Second-Amendment Scrutiny: Firearm Enthusiasts May Win the Battle But Ultimately Lose the War in District of Columbia v. Heller

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SECOND-AMENDMENT SCRUTINY: FIREARM ENTHUSIASTS MAY WIN THE BATTLE BUT ULTIMATELY LOSE THE WAR IN DISTRICT OF COLUMBIA V. HELLER

INTRODUCTION

In Parker v. District of Columbia (Parker II), the U.S. Court of Appeals for the District of Columbia Circuit became the first federal appeals court in the United States to strike down a gun-control law as an unconstitutional infringement of the Second Amendment to the United States Constitution. In doing so, the D.C. Circuit became only the second federal appeals court to explicitly interpret the Second Amendment as protecting an individual right to possess firearms for private use. On November 20, 2007, the Supreme Court granted the District of Columbia’s petition for a writ of certiorari. Thus, after a sixty-nine-year hiatus, the scope of the Second Amendment will once again be an issue before the Supreme Court.

The debate surrounding the Second Amendment has largely focused on the nature of the protected right—i.e., whether the right is individual or collective in nature. Lost in the morass of this debate is

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2 The Court of Appeals for the Fifth Circuit was the first federal appeals court to expressly interpret the Second Amendment as protecting an individual right to possess firearms for private use. See United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).
3 District of Columbia v. Heller, 128 S. Ct. 645, 645 (2007). The Supreme Court limited its review to: “Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second[-]Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?” Id.
4 The Supreme Court has not interpreted the Second Amendment since United States v. Miller, 307 U.S. 174 (1939).
a question of paramount importance if the Supreme Court endorses the individual-rights interpretation: what level of scrutiny should courts apply against gun-control laws? An individual right to possess firearms for private use would not be absolute; like most individual rights it would undoubtedly be subject to regulation. Thus, the (largely ignored) corollary question to an individual-rights interpretation asks what level of scrutiny courts should apply to determine the constitutionality of gun-control laws: rational-basis scrutiny, intermediate scrutiny, strict scrutiny, or some other type of judicial scrutiny.

Applying these standards, a gun-control law is constitutional if: (1) under rational-basis scrutiny, "it is rationally related to a legitimate government purpose"; (2) under intermediate scrutiny, "it is substantially related to an important government purpose"; and (3) under strict scrutiny, "it is necessary [i.e., narrowly tailored] to achieve a compelling government purpose."5 In the realm of gun-control laws, the government purpose will "typically be some variation on the theme of public safety—prevention of the death of or injury to innocent people."6 So long as it is not pretextual, the government's public-safety purpose will always satisfy the "ends" prong of each standard—in other words, such a purpose will always be compelling. Thus, the importance of applying one standard or the other is realized in the "means" prong. Under rational-basis scrutiny, the gun-control law need only be a reasonable means of achieving the government's public-safety purpose; under intermediate scrutiny, the law must be more than a reasonable means; and, under strict scrutiny, the law must be the least-restrictive means.7

As Professor Erwin Chemerinsky observes, "The assumption in the debate seems to be that [under] an individual[-]rights approach [courts would apply] strict scrutiny . . . [to] appraise the constitutionality of gun[-]control measures. But there is no reason why this must necessarily be so."8 Looking to state constitutional law as a guidepost,9 no state's judiciary applies a strict standard of

7 CHEMERINSKY, supra note 5, at 540–41. Another important distinction between the three standards is that, under rational-basis scrutiny, the challenger of the law bears the burden of proof—under both intermediate and strict scrutiny, the government bears the burden of proof. Id. at 540–42.
9 State constitutional law is particularly useful because as of 1989 forty-three states had constitutional provisions guaranteeing an individual right to bear arms. See Robert Dowlut,
scrutiny against gun-control laws.\textsuperscript{10} Rather, the judiciary of every state that has considered the issue applies a "reasonable-regulation" standard.\textsuperscript{11} This reasonable-regulation standard is not rational-basis scrutiny, but the distinction is slight and, in operational effect, negligible. The only two federal appeals courts to consider the issue applied what appears to be a strict-scrutiny-like standard.\textsuperscript{12}

The importance of this level-of-scrutiny question cannot be overstated. If the Supreme Court endorses the individual-rights interpretation of the Second Amendment but then chooses to subject that right to the reasonable-regulation standard—under which nearly all gun-control laws survive judicial review—firearm enthusiasts will have effectively won the battle but lost the war. Alternatively, if the Supreme Court interprets the Second Amendment as protecting an individual right, and then attaches a strict standard of scrutiny (requiring gun-control laws to be narrowly tailored to achieve a compelling government interest), the right itself will be less illusory, though by no means absolute.

This Comment will first trace the path of District of Columbia v. Heller\textsuperscript{13} from the United States District Court for the District of Columbia, through the United States Court of Appeals for the District of Columbia Circuit, and up to the United States Supreme Court.\textsuperscript{14} This Comment will then examine the Second-Amendment standard-of-scrutiny spectrum—as articulated by two federal courts, numerous state courts, various amici curiae in Heller, and several

\textit{Federal and State Constitutional Guarantees to Arms,} 15 U. DAYTON L. REV. 59, 59 n.2 (1989). Wisconsin added an individual-rights provision in 1998. See WIS. CONST. art. I, § 25. As a result, the state courts have had an opportunity to consider the corollary question at issue: what level of scrutiny should courts apply to gun-control laws? In contrast, only two federal appeals courts have interpreted the Second Amendment as protecting an individual right. See Parker v. District of Columbia (\textit{Parker II}), 478 F.3d 370 (D.C. Cir. 2007), \textit{aff'd sub nom.} District of Columbia v. Heller, 128 S. Ct. 2783 (2008); United States v. Emerson, 270 F.3d 203 (5th Cir. 2001). Therefore, most federal courts have not yet had an opportunity to consider the appropriate level of scrutiny to apply against gun-control laws.

\textsuperscript{10} See State v. Cole, 665 N.W.2d 328, 337 (Wis. 2003) ("If this court were to utilize a strict scrutiny standard, Wisconsin would be the only state to do so.").


\textsuperscript{12} See \textit{Parker II}, 478 F.3d at 399; \textit{Emerson}, 270 F.3d at 261.

\textsuperscript{13} 128 S. Ct. 2783 (2008).

\textsuperscript{14} At the time of this Comment's completion in May 2008, the Supreme Court had heard oral argument in \textit{Heller} and was scheduled to decide the case in June 2008.
scholars. Finally, this Comment will argue that the Supreme Court should recognize the Second Amendment as a fundamental right, and require courts to apply strict scrutiny against gun-control legislation.

I. DISTRICT OF COLUMBIA V. HELLER

The case now before the Supreme Court, District of Columbia v. Heller, began as Parker v. District of Columbia (Parker I) in the United States District Court for the District of Columbia.

A. Parker I

In Parker I, six D.C. residents brought suit in federal district court challenging the constitutionality of three D.C. gun-control laws. All six plaintiffs "wish[ed] to possess a handgun or an assembled long gun in their homes for self-defense but d[id] not do so because they ‘fear[ed] arrest, criminal prosecution, and fine.’" Of the six plaintiffs, Dick Anthony Heller was the only one who "applied for and was denied a registration certificate to own a handgun." Heller works as a guard at the Federal Judicial Center and carries a handgun while on duty—he wished to possess a handgun within his home.

The plaintiffs argued the D.C. gun-control laws violated their "fundamental individual right to bear arms" under the Second Amendment. The district court rejected this argument, finding there is no "individual right to bear arms separate and apart from service in the Militia." "[B]ecause none of the plaintiffs have asserted membership in the Militia,” the court reasoned, “plaintiffs have no viable claim under the Second Amendment . . . .” Thus, the court dismissed plaintiffs’ complaint. And, because the district court rejected the individual-rights interpretation of the Second

16 Parker I, 311 F. Supp. 2d at 103–04. The plaintiffs challenged section 7–2502.02(a)(4) of the D.C. Code, which effectively bans the registration of handguns; section 7–2507.02 of the D.C. Code, which requires that all lawfully-owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device; and section 22–4504 of the D.C. Code, which prohibits carrying a pistol without a license. Id.; see also D.C. CODE ANN. §§ 7-2502.02(a)(4), 7-2507.02, 22-4504 (LexisNexis 2001).
17 Parker I, 311 F. Supp. 2d at 103 (quoting Complaint at ¶¶ 1, 3, 5, 6, Parker I, 311 F. Supp. 2d 103 (No. Clv.A.03-0213 EGS)).
18 Parker II, 478 F.3d at 374 (“The District, in refusing his request, explicitly relied on D.C. Code § 7-2502.02(a)(4).”)
19 Id. at 373–74.
20 Parker I, 311 F. Supp. 2d at 106.
21 Id. at 109.
22 Id.
Amendment, it did not reach the issue of what standard of scrutiny should apply against the D.C. gun-control laws.

B. Parker II

On appeal, the D.C. Circuit reversed the district court’s decision. Judge Silberman first determined Heller was the only plaintiff with standing to challenge the D.C. gun-control laws because only Heller “ha[d] applied for and been denied a registration certificate to own a handgun.” “[T]he formal process of application and denial, however routine, [made] the injury to Heller’s alleged constitutional interest concrete and particular.”

Judge Silberman then addressed the nature of the right protected by the Second Amendment. He examined the text, history, structure, and context of the Amendment. He also discussed the Supreme Court’s holding in United States v. Miller, as well as the Supreme Court’s “other statements on the Second Amendment.” Judge Silberman’s discussion culminated when he defiantly declared, “[T]he Second Amendment protects an individual right to keep and bear arms.” In doing so, the D.C. Circuit became only the second federal appeals court to hold that the Second Amendment protects an individual right—and the first to strike down a gun-control law on Second-Amendment grounds.

Judge Silberman then turned to whether the D.C. gun-control laws violated Heller’s Second-Amendment rights. The District argued that even if the Second Amendment protects an individual right, the handgun regulations were still constitutional because the Second Amendment does not cover modern handguns. Judge Silberman rejected this argument, stating that “the District’s claim runs afoul of Miller’s discussion of ‘Arms.’” He interpreted Miller as having set forth a test to determine which types of weapons fall under the Second Amendment’s protective umbrella. The Miller test has two prongs: to enjoy Second-Amendment protections, a particular weapon (1) must “[bear] a ‘reasonable relationship to the preservation or efficiency of a well regulated militia,’ because [the weapon was one of] the very arms needed for militia service”; and (2) must “be

23 Parker II, 478 F.3d at 373.
24 Id. at 376.
25 Id.
27 Parker II, 478 F.3d at 391.
28 Id. at 395.
29 Id. at 397.
30 Id.
personally owned and 'of the kind in common use at the time.' Applying this test, Judge Silberman concluded the term “Arms” in the Second Amendment encompasses modern handguns.

Judge Silberman then proceeded to articulate the appropriate standard of scrutiny to apply against the D.C. gun-control laws. He stated, “The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment.” In other words, it is reasonable to impose time-place-or-manner-type restrictions on an individual’s Second-Amendment rights so long as the restrictions are narrowly tailored to achieve the (compelling) government interest. Under Judge Silberman’s formulated standard, narrowly-tailored time-place-or-manner restrictions do not violate Second-Amendment rights so long as they “promote the government’s interest in public safety . . . [without] impair[ing] the core conduct upon which the right was premised.”

Having articulated the appropriate standard of review, Judge Silberman then applied that standard to each of the D.C. gun-control laws to determine whether it was constitutional. First, he addressed section 7-2502.02(a)(4) of the D.C. Code, which effectively bans the registration of handguns. The District argued the prohibition did not implicate the Second Amendment because it only bars one specific type of firearm—handguns. Judge Silberman characterized this

31 Id. at 398 (quoting Miller, 307 U.S. at 178–79).
32 Id. at 397-98.

There can be no question that most handguns (those in common use) fit that description then and now.

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The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes Miller’s standards.

33 Id. at 399 (emphasis added) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

35 Parker II, 478 F.3d at 399.
36 D.C. CODE ANN. § 7-2502.02(a)(4) (LexisNexis 2001).
37 Parker II, 478 F.3d at 400.
argument as "frivolous," and admonished that a ban on all handguns is a prohibition, not a regulation. He reasoned, "Once it is determined—as we have done—that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them."\footnote{Id.}

Second, Judge Silberman addressed section 22-4504, which prohibits carrying a pistol without a license.\footnote{D.C. CODE ANN. § 22-4504 (LexisNexis 2001).} Under this provision, if a person has a lawfully registered firearm and wishes to carry that firearm anywhere in the District—whether inside or outside the home—that person "must apply for and obtain an additional license from the Chief of Police."\footnote{Parker II, 478 F.3d at 400.} The Chief of Police has "complete discretion to deny license applications."\footnote{Id.} Heller challenged this provision to the extent that it prohibited him from moving his handgun around within the confines of his house—he "[did] not claim a legal right to carry a handgun outside his home."\footnote{Id. at 400-01 (alteration in original) (quoting D.C. CODE § 7-2507.02).} Judge Silberman determined this regulation is unreasonable because it effectively "negate[s] the lawful use upon which the right was premised—i.e, [sic] self-defense."\footnote{Id. at 401.}

Third, Judge Silberman addressed section 7-2507.02, which requires that all lawfully owned firearms "be kept 'unloaded and disassembled or bound by trigger lock or similar device, unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia.'"\footnote{Id., at 400-01 (alteration in original) (quoting D.C. CODE § 7-2507.02).} There is no self-defense exception to the unloaded-and-disassembled-or-bound-by-a-trigger-lock requirement—it was on this basis that Heller challenged the provision. He did not object to ordinarily keeping his handgun unloaded or even bound by a trigger lock. He merely claimed the right to possess (and use) a "functional" firearm to defend himself against "a threat to life or limb."\footnote{Id. at 401.} The District tried to justify the provision’s broad language by arguing that a judge would read a self-defense exception into the statute.\footnote{Id.} Judge Silberman rejected this argument, countering that "judicial lenity cannot make up for the

\footnote{38 Id.}
\footnote{39 Id. ("‘To exclude all pistols . . . is not a regulation, but a prohibition, of . . . ‘arms’ which the people are entitled to bear.’" (alterations in original) (quoting State v. Kerner, 107 S.E. 222, 225 (N.C. 1921))).}
\footnote{40 Id.}
\footnote{41 D.C. CODE ANN. § 22-4504 (LexisNexis 2001).}
\footnote{42 Parker II, 478 F.3d at 400.}
\footnote{43 Id.}
\footnote{44 Id.}
\footnote{45 Id.}
\footnote{46 Id. at 400-01 (alteration in original) (quoting D.C. CODE § 7-2507.02).}
\footnote{47 Id. at 401.}
\footnote{48 Id.}
unreasonable restriction of a constitutional right." He determined that section 7-2507.02 was unconstitutional because it "prohibit[ed] ... the lawful use of handguns for self-defense."

C. Petition for Writ of Certiorari

On November 20, 2007, the Supreme Court granted the District of Columbia’s petition for a writ of certiorari. The Supreme Court limited its review to "Whether the following provisions—D.C. Code §§ 7-2502(a)(4), 22-4504(a), and 7-2507.02—violate the Second[-]Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?" On March 18, 2008, the Supreme Court heard oral argument in the case. The Court is scheduled to decide the case in June 2008. In doing so, the Court could determine not just the nature of the right that the Second Amendment guarantees, but also the appropriate standard of scrutiny to apply against gun-control laws.

II. THE SECOND-AMENDMENT STANDARD-OF-SCRUTINY SPECTRUM

The full panoply of potential Second-Amendment scrutiny standards—as articulated by two federal courts, numerous state courts, various amici curiae in Heller, and several scholars—includes strict scrutiny, semi-strict scrutiny, intermediate scrutiny, reasonable-regulation scrutiny, and rational-basis scrutiny.

A. Strict Scrutiny

To date, only two federal circuit courts have articulated a Second-Amendment standard of scrutiny: The Fifth Circuit in United States v. Emerson and the D.C. Circuit in Parker II. Both courts endorsed a heightened level of scrutiny resembling strict scrutiny. In addition, Roy Lucas, an independent scholar, argues that strict scrutiny is the appropriate standard. And the National Rifle

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49 Id.
50 Id.
52 Id.
54 270 F.3d 203 (5th Cir. 2001).
Association’s (“NRA”) amicus brief in *Heller* urges the Supreme Court to subject gun-control laws to a strict standard of scrutiny.\(^{56}\)

1. United States v. Emerson

In *Emerson*, the Fifth Circuit articulated and applied a heightened standard of scrutiny resembling strict scrutiny. The Fifth Circuit stated,

> Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, *narrowly tailored* specific exceptions or restrictions for particular cases that are *reasonable* and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.\(^{57}\)

This standard draws upon the language of strict scrutiny—“narrowly tailored”—and implicitly measures the constitutionality of Second-Amendment restrictions by whether such restrictions are narrowly tailored *to the government interest*. The Fifth Circuit did not specify whether that government interest needs to be compelling, important, or merely legitimate (in fact, the court did not even mention the term “government interest”). But its use of the term “narrowly tailored” implies that the Second-Amendment restriction must be narrowly tailored in relation to the government interest it is meant to achieve. A restriction simply cannot be narrowly tailored in a vacuum; rather, the adequacy of its tailoring can only be assessed in relation to its purpose. The Fifth Circuit’s standard of scrutiny also requires the Second-Amendment restriction to be “reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.”\(^{58}\)

Professor Adam Winkler criticizes the Fifth Circuit’s standard of scrutiny in *Emerson*, stating that it “confuses more than it clarifies.”\(^{59}\) Specifically, he points to the schizophrenic use of the terms “narrowly tailored” and “reasonable” in the same sentence—one a catchphrase for an exacting, heightened scrutiny, and the other a buzzword for a deferential, rational-basis-type scrutiny. However, the term


\(^{57}\) *Emerson*, 270 F.3d at 261 (second and third emphasis added).

\(^{58}\) *Id.*

\(^{59}\) Winkler, *supra* note 11, at 691.
“reasonable restriction” is commonly used in the First-Amendment context to describe a restriction capable of surviving rigorous strict-scrutiny analysis. For instance, in Ward v. Rock Against Racism, the Supreme Court stated,

Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

The Court in Ward used the term “reasonable restrictions” to identify those restrictions that are constitutional (in part) precisely because “they are narrowly tailored to serve a significant governmental interest.” Clearly, the Fifth Circuit in Emerson could have done more to elucidate the applicable standard of scrutiny using the familiar nomenclature—e.g., strict scrutiny. However, the court’s failure to do so may indicate, not an error, but an attempt to articulate a novel standard of heightened scrutiny (akin to strict scrutiny) specifically geared to apply against gun-control laws in the Second-Amendment context.

The Fifth Circuit subsequently interpreted Emerson’s standard of scrutiny to be something other than strict scrutiny. In United States v. Darrington, the court stated,

Emerson is a carefully and laboriously crafted opinion, and if it intended to recognize that the individual right to keep and bear arms is a “fundamental right,” in the sense that restrictions on this right are subject to “strict scrutiny” by the courts and require a “compelling state interest,” it would have used these constitutional terms of art.

Emerson is indeed a “carefully and laboriously crafted opinion,” but the otherwise comprehensive opinion devoted only one sentence to

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61 Id. at 791 (emphasis added) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).
62 Id.
63 351 F.3d 632 (5th Cir. 2003).
64 Id. at 635.
65 Id.
the applicable standard of scrutiny. And although Emerson does not
invoke certain “constitutional terms of art” such as “strict scrutiny” or
“compelling state interest,” it does invoke the term “narrowly
tailored” which clearly evinces a heightened and rigorous standard of
scrutiny—alogous to strict scrutiny. Thus, in Emerson, the Fifth
Circuit applied a strict standard of scrutiny.

2. Parker II

In Parker II, the D.C. Circuit also applied a heightened standard of
scrutiny resembling strict scrutiny. However, as in Emerson, the D.C.
Circuit’s standard of scrutiny in Parker II is subject to interpretation.

At first glance, Judge Silberman appeared to employ a variation of
the reasonable-regulation standard that state courts use. He stated that
Second-Amendment protections “are subject to the same sort of
reasonable restrictions [time, place, and manner] that . . . limit[.] . . .
the First Amendment.” Although First-Amendment rights often
trigger strict scrutiny, they occasionally trigger a deferential,
rational-basis-type scrutiny. Judge Silberman considered a
“reasonable regulation” to be analogous to the common-law
restrictions that limited the pre-existing right to keep and bear
arms—which the Second Amendment merely preserved. He
indicated that gun-control laws prohibiting the carrying of concealed
weapons and depriving convicted felons of their right to keep and
bear arms were reasonable and would survive his standard of
scrutiny: “These regulations promote the government’s interest in
public safety consistent with our common law tradition. Just as

66 Id.
67 Parker v. District of Columbia (Parker II), 478 F.3d 370, 399 (D.C. Cir. 2007), aff’d
69 See, e.g., Morse v. Frederick, 551 U.S. 393, 408-09 (2007) (holding that public school
students' speech rights at official school outings may be limited whenever a reasonable basis
exists for believing the speech advocates illegal drug use); Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260, 273 (1988) (holding that public school officials can restrict student speech in the
school newspaper “so long as their actions are reasonably related to legitimate pedagogical
concerns”).
70 Parker II, 478 F.3d at 399.
71 Id. (quoting State v. Kerner, 107 S.E. 222, 225 (N.C. 1921)).
importantly, however, they do not impair the core conduct upon
which the right was premised." Thus, at first blush, Judge Silberman
ostensibly employed a variation of the reasonable-regulation standard
that state courts use.

However, to illustrate that Second-Amendment protections are
subject to reasonable, First-Amendment-type restrictions, Judge
Silberman cited Ward v. Rock Against Racism and included the
following parenthetical quotation: "([G]overnment may impose
reasonable restrictions on the time, place, or manner of protected
speech . . . .)." Although not included in Judge Silberman's
opinion, the remaining portion of that quote from Ward requires the
"reasonable restrictions" to be "narrowly tailored to serve a
significant governmental interest." Thus, in citing Ward, Judge
Silberman uncloaked the true nature of his (strict) standard of
scrutiny—to be constitutional, gun-control laws must be narrowly
tailored to serve a (significant/compelling) government interest.
Indeed, Justice Ginsburg read Judge Silberman's opinion as imposing
a strict standard of scrutiny. It is unclear why Judge Silberman did
not explicitly brand his standard as strict scrutiny. Perhaps he felt
such a label was overly simplistic given the intricacies involved in the
Second-Amendment context. Perhaps he considered his standard to be
novel, and avoided the typical nomenclature to forestall confusion.
Regardless, the strict nature of Judge Silberman's standard of scrutiny
is apparent. Thus, in Parker II, the D.C. Circuit applied a strict
standard of scrutiny.

3. Roy Lucas

Roy Lucas argues that courts should apply strict scrutiny against
gun-control laws. In doing so, he finds a concomitant link between
the "fundamental right to protect and defend the home and family" and
the fundamental Second-Amendment right to keep and bear
arms.

72 Id.
74 See Parker II, 478 F.3d at 399 (alteration in original) (citing Ward, 491 U.S. at 791).
75 See Ward, 491 U.S. at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468
U.S. 288, 293 (1984)) ("Our cases make clear, however, that even in a public
forum the government may impose reasonable restrictions on the time, place, or manner of
protected speech, provided . . . they are narrowly tailored to serve a significant governmental
interest . . . .") (emphasis added) (internal quotation marks omitted).
76 See Transcript of Oral Argument, supra note 53, at 43–45.
78 Id. at 327.
The rounding up of guns from private homes, facilitated by gun registration, leaves families defenseless against burglary, gangs, looting, violent civil disorder, and terror . . . .

. . . Such registration leads directly to confiscation and disarmament based upon mere defensive possession. It satisfies no compelling interest.

. . . The Second Amendment embodies a fundamental policy against citizen disarmament. "The framers . . . had a keen appreciation of the peril of being defenseless." 79

Lucas cites Justice Thomas’ concurring opinion in Troxel v. Granville 80 for the proposition that "'strict scrutiny [applies] to infringements of fundamental rights." 81 He claims that applying a strict standard of scrutiny against gun-control laws "would clarify Second[-]Amendment jurisprudence immensely and align it with First[-]Amendment practice that is closely analogous." 82 And he contends that strict scrutiny is especially appropriate in the Second-Amendment context "to avoid leaps of illogic and unjust treatment of defendants for acts and omissions that are miles distant from criminal activity, such as mere possession of a firearm that has legitimate defensive uses." 83

Unfortunately, Lucas’ analysis—although germane—is cursory, spanning only a few pages in a seventy-plus-page article. But it does serve as an introduction to the arguments in favor of a Second-Amendment strict-scrutiny standard.

4. National Rifle Association's Amicus Brief in Heller

In Heller, the National Rifle Association ("NRA") submitted an amicus brief in which it urges the Supreme Court to subject gun-control laws to strict scrutiny. 84 In doing so, the NRA argues the Second Amendment protects a fundamental right. 85

79 Id. at 328 (last omission in original) (quoting Silveira v. Lockyer, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc)).
80 530 U.S. 57 (2000).
82 Id. at 329.
83 Id.
84 See NRA Brief, supra note 56, at 16–26, 20–21 ("[L]aws infringing the Second Amendment should be the subject of strict scrutiny by a reviewing court, not the lower levels of scrutiny sought by petitioners, their supporting amici, and the United States.").
85 Id. at 16–21.
Recognizing "that not all laws restricting 'fundamental' rights are subjected to strict scrutiny," the NRA distinguishes between two types of fundamental rights: (1) those "rights that are fundamental to democratic self-government[—]such as political speech and the right of the people to keep and bear arms"; and (2) those rights that are "fundamental to the American system of justice"—such as the "criminal justice and due process provisions in the Bill of Rights." Courts apply strict scrutiny to laws burdening the former (i.e., rights fundamental to democratic self-government). But courts apply various tests to laws burdening the latter (i.e., rights fundamental to the American system of justice).

Upon distinguishing between the two types of fundamental rights, the NRA argues Second-Amendment rights are fundamental to democratic self-government because of the "explicit connection between the right to keep and bear arms and the preservation of democratic self-government." Thus, because the Second-Amendment right to arms is fundamental to democratic self-government, the NRA argues courts should apply strict scrutiny against gun-control laws.

B. Semi-Strict Scrutiny

Calvin Massey argues that courts should apply a "'semi-strict' [standard of] scrutiny" against gun-control laws that materially infringe upon the "individual right to armed self-defense." However, if the gun-control law does not constitute a material infringement, then presumably a deferential standard of scrutiny applies—not semi-strict scrutiny. The fundamental question is whether the particular regulation constitutes a material infringement.

To address this fundamental question, Massey states, "[M]ost regulations that are short of absolute prohibitions will likely be found

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86 Id. at 20 (internal quotation marks omitted).
87 See Adam Winkler, Fundamentally Wrong About Fundamental Rights, 23 CONST. COMMENT. 227, 229 (2006) ("Laws invading on First Amendment rights of speech, association, and religious liberty are often subject to strict scrutiny, as are laws that restrict the due process and (invisible) equal protection guarantees of the Fifth Amendment.").
88 Id. ("[S]trict scrutiny is nowhere to be found in the jurisprudence of ... the Third Amendment, the Fourth Amendment, the Sixth Amendment, the Seventh Amendment, the Eighth Amendment, the Ninth Amendment, or the Tenth Amendment."). In the Fourth-Amendment context, courts apply a reasonableness test to unreasonable searches and seizures; in the Sixth-Amendment context, courts apply categorical rules to implement the right to counsel; in the Eighth-Amendment context, courts apply categorical rules against cruel and unusual punishments and excessive bail and fines. Id. at 229–31.
89 NRA Brief, supra note 56, at 17–21.
90 Massey, supra note 6, at 1133, 1125–33.
not to be *material* infringements."\(^9\) In an effort to further define "material infringement," Massey lists the following categories of regulation as examples of *non*-material infringements: (1) regulations that deny certain people—e.g., minors, convicted criminals, and the insane—their Second-Amendment right to possess arms; (2) regulations that ban certain categories of weapons—e.g., handguns equipped with silencers, automatic weapons, grenade launchers, artillery, rockets, tanks, bombs, and weapons of mass destruction; (3) regulations that limit the number of guns that a given person could purchase; and (4) regulations that require guns to be equipped with trigger locks.\(^9\) These regulations would not be subject to a heightened form of scrutiny.

Those categories of regulation that might constitute material infringements include: (1) regulations that amount to "[a]bsolute prohibitions upon private possession of handguns, shotguns, [or] rifles"; and (2) regulations that impose certain forms of licensing systems.\(^9\) The materiality of the former category "depends upon the utility of the weapon in question."\(^9\) The materiality of the latter category "depends upon the standards employed to limit the discretion of the licensing authority."\(^9\)

If a particular gun-control law materially infringes the underlying right, then Massey applies a semi-strict standard of scrutiny to vet the law's constitutionality. Under this standard, "The government [is] required to prove that its chosen means, in purpose and in fact, *substantially advance* the government’s *compelling* objective."\(^9\) This is a more lenient standard than strict scrutiny because it does not require the government "to prove that its choice of means is the least restrictive alternative available to it."\(^9\)

**C. Intermediate Scrutiny**

The United States' amicus brief in *Heller* urges the Supreme Court to adopt a "heightened judicial scrutiny" resembling intermediate scrutiny.\(^9\) The impetus for urging this intermediate standard of

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91 Id. at 1128 (emphasis added).
92 Id. at 1126–27.
93 Id. at 1127–29.
94 Id. at 1127–28 ("If the regulation permits reasonable access to and use of firearms that are both suited to self-defense and that do not have an inherent risk of collateral damage, the regulation does not materially impair the individual right of armed self-defense.").
95 Id. at 1128–29 (arguing that unconstrained discretion would be a material infringement; official discretion—guided by specific criteria—would not be a material infringement).
96 Id. at 1132 (emphasis added).
97 Id.
98 See Brief for the United States as Amicus Curiae at 20–33, District of Columbia v.
scrutiny is clear: the United States is concerned that a more exacting standard will render all existing federal firearms laws susceptible to Second-Amendment challenges.\footnote{99} Indeed, since at least 2001, the United States—through then Attorney General John Ashcroft—vowed to “defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws.”\footnote{100} The United States argues that Congress has authority to: (1) prohibit particular types of firearms; (2) ban the private possession of firearms by persons unfit to keep such weapons; and (3) regulate the manufacture, sale, and flow of firearms in commerce.\footnote{101}

1. Prohibiting Particular Types of Firearms

The United States contends that the Second Amendment protects a right to “‘keep and bear Arms,’ not a right to possess any specific type of firearm.”\footnote{102} Consequently, a categorical ban on any particular type of firearm—such as a machine gun—is constitutional, so long as it survives heightened scrutiny.\footnote{103} The United States objects to the D.C. Circuit’s “categorical test.”\footnote{104} But the D.C. Circuit did not create this “categorical test,” it merely applied the test that the Supreme Court

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Heller, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157201, at *20–33 [hereinafter U.S. Brief]. The U.S. Brief argued “there would be virtue in remanding the case for application of a proper standard of review and permitting Second Amendment doctrine to develop in an incremental and prudent fashion as is necessary to decide particular cases that may arise.” Id. at 29.


\footnote{100} Memorandum from John Ashcroft, U.S. Attorney General, to all United States’ Attorneys (Nov. 9, 2001), http://www.usdoj.gov/ag/readingroom/emerson.htm.

\footnote{101} U.S. Brief, \textit{supra} note 98, at 21–27.

\footnote{102} Id. at 22.

\footnote{103} Id.

\footnote{104} Id. at 21.
created in United States v. Miller. Applying this test, the D.C. Circuit determined that the modern handgun at issue "passes Miller's standards," and therefore constitutes an "Arm" under the Second Amendment. Judge Silberman then concluded, "Once it is determined—as we have done—that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." Of course, the District is free to regulate Second-Amendment arms, but it cannot ban them outright.

The United States apparently objects to the Miller test, or at least to the D.C. Circuit's interpretation of Miller. And it urges the Supreme Court to (effectively overrule Miller and) adopt a form of heightened scrutiny—i.e., a balancing test—to determine the constitutionality of a categorical ban on a particular type of weapon. The United States' balancing test considers: (1) whether the "firearm is commonly possessed"; (2) whether the firearm "poses specific dangers, or has unique uses"; and (3) whether "functional alternatives" are available.

2. Banning the Private Possession of Firearms by Persons Unfit to Keep Such Weapons

The United States argues, "Heightened judicial scrutiny is not appropriate for all laws regulating the possession of firearms." Certain individuals "fall outside the protection of the Second Amendment"—e.g., felons and the insane. The United States contends that heightened scrutiny should not apply to federal laws banning certain categories of individuals from privately possessing firearms, so long as the ban has a "Framing-era analog." For

106 The Miller test consists of two prongs for a firearm to fall under the Second Amendment's protective umbrella: (1) it must bear a "'reasonable relationship to the preservation or efficiency of a well regulated militia,' because [it is] the very [type of] arm[] needed for militia service"; and (2) it must "be personally owned and 'of the kind in common use at the time.'" Parker v. District of Columbia (Parker II), 478 F.3d 370, 398 (D.C. Cir. 2007) (quoting Miller, 307 U.S. at 178-79), aff'd sub nom. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).
107 Parker II, 478 F.3d at 398.
108 Id. at 400 (emphasis added) ("To exclude all pistols . . . is not a regulation, but a prohibition, of . . . "arms" which the people are entitled to bear." (alteration in original) (quoting State v. Kerner, 107 S.E. 222, 225 (N.C. 1921))).
109 U.S. Brief, supra note 98, at 22.
110 Id.
111 Id. at 25.
112 Id.
115 U.S. Brief, supra note 98, at 26 n.7.
instance, at common law, felons did not enjoy the right to possess arms; thus, section 922(g)(1)’s ban on firearm possession by felons would not be subject to heightened scrutiny. However, if a federal law prohibited a particular group from possessing firearms “in the absence of a Framing-era analog, [that federal law] would be subject to [heightened] scrutiny.”

3. Regulating the Manufacture, Sale, and Flow of Firearms in Commerce

The United States argues that federal licensing provisions or federal limits on importing or transporting firearms are constitutional. However, it acknowledges, “this case, which involves private possession, provides no opportunity for the Court to expound on the different principles that might govern efforts to regulate the commercial trade in firearms.”

D. Reasonable-Regulation Scrutiny

Professors Erwin Chemerinsky and Adam Winkler’s amicus brief in Heller urges the Supreme Court—should it interpret the Second Amendment as protecting an individual right—to adopt the reasonable-regulation standard. They beseech the Supreme Court to look to the beacon of “well developed and comprehensive” state-court jurisprudence regarding the right to bear arms. In doing so, they cite Winkler’s article on Second-Amendment judicial review in which he claims, “Forty-two states have constitutional provisions guaranteeing an individual right to bear arms and, tellingly, the courts of every state to consider the question apply a deferential ‘reasonable regulation’ standard in arms rights cases.” Of course, as Professor Glenn Reynolds notes, “This statement, while not exactly inaccurate, is incomplete.” But, regardless, in the realm of state-court right-to-bear-arms jurisprudence, reasonable-regulation scrutiny is the norm, if not the uniform standard.

116 Id. at 25–26.
117 Id. at 26 n.7.
118 Id. at 26–27.
119 Id. at 27.
121 Id. at 5.
122 Winkler, supra note 11, at 686 (footnote omitted).
123 Reynolds, supra note 11, at 138 (“One of the best known and most important lines of state right-to-arms cases does not comfortably fit this characterization.” (citing Andrews v. State, 50 Tenn. 165 (Tenn. 1871) and Aymette v. State, 21 Tenn. 154 (Tenn. 1840))).
The difference between reasonable-regulation scrutiny and rational-basis scrutiny is slight; and, in operational effect, the difference is negligible. Rational-basis scrutiny asks whether the gun-control law is a rational means to achieve a legitimate governmental end. This level of scrutiny is "enormously deferential to the government." The analysis focuses upon the relationship between the law and its intended purpose—the effect upon the individual claiming a right to bear arms is not considered.

Reasonable-regulation scrutiny, however, asks whether the gun-control law is "a 'reasonable' limitation on the right to bear arms." The analysis purportedly focuses upon the extent to which the law burdens the right. In applying this standard, courts ostensibly seek to "balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety, and welfare of its citizens." But as Winkler observes, the "balancing is decidedly tipped in favor of the government, so much so that the individual almost never wins." Thus, despite the apparent change in focus, both standards—in operational effect—are extremely deferential. And, under the reasonable-regulation standard, a gun-control law generally will survive scrutiny unless that law effectively "eviscerates" the constitutional right to keep and bear arms.

Professors Chemerinsky and Winkler's amicus brief implores the Court to adopt the reasonable-regulation standard for three principle reasons: (1) gun-control laws are "legitimate means of enhancing public safety, reducing crime, [and] protecting children . . . [thus] the predicate for heightened scrutiny is absent"; (2) "[T]he text of the Second Amendment, the history of the right to bear arms in federal and state constitutional law, and federalism values all support permitting legislators substantial latitude to adopt reasonable regulations of arms"; and (3) "[E]ven if the Court concludes that the right to keep and bear arms is a 'fundamental' right[,] [n]ot all

124 CHEMERINSKY, supra note 5, at 540.
125 Id.
126 Jeffrey Monks, Comment, The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws, 2001 WIS. L. REV. 249, 275 n.147 (2001).
127 State v. Hamdan, 665 N.W.2d 785, 800 (Wis. 2003).
128 Winkler, supra note 11, at 717–18.
129 Hamdan, 665 N.W.2d at 799 ("Case law reveals that while the right to bear arms for lawful purposes is not an absolute, neither is the State's police power when it eviscerates this constitutionally protected right."); see also Winkler, supra note 11, at 717 ("State courts explain that the difference between reasonable and unreasonable regulation of the arms right is that any law that 'eviscerates,' renders 'nugatory,' or results in the effective 'destruction' of the right is unreasonable." (footnotes omitted)).
fundamental rights trigger heightened scrutiny and many are governed by reasonableness tests or other forms of relatively deferential scrutiny."

E. Rational-Basis Scrutiny

As previously mentioned, the difference between rational-basis scrutiny and the reasonable-regulation standard is negligible; although proponents of the latter claim it is (vaguely) more stringent than the former. Under either standard, nearly all gun-control laws survive judicial review.

III. PROPOSED SECOND-AMENDMENT STANDARD OF SCRUTINY

The Supreme Court should find that the Second-Amendment right to keep and bear arms is a fundamental right. And the Court should require courts to subject gun-control laws to strict-scrutiny analysis.

A. A Fundamental Right to Keep and Bear Arms

"The Supreme Court has held that some liberties are so important that they are deemed to be ‘fundamental rights’ . . . ." Generally, the government cannot infringe upon fundamental rights unless the transgression survives strict-scrutiny analysis. Some fundamental rights are expressly provided for in the Constitution—e.g., the First-Amendment right to freedom of speech is an express fundamental right. Other fundamental rights are implied through the Due Process Clauses of the Fifth and Fourteenth Amendments and/or the Equal Protection Clause of the Fourteenth Amendment—e.g., the right to privacy is an implied fundamental right. The Supreme Court should find that the Second-Amendment right to keep and bear arms is a fundamental right because (1) it is uniquely and inextricably intertwined with the fundamental First-Amendment right to engage in political speech, and (2) it is inseparable from what the Framers called “the first law of nature”: the right of self-preservation.

130 Chemerinsky & Winkler Brief, supra note 120, at 1–4.
131 CHEMERINSKY, supra note 5, at 792.
132 See id.
133 Id. at 792–93.

Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the
1. Nexus Between the Second Amendment and the Fundamental First-Amendment Right to Engage in Political Speech

In determining what the appropriate Second-Amendment standard of scrutiny should be—and whether the right to keep and bear arms is a fundamental right—it is helpful to compare the Second Amendment with the other constitutional provision to which it is most analogous: the First Amendment. The right to keep and bear arms is uniquely and inextricably intertwined with the fundamental First-Amendment right to engage in political speech. Thus, the Supreme Court should recognize the Second-Amendment right to keep and bear arms as a fundamental right.

There are four major theories addressing why the right to freedom of speech is protected as a fundamental right: "freedom of speech is protected [1] to further self-governance, [2] to aid the discovery of truth via the marketplace of ideas, [3] to promote autonomy, and [4] to foster tolerance." Of these four rationales, the self-governance rationale is the most relevant to the Second-Amendment inquiry. The premise of the self-governance rationale is that the First-Amendment freedom of speech is critical in a democracy. Professor Vincent Blasi argues political speech serves as an indispensable check against government misconduct. He writes, "[government misconduct] is so antithetical to the entire political arrangement, is so harmful to individual people, and also is so likely to occur, that its prevention and containment is a goal that takes precedence over all other goals of the political system." Indeed, political speech "is at the very core of the First Amendment. [And] [i]f there is a hierarchy of protected speech, political speech occupies the top rung." Thus, because political speech provides a necessary check against government misconduct, the First Amendment is deemed fundamental, and courts subject political-speech restrictions to strict scrutiny.

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best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.

Id.

CHEMERINSKY, supra note 5, at 926.

See id. ("Open discussions of candidates is essential for voters to make informed selections in elections; it is through speech that people can influence their government's choice of policies; public officials are held accountable through criticisms that can pave the way for their replacement.").


id. at 558.

CHEMERINSKY, supra note 5, at 1070.
The Second-Amendment right to keep and bear arms is uniquely and inextricably intertwined with political speech. It is axiomatic that "tyranny thrives best where government need not fear the wrath of an armed people." There is ample evidence of this axiom in our own history. "[D]uring the Jim crow era... gun[-]control laws were used to help secure [the] political subordination" of black slaves.

Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence.

In *Dred Scott v. Sandford*, the Supreme Court ruled black slaves could never attain citizenship because—among a parade of horribles—citizenship would give blacks the right to "keep and carry arms wherever they went." The possibility of "four million armed blacks" was not just anathema to the prevailing prejudices of the time; rather, that possibility threatened the institution of slavery itself, because an armed population is not easily oppressed.

This connection between disarmament and political oppression is seen throughout history: "Stalin's atrocities, the killing fields of Cambodia, [and] the Holocaust[—]to name but a few—were [all] perpetrated by armed troops against unarmed populations." One would hope the mechanisms of our constitutional republic are sufficient to forestall the need for armed-citizen resistance against a tyrannical government seeking to quell political opposition. But however unlikely the need for an armed-citizen resistance is, it is not beyond the realm of possibility. This is why Judge Kozinski characterized the Second Amendment as a "doomsday provision... designed for those exceptionally rare circumstances... where the

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140 Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).
142 Silveira, 328 F.3d at 569 (Kozinski, J., dissenting from denial of rehearing en banc) (citations omitted).
143 60 U.S. 393 (1857).
144 Id. at 417.
145 Silveira, 328 F.3d at 569 (Kozinski, J., dissenting from denial of rehearing en banc).
146 Id. at 569–70.
147 See id. at 570 ("However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.").
government refuses to stand for reelection and silences those who protest."

Because the Second-Amendment right to keep and bear arms is inextricably intertwined with the fundamental right to engage in political speech—which lies at the core of the First Amendment—Second-Amendment rights should be recognized as fundamental.

2. Nexus Between the Second Amendment and the First Right of Nature: the Right of Self-Preservation

The Second-Amendment right to keep and bear arms is inseparable from what the Framers called the "first law of nature": the natural right of self-preservation. In liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial, and due process of law." Indeed, Thomas Hobbes wrote of "the Liberty each man hath, to use his own power . . . for the preservation of his own Nature . . . his own Life." John Locke thought it "reasonable and just I should have a Right to destroy that which threatens me with Destruction." William Blackstone considered the right of self-defense to be "the primary law of nature" and proclaimed the right to self-defense could not be "taken away by the law of society." And Alexander Hamilton regarded the "original right of self-defense . . . [as] paramount to all positive forms of government."

Liberal theory had an unquestionable and well-documented influence on the Constitution's framing. And the axiomatic right of self-preservation, ubiquitous in the writings of liberal theorists—such as Hobbes, Locke, Blackstone, Hamilton, and Adams—not only preexisted our Constitution, but was arguably embedded into it, either through the Second Amendment or through the realization that this first right of nature could not be "taken away [or established] by the law of society." For instance, consider the fact that "At the time of the founding, organized police forces had not yet been developed."
Without an organized police force, ordinary Americans were left (and expected) to defend themselves and maintain order. Moreover, the common-law doctrine of self-defense is predicated on the principle that individuals have a natural right to self-preservation. This right of self-preservation is undoubtedly fundamental, even if the Supreme Court has not yet recognized it as such among the panoply of fundamental rights.

The (fundamental) right of self-preservation is inseparable from the Second-Amendment right to keep and bear arms. Indeed, if an individual were unable to keep and bear arms to defend himself or herself, then the natural right of self-preservation would be a hollow ideal, completely devoid of any meaning. Certainly, governments have an interest in mitigating the undesirable consequences of an armed populace. But given the preeminent importance of the natural right of self-preservation—which is inseparable from the Second-Amendment right to keep and bear arms—the Supreme Court should find that the Second-Amendment right to keep and bear arms is fundamental.

Thus, the Supreme Court should find that the Second-Amendment right to keep and bear arms is a fundamental right—because it is (1) inextricably intertwined with the fundamental right to engage in political speech, and (2) inseparable from the natural right of self-preservation.

B. Second-Amendment Strict Scrutiny

In addition to ruling that the individual right to keep and bear arms is fundamental, the Supreme Court should require courts to apply a strict standard of scrutiny against gun-control laws. Generally, the government cannot infringe upon fundamental rights unless the transgression survives strict-scrutiny analysis. Indeed, in *Troxel v. Granville*, Justice Thomas stated he "would apply strict scrutiny to infringements of fundamental rights." And in *United States v. Virginia*, Justice Scalia indicated "strict scrutiny [should] be applied to the deprivation of whatever sort of right we consider 'fundamental.'" Of course, Professors Chemerinsky and Winkler's amicus brief in *Heller* notes that not all fundamental rights are subject to strict scrutiny. But the NRA's amicus brief clarifies the issue:

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156 CHEMERINSKY, supra note 5, at 792.
158 Id. at 80 (Thomas, J., concurring in the judgment).
160 Id. at 568 (Scalia, J., dissenting).
The *amici* fail to note the distinction, however, between rights that are fundamental to democratic self-government, such as political speech and the right of the people to keep and bear arms, and those protections of the Bill of Rights that, in the course of being incorporated through the Fourteenth Amendment against the States, were deemed “fundamental” to the American system of justice. Whatever the varying tests applied to laws touching on the criminal justice and due process provisions in the Bill of Rights, laws burdening rights fundamental to our democracy, such as political speech, are reviewed under strict scrutiny.\(^{162}\)

Thus, because the right to keep and bear arms is fundamental to democratic self-government—like the right to engage in political speech—the Supreme Court should require courts to apply strict scrutiny against gun-control laws.

Under strict scrutiny, a gun-control law is constitutional “if it is necessary [i.e., narrowly tailored] to achieve a compelling government purpose.”\(^{163}\) And the government bears the burden of proof. In the context of gun-control legislation, the government’s purpose will typically be rooted in a concern for public safety. Consequently, the government purpose will always be compelling, so long as that purpose is not pretextual. The issue will turn on whether the gun-control law is narrowly tailored to achieve its public-safety purpose. To be narrowly tailored the law must be the “least restrictive alternative.”\(^{164}\)

A strict standard of scrutiny would not be fatal to all gun-control legislation. On the contrary, “most existing forms of gun control would survive such scrutiny because they are sufficiently well tailored to achieve sufficiently worthy government purposes.”\(^{165}\) But requiring gun-control laws to be narrowly tailored will ensure that such legislation is adequately precise and not unduly over- or under-inclusive.

For instance, gun-control laws that deprive convicted felons of their right to keep and bear arms are woefully over-inclusive because many felonies—such as securities law violations, obstruction of justice, perjury, and embezzlement—“do not indicate a propensity for

\(^{162}\) NRA Brief, *supra* note 56, at 20 (footnote omitted).

\(^{163}\) CHEMERINSKY, *supra* note 5, at 541 (emphasis omitted).

\(^{164}\) Id.

dangerousness." As Professor Winkler notes, "It is hard to imagine how banning Martha Stewart or Enron's Andrew Fastow from possessing a gun furthers public safety." However, other felonies—such as aggravated assault, battery, arson, kidnapping, rape, and murder—do demonstrate a propensity for violence. Gun-control laws that deprive convicted felons of their Second-Amendment right to keep and bear arms should be narrowly tailored to affect only those felons who committed felonies that demonstrate a propensity for violence.

Although some gun-control laws might need to be more precisely tailored, Professor Winkler admits, "[S]trict scrutiny in the context of gun regulation will not be overwhelmingly fatal and might even permit most, if not all, gun control laws to survive judicial review." But even if a strict standard of scrutiny would be fatal to a particular gun-control law or even all gun-control laws—which it would not be—a result-oriented approach to the Second-Amendment standard-of-scrutiny issue is inappropriate. In other words, it would be entirely incongruous—if not unconstitutional—for the Supreme Court to select an applicable standard of scrutiny by speculating as to the corresponding results and choosing a particular standard based on which corresponding result is most (subjectively) desirable. If the Supreme Court interprets the Second Amendment as protecting an individual right, and deems that right to be fundamental—not just to the American system of justice but to democratic self-government and individual self-preservation—then the Supreme Court should require courts to apply strict scrutiny against gun-control legislation, irrespective of the result.

CONCLUSION

There are essentially two sides in the gun-control debate: (1) those who regard gun ownership as a fundamental right, and view guns as both a symbol and an implement of individual freedom; and (2) those who regard guns as instruments of death, and gun control as a necessary means of protecting public safety. The debate has focused almost exclusively on the nature of the right that the Second Amendment guarantees. Those who seek to preserve their Second-Amendment right to keep and bear arms advocate for the individual-rights interpretation. Those who seek to achieve the wholesale disarmament of the American people—or at least pervasive

166 Winkler, supra note 11, at 721.
167 Id.
168 Id. at 730.
and stifling gun-control laws—advocate for the collective-rights approach.

If the Supreme Court interprets the Second Amendment as protecting an individual right (as it seems poised to do), then the standard-of-review debate will simply rehash the nature-of-the-right debate. In other words, individual-rights advocates will prefer an exacting, heightened standard of scrutiny, and collective-rights advocates will favor a deferential standard of scrutiny. But the Supreme Court should not indulge in a result-oriented approach to the Second-Amendment standard-of-scrutiny issue.

Rather, if the Court endorses the individual-rights interpretation, it should then examine whether the individual right to keep and bear arms is fundamental. The Supreme Court should find that the Second-Amendment right to keep and bear arms is a fundamental right because (1) it is uniquely and inextricably intertwined with the fundamental First-Amendment right to engage in political speech, and (2) it is inseparable from what the Framers called "the first law of nature": the right of self-preservation. And because the right to keep and bear arms is fundamental to democratic self-government and individual self-preservation—not merely to the American system of justice—the Supreme Court should require courts to subject gun-control laws to strict-scrutiny analysis.

Although a result-oriented approach is inappropriate, the corresponding implications of each standard are apparent. A deferential standard—such as reasonable-regulation scrutiny—would be inimical to the individual Second-Amendment right to keep and bear arms. It would render the individual right to keep and bear arms illusory, as nearly all gun-control laws would survive judicial review. A deferential standard would also embolden legislatures, inviting a barrage of nonsensical gun-control laws poorly tailored to further public safety. Citizens who wish to possess firearms to protect themselves and their families—or to contribute a modicum of potential force to an armed-citizen check against government misconduct—would be prevented from doing so. All the while, criminals, delinquents, and other such miscreants who refuse to take heed of our laws—gun control or otherwise—would continue to be armed and dangerous.

However, a strict standard of scrutiny will preserve the right of individual law-abiding citizens to defend themselves and their families. It will also help to maintain an armed-citizen check on government misconduct. Under strict scrutiny, the government will bear the burden of proving that a gun-control law is narrowly tailored
to achieve its public-safety purpose. This standard will (1) eliminate those gun-control laws that defy logic, (2) encourage legislatures to draft precise limitations that are not too burdensome, and (3) preserve those laws which are narrowly tailored, effective, and wise. Strict scrutiny is the only standard capable of achieving the proper balance in the gun-control debate.

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† Case Western Reserve University School of Law, J.D. 2008. I would like to thank the editors of the Case Western Reserve Law Review for their acute attention to detail. I would also like to thank Gillian Lindsay for her steadfast support and encouragement, and for the countless number of times she picked me up from the law library at ungodly hours.