554 U.S. 570 (2008).

94 McDonald v. City of Chicago, 130 S. Ct. 3020, 3046 (2010) (citing Brief for Municipal Respondents at 18–20, 23).

Justice Breyer's dissenting opinion in *McDonald* suggested the reasonableness test because it was used in many state court decisions. These decisions generally held that state constitutional provisions protecting gun possession[95] "typically do no more than guarantee that a gun regulation will be a *reasonable* police power regulation."[96] Justice Breyer explained that these states have almost uniformly interpreted the right to bear arms as providing protection from *unreasonable* regulations and their "courts have normally adopted a highly deferential attitude towards" firearm regulations.[97]

The Supreme Court, however, largely ignores state doctrine when it constructs federal constitutional rules, even when the states have a well-articulated doctrine and the Court has not dealt with the issue.[98] The Court's rejection of the reasonableness test is consistent with this premise.

3. Interest-Balancing Rejected

Justice Breyer's *Heller* dissent recommended an interest-balancing test for evaluating regulations under the Second Amendment.[99] Justice Breyer further explained in his *McDonald* dissent that, under this standard, courts would determine whether a gun regulation is constitutionally valid by weighing the constitutional right to bear arms against the government's concern for the safety and lives of its citizens.[100] The *Heller*

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95 Blocher, *supra* note 30, at 382 (forty-two states protect an individual right to bear arms and two states are equivocal on the matter (citing Volokh, *supra* note 30, at 192; *Scrutinizing*, *supra* note 29, at 686, 711)).

96 *McDonald*, 130 S. Ct. at 3130 (Breyer, J., dissenting) (citing *Scrutinizing*, *supra* note 29, at 716–17) (italics in original).

97 *Id.* at 3135 (citing *Scrutinizing*, *supra* note 29, at 686, 716–17) (italics in original). In fact, in the sixty years prior to Professor Adam Winkler's 2007 article analyzing state constitutional challenges to firearms regulations, state courts struck down only six gun control regulations. *Scrutinizing*, *supra* note 29, at 718.

98 Blocher, *supra* note 30, at 325–26. Some may feel that the dismissal of significant state doctrine offends their innate sense of judicial fairness because they expect state and federal courts to use the same rules to review constitutionally protected individual rights. *See* Denning & Reynolds, *supra* note 13, at 278. Professors Denning and Reynolds compare *Heller* and *McDonald* to *Bolling v. Sharpe*, 347 U.S. 947 (1954), which invalidated school desegregation in the District of Columbia, and *Brown v. Board of Education*, 347 U.S. 483 (1954), which invalidated state-mandated public school segregation. *Id.* The *Brown* Court said, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.* at 278. If the Court establishes a standard that is "higher" than the states' reasonableness test, it would displace state constitutional law on the issue and result in a new round of litigation to re-examine regulations that were previously upheld in state courts under the reasonableness test. *See* Blocher, *supra* note 30, at 383.

99 District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).

100 *McDonald*, 130 S. Ct. at 3126 (Breyer, J., dissenting) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)). *See also*, Ryan L. Card, Note, *An Opinion Without Standards: The Supreme Court's Refusal to Adopt a Standard of Review in* District of Columbia v. Heller *Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*,

majority rejected Justice Breyer's proposed standard, noting that it knew of no other enumerated constitutional right that subjected its core protection to an interest-balancing approach.[101] Such an approach, opined Justice Scalia, would not amount to a constitutional guarantee.[102]

Heller's dismissal of the interest-balancing tests utilized by state courts did not dissuade Justice Breyer from urging an interest-balancing test again in *McDonald*.[103] Justice Breyer suggested that the Court could make it easier on itself and other courts by adopting a "jurisprudential approach similar to the many state courts that administer a state constitutional right to bear arms."[104]

McDonald's plurality did not venture far from *Heller* in rejecting the interest-balancing test. Justice Alito simply noted the municipal respondents' argument that most state courts have used interest-balancing and sustained a variety of restrictions.[105] He then cited to *Heller* where the Court "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing."[106]

4. Strict Scrutiny Test in Debate

The *McDonald* plurality left open for interpretation whether its designation of the right to bear arms for self-defense as a "fundamental right" meant that strict scrutiny would be the appropriate standard of review. Justice Scalia's reasoning in *Heller* that enumerated rights as a

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23 BYU J. PUB. L. 259, 284–85 (2009) (discussing Justice Breyer's interest-balancing approach). While Justice Breyer's interest-balancing test and the proposed undue burden test may appear to be quite similar, there is a real difference between the two: interest-balancing pits one interest against the other while the undue burden analysis focus more on the burden placed on the individual attempting to exert their constitutional right. This is discussed in more detail in Part IV, *infra*.

101 *Heller*, 554 U.S. at 634–35.

102 *Id.* at 634.

103 *McDonald*, 130 S. Ct. at 3126–27 (Breyer, J., dissenting).

104 *Id*. at 3126. *See* Blocher, *supra* note 30, at 381–82. Justice Stevens' *McDonald* dissent also pointed out that respondents and their amici easily supported the fact that there is a consensus among the states recognizing firearms rights, that arms possession is subject to interest-balancing, and that there are ample historical examples of banning weapons used for self-defense when it is necessary for the public welfare. *McDonald*, 130 S. Ct. at 3113 n.42 (Stevens, J., dissenting) (citing Brief for Municipal Respondents at 24).

105 *McDonald*, 130 S. Ct. at 3047 (citing Brief for Municipal Respondents at 23–31).

106 *Id.* (citing *Heller*, 554 U.S. at 634).

whole deserve strict scrutiny may tempt some scholars[107] and judges[108] to use the highest level of review for Second Amendment related regulations.

Justice Scalia quoted *Carolene Products*' famous footnote four[109] to bolster his support for a stringent evaluative test for enumerated rights.[110] "There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ."[111] *Carolene Products*' footnote four, however, specifically addressed Equal Protection Clause jurisprudence and was not a statement regarding fundamental rights generally. Justice Scalia's reliance on this language is an example of the Court borrowing the reasoning from one constitutional amendment's analysis to support the analysis of a different amendment.[112] Scalia in no other way used Equal Protection review analysis to evaluate Second Amendment claims.

Justice Stevens's *McDonald* dissent utilized a different part of the *Carolene Products*' footnote to support his argument that the Second Amendment does not call for a heightened judicial inquiry because there is no "special condition" related to gun owners.[113] He relied on the language that addressed discrete and insular minorities as deserving more

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107 *See* Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011). Professor Malcolm supports a strict scrutiny standard of review, explaining that "fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment . . . freedom of speech should also be applied to Second Amendment rights." *Id.* (citing Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978–88 (2010); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010)). Professor Malcolm does note that not all speech restrictions are accorded a strict scrutiny standard of review. *Id.* at 455 n.114. *See also* Lindsey Craven, Note, *Where Do We Go from Here? Handgun Regulation in a Post-*Heller *World*, 18 WM. & MARY BILL OF RTS. J. 831, 842–44 (2010) (citing Calvin Massey, *Guns, Extremists, and the Constitution,* 57 WASH. & LEE L. REV. 1095, 1132–33 (2000) (supporting semi-strict scrutiny); Nelson Lund, *The Past and Future of the Individual's Right to Bear Arms,* 31 GA. L. REV. 1, 49 (1996)); Kopel & Cramer, *supra* note 69, at 1121–22 (citing to scholars, students, and others supporting a "semi-strict scrutiny" or a "deferential strict scrutiny" standard).

108 *See* strict scrutiny discussion *infra* Part III.

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

110 *See Heller*, 554 U.S. at 629 n.27 (2008) (referencing *Carolene Products* footnote four to signal that the Court will rigorously protect enumerated rights); *see also* Levy, *supra* note 28, at 206 (citing to Justice Scalia's use of *Carolene Products* footnote four).

111 *Heller*, 554 U.S. at 629 n.27 (quoting *Carolene Products*, 304 U.S. at 152 n.4).

112 *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 475–76 (2010). Borrowing or "hedging" occurs when the Court selects one rationale over another, but blurs the differences between the two. *See id.* Hedging may be seen as an effort to reduce the risks and disadvantages of making a doctrinal commitment to a single standard. *See id.*

113 *See* McDonald v. City of Chicago, 130 S. Ct. 3020*,* 3115–16 n.48 (2010) (Stevens, J., dissenting).

searching scrutiny[114] and concluded that gun owners are not a group needing protection due to their considerable political power and the fact that they do not appear to suffer from a systematic political disadvantage.[115] Unlike discrete and insular groups typically accorded greater protections under the Constitution, gun owners are viewed as politically powerful and have influenced legislation and elections on the local, state, and federal level.[116]

This is another example of one of the justices looking to *Carolene Products*' Equal Protection analysis but applying it to another amendment in a different context. Here, Justice Stevens utilizes Equal Protection analysis to reject a strict scrutiny standard of review for the Second Amendment by stating that gun owners are not the type of marginalized group that deserves a more exacting standard of review.

Justice Breyer opposes strict scrutiny review on other grounds. He opines that the *Heller* majority implicitly rejected strict scrutiny when it handed down its approved list of firearms regulations cited above.[117] If these categories of restrictions are "presumptively lawful,"[118] then these types of regulations would always serve a sufficiently compelling governmental interest. As a result, a Court determination that strict scrutiny is the appropriate standard of review would be strict in name only, and the Court would consequently utilize a much weaker version of the test than currently relied upon by Equal Protection and Due Process analyses.

5. The Available Standards of Review

By process of elimination, the only tests that remain available for reviewing Second Amendment claims are some form of intermediate scrutiny or a modified strict scrutiny analysis.[119] Justice Stevens's dissent in *McDonald* provided suggestions on how to analyze Second Amendment regulations in the future. Justice Stevens suggested that the ultimate standard may be "more deferential to those laws than the status

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114 *See id.* (referencing *Carolene Products*, 304 U.S. at 153 n.4 ("[P]rejudice 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 minorities, and which may call for a correspondingly more searching judicial inquiry.")).

115 *See id.* (quoting Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 260 (2008)).

116 *See id.* (quoting *Carolene Products*, 304 U.S. at 153 n.4; David B. Kopel, *Hold Your Fire*, 63 POL'Y REV. 58 (1993)).

117 *See* Card, *supra* note 100, at 282 (citing District of Columbia v. Heller, 554 U.S. 570, 688 (2008) (Breyer, J., dissenting)).

118 *Heller*, 554 U.S. at 627 n.26; *see* Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. CAL. L. REV. 547, 572 (2009) (citing *Heller*, 554 U.S. at 688).

119 *See* Card, *supra* note 100, at 286–87 ("The intermediate-scrutiny approach is the only standard not rejected by the Court . . . .").

quo ante" and that the "courts will have little choice but to fix a highly flexible standard of review if they are to avoid leaving federalism and the separation of powers—not to mention gun policy—in shambles."[120]

Justices Stevens and Breyer looked at some of the additional considerations that factor in determining the validity of a firearms regulation.[121] Justice Stevens drew distinctions between the state's ability to regulate private versus public acts.[122] He concluded that an individual's Second Amendment interest is heightened in the home while the state's corresponding interest is weaker because the state generally has a lower interest in regulating private acts.[123] He reinforced this point by referencing historical state regulations of guns that imposed stricter and less controversial restrictions for guns outside the home than for guns inside the home.[124]

Justice Breyer's dissent, however, argued that the mere "use of arms for private self-defense does not warrant federal constitutional protection from state regulation."[125] Justice Breyer criticized the use of different tests based upon the private location of the gun.[126] As discussed previously, the Second Amendment, like other types of rights, may be treated differently in the home, but this does not mean that an individual has the unfettered right to firearms because it is so-called private or at-home conduct.

While the *McDonald* plurality expressly rejected the interest-balancing, reasonableness, and rational basis approaches,[127] it did not explicitly address the appropriate standard for evaluating Second Amendment challenges. This lack of guidance has resulted in the judicial "tsunami" that Justice Stevens predicted.[128]

III. SECOND AMENDMENT ANALYSES IN A POST-*MCDONALD* WORLD

As Justice Stevens predicted, *Heller* and *McDonald* were just the beginning of Second Amendment litigation.[129] Scholars and

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120 *McDonald*, 130 S. Ct. at 3095 n.13 (Stevens, J., dissenting) (citing Brief for Brady Center to Prevent Gun Violence, et al. as Amici Curiae).

121 *See* discussion *supra* Part I.E.

122 *McDonald*, 130 S. Ct. at 3103–05 (Stevens, J., dissenting).

123 *Id.* at 1305.

124 *Id.*

125 *Id.* at 3120 (Breyer, J., dissenting).

126 *Id.*

127 *See id.* at 3045–47 (plurality opinion).

128 *See id.* at 3105 (Stevens, J., dissenting).

129 Prior to the Court's decision in *Heller*, few Second Amendment claims reached the United States Supreme Court. *See* Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1540 (2009). One of Heller's attorneys referred to the Second Amendment as "a sort of constitutional Loch Ness Monster: Despite occasional reported sightings, many people—and certainly most

judges[130] foresaw a period of litigation that would enmesh lower courts in firearms decisions, by creating a volume of cases that some critics believe the courts do not have the institutional capacity to handle.[131] In fact, Judge J. Harvie Wilkinson of the U.S. Court of Appeals for the Fourth Circuit stated that the federal docket post-*Heller* "threaten[ed] to suck the courts into a quagmire."[132] These commentators see *Heller* as the prologue and *McDonald* as the first battle in a long-term effort to determine the parameters of firearms laws.[133]

There was relatively little litigation related to the Second Amendment in comparison to other federal constitutional amendments prior to *Heller* and *McDonald*.[134] As a result, there was no real need for courts to address which constitutional standard of review should be applied to Second Amendment cases. This section looks at how courts have decided cases involving Second Amendment issues post-*Heller* and *McDonald*, and then it more closely examines the Ninth Circuit's recent decision, relying on a substantial burden analysis of a local firearms ordinance.[135]

A. Avoidance of Standards of Review

One of the simplest ways for a court to avoid the standard of review dilemma[136] is to base its decision on one of the pre-approved categorical distinctions provided by *Heller* and *McDonald*.[137] These categorical distinctions include regulations related to felons, the mentally ill, sensitive places such as schools and government buildings, conditions and qualifi-

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judges—were inclined to believe it did not really exist." *Id.* (quoting Clark Neily, District of Columbia v. Heller*: The Second Amendment is Back, Baby*, 2007–08 CATO SUP. CT. REV. 127, 127 (2008)).

130 *See* Adam Winkler, Heller'*s Catch-22*, 56 UCLA L. REV. 1551, 1565 (2009) (citing Richard Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 34) [hereinafter *Catch-22*].

131 Denning & Reynolds, *supra* note 13, at 301 (citing William G. Merkel, Heller *as Hubris: How* McDonald v. City of Chicago *May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221 (2010)).

132 J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009).

133 Denning & Reynolds, *supra* note 13, at 301.

134 *See supra* note 129.

135 Nordyke v. King, 644 F.3d 776 (9th Cir. 2011).

136 *See* Brannon P. Denning, Essay, *The New Doctrinalism in Constitutional Scholarship and* District of Columbia v. Heller, 75 TENN. L. REV. 789, 799 (2008) ("Lower courts may refuse to infer a standard from the clues the Court provided . . . and may find it easier to narrow *Heller* or even avoid it altogether.").

137 *See* McDonald v. Chicago, 130 S. Ct. 3020, 3047 (2010) (citing District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008)). *See also* Mehr & Winkler, *supra* note 31, at 2 (citing Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009)).

cations on the commercial sale of arms,[138] and circumstantial factors such as home use.[139] The courts that choose this avoidance methodology merely look to see if the regulation is on the presumptively valid list articulated in *Heller* and *McDonald*.[140] If so, the court holds that the regulation or alleged infringement is constitutionally valid, thereby opting out of any type of standard of review analysis by relying on the pre-approved categories of regulations.[141]

1. Presumptively Valid Regulations

A number of court decisions have analyzed presumptively valid regulations concerning felons, mentally ill individuals, and sensitive places. Some courts cases involving felons' firearms rights have utilized specific standards of review while others have used the categorical exemptions of *Heller* and *McDonald* to dispose of the cases based on the felony status of the individual asserting their Second Amendment right.[142] This issue has been the subject of many court decisions since *McDonald* where individuals have challenged the constitutionality of 18 U.S.C. § 922, a gun regulation statute.[143] These decisions include *United States v. Kanios*, where the defendant was charged with illegal possession of a firearm by a felon under 18 U.S.C. §§ 922(g)(1) and 942(a)(2).[144] The *Kanios* court held that the defendant's indictment under these laws did not infringe upon his Second Amendment rights because language regarding felons in *Heller* and *McDonald* supported the result.[145]

The mentally ill related text has been discussed in cases such *United States v. Roy*, where the court held that a defendant who has been involuntarily committed to a mental institution does not have a Second Amendment right to bear arms post-*Heller* and *McDonald*.[146]

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138 *See id.*

139 *See supra* Part II.A.

140 *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–82 (2009).

141 Mehr & Winkler, *supra* note 31, at 2 (stating that eighty percent of the more than two hundred cases in a little more than a year post-*Heller* upheld firearms regulations based on a *Heller* or other similar categorical exceptions.).

142 *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698–13 (2009) (surveying the history of state laws limiting convicts' entitlement to possess firearms).

143 *See, e.g.*, United States v. Davis, 406 Fed. App'x 52, 53–54 (7th Cir. 2010) (rejecting defendant's argument that possession of firearm by a felon was constitutional because he had the Second Amendment right to possession at home).

144 United States v. Kanios, No. 1:10cr100, 2011 U.S. Dist. LEXIS 22609, at *2 (N.D.W. Va. Feb. 18, 2011).

145 *Id.* at *3–6.

146 *See* United States v. Roy, 742 F. Supp. 2d 150, 152 (D. Me. 2010) (citing United States v. Burhoe, No. CR-06-57-B-W, 2010 U.S. Dist. LEXIS 100397, at *2 (D. Me. Sept. 21, 2010); United States v. Zetterman, No. CR-09-54-B-W, 2010 U.S. Dist. LEXIS 25228, at *2 (D. Me. Mar. 17, 2010); United States v. Small, No. CR-09-184-B-W, 2010 U.S. Dist. LEXIS

According to *Heller* and *McDonald*, governments can make presumptively valid prohibitions on firearms in sensitive places such as schools and government buildings.[147] In cases such as *Hall v. Garcia*, where the plaintiff claimed that deprivation of his right to openly carry a handgun in a school zone violated his Second Amendment right, the court took into consideration the language regarding firearms regulations in sensitive places in determining that his Second Amendment claim was not valid.[148] In *United States v. Masciandaro*, the Fourth Circuit also looked to the sensitive places language from *Heller* and *McDonald* when evaluating a Second Amendment claim related to carrying or possessing a loaded handgun in a motor vehicle in a national park.[149] The defendant, who claimed that he traveled extensively for work and frequently slept in his car, said that he needed a gun for self-defense.[150] After extended analysis of the sensitive places language, the court stated that it did not have to resolve any ambiguities raised by the parties relating to sensitive places because the regulation passed muster under intermediate scrutiny.[151]

2. Location Distinctions

Courts have gone as far as creating another categorical distinction not explicitly approved in either *Heller* or *McDonald*, possibly in an effort to avoid a traditional standard of review analysis. Courts have been relying upon the public versus private nature of the use of firearms in order to decide Second Amendment challenges.[152] Lower courts may look to the fact that *Heller* and *McDonald* both narrowly discuss the core Second Amendment right as it relates to self-defense in the home.[153] Since neither case addressed a broader core right, some courts may be willing to base their decisions solely on the location of the regulatory infringement.[154]

13698, at *2 (D. Me. Feb. 16, 2010); United States v. Murphy, 681 F. Supp. 2d 95, 103 (D. Me. 2010)).

147 McDonald v. Chicago, 130 S. Ct. 3020, 3047 (2010) (citing District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008)).

148 *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *5–6, 16 (N.D. Cal. Mar. 17, 2011) (holding that the denial of plaintiff's request to be exempt under California Gun-Free School Zone Act was constitutional under the Second Amendment).

149 United States v. Masciandaro, 638 F.3d 458, 466 (4th Cir. 2011).

150 *Id.* at 465.

151 *Id.* at 473–74.

152 *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1281–82 (2009) (applying the right to possess obscenity in the home to the Second Amendment).

153 *See* McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010).

154 *See* Dorf & Chemerinsky, *supra* note 22, at 137–38 (comments of Erwin Chemerinsky); *see also* Charles, *supra* note 30, at 235 (stating that there is historical support for the

For example, in *United States v. Hart*, the court held there was no Second Amendment violation where the defendant was stopped for suspicion of a concealed weapon outside the home.[155] Similarly, in *Williams v. State* the court upheld a conviction because the defendant was not at home when he engaged in criminal activity.[156] The *Williams* court made the leap that only home possession is protected and, as a result, the defendant's conviction for public possession of a handgun did not implicate the Second Amendment.[157] One court even suggested that there should be different levels of review depending on whether or not the firearm was in the home, with strict scrutiny applying to in-home possession and intermediate scrutiny for all other Second Amendment cases.[158]

B. The Standards of Review Applied After Heller *and* McDonald

A review of cases eight months after *Heller* revealed that courts were sometimes straining to distinguish the challenged regulation from the one at issue in *Heller*.[159] These courts frequently stated that the instant regulation was constitutionally valid because it was much narrower than the regulation in *Heller*, and, as a result, the court did not have to engage in a full analysis.[160] Additionally, the review noted that cases that did engage in a little analysis quickly concluded that *Heller* did not really change anything. While some courts lamented the fact that *Heller* provided no guidance on the proper standard of review, few judges attempted to figure it out on their own.[161]

Just as *Heller* created an avalanche of Second Amendment challenges, there has been a corresponding rush to the courthouse since the Court handed down *McDonald*.[162] More than 190 decisions have cited to *McDonald* in a little over a year after the decision was issued.[163] Approximately 115 of these cases arguably involved a Second Amendment

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argument that only the "core" right of the Second Amendment should receive elevated protection and that regulations outside this "core" should receive minimized protections).

155 *See* United States v. Hart, 726 F. Supp. 2d 56, 60 (D. Mass. 2010).

156 Williams v. State, 10 A.3d 1167, 1179 (Md. 2011).

157 *See id.* at 1177–78.

158 *See* United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011).

159 Denning & Reynolds, *supra* note 13, at 295.

160 *Id.* (quoting Brannon P. Denning and Glenn H. Reynolds, Heller*, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms,* 60 HASTINGS L.J. 1245, 1259 (2009)).

161 *See id.* at 295–296.

162 *Catch-22*, *supra* note 130, at 1565 (stating that lower federal courts decided seventy-five Second Amendment challenges to gun control laws in the first five months after *Heller* and that "[e]very person charged with a gun crime saw *Heller* as a get out of jail free card.").

163 *See* sources cited *supra* note 8.

claim.[164] These courts utilized virtually every possible test to determine the constitutionality of the Second Amendment right at issue.[165]

Some courts utilized a form of rational basis review for varied reasons. In *People v. Williams*, the Appellate Court of Illinois held that the rational basis test applied to an Illinois statute limiting the right to carry firearms outside the home because the statute did not implicate the fundamental right found in *Heller*.[166] In *Richards v. County of Yolo*, the court stated that the rational basis test should apply because the law at issue did not "substantially burden"[167] the plaintiff's Second Amendment rights when their requests for concealed carry licenses were declined.[168] The court in *United States v. Barrett* stated that the rational basis test was appropriate due to the minimal burden of prohibiting controlled substance users from possessing guns under federal law.[169]

The opposite extreme, strict scrutiny, has been considered in only one case post-*McDonald*.[170] In *United States v. Ligon*, the United States district court of Nevada discussed the lack of a standard in *Heller* and found that strict scrutiny would be appropriate if individuals exercised their fundamental right to use firearms for self-defense.[171] The defendant claimed that the weapons at issue were for self-defense, but the court found overwhelming evidence to the contrary and concluded that his argument failed even if strict scrutiny analysis applied.[172] Ms. Mehr

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164 *Id.*

165 This is hardly surprising when one of Heller's own attorneys, Robert Levy, suggested in one article that some sort of heightened review should be used but suggested in a second article that rational-basis review with bite was appropriate. Gould, *supra* note 129, at 1551 (citing Robert A. Levy, *Standards of Review: A Review*, CATO UNBOUND, July 25, 2008, http://www.cato-unbound.org/2008/07/25/robert-a-levy/standards-of-review-a-review/; Robert A. Levy, District of Columbia v. Heller*: What's Next?*, CATO UNBOUND, July 14, 2008, http://www.cato-unbound.org/2008/07/14/robert-a-levy/district-of-columbia-v-heller-whats-next/).

166 People v. Williams, 940 N.E.2d 95, 99 (Ill. App. Ct. 2010).

167 *See* discussion *infra* Part III.B.2. (discussing the "substantial burden" analysis provided in Nordyke v. King, 644 F.3d 776 (9th Cir. 2011)).

168 Richards v. County of Yolo, No. 2:09-CV-01235 MCE-DAD, 2011 U.S. Dist. LEXIS 51906, at *3 (E.D. Cal. May 16, 2011).

169 United States v. Barrett, No. 10-CR-36-WMC, 2010 U.S. Dist. LEXIS 99397, at *3 (W.D. Wis. June 30, 2010) (quoting United States v. Hendrix, No. 09-CR-56-BBC, 2010 U.S. Dist. LEXIS 33756 (W.D. Wis. Apr. 6, 2010)).

170 Post-*Heller* but pre-*McDonald*, other courts used a strict scrutiny standard. *See* Mehr & Winkler, *supra* note 31, at 3 (citing United States v. Montalvo, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009); United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008)).

171 United States v. Ligon, No. 3:04-CR-00185-HDM, 2010 U.S. Dist. LEXIS 116272, at *16–17 (D. Nev. Oct. 20, 2010). Scholars have argued that it is doctrinally impossible to use strict scrutiny analysis for the Second Amendment while still upholding *Heller*'s categorical exceptions. Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1379 (2009).

172 *Ligon*, 2010 U.S. Dist. LEXIS 116272 at *17–20 (noting defendant's concession that the state had a compelling interest but rejecting the argument that the regulation was not narrowly tailored).

and Professor Winkler's review of all Second Amendment cases where strict scrutiny was applied revealed that none of the regulations at issue were invalidated, demonstrating that strict scrutiny has not been a significant barrier to firearms regulations.[173]

Other courts have applied some level of "heightened scrutiny" to regulations.[174] The Seventh Circuit engaged in a significant analysis of *Heller*'s language and determined that some form of "heightened scrutiny" should be applied.[175] After comparing the Second Amendment right to other constitutional rights, the court stated that the government must establish "a strong public-interest justification" or, in other words, it "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."[176] The government's burden, as defined by the court, was not one typically associated with any type of review.

The majority of courts have applied an intermediate scrutiny test.[177] One court specifically recognized that courts disagree whether intermediate or strict scrutiny should apply but chose to join the "courts holding that strict scrutiny is incompatible with *Heller*'s dicta concerning presumptively constitutional gun prohibitions."[178]

1. The Two-Prong Burden Test

Some of the courts using intermediate scrutiny employ the two-pronged test laid out in *United States v. Marzzarella*.[179] Under this test, the court first determines if the Second Amendment right is burdened, and if it is, the court implements "some form of means-ends scrutiny."[180] The appropriate form is most often an intermediate standard of review using the traditional analysis wording—that the regulation must be "substan-

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173 *See* Mehr & Winkler, *supra* note 31, at 4.

174 The courts are not alone in encouraging some form of heightened scrutiny. Former Solicitor General, Paul Clement, suggested applying "heightened" scrutiny in his *Heller* brief. Brief for the United States as Amicus Curiae at 8, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

175 Ezell v. City of Chicago, 651 F.3d 684, 706 (7th Cir. 2011).

176 *Id.* at 708–09.

177 *See* discussion *infra* Parts I.B-C.

178 United States v. Oppedisano, No. 09-CR-0305 JS, 2010 U.S. Dist. LEXIS 127094, at *5 (E.D.N.Y. Nov. 30, 2010) (citing Heller v. District of Columbia, 698 F. Supp. 2d 179, 187–88 (D.D.C. 2010) (noting that the majority of courts apply intermediate scrutiny to gun dispossession laws)).

179 *See, e.g.*, United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) (citing United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (en banc)).

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

tially related" to an "important governmental interest" in order to determine the constitutionality of the Second Amendment right at issue.[181]

In utilizing the two-pronged test, the Seventh Circuit reasoned that:

> The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights . . . . A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.[182]

The Tenth Circuit used this two-part analysis in upholding a federal statute that limited gun possession for individuals subject to a domestic protection order and determined that the statute at issue was appropriately reviewed under intermediate scrutiny.[183] In *Hall v. Garcia*, the Northern District of California determined that a statute prohibiting gun possession in a school zone was constitutional under the Second Amendment because it had a "substantial relationship to the important objective of protecting children on and near schools from exposure to firearms."[184] Some Fourth Circuit courts that applied intermediate scrutiny used slightly different language in asking if "there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective."[185]

Even though most courts utilizing the two-prong test are ultimately making an intermediate scrutiny evaluation, it is possible that higher or lower standards of review could be applied depending on the burden that the regulation at issue places upon the right.

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181 *See, e.g.*, *id.* at 97–98; United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011); United States v. Staten, Crim. Action No. 2:09-00235, 2010 U.S. Dist. LEXIS 91653 (S.D.W. Va. Sept. 2, 2010).

182 United States v. Skoien, 587 F.3d 803, 813–14 (7th Cir. 2009), *vacated en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (2011).

183 *Reese*, 627 F.3d at 800–02; *see also Skoien*, 614 F.3d at 642 (finding the prevention of "armed mayhem" is an important governmental objective, and a statute limiting the gun possession of those convicted of domestic violence is substantially related to that objective).

184 Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *16 (N.D. Cal. Mar. 17, 2011).

185 United States v. Lunsford, Crim. Action No. 2:10-CR-00182, 2011 U.S. Dist. LEXIS 4753, at *16 (S.D.W. Va. Jan. 18, 2011) (quoting United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010)).

2. *Nordyke* and the Substantial Burden Analysis

One court decision supports a different "burden test" to analyze Second Amendment challenges."[186] In *Nordyke v. King*, gun show promoters claimed that an Alameda, California ordinance, prohibiting bringing or possessing a firearm or ammunition on County property, prevented them from holding a gun show at the public fairgrounds.[187] In analyzing the claim, the Ninth Circuit acknowledged that the Supreme Court left the task of articulating a standard of review to the lower courts[188] and then proceeded to methodically look at prior Second Amendment and other cases to determine the appropriate standard of review.

Nordyke recognized that other courts had found that heightened scrutiny applies only if the regulation in question "substantially burdens" the right to keep and bear arms.[189] The *Nordyke* court further explained that the Supreme Court looked to the extent that a law burdened the core Second Amendment right to armed self-defense in the home, as laid out in *Heller*.[190] The *Nordyke* decision then drew attention to the distinction between what the *Heller* Court did and did not do: it did not consider the government interest in preventing crime, but instead analyzed the regulation's burden on the right to keep and bear arms for self-defense.[191]

Nordyke stated that a strict scrutiny analysis is inconsistent with *Heller* because the Court rejected Justice Breyer's "interest-balancing" test.[192] The *Nordyke* court also concluded that a substantial burden framework is more judicially manageable than the strict scrutiny standard of review because of the difficulties judges face in making empirical judgments.[193] The court opined that the substantial burden test would not have as many difficult empirical challenges as strict scrutiny.[194]

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186 *See* Nordyke v. King, 644 F.3d 776 (9th Cir. 2011). Although the local ordinance at issue did not specifically mention gun shows, the Nordykes filed suit claiming a Second Amendment violation, among others, on the ground that the ordinance hinders the conduct of a successful gun show. *Id.* at 780–782

187 *Id.* at 781.

188 *Id.* at 782.

189 *Id.* at 782–783 (citing United States v. Masciandaro, 638 F.3d 458, 469–70 (4th Cir. 2011); *Chester,* 628 F.3d at 680–83; United States v. Marzzarella*,* 614 F.3d 85, 89 (3d Cir. 2010); Heller v. District of Columbia, 698 F. Supp. 2d 179, 188 (D.D.C. 2010); United States v. Engstrum, 609 F. Supp. 2d 1227, 1231–32 (D. Utah 2009) (applying strict scrutiny to all gun-control regulations)).

190 *Id.* at 783.

191 *Id.* at 784.

192 *See id.*

193 *Id.* at 784–85 (citing McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010)).

194 *Id.* (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda,* 56 UCLA L. REV. 1443, 1461 (2009) [hereinafter *Implementing*]).

The *Nordyke* court looked to other constitutional contexts that apply a burden analysis and concluded that courts can use these other doctrines for guidance in determining whether a firearms regulation is impermissibly burdensome.[195] After this review, *Nordyke* held that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment,"[196] but declined to state precisely which type of heightened scrutiny courts should apply to laws that substantially burden the right.[197]

The *Nordyke* court, applying the substantial burden test, first looked to determine whether there were sufficient alternative avenues for restricted activity.[198] *Nordyke* stated that in order to determine whether a firearm restriction substantially burdens Second Amendment rights, a court should ask if the restriction leaves law-abiding citizens reasonable alternatives for obtaining firearms for self-defense.[199]

The Ninth Circuit then directed its lower courts to take into account whether there are reasonable alternative means for law-abiding citizens to obtain firearms for self-defense purposes.[200] The case will be reheard by the Ninth Circuit en banc,[201] so it remains to be seen how the substantial burden framework will be utilized.

Nordyke is valuable for setting a framework to first determine whether a substantial burden exists and, if so, then to apply heightened scrutiny. Even though the case fails to state what heightened standard should be applied, *Nordyke's* consistency in requiring a "substantial" burden is preferable to the moving target created by the two-prong burden test. The next section builds on *Nordyke's* analysis and proposes that an undue burden test should be utilized where regulations impose obstacles on the Second Amendment right.

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195 *Id.* at 785–86 (reviewing Supreme Court burden analysis in Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (applying rational basis review and allowing abortion regulations if they do not place an undue burden on the right); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (allowing regulations on the right to obtain an abortion); Ward v. Rock Against Racism, 491 U.S. 781, 791(1989) (finding reasonable time, place, or manner restrictions on speech permissible as long as the restriction is not too cumbersome); Burdick v. Takushi, 504 U.S. 428, 432 (1992) (rejecting the proposal that laws burdening the right to vote must be subject to strict scrutiny)).

196 *Id.* at 786.

197 *Id.* at 786 n.9.

198 *Id.* at 787 (comparing Second Amendment analysis to First Amendment time, place, and manner restrictions requiring alternative channels of communication).

199 *Id.* (citing United States v. Marzzarella, 595 F. Supp. 2d 596, 606 (W.D. Pa. 2009)).

200 *Id.* at 790.

201 Nordyke v. King, 664 F.3d 774 (9th Cir. 2011). .

IV. THE UNDUE BURDEN TEST: A SOLUTION FOR THE TSUNAMI OF LEGAL UNCERTAINTY

The varied court responses to Second Amendment challenges post-*Heller* and *McDonald* demonstrate the serious need for analytical uniformity on this issue. The biggest surprise in these cases is not that only one court considered a strict scrutiny standard of review[202] or that only one created a substantial burden framework,[203] but that courts have declined to apply any standard of review in more than half of the cases.[204] If *McDonald*'s core fundamental right to bear arms for lawful self-defense in the home is to have any real meaning, then it is imperative that courts utilize the same analytical framework for the Second Amendment right regardless of the judge or venue hearing the case.[205]

The Court needs to establish a test that recognizes the serious nature of gun use. At the same time, it must give some deference to state and local governments while not eliminating the Second Amendment's core right. An undue burden test would allow this to occur.

This test is not contrary to *Heller* because the decision addressed only the narrow issue before the Court and did not discuss the outer limits of the Second Amendment's core right. The fact that other Second Amendment cases are likely to reach the Court in order to test the parameters of this core right does not impact the proposed undue burden test analysis. This test is appropriate to decide the validity of any firearms regulation, regardless of how the Court may define the core Second Amendment right in the future.[206] The undue burden test protects the core right, while acknowledging that some regulation is necessary.[207]

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202 *See* United States v. Ligon, No. 3:04-CR-00185-HDM, 2010 U.S. Dist. LEXIS 116272 (D. Nev. Oct. 20, 2010).

203 *See Nordyke*, 644 F.3d 776.

204 *See, e.g.*, United States v. Barton, 633 F.3d 168 (3rd Cir. 2011); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011); United States v. Nicoll, 400 F. App'x 468 (11th Cir. 2010); United States v. Seay, 620 F.3d 919 (8th Cir. 2010).

205 *See* Denning & Reynolds, *supra* note 13, at 278 (stating that Americans expect the federal and state governments to play by the same rules when it comes to individual rights).

206 Some scholars have argued that only the Second Amendment's core right should receive elevated protection, and interests outside the core right should receive minimal protection, especially if the infringement falls outside the founders' ideological and philosophical understandings. Charles, *supra* note 30, at 235.

207 Lawrence Rosenthal, *Second Amendment Plumbing After* Heller: *Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 84 (2009). A concealed carry law could be upheld due to the public safety concerns that concealed firearms could facilitate unlawful conduct, yet this type of regulation does not infringe upon the core right defined in *Heller* or *McDonald*. *Id. See also*, Rosenthal & Malcolm, *supra* note 108, at 443–45 (discussing the "core-and-penumbra approach" to Second Amendment cases).

A. Traditional Standards of Review Are Inadequate

As analyzed above, the Court is highly unlikely to establish rational basis, reasonableness or strict scrutiny analyses as the appropriate standard of review for Second Amendment cases.[208] In some ways, intermediate review would be a simple test to adopt.

Intermediate and even strict scrutiny review of Second Amendment challenges, however, may be ineffective due to the significant public safety concerns related to firearms and the fact that public safety will almost always qualify as an "important governmental interest" or even a "compelling interest."[209] When strict scrutiny is applied to the Second Amendment, it might not always be fatal in fact to the governmental regulation because the government's compelling purpose will typically be based on a public-safety consideration, such as preventing death or injury to innocent people.[210]

As Professor Calvin Massey noted, "[s]urely [public safety] is a compelling interest. What could be of much higher priority? The degree of connection between this laudable objective and the means chosen to achieve it would likely prove to be the litigation battleground."[211] As a result, the only issue for a court to decide would be whether the regulation is "substantially related" or "narrowly tailored" to that interest. The determination of constitutional validity would then focus on the government's public-safety interest, which would almost always trump the individual's infringed right.

B. The Burden Is the Real Issue

Traditional scrutiny analysis should also be rejected because Second Amendment review should focus on the boundaries or burdens of the Second Amendment rather than the state's interest under the appropriate standard of review.[212] A burden analysis is a better post-*McDonald* analysis because *Heller* and *McDonald* have already identified the core pro-

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208 *See* discussion *supra* Part II.B.

209 District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (citing United States v. Salerno, 481 U.S. 739, 750, 754-55 (1987) (noting that safety and lives are the primary concern of government, and preventing crime is compelling interest); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (public safety concerns justify individual liberty restrictions)). Justice Breyer reasoned that any attempt to analyze the Second Amendment under strict scrutiny would become an interest-balancing test of the Second Amendment right versus public-safety concerns, with the only real question being "whether the regulation at issue impermissibly burdens the former in the course of advancing the latter." *Id.* at 689. *See also Scrutinizing*, *supra* note 29, at 727 (discussing the role of public safety as a compelling interest).

210 Massey, *supra* note 107, at 1132.

211 *Id.*

212 *See* Tushnet, *supra* note 88, at 424 (recommending categorical balancing to determine boundaries).

tection and the presumptively lawful exceptions.[213] Therefore, the real question today concerns the Second Amendment's boundaries.[214]

The two-prong burden analysis, applied in cases such as *Marzzarella*,[215] is a step in the right direction because it looks at the burden that is placed on the core Second Amendment right. One problem with the two-prong test is that it shifts the focus to the government's interest, which is almost always constitutionally valid due to the public-safety interests involved; consequently, the individual's burden becomes almost irrelevant. Additionally, by utilizing a sliding-scale analysis that allows all traditional standards of review to be used in Second Amendment cases, courts applying the two-part test engage in an ad hoc process to determine the standard of review based upon the level of burden in each case.

No other right is subject to a constitutional analysis in which the standard of review shifts on a case-by-case basis.[216] While a number of constitutional amendments utilize a variety of tests,[217] their application is consistently based on categorical determinations. For example, protected content-based regulations of speech receive strict scrutiny analysis.[218] If a two-prong test like the one that a number of post-*McDonald* courts have suggested were applied to content-based regulations, courts could use any standard of review to determine the regulation's constitutionality, depending upon how severely the right was burdened in that particular case. Consequently, under the two-prong test, the same right may be more or less stringently protected based on the burden, not on the type of infringement.

Nordyke takes the burden analysis a step further. *Nordyke*'s test involves less legal guesswork than the two-prong test because only regulations that "substantially" burden the Second Amendment core right receive heightened scrutiny and those that do not substantially burden the

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213 Burden tests have been utilized in a variety of constitutional contexts including marriage, abortion, freedom of religion, and expressive association. *See Implementing*, *supra* note 193, at 1454–55.

214 *See* Mehr & Winkler, *supra* note 31, at 1 (noting that the government has successfully defended almost every one of the over two hundred post-*Heller* cases—only handgun regulations in Washington, D.C. (*Heller*) and Chicago (*McDonald*) were invalidated under Second Amendment).

215 *See* discussion *supra* Part III.B.1.

216 Some members of the Court may be reluctant to use this approach based on the Court's statements regarding the interest-balancing test: "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." McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

217 *See* United States v. Skoien, 587 F.3d 803, 813–14 (7th Cir. 2009), *vacated en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (2011).

218 *See* Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 642–43 (1994).

right receive rational basis review. The *Nordyke* court, however, also shifted the analysis back to the governmental interest and failed to select a particular standard of review to apply when a right is substantially burdened. Therefore, *Nordyke* allows courts to pick and choose their standard of heightened scrutiny, much like the two-prong test.

Professor Eugene Volokh explains that the "government often tries to justify substantial burdens of constitutional rights by arguing that such burdens significantly reduce some grave danger."[219] Even though a court does not have to engage in a traditional standard of review analysis under the burden evaluation, courts will sometimes try to fit the government's arguments into traditional standards of review language by stating that the law is necessary to serve a compelling state interest or is substantially related to an important governmental interest.[220]

The undue burden test does not apply a traditional standard of review analysis to determine the constitutional validity of a regulation. It simply asks if the regulation imposes a substantial obstacle on a person's ability to exercise their right, and if it does, then the regulation is invalid. This type of analysis focuses on the boundaries of the core right, not on the government's justifications for the infringement.

C. Abortion, Tripartite Interests, and the Undue Burden Test

The undue burden test proposed in *Casey* has been criticized by advocates on both sides of the abortion issue. Critiques of abortion-related jurisprudence often focus on the fact that reproductive rights are not an enumerated fundamental right and do not deserve any level of heightened scrutiny analysis.[221] Reproductive rights advocates find dissatisfaction with the undue burden test because it lowered the strict scrutiny standard of review announced in *Roe v. Wade*.[222] It is likely that scholars who find fault with the undue burden test will not support its use in other contexts because it would confer additional credibility upon the test.[223] The undue burden test, however, offers a legitimate parallel anal-

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219 *Implementing*, *supra* note 194, at 1461.

220 *Id.*

221 *See* Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 455 (1995) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 951 (1992) (Rehnquist, J., concurring in part and dissenting in part)).

222 *See* Roe v. Wade, 410 U.S. 113 (1973); Deborah A. Ellis, *Protecting "Pregnant Persons": Women's Equality and Reproductive Freedom*, 6 SETON HALL CONST. L.J. 967, 972 (1996).

223 Judges may also find the undue burden test difficult to support. Some have suggested, however, that a majority of Justices might unite behind this approach, even though Justices Scalia and Thomas have repudiated the undue burden test as part of due process jurisprudence. Rosenthal & Malcolm, *supra* note 107, at 447 n.58 (citing Gonzales v. Carhart, 550 U.S. 124, 146–68 (2007) (stating that Justices Scalia and Thomas supported the undue burden test to create a majority to reach the result they approved); Gould, *supra* note 129, at 1573–75).

ysis to the issues that confront courts in conducting a Second Amendment analysis of regulations.

This test is the most legally appropriate because of the tripartite interests at stake in abortion and firearm regulation. *Casey* upheld the three basic interests found in *Roe v. Wade*: the liberty interest of the pregnant women; the state's "important and legitimate interest" in protecting potential human life; and the state's interest in safeguarding the health of the woman, including maintaining medical standards.[224] Similarly, there are important tripartite interests involved in firearms regulation: the individual's interest to keep and bear arms; the state's interest in protecting human life that may be endangered by guns; and the state's interest in safeguarding the health and welfare of individuals, including maintaining safety standards. These interests at their common core invoke the tradeoffs that governments must make between peoples' fundamental rights, the serious consequences that may occur when one exercises those rights, and the government's need to promote community welfare.

Professor Alan Brownstein offers that the doctrinal roots of the undue burden test can be firmly grounded in the fundamental rights case law.[225] Brownstein asserts that the primary reason for supporting an undue burden standard is that no other approach "provides sufficient protection to the rights guaranteed by the Constitution without unreasonably preventing the other branches of government from performing their constitutionally assigned functions."[226]

The Second Amendment has more in common with the unenumerated right to abortion than with the other rights enumerated in the Bill of Rights because those other rights do not typically involve acts that have the potential for serious immediate harm to the individual exercising the right or to others.[227] For example, the First Amendment protects the freedom of speech, but prohibited harmful speech is not protected under strict scrutiny and is sometimes not protected at all.[228] Similarly, while government infringement of an individual's Fourth, Fifth, and Sixth Amendment rights could result in prison or even a potential death penalty case, there is no immediate substantial harm. The courts have cre-

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224 *Casey*, 505 U.S. at 846, 871, 875–76 (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (citing *Roe*, 410 U.S. at 162).

225 Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 955 (1994).

226 *Id.* at 955–56.

227 *See* Jamie L. Wershbale, *The Second Amendment Under a Government Landlord: Is There a Right to Keep and Bear Legal Firearms in Public Housing?,* 84 ST. JOHN'S L. REV. 995, 1045 (2010) (citing Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 236–37 (2009)).

228 *See* cases cited *supra* note 58.

ated constitutional safeguards to protect a person's rights under these amendments, including numerous opportunities to prevent a constitutionally invalid act from occurring or legally affecting an individual.[229] In the case of reproductive rights and firearms, there is no appeal process that can undo the harm once it is done.

If the government imposes, or has the purpose to impose, a "substantial obstacle" to a woman's ability to get an abortion, then it is categorically invalid, but if the burden is minor, then the regulation is valid unless it is irrational.[230] Analogously, because the risks are so great when firearms are at issue—just as they are in the abortion context—the burden must be exceedingly severe to invalidate the infringement of the Second Amendment right.

1. Application of the Undue Burden Test

It is likely that one of the cases discussed in Part III or one not that different from them will come before the Supreme Court. Assuming the Court adopts an undue burden test, *Nordyke*, for example, would be decided in the following manner, with similar cases receiving the same treatment:

First, the Court would determine if Alameda County's ordinance prohibiting guns and ammunition on county property was an undue burden on the Nordykes' Second Amendment right. The Nordykes never alleged that the ordinance made it materially more difficult to obtain firearms, that there was a shortage of firearms in the area, or even that the regulation prohibited gun shows.[231] The local government merely declined to allow them to host a show on county property.[232] Under *Nordyke*'s facts, the Court would uphold the Alameda regulation using an undue burden analysis because the regulation did not intend to, nor did it actually, place a substantial obstacle on the Nordykes' ability to exercise their core right to lawfully keep and bear arms for the purpose of self-defense at home.

Conversely, the District of Columbia's ordinance at issue in *Heller* would still be invalid because it imposed a substantial obstacle on an individual's core Second Amendment right.[233]

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229 *See* cases cited *supra* notes 59–61.

230 *Implementing*, *supra* note 194, at 1471–72 (citing Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (stating that abortion regulations that do not impose an undue burden need only have a rational basis to be valid); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).

231 Nordyke v. King, 644 F.3d 776, 788 (9th Cir. 2011).

232 *Id.*

233 The *McDonald* Court remarked that there have been few cases with bans on the same broad level as those considered in *Heller* and *McDonald* and that the Municipal Respondents cited to only one upheld law involving a comprehensive handgun ban. McDonald v. City of

There are many other scenarios where legislation could be invalidated under this test.[234] For example, many states delay a person's ability to acquire a firearm for a variety of purposes, such as giving an individual time to "cool off" to reduce the risk of crime or injury, or allowing sufficient time for law enforcement officials to conduct background checks.[235] These waiting periods—the time between the initiation of a gun purchase and the purchaser's receipt of the firearm—last anywhere from a few days to months.[236] Victims of domestic abuse may find this regulation particularly burdensome if they seek to obtain a weapon after a serious threat of harm or attack.[237] While it is likely that waiting periods can be valid, excessively long periods may so eviscerate the right that the regulation could fail under the undue burden test because it imposed a substantial obstacle to exercising the core Second Amendment right.[238]

It is impossible to predict how every hypothetical regulation will be handled under the undue burden test, but this test, unlike any other, allows the government to engage in its traditional police powers as it relates to public safety without making the Second Amendment right meaningless.

CONCLUSION

Justice Stevens's predicted "tsunami of legal uncertainty"[239] has in fact occurred. The Court's *Heller* and *McDonald* decisions ensured this result by failing to provide any real guidance to the lower courts.

Adoption of the proposed undue burden test will not be an easy path to take. Many will disregard it due to its use in abortion cases. Others will reject it because it does not use any of the familiar magic standards-of-review words that lawyers are accustomed to applying, such as "strict scrutiny" or "compelling state interest."

One litigator who argued a Supreme Court abortion case responded to this Article's proposal of adopting the undue burden test in Second Amendment challenges by asking, "Why bother going there when you don't have to?" It would have been easy to avoid the controversial issue of abortion by proposing something akin to an intermediate scrutiny test, but the undue burden test is a more appropriate jurisprudential approach

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Chicago, 130 S. Ct. 3020, 3047 (2010) (citing Brief for Municipal Respondents 26–27 (citing Kalodimos v. Morton Grove, 470 N.E.2d 266 (Ill. 1984))).

234 *See Implementing*, *supra* note 194, at 1475–1549.

235 *See id*. at 1538–39.

236 *See id*. (discussing a variety of state laws requiring waiting periods, including up to six months for a handgun in New York).

237 *See id*. at 1538–39.

238 *See id.* at 1540–41.

239 McDonald v. City of Chicago, 130 S. Ct. 3020, 3105 (2010) (Stevens, J., dissenting).

to a very grave issue. The undue burden test is the best test to protect an individual's Second Amendment rights, while still allowing the government to regulate extremely dangerous weapons that have the ability to deprive others of their lives or liberty.