

## What the Hell[er]? The Fine Print Standard of Review Under *Heller*

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### I. INTRODUCTION

*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.*<sup>1</sup>

Those twenty-seven words make up the Second Amendment of the United States Constitution and, without a doubt, guarantee constitutional protection of the right to keep and bear arms—but whose right is protected has been the difficult question. Up until 2001, all of the federal circuit courts that had ruled on the meaning interpreted the Second Amendment as protecting either a collective right that did not apply to individuals or a sophisticated collective right that only applied individually to people linked to state militias.<sup>2</sup> In 2001, the Fifth Circuit and, in 2007, the D.C. Circuit devi-

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1. U.S. CONST. amend. II.

2. *See, e.g.*, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999) (stating that the Second Amendment protects a collective right); *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997) (suggesting an individual right only to an extent that a person is a member of the militia); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (suggesting an individual right only to an extent that a person is a member of the militia); *Hickman v. Block*, 81 F.3d 98, 99 (9th Cir. 1996) (stating the Second Amendment

ated from their sister courts and held the Second Amendment to confer an individual right unrelated to a state's militia.<sup>3</sup>

The Second Amendment was ratified over 200 years ago, yet its meaning has been widely debated and, until June 26, 2008, judicially unresolved.<sup>4</sup> On June 26, 2008, in *District of Columbia v. Heller*, the Supreme Court examined the Second Amendment and found there to be a private, individual right to possess a firearm unconnected with the militia.<sup>5</sup> In doing so, the Court struck down the District of Columbia's handgun ban, bringing the Second Amendment to the front page and forefront of legal debate.<sup>6</sup>

In the days, weeks, and months following the decision, the debate revolving around the Second Amendment right to keep and bear arms ignited. The day after the decision was handed down, newspaper headlines acknowledged the historic ruling.<sup>7</sup> Gun rights advocates were quick to hail the ruling as signifying "a great moment in American history."<sup>8</sup> Judicial dock-

protects a collective right); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995) (stating that the Second Amendment protects a collective right); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) (suggesting an individual right only to an extent that a person is a member of the militia); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (suggesting an individual right only to an extent that a person is a member of the militia); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (stating that the Second Amendment protects a collective right); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942) (suggesting an individual right only to an extent that a person is a member of the militia).

3. *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff'd sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (finding there to be an individual right unconnected to militia service protected under the Second Amendment); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (holding that the Second Amendment protects an individual right to keep and bear arms unconnected to militia service).

4. Compare Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998) (arguing for a collective rights interpretation of the Second Amendment), and H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403 (2000) (arguing for a collective rights interpretation of the Second Amendment), with Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (arguing for an individual right interpretation of the Second Amendment), Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996) (arguing for an individual right interpretation of the Second Amendment), Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (arguing for an individual right interpretation of the Second Amendment), and Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (arguing for an individual right interpretation of the Second Amendment).

5. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008).

6. *Id.* at 2821-22; Joan Biskupic & Kevin Johnson, *Landmark Ruling Ignites Challenges to Firearms Laws: The Supreme Court Says Individuals Have a Right to Guns, but Many Questions Remain*, USA TODAY, June 27, 2008, at 1A.

7. E.g., David G. Savage, *The 2nd Amendment: Key Ruling on the Right to Bear Arms*, L.A. TIMES, June 27, 2008, at 1; Mary Schmich, *Gun-Control Views Bigger than Pro, Con*, CHI. TRIB., June 27, 2008, at 1.

8. Robert Cohen, *High Court Lifts Limit on Right to Bear Arms: Historic Ruling Imperils State Laws*, STAR-LEDGER, June 27, 2008, at 1.

ets across the country received lawsuits requesting courts to strike down various gun control laws.<sup>9</sup> However, gun control advocates were quick to spin the ruling in their favor, arguing that *Heller* will help prompt an increase in gun laws.<sup>10</sup> Since the Court's decision, legal scholars have wasted little time offering their opinions. Professor Erwin Chemerinsky criticized the Court's majority for their judicial activism and lack of judicial restraint.<sup>11</sup> Professor Akhil Reed Amar argued that none of the Justices sufficiently handled the constitutional aspects of the case.<sup>12</sup> Professor Sanford Levinson characterized the Court's decision as "eminently respectable."<sup>13</sup> Beyond professors, well known federal appellate judges have joined the discussion of *Heller* and the Second Amendment.<sup>14</sup> Judge J. Harvie Wilkinson III, of the Fourth Circuit Court of Appeals, and Judge Richard A. Posner, of the Seventh Circuit Court of Appeals, marked the case as advancing political policy, while portraying the *Heller* decision as being comparable to the historic abortion case *Roe v. Wade*.<sup>15</sup>

While *Heller* seems to settle the interpretive debate, it is clear that the gun debate surrounding the Second Amendment and *Heller* will continue to generate large amounts of public, legal, and judicial feedback.<sup>16</sup> As Dick Heller's cocounsel, Robert A. Levy, put it: "Heller is merely the opening salvo in a series of litigations that will ultimately resolve what weapons and persons can be regulated and what restrictions are permissible."<sup>17</sup> This series of litigations will involve detailing the scope of the articulated individual right.<sup>18</sup> Remaining hurdles include, among others, determining whether

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9. The following five cases were all filed the day after the Supreme Court's decision in *District of Columbia v. Heller* was decided: *Doe v. S.F. Hous. Auth.*, No. 08-3112 (N.D. Cal. filed June 27, 2008); *NRA v. City of Chi.*, No. 08-3697 (N.D. Ill. filed June 27, 2008); *NRA v. City of Evanston*, No. 08-3693 (N.D. Ill. filed June 27, 2008); *NRA v. Vill. of Oak Park*, No. 08-3696 (N.D. Ill. filed June 27, 2008); and *NRA v. Vill. of Morton Grove*, No. 08-3694 (N.D. Ill. filed June 27, 2008).

10. Cohen, *supra* note 8, at 1.

11. Erwin Chemerinsky, Op-Ed., *The Right Ruling? Judicial Activism by Conservatives*, BALT. SUN, June 30, 2008, at 11A.

12. Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008).

13. Adam Liptak, *Ruling on Guns Elicits Rebuke from the Right*, N.Y. TIMES, Oct. 21, 2008, at A15, available at [http://www.nytimes.com/2008/10/21/washington/21guns.html?\\_r=1&ref=us&oref=slogin](http://www.nytimes.com/2008/10/21/washington/21guns.html?_r=1&ref=us&oref=slogin).

14. *Id.*

15. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1265118>; Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32, available at <http://www.tnr.com/booksarts/story.html?id=d2f38db8-3c8a-477e-bd0a-5bd56de0e7c0>.

16. See *supra* notes 7-15.

17. Robert A. Levy, *Second Amendment Aftermath*, WASH. TIMES, July 3, 2008, at A22.

18. See *id.*

the individual right of the Second Amendment is applicable to the states and specifying the appropriate level of judicial review.<sup>19</sup>

This note proposes an analytical framework addressing the standard of review hurdle.<sup>20</sup> Now that the Supreme Court has acknowledged a private right to possess a firearm, it must be determined to what extent the right can be constitutionally infringed upon by government regulations.<sup>21</sup> Judicially created doctrines pertaining to constitutional rights typically contain analytical frameworks consisting of rules and tests that include a standard of review and thereby establish the scope of acceptable regulations.<sup>22</sup> In *Heller*, the Court did not specify an exact standard of review.<sup>23</sup> However, this note argues that a workable analytical framework can be extracted from the Court's language and reasoning.

Part II of this note takes a look at the historic decision in *Heller*. Summarizing the Court's reasoning and analysis, this part introduces the reader to the first thorough analysis of the Second Amendment by the Supreme Court in just less than seventy years.<sup>24</sup> It discusses the historic nature of the case and the corresponding effect on the individuals whom the Second Amendment was read to protect. Also, this part discusses the confined focus of the *Heller* holding and the resulting effect of leaving a void on determining an appropriate standard of review.

Part III of this note reveals the proposed framework that reviewing courts should use to determine the appropriate standard of review in future Second Amendment challenges. In this part, the proposed framework is developed into a three-step test, including categorical rules, a locality scheme, and burden-based/burden-neutral factors, with each step being extracted from *Heller*. The development of the test in this part supports each step with analogous tests and methods used in First Amendment doctrine. Part IV implements the proposed three-step test to two unaddressed issues within *Heller*—licensing laws and conceal and carry laws.

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19. Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2039-40 (2008); Linda Greenhouse, *Justices, Ruling 5-4, Endorse Personal Right to Own Gun*, N.Y. TIMES, June 27, 2008, at A1.

20. Throughout this note the phrases analytical framework and standard of review are used interchangeably.

21. Biskupic & Johnson, *supra* note 6, at 1A.

22. See generally Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

23. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817-18 & n.27, 2821 (2008) (noting that any standard, besides rational basis, would result in striking down the laws in question and acknowledging that the Court did not specify a standard of review).

24. *Id.* at 2821.

## II. A LOOK AT *HELLER*

The District of Columbia essentially banned the possession of handguns<sup>25</sup> by making it a crime to be in possession of an unregistered firearm, while simultaneously prohibiting the registration of a handgun.<sup>26</sup> Separately, the district also prohibited a person from carrying a handgun without a license; however, the Chief of Police was authorized to issue one year handgun licenses.<sup>27</sup> Dick Heller, a D.C. special police officer who was allowed to be in possession of a handgun while on duty at the Federal Judicial Center, attempted to obtain a valid registration certificate for a handgun he wanted to keep within his home.<sup>28</sup> The district denied his application, at which point Mr. Heller filed suit in the Federal District Court for the District of Columbia seeking to prevent the district from enforcing: (1) its ban on the registration of handguns, (2) the licensing provision insofar as it bans the carrying and moving of a firearm within the home without an issued license, and (3) the trigger lock provision insofar as it bans the use of a firearm within the home.<sup>29</sup> The issue before the Supreme Court was framed as “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment.”<sup>30</sup>

At the core of *Heller* was a dispute over the judicially unresolved meaning of the Second Amendment.<sup>31</sup> The Court spent nearly thirty-five pages of the opinion analyzing textual and historical arguments surrounding the twenty-seven words making up the Second Amendment.<sup>32</sup> In delivering the opinion of the Court, Justice Scalia started his argument by analyzing the “right of the people” contained in the operative clause.<sup>33</sup> Justice Scalia looked to the First and Fourth Amendments, which contain the same wording, as a guide in interpreting the textual meaning of the phrase.<sup>34</sup> The Assembly and Petition Clause of the First Amendment, along with the Search and Seizure Clause of the Fourth Amendment, use the same “right of the people” expression and, in doing so, refer to individual rights.<sup>35</sup> Given that

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25. See D.C. CODE § 7-2501.01(12) (2008) (defining pistol as “any firearm originally designed to be fired by use of a single hand”).

26. See D.C. CODE §§ 7-2502.01(a), 7-2502.02(a)(4) (2002).

27. See D.C. CODE §§ 22-4504(a), 22-4506 (2001).

28. *Heller*, 128 S. Ct. at 2783, 2788.

29. *Id.*

30. *Id.* at 2787-88.

31. *Id.* at 2816.

32. *Id.* at 2783-2817.

33. *Id.* at 2790-91. The operative clause of the Second Amendment is as follows: “the right of the people to keep and bear Arms.” U.S. CONST. amend. II; see also *Heller*, 128 S. Ct. at 2790-99.

34. *Heller*, 128 S. Ct. at 2790.

35. *Id.* at 2790-91.

the “right of the people” language in the First and Fourth Amendments referred to the rights of an individual, the Court reasoned there to be a strong presumption of an individual right protected by the Second Amendment “belong[ing] to all Americans.”<sup>36</sup>

Justice Scalia moved along the operative clause to the phrase “keep and bear arms.” Looking to dictionaries from the late eighteenth and nineteenth centuries, Justice Scalia determined the meaning of “keep” and “bear” at the time the framers wrote it was “‘not to lose’ [and] . . . ‘[t]o hold’” and “to carry,” respectively.<sup>37</sup> The common use of these words was applied to all individuals, not just militia members, which consequently showed an individual right to possess weapons beyond the context of militia purposes.<sup>38</sup> Justice Scalia reinforced the individual right presumption by characterizing the Second Amendment as the formal adoption of the pre-existing right of individuals to possess and carry weapons for self-defense.<sup>39</sup> After examining the operative clause, Justice Scalia marked the Second Amendment as undoubtedly granting an individual right to keep and bear arms for purposes beyond that of a militia.<sup>40</sup>

Justice Scalia shifted focus to the prefatory clause to see if the individual right reading of the operative clause was consistent with the former.<sup>41</sup> The purpose of creating a “well regulated militia” was to protect and impose security for the state.<sup>42</sup> The “militia” referred to in the Second Amendment was not the organized militia within an individual state; Justice Scalia separated the two and likened the former to the “militia” of Article 1, Section 8 of the Constitution and, therefore, reasoned that its meaning referred to all able-bodied men.<sup>43</sup> Wrapping up the prefatory clause, Justice Scalia moved to the phrase “necessary to the security of a free State” and argued that “state,” in context, goes beyond defending a specific state or each state individually and represents, generally, the organized nation.<sup>44</sup> A well-organized militia decreased the need for a large standing army, a well-

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36. *Id.*

37. *Id.* at 2791-99 (second alteration in original) (quoting 1 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1773); NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828)).

38. *Id.*

39. *Id.* at 2797-99. In the Supreme Court case *United States v. Cruikshank*, the Court, in regards to the right articulated in the Second Amendment, stated its pre-existing nature as it “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” 92 U.S. 542, 553 (1876).

40. *Heller*, 128 S. Ct. at 2799. Justice Scalia’s technique of looking to the operative clause first will no doubt be criticized.

41. *Id.*

42. *Id.* at 2799-2801.

43. *Id.* at 2799-2800.

44. *Id.* at 2800.

recognized fear in the lessons of English history, and presented the individuals of the states with the power to overthrow the government in a time of tyranny in order to ensure the security of a free nation—“security of a free state.”<sup>45</sup>

The militia was gathered from private citizens who would “bear” their personal arms to create a military unit.<sup>46</sup> If the government were to take away an individual’s right to bear arms, the government would effectively eliminate the ability to form a militia, or at least an effective one.<sup>47</sup> In combining the prefatory and operative clauses, Justice Scalia linked each clause together to read that every individual must be afforded the right to keep and bear arms if a well-regulated (effective) militia were to be present.<sup>48</sup> Justice Scalia referenced a number of state constitutions to bolster the individual right interpretation, in that state constitutions recognized both rights—the right to keep and bear arms in defense of self (individual) and state (militia)—which spoke to a common understanding that the Second Amendment right advanced military purposes as well as individual rights.<sup>49</sup> In other words, the Second Amendment protects a right to have and possess weapons, protects an individual right that goes beyond military purposes, and protects an individual’s right to possess a firearm for lawful purposes.

The Court then examined whether any precedent cases conflicted with the individual right interpretation.<sup>50</sup> After distinguishing a number of precedent cases from *Heller*, whether it was through reasoning a case to be off point regarding the interpretive issue, downplaying the strength of a precedent case, or pointing out relevant factual differences,<sup>51</sup> Justice Scalia concluded that Second Amendment jurisprudence did not exclude an individual right interpretation and that, if anything, the jurisprudence supported the Court’s interpretation.<sup>52</sup> Before implementing the Second Amendment individual right to the challenged laws, however, Justice Scalia explained that

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45. *Id.*

46. *Heller*, 128 S. Ct. at 2801-02.

48. *Id.*

49. *Id.* at 2802-03 (analogizing the individualistic provisions within the Pennsylvania, Vermont, North Carolina, Massachusetts, Kentucky, Ohio, Indiana, Missouri, Mississippi, Connecticut, Alabama, Tennessee, and Maine state constitutions to the individual right interpretation of the Second Amendment).

50. *Id.* at 2812-16.

51. *Id.* at 2812-13 (distinguishing *United States v. Cruikshank*, 92 U.S. 542 (1875) (pertaining to who cannot infringe upon the Second Amendment), and using its holding to support the individual right interpretation); *id.* at 2813 (distinguishing *Presser v. Illinois*, 116 U.S. 252 (1886) (pertaining to nonsanctioned military organizations)); *Heller*, 128 S. Ct. at 2813-16 (distinguishing *United States v. Miller*, 307 U.S. 174 (1939) (focusing not on the individuals but rather on the weapons protected by the Second Amendment), and limiting the case’s strength by pointing out that the respondent did not file a brief or make an oral argument).

52. *Heller*, 128 S. Ct. at 2813-16.

the Second Amendment right is not unlimited, and he presented a few illustrations of permissible limitations.<sup>53</sup> The Court made blanket statements, without explanation, regarding laws restricting the commercial sale of arms, the possession of firearms by felons and the mentally ill, and the possession of firearms within sensitive places.<sup>54</sup> Further, the Court stated another limitation concerning the types of weapons protected by the Second Amendment.<sup>55</sup> Following Second Amendment jurisprudence, the Court limited protected weapons to those which are “in common use at the time.”<sup>56</sup>

Lastly, the Court arrived at the stage for determining the effect of the Second Amendment individual right on the constitutionality of the challenged statutes.<sup>57</sup> Assuming Mr. Heller was “not disqualified from the exercise of Second Amendment rights,”<sup>58</sup> the Court looked to the type of weapon banned (handgun).<sup>59</sup> Justice Scalia did not provide much analysis regarding why handguns are protected by the Second Amendment.<sup>60</sup> Instead, Justice Scalia generally stated “that the American people have considered the handgun to be the quintessential self-defense weapon” and determined handguns to be weapons protected by the Second Amendment.<sup>61</sup>

Moving on in the Court’s analysis, a substantial amount of emphasis was placed on two elements: the home and the burden on lawful purposes, specifically on self-defense.<sup>62</sup> The Court stressed the fact that the laws in question reached inside the home, where the Second Amendment right is “most acute.”<sup>63</sup> In addressing the burden placed on the Second Amendment, the Court looked to the extent of the ban (complete prohibition of an entire class of guns—handguns), the effect upon the “core lawful purpose” (self-defense), and the affected locale (both public and private places, but emphasizing the private, i.e., the home).<sup>64</sup> The Court found the effective prohibition on handguns to be unconstitutional.<sup>65</sup> Also, in stressing that the safe storage statute impacted the “core lawful purpose” of the Second Amend-

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53. *Id.* at 2816-17.

54. *Id.*

55. *Id.* at 2817.

56. *Id.* (stating weapons protected under the Second Amendment are those “in common use at the time” (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939))).

57. *Id.* at 2817-22.

58. *Heller*, 128 S. Ct. at 2822.

59. *Id.* at 2817.

60. *Id.* at 2817-22.

61. *Id.* at 2818.

62. *Id.* at 2817-22.

63. *Id.* at 2817.

64. *Heller*, 128 S. Ct. at 2817-22.

65. *Id.*

ment right, the Court held the storage restrictions on lawful firearms to be unconstitutional.<sup>66</sup>

#### A. HISTORICAL LANDMARK

The *Heller* case is without a doubt a monumental decision in American jurisprudence. Justice Scalia tagged the case as representing “[the Supreme] Court’s first in-depth examination of the Second Amendment.”<sup>67</sup> So, without even addressing the outcome of the case, simply considering that the Supreme Court, approximately 220 years after the Second Amendment’s ratification, has finally engaged in an “in-depth examination of the Second Amendment” is in and of itself a landmark.<sup>68</sup> The outcome of the first thorough analysis of the Second Amendment, however, is at the heart of *Heller*’s historical character.

The Court answered the interpretive question of what the meaning of the Second Amendment truly is.<sup>69</sup> In doing so, the Supreme Court, for the first time in history, clearly pronounced that the Second Amendment confers an individual right to own and possess a firearm unconnected with service in a militia.<sup>70</sup> The finding that the Second Amendment protects an individual right to own and possess a firearm is the essence of *Heller*’s historical nature.<sup>71</sup>

The fact that the Second Amendment protects an individual right has a number of impacts. The decision effectively resolved the fiercely debated issue in our society regarding private firearm ownership.<sup>72</sup> Without an individual right included in the Second Amendment, the government would be able to pass any “reasonable” firearm regulation so long as it was not arbi-

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66. *Id.* at 2818.

67. *Id.* at 2821.

68. *Id.*; see also U.S. CONST. amend. II.

69. *Heller*, 128 S. Ct. at 2799; see also Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2035 (2008) (“What *Heller* is most notable for is its complete and unanimous rejection of the ‘collective rights’ interpretation . . .”).

70. *Heller*, 128 S. Ct. at 2816 (“It should be unsurprising that such a significant matter has been for so long judicially unresolved.”); *id.* at 2821 (“But since this case represents this Court’s first in-depth examination of the Second Amendment . . .”).

71. See *supra* notes 2-4 and accompanying text.

72. Compare Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (arguing the Second Amendment confers an individual right), and Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (arguing for an individual right interpretation of the Second Amendment), with Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000) (arguing the Second Amendment confers a collective right), and David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (arguing the Second Amendment confers a collective right).

trary and capricious.<sup>73</sup> Negating, generally, “reasonable” legislative action, the individual right holding places a significant burden on the legislature in its construction of gun control legislation.<sup>74</sup> Further, the decision judicially resolved the Second Amendment’s interpretative debate between an individual right,<sup>75</sup> sophisticated collective right,<sup>76</sup> and collective right,<sup>77</sup> which had plagued the courts for over 100 years. Lastly, the Second Amendment’s protection of an individual’s right unconnected to a militia to own and possess a firearm provides individuals the opportunity to judicially challenge gun control laws without simply having their case dismissed.<sup>78</sup>

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73. See Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL’Y REV. 488, 504 (1992) (stating a collective right would offer no protection for individuals under federal or state gun restrictions); Brannon P. Denning, *In Defense of a “Thin” Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV’T L. REV. 420 (2008) (stating the denial of an individual right under the Second Amendment would be a loss of legislative protection for the right to own and possess firearms).

74. Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1137 (2000) (discussing the burden placed on the government as a result of an individual right reading of the Second Amendment).

75. The Fifth and D.C. Circuits are the only appellate courts to interpret the Second Amendment as protecting an individual right. See, e.g., *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff’d sub nom. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

76. Five federal appellate courts have implemented or suggested a sophisticated collective right interpretation of the Second Amendment. See, e.g., *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942).

77. Four federal appellate courts have implemented a collective right interpretation of the Second Amendment. See, e.g., *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *Hickman v. Block*, 81 F.3d 98, 99 (9th Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976).

78. See, e.g., *Nordyke v. King*, 319 F.3d 1185, 1192 (9th Cir. 2003) (holding the Second Amendment confers a collective right and, therefore, dismisses private Second Amendment challenges); *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (finding the Second Amendment confers a collective right and, therefore, dismisses private Second Amendment challenges); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (holding the Second Amendment confers a collective right and, therefore, dismisses private Second Amendment challenges); see also Reynolds & Denning, *supra* note 19, at 2036 (“[T]he . . . collective rights interpretation . . . gives rise to no judicially enforceable right to bear arms on the part of individuals.”).

## B. NARROW SCOPE

While undoubtedly a historical decision, *Heller*'s holding was exceedingly narrow in scope.<sup>79</sup> The question presented to and considered by the Court was "whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution."<sup>80</sup> In order to answer that question, the Court needed to determine the proper interpretation of the Second Amendment and, therefore, engaged in an extensive examination of its text and history.<sup>81</sup> After concluding the Second Amendment protected an individual right, the Court, with a few exceptions, tapered the rest of its opinion to answering the presented question, holding the Second Amendment protects the possession of usable *handguns in the home*.<sup>82</sup>

The Court's holding can be effectively stated as being that the scope of the Second Amendment confers on an individual the right to possess a usable handgun in the home unconnected to militia service.<sup>83</sup> While the holding did acknowledge more general issues, such that the scope of the Second Amendment goes beyond military uses and protects the private use of firearms for lawful purposes, the holding was exceedingly narrow. The fact that the scope of the Second Amendment goes beyond military uses and protects lawful purposes does little to clarify the *extent* of the conferred individual right beyond that stated by the Court—usable handguns in the home are protected.<sup>84</sup> As a result, there is a large grey area regarding the scope of the conferred individual right and to what extent that right protects gun possession beyond handguns in the home. Stated differently, and maybe more importantly, there is a grey area regarding the extent to which the government can and cannot regulate the individual right outside the context of handguns in the home.

Through a few exceptions, the Court provided some clarification regarding the scope of the Second Amendment protection in the form of limitations.<sup>85</sup> First, reasonable conditions and qualifications placed on the com-

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79. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008) (acknowledging aspects of the Second Amendment that have not been clarified and narrowly holding the Second Amendment protects usable handguns in the home).

80. *Id.* at 2787-88.

81. *Id.* at 2788-2812.

82. *Id.* at 2817-22.

83. *See generally Heller*, 128 S. Ct. 2783.

84. *See id.* at 2817-22 (holding an individual has a constitutional right to possess an operable handgun in the home for the purpose of self-defense).

85. *Id.* at 2816-17 (stating limitations to the Second Amendment without much elaboration).

mercial sale of arms are constitutional.<sup>86</sup> Second, felons and the mentally ill do not have a Second Amendment right to possess firearms, even in the home.<sup>87</sup> Next, the types of weapons protected are those “in common use at the time,” whether in the home or not.<sup>88</sup> Lastly, individuals do not have a right to carry a firearm in “sensitive places.”<sup>89</sup>

The fact that certain individuals can be completely restricted from having guns and some firearms can be completely banned provides insight into the framework of the Second Amendment doctrine.<sup>90</sup> Also, the fact that on one hand the possession of a firearm in the home is protected and on the other hand firearm possession in a “sensitive place” is unprotected suggests the idea of a locality scheme functioning as a determining factor within the Second Amendment doctrine.<sup>91</sup> While these limitations alone do not clarify the entire scope of the Second Amendment, they do shed light on the grey area and, in doing so, provide the reasoning behind the proposed framework for a workable standard of review.

### III. AN ARTICULATION OF *HELLER*'S UNSTATED STANDARD OF REVIEW

In the aftermath of *Heller*'s holding, people criticized the Court for leaving the level of judicial review unspecified.<sup>92</sup> In fact, dissenting Justice Breyer criticized the majority for the lack of clarity and direction it offered towards establishing a standard of review to support its reasoning behind rejecting the gun control legislation.<sup>93</sup> The majority, indeed, responded to Justice Breyer's criticism and acknowledged that the decision in *Heller* by no means explains every aspect of the Second Amendment.<sup>94</sup> While it is clear that the Court did not spell out every facet of the individual right, the Court undoubtedly employed some level of heightened review.<sup>95</sup>

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86. *Id.* at 2817. The “conditions and qualifications” limitation regarding the commercial sale of arms seems to refer to who can sell firearms and how firearms can be sold, which would not directly speak towards individual possession of a firearm for purposes such as self-defense and, for practical purposes, will not be discussed in this note. *Id.*

87. *Id.* at 2816-17.

88. *Heller*, 128 S. Ct. at 2817.

89. *Id.*

90. *See infra* Part III.A-B.

91. *Heller*, 128 S. Ct. at 2816-17; *see infra* Part III.C.

92. *See Reynolds & Denning, supra* note 19, at 2040.

93. *Heller*, 128 S. Ct. at 2868 (Breyer, J., dissenting).

94. *Id.* at 2821 (majority opinion).

95. *Id.* at 2817-18 & n.27. Writing for the majority, Justice Scalia acknowledges that the district's laws would have held up under rational-basis scrutiny. *Id.* at 2817 n.27.

People may assume that an individual-right reading of the Second Amendment automatically sets the level of review at strict scrutiny.<sup>96</sup> Likewise, individuals may not take it to the extent of strict scrutiny but may assume that the acknowledgment of a constitutionally protected individual right within the Second Amendment places a burden—some form of heightened scrutiny—on the government to show that a gun control regulation was necessary.<sup>97</sup> Others will argue that even with the individual-right view, the standard of review should be deferential to the government.<sup>98</sup> Yet, others may point to the Court's assertion that felons and the mentally ill may be banned from possessing firearms to argue the Court implemented a standard of review lower than strict scrutiny.<sup>99</sup> To be sure of one thing, regarding the individual right of the Second Amendment, the entire spectrum of standards of review will most certainly be argued for and against.<sup>100</sup>

To provide possible insight into the appropriate standard of review, it may be helpful to look at the first case to hold that the Second Amendment protected an individual right to keep and bear arms.<sup>101</sup> In *United States v. Emerson*, the court was posed with a challenge to a law banning an individual under a restraining order in a domestic harassment case from possessing firearms.<sup>102</sup> After the Fifth Circuit interpreted the Second Amendment to protect an individual right, the court seemed perplexed at how to go about reviewing the challenged law.<sup>103</sup> It appeared that the court knew where it

96. See, e.g., *United States v. Carolene Prod.*, 304 U.S. 144, 153 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.”); see also Brannon P. Denning & Glenn H. Reynolds, *Telling Miller’s Tale: A Reply to David Yassky*, LAW & CONTEMP. PROBS., Spring 2002, at 120 (arguing for strict-scrutiny review under an individual right interpretation); Roy Lucas, *From Patson & Miller to Silveira v. Lockyer: To Keep and Bear Arms*, 26 T. JEFFERSON L. REV. 257, 329 (2004) (arguing for strict-scrutiny review under an individual right interpretation).

97. See Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 333 (2000) (“If constitutional text, structure, history, and doctrine led . . . to . . . a Second Amendment [individual] right to own firearms . . . the persuasion burden would fall on those who sought to limit that right.”); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1392 (1997) (“If the [Second] Amendment has [an individual right] . . . then it creates presumptions that tilt the debate.”).

98. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 716-33 (2007) (assuming an individual right interpretation of the Second Amendment [pre-*Heller*], he proposes a reasonable regulation standard resembling that of the state courts).

99. See *Heller*, 128 S. Ct. at 2816-17.

100. See, e.g., *id.* at 2852 (Breyer, J., dissenting) (arguing for an interest-balancing test weighing competing interests).

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

102. *Id.* at 212-213.

103. See Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 908 (2004) (reviewing DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND*

wanted to go, spelling out strict scrutiny as the level of review, but was hesitant to do so and, therefore, included the idea of reasonableness, which does little to help in clarifying the appropriate standard of review.<sup>104</sup> The way reasonableness was included throws a reader off.<sup>105</sup> However, after examining *Heller* and the proposed framework, the “reasonableness” in *Emerson* should no longer be confusing.<sup>106</sup>

While the Court in *Heller* was by no means explicit in revealing the appropriate level of review, this note purports that an appropriate framework most certainly can be extracted from the Court’s language. This note asserts that, drawing from the Court’s holding and reasoning, there is a workable three-step test that should be used as the standard of review for courts evaluating challenges to gun control laws in future cases. The first two steps are categorical rules that deal with the limited extent of the Second Amendment individual right. The first step determines whether an individual making a challenge to gun control legislation falls within the scope of those protected under the Second Amendment. If the individual is not covered by the Second Amendment, the government would only have to show the statute has a rational basis. If the individual is protected by the Second Amendment, the process would then move on to the second step. The second step identifies whether a weapon that is afforded constitutional protection under the Second Amendment is being restricted by the challenged statute. Similarly, if the weapon is not protected, the government would only need to show the restriction had a rational basis; however, if the weapon is protected, the process moves to the final step. The third and final step, which this note proposes as the HPS test, is the heart of the review process for a Second Amendment challenge.

The HPS test begins by establishing the effective range of the challenged statute in terms of a locality scheme. Within the test there are three possible affected localities: (1) home, (2) public, and (3) sensitive place. The function of establishing the localities reached by a restriction is to help

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AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003)) (“[T]he Fifth Circuit seemed to be at something of a loss as to exactly what to do next.”).

104. See *Emerson*, 270 F.3d at 261 (“[While] the Second Amendment does protect individual rights, . . . those rights may . . . 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.”).

105. See Winkler, *supra* note 98, at 691 (stating that the narrowly tailored language seen within *Emerson* traditionally signifies a strict scrutiny level of review, which would be deferential to individuals, while at the same time *Emerson* includes reasonableness, which traditionally signifies a low level of scrutiny that is deferential toward government action, leading to confusion).

106. See *infra* Part III.A-C (stating felons, mentally ill, particular weapons, and possession of firearms in sensitive places are not protected by the Second Amendment).

determine the strength of the Second Amendment right being infringed so that the appropriate standard of review can be implemented. For instance, a restriction reaching the home, such as a law banning the carrying and concealment of a weapon within a person's home, will be reviewed with a more heightened scrutiny as compared to a law banning the carrying and concealment of a weapon in public, which would be seen as affecting the public locale.<sup>107</sup> As asserted by the Court, the sensitive place locale represents schools and government buildings.<sup>108</sup> The sensitive place locale falls on the opposite side of the spectrum from the home locale, offering no protection for the right to possess firearms in such a place.<sup>109</sup>

After determining the affected localities, the burden placed by the challenged law on an individual's ability to keep and bear a firearm for lawful purposes, such as hunting and self-defense, must be established. Throughout the opinion, the Court stressed the connection between the Second Amendment right and "the inherent right of self-defense," and its importance.<sup>110</sup> As a result, the function of establishing the burden placed on the lawful purposes, such as self-defense, is to supplement the locality scheme in determining the appropriate standard of review. The more a law infringes on the ability of an individual to defend oneself, the more skeptical a court should be when determining the constitutionality of such a law. For instance, imagine a law banning silencers and weapons with silencers. Such a ban hardly, if at all, infringes upon an individual's ability to defend oneself. A barely audible gun would be neither necessary nor very helpful regarding protected lawful purposes<sup>111</sup> and, therefore, a court would not be skeptical of such a ban.<sup>112</sup>

Once the affected locale(s) and burden placed on lawful purposes are established, the two elements are measured in light of one another. Take, for example, a complete ban on weapons with silencers. The complete ban would reach the home, public, and sensitive place locales. While extending to the home and, as a result, raising judicial skepticism, the burden placed upon lawful purposes would be nonexistent because, as previously stated, silencers would likely not stand as a detriment to self-defense. Therefore, such a restriction would face a form of intermediate scrutiny.<sup>113</sup>

As stated by the Court, on the basis of both textual and historical sources, there is no doubt that the Second Amendment grants an individual

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107. See *infra* Part III.C.

108. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

109. See *id.* at 2816-22.

110. *Id.* at 2817.

111. Massey, *supra* note 74, at 1126 (stating the ineffectiveness of a silencer for self-defense purposes).

112. See, e.g., CAL. PENAL CODE § 12276.1(a)(1)(A)-(E) (2000 & Supp. 2009).

113. See *infra* Part III.C.

right to own and possess firearms.<sup>114</sup> The Court immediately pointed out, however, that similar to the First Amendment right, the Second Amendment right is not read to be unlimited.<sup>115</sup> Limitations as to who is protected under the Second Amendment are the starting point for the three-step test.

A. THE INDIVIDUALS GRANTED RIGHTS UNDER THE SECOND AMENDMENT—THE FIRST STEP

The Court unequivocally stated that the articulated individual right granted by the Second Amendment in no way “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”<sup>116</sup> The Court did not provide any explanation for why its opinion in *Heller* should not “cast doubt” upon the constitutionality of laws prohibiting firearm possession by felons and the mentally ill.<sup>117</sup> Without any sort of direction from the Court, two separate, logical inferences regarding the Court’s standard of review may be drawn from the provision. First, the Court intended to suggest that laws prohibiting the possession of firearms by felons or the mentally ill would pass the standard of review applied by the Court.<sup>118</sup> Second, the Court intended to assert that such laws do not implicate the Second Amendment right because felons and the mentally ill are not within the scope of individuals granted protection under the Second Amendment.<sup>119</sup>

In considering the first possible inference—that the Court intended to presume felon-in-possession or mentally ill-in-possession laws were constitutional under whatever standard of review utilized—such an inference does not make sense when viewed in light of the *Heller* opinion. While the holding was narrow in scope, stating that individuals have the right to possess a useable handgun in the home,<sup>120</sup> the Court was clear in stating that the right to self-defense is essential to and the core lawful purpose of the right protected under the Second Amendment.<sup>121</sup> Also, the Court was explicit in stating that “the home” is where the protected right is deemed to be the strongest.<sup>122</sup> Given that the Second Amendment right is most firmly grounded in the home and in the aspect of self-defense according to the

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114. *Heller*, 128 S. Ct. at 2799.

115. *Id.*

116. *Id.* at 2816-17.

117. *Id.* at 2816.

118. *See id.* at 2817 & n.26.

119. *See id.* at 2822 (qualifying the ability to exercise the Second Amendment rights).

120. *See infra* Part III.B.

121. *Heller*, 128 S. Ct. at 2817-18 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”).

122. *Id.* at 2817.

Court, it is hard to believe the Court was asserting that laws prohibiting felons and the mentally ill from exercising the rights protected by the Second Amendment at their most fundamental level (being able to defend oneself in the home) would presumptively pass the Court's implemented standard of review, which was some form of heightened scrutiny.<sup>123</sup> It is nonsensical to think that a law that completely abrogates a constitutionally enumerated, protected right could pass heightened scrutiny.<sup>124</sup> And directly contrary to the first inference, the Court acknowledged that Mr. Heller could be disqualified from constitutional protection to possess a firearm.<sup>125</sup>

The more plausible inference would be that the Court intended to assert that felons and the mentally ill are not protected under the Second Amendment. As noted, the Court did not explicitly state such an assertion; however, the Court later stated that the "[Second Amendment] surely elevates above all other interests the right of *law-abiding, responsible* citizens to use arms in defense."<sup>126</sup> Also, in its final summation, the Court stated that the District of Columbia must allow Mr. Heller to possess and carry his handgun within his home if Mr. Heller was not *disqualified* from protection under the Second Amendment.<sup>127</sup> While these statements alone may not form a steadfast pillar of support for the claim that felons and the mentally ill are not within the scope of the Second Amendment, these statements most certainly provide a colorable basis for such a claim. Looking to other sources, the claim finds much stronger pillars of support.

The claim that laws banning felons and the mentally ill from possessing weapons do not implicate any Second Amendment right is supported by case law, historical intent, and modern legal articles. Previously, the Supreme Court seemed to have maintained that laws denying felons and the mentally ill the right to possess firearms neither implicated nor restricted the rights protected under the Second Amendment.<sup>128</sup> Also, the only two

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123. See *id.* at 2817-18 & n.27 (acknowledging the use of some form of heightened scrutiny and stating that the individual right to possess firearms is a specific, enumerated right); see also Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 *FORDHAM L. REV.* 477, 484 (2004) (believing an individual right reading would bring on a level of strict-scrutiny protection).

124. *Heller*, 128 S. Ct. at 2817 n.27 (stating that the individual right is a specific, enumerated right).

125. *Id.* at 2821-22 (qualifying the ability to exercise Second Amendment rights).

126. *Id.* at 2821 (emphasis added).

127. *Id.* at 2822 ("Assuming that Heller is not *disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." (emphasis added)).

128. The Court, in *Lewis v. United States*, with regard to the federal felon-in-possession statute, stated that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." 445 U.S. 55, 65 n.8 (1980) (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

circuit courts to find an individual right, the Fifth Circuit and the D.C. Circuit, both assert the claim that the Second Amendment does not extend protection to felons and the mentally ill.<sup>129</sup> In other words, a law prohibiting firearm possession by felons and the mentally ill does not present a Second Amendment challenge because neither classification of people is included as “people” protected by the Amendment.<sup>130</sup> Looking to the ratifying convention proposals, which specifically proposed the aspects of the Second Amendment right, all such proposals denied the right to criminals and violent individuals.<sup>131</sup> At the time the Second Amendment was ratified it was understood that felons and the mentally ill, among others, did not have a right to keep and bear arms.<sup>132</sup>

Some modern scholars have suggested that under an individual right interpretation, the Second Amendment doctrine may include some categorical rules clarifying the extent of the right.<sup>133</sup> The use of categorical rules in the process of reviewing challenges regarding other enumerated rights has

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129. *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007) (citing *Lewis*, 445 U.S. at 65 n.8) (alluding to the Supreme Court, stating “the Court . . . appears to have held that convicted felons may be deprived of their right to keep and bear arms”), *aff’d sub nom. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (“[I]t is clear that felons . . . and those of unsound mind may be prohibited from possessing firearms.”).

130. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983) (“The constitutionality of such legislation cannot seriously be questioned on a theory that felons are included within ‘the people’ whose right to arms is guaranteed by the second amendment.”); *see also* Reynolds, *supra* note 4, at 480 (“[F]elons, children, and the insane were excluded from the right to arms precisely (and for the same reason) as they were excluded from the franchise.”).

131. Kates, *supra* note 130, at 266 (“All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.”).

132. *See* Robert Dowd, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983) (“Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons.”); *see also* Don B. Kates, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143, 146 (“In classical republican political philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the ‘virtuous citizen.’ Free and republican institutions were believed to be dependent upon civic *virtu* which, in turn, depended upon each citizen being armed—and, therefore, fearless, self-reliant, and upright. Since possession of arms was the hallmark of a citizen’s independence, the ultimate expression of civic *virtu* was his defensive use of arms against criminals, oppressive officials, and foreign enemies alike. One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.” (footnote omitted)).

133. *See, e.g.*, Winkler, *supra* note 105, at 689 (referencing the possibility of categorical rules for the Second Amendment doctrine, stating that “the Court could hold that some types of weapons are not ‘arms’ covered by the amendment”).

repeatedly been applied.<sup>134</sup> For example, the enumerated right to freedom of speech in the First Amendment has a categorical rule that defines obscenity, no doubt a form of speech, to be outside the meaning of “speech” as protected under the First Amendment.<sup>135</sup> As a result, obscenity is unprotected by the First Amendment and laws restricting obscenity face rationality as their standard of review.<sup>136</sup>

The Court’s statement disqualified felons and the mentally ill from firearm possession. While it may be argued that such disqualifications were merely an attempt to assert that felon-in-possession laws and the like are lawful under the Court’s level of review, this note suggests that the statement qualifies the Second Amendment individual right by creating a categorical rule. The categorical rule being, as a number of cases and articles illustrate, that the Second Amendment individual right to bear arms does not encompass felons or the mentally ill. Therefore, neither a felon nor a mentally ill person<sup>137</sup> may claim that the government has infringed upon their constitutional right to possess a firearm because they fall outside the sphere of individuals protected under the Second Amendment.

As a result, this note proposes that the standard of review for a Second Amendment challenge begins with this categorical rule pertaining to “who” is protected. The real question for the first step is whether the individual bringing a challenge under the Second Amendment is in fact an individual guaranteed protection by the Second Amendment. Felons and the mentally ill, among others, do not hold a constitutional right to possess firearms, and, therefore, these individuals have no Second Amendment constitutional

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134. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding that advocacy directed to inciting people to do imminent, lawless action is categorically unprotected); *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that a true threat is another form of unprotected speech); *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding obscenities do not fit within speech as protected under the First Amendment and are, thus, categorically unprotected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding fighting words to be outside the scope of the First Amendment and, therefore, categorically unprotected); see also *Winkler*, *supra* note 105, at 689 (“Courts sometimes employ a definitional approach to implementation that uses categorical rules to determine the scope of rights.”).

135. *Roth v. United States*, 354 U.S. 476, 485 (1957) (finding obscenities to be outside the scope of the protection guaranteed to speech because obscenities do not constitute speech as protected by the First Amendment).

136. See generally *Roth*, 354 U.S. 476.

137. This note is not purporting that felons and the mentally ill are an exhaustive list of individuals disqualified from protection under the Second Amendment, similar to the Court in *Heller*. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.26 (2008) (stating that the list of limitations was not exhaustive); see also *Dowlut*, *supra* note 132, at 96 (including children in the category of those not protected under the Second Amendment); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms”*, LAW & CONTEMP. PROBS., Winter 1986, at 151, 161 (including children in the category of those not protected under the Second Amendment).

claim against the government if the government so chooses to prohibit them from possessing firearms.

Imagine the scenario where a former felon was arrested inside his home. Within the home, police officers subsequently found a handgun and a fully automatic machinegun. The individual was charged and convicted of violating the federal statute criminalizing the possession of a firearm by a felon<sup>138</sup> and the federal statute criminalizing the possession of a machinegun.<sup>139</sup> The individual appealed the conviction on the grounds that the two statutes violated his Second Amendment individual rights to own and possess firearms because they prohibited his ability to use firearms for, among other lawful purposes, the “core lawful purpose of self-defense,” as articulated in *Heller*.<sup>140</sup> The reviewing court needs to first determine whether the individual is guaranteed any protection under the Second Amendment. Because the individual has previously been convicted of a felony, the individual would fall outside the scope of any individual right conferred by the Second Amendment and, therefore, the statutes in question would only need to meet mere rationality.

However, if these facts were slightly modified, the scenario would require further analysis. Imagine instead that the individual was not a former felon but was still arrested inside his home. Within the home, police officers found a handgun and a fully automatic machinegun. The individual was again charged and convicted, however, this time it was for being in violation of section 7-2502.01(a)<sup>141</sup> and subsections (a)(2)<sup>142</sup> and (a)(4)<sup>143</sup> of section 7-2502.02 of the District of Columbia Criminal Code, which, prior to the *Heller* decision, effectively banned the possession of handguns and fully automatic machineguns. A reviewing court again would need to first determine whether the individual is guaranteed any protection under the Second Amendment. In this example, the individual, assuming he is not disqualified for other reasons, would fall within the scope of individuals protected by the Second Amendment.<sup>144</sup> Therefore, because the man is a qualified individual, the reviewing court would be required to move to the second step of the proposed standard of review to determine whether the banned firearms are, similarly, within Second Amendment protection.

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138. 18 U.S.C § 922(g)(1) (2006).

139. *Id.* § 922(o)(1).

140. *Heller*, 128 S. Ct. at 2818.

141. D.C. CODE § 7-2502.01(a) (2008) (requiring all firearms be registered).

142. D.C. CODE § 7-2502.02(a)(2) (2008) (prohibiting the registration of fully automatic machineguns).

143. D.C. CODE § 7-2502.02(a)(4) (2008) (prohibiting the registration of handguns).

144. *See supra* note 93 and accompanying text.

B. THE FIREARMS PROTECTED UNDER THE SECOND AMENDMENT—THE SECOND STEP

The intent of the Court in expressing that the right protected by the Second Amendment does not extend to all “arms” was far more apparent than that of the qualification placed on being a protected individual.<sup>145</sup> The Court plainly stated that the Second Amendment does not protect an individual’s right to “keep and carry *any* weapon whatsoever.”<sup>146</sup> While not explicitly stating there to be a categorical rule, the Court, without a doubt, asserted that the scope of the individual right of the Second Amendment does not reach to every type of firearm.<sup>147</sup> As a result, before engaging in an extensive examination of the constitutionality of a challenged gun control law, a court must first determine if the law in question pertains to a firearm that would even implicate such an examination—the second step of the test.

In recognizing the abridged scope of “arms” protected under the Second Amendment, the Court pointed to *United States v. Miller*, the last Supreme Court case to deal with the Second Amendment,<sup>148</sup> to shed light on which “arms” are afforded constitutional protection.<sup>149</sup> Although the Court examined *Miller* to make sure an individual right reading was not excluded by its prior holdings, the Court in the process went on to explain *Miller*’s holding, which clarified what types of “arms” are protected under the Second Amendment.<sup>150</sup> In analyzing *Miller*, the Court stated that the reasoning for why the Second Amendment did not apply in *Miller* was because the restricted firearm in question (a sawed-off shotgun) “was not eligible for Second Amendment protection.”<sup>151</sup> The Court went on to further say that “*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”<sup>152</sup> The presence of a limitation on the scope of “arms” afforded constitutional protection under the Second Amendment could not be more apparent. The Court’s examination of *Miller*, in every respect, called upon the notion of a categorical rule pertaining to the types of firearms outside the scope of Second Amendment protection.<sup>153</sup> This is reinforced by the fact that prior to *Heller*

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145. *Heller*, 128 S. Ct. at 2816-17.

146. *Id.* at 2816 (emphasis added).

147. *Id.* at 2814.

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

149. *Heller*, 128 S. Ct. at 2818.

150. *Id.* at 2813-16.

151. *Id.* at 2814.

152. *Id.*

153. *See id.* at 2813-17. Specifically, the Court’s analysis concentrated on two sentences from *Miller* to magnify the limitation on weapons protected by the Second Amendment:

other courts and scholars had suggested the notion of a categorical rule within the Second Amendment doctrine.<sup>154</sup>

Accordingly, a court, after determining the challenger is a qualified individual, should ask itself whether a law challenged under the Second Amendment involves a restriction or places a ban on a firearm granted constitutional protection. If the answer is no, the court would have no need to extend its analysis to the third step because the restricted firearm in question would not fall under the scope of “arms” protected under the Second Amendment and, therefore, the court would need only to find that the government had a rational basis for such a restriction. On the other hand, if the answer is yes—the challenged law places a restriction or burden on a constitutionally protected firearm—the court must proceed to the third and final step<sup>155</sup> and further evaluate the constitutionality of the law in question. While answering the second step may, at first glance, appear to be straightforward given that it should be easy to establish that the Framers could not have intended to secure individuals with the right to privately possess weapons capable of mass destruction, such as atomic bombs and rockets, answering what weapons fall within the protected scope, in fact, will be no simple task and will most likely end up as a highly contested and litigated area of Second Amendment jurisprudence.<sup>156</sup> The author of this note does not contend or intend to engage in the exhaustive analysis required to answer such a question. However, for the purposes of this note, it is necessary to identify the components and standards identified by the Court needed to

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Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection:

In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*.

“Certainly,” the Court continued, “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”

*Id.* at 2814 (citation omitted) (alteration in original) (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)).

154. See, e.g., *United States v. Emerson*, 270 F.3d 203, 224 (5th Cir. 2001) (“We believe it is entirely clear that the Supreme Court decided *Miller* on the basis of the government’s *second* argument—that a ‘shotgun having a barrel of less than eighteen inches in length’ as stated in the National Firearms Act is not (or cannot merely be assumed to be) one of the ‘Arms’ which the Second Amendment prohibits infringement of the right of the people to keep and bear . . . .”); Winkler, *supra* note 105, at 689 (referencing the possibility of categorical rules for the Second Amendment doctrine by stating that “the Court could hold that some types of weapons are not ‘arms’ covered by the amendment”).

155. See *infra* Part III.C.

156. Massey, *supra* note 74, at 1126.

answer whether a type of weapon qualifies for Second Amendment protection.

The Court identified the types of weapons covered by the Second Amendment through its analysis of *Miller*. The Court stated:

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”<sup>157</sup>

It is quite evident that the Court adhered to its reading of *Miller* by qualifying the weapons afforded constitutional protection with the requirement that they be “in common use at the time.”<sup>158</sup> However, the Court was less clear how “in common use at the time” is supposed to be interpreted in order to determine whether a weapon has a protected or unprotected status under the Second Amendment. Even Justice Breyer was at a loss or confused on how to implement the limitation standard. In his dissent, Justice Breyer remarked that the Court seemingly implied that the phrase was to mean that weapons that have been banned, so effectively not in common use, would be unprotected by the Second Amendment.<sup>159</sup> Justice Breyer went on to say that lifting the bans would place those weapons back in the scope of protection if such weapons were then purchased by individuals, or effectively in common use.<sup>160</sup> However, the Court’s holding neither asserted nor implied such an interpretation. It seems illogical to believe that the protected scope of weapons could at one point in time not cover weapon “X” but later include weapon “X” after its restricting law had been lifted. Likewise, it would be illogical to believe that a balancing test measuring the number of individuals who possess new weapon “Y” and the timing of government action in banning new weapon “Y” would be the pivotal factor in determining the constitutionally protected or unprotected nature of new weapon “Y.”

The First Amendment, as previously mentioned,<sup>161</sup> contains categorical limitations that define the scope of its analytical doctrine.<sup>162</sup> Obscenity, despite being a form of speech, does not fall within the scope of “speech” as protected under the First Amendment and, therefore, represents unpro-

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157. *Heller*, 128 S. Ct. at 2817 (citation omitted) (emphasis added) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

158. *Id.*

159. *Id.* at 2869 (Breyer, J., dissenting).

160. *Id.*

161. See *supra* notes 134-36 and accompanying text.

162. See *supra* notes 134-36 and accompanying text.

tected speech.<sup>163</sup> Obscenity's characterization as unprotected speech, or speech outside the scope of the First Amendment, forms a categorical limitation to the First Amendment.<sup>164</sup> As a result, a person's right to obscene speech is not constitutionally protected, so in restricting such speech, government action would need only to meet mere rationality. If the government was to choose not to act or choose to lift a restriction on obscene speech, individuals would be free to use such speech, but obscenity would not, thus, shift into the scope of speech as protected by the First Amendment. Whether restricted or not, obscenity is defined categorically and is positioned outside the protected forms or types of speech as referred to by the First Amendment.

Similarly, particular weapons, such as sawed-off shotguns, are positioned outside the protected types of "arms" as referred to by the Second Amendment.<sup>165</sup> As already established, a limitation on the scope of weapons afforded constitutional protection under the Second Amendment was directly stated by the Court.<sup>166</sup> In attempting to further develop the *Miller* Court's "in common use at the time" limitation, *Heller*, while not laying out every aspect, made it apparent that the phrase referenced the Framers' intent to guarantee protection to the types of weapons (e.g., rifles and pistols) brought by individuals when called for militia duty.<sup>167</sup> The Court did not say or mean, however, that the Second Amendment only protects the weapons present at the time it was ratified.<sup>168</sup> It is quite reasonable that the Court meant lineal descendants of the weapons in common use during the eighteenth century. Before *Heller*, scholars recognizing the limited scope of "arms" argued that weapons that were lineal descendants of the kinds of

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163. *Roth v. United States*, 354 U.S. 476, 485 (1957) (finding obscenities to be outside the scope of the protection guaranteed to speech because obscenities do not constitute speech as protected by the First Amendment).

164. Winkler, *supra* note 105, at 689.

165. *Heller*, 128 S. Ct. at 2816.

166. *Id.* at 2817.

167. *See id.* at 2815 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) ("The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense. 'In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.' Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." (citation omitted) (alteration in original) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939))).

168. *Id.* at 2791-92 ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, 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." (citations omitted)).

weapons brought by individuals when called for militia duty are the weapons extended protection under the Second Amendment.<sup>169</sup> In the appellate level case leading to the Supreme Court's decision in *Heller*, the D.C. Circuit acknowledged that modern rifles, shotguns, and handguns were lineal descendants of colonial firearms and, therefore, were protected by the Second Amendment.<sup>170</sup> Yet, a person may attempt to argue that, linked with "in common use at the time" protected weapons are only weapons that are suitable for the highly touted self-defense purpose of the Second Amendment.

Whatever the case, the exact method and manner in which to interpret "in common use at the time," in determining a weapon's protected or unprotected status was not ultimately identified, and any guidance that was offered seems to be somewhat muddled.<sup>171</sup> In *Heller*, the Court referenced "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" as support for the "in common use at the time" limitation, which may certainly stand as an indication of the correct approach to de-

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169. See, e.g., Jerry Bonanno, *Facing the Lion in the Bush: Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution*, 29 HAM. L. REV. 463, 484 (2006) (arguing lineal descendants of the rifles and pistols of colonial times are protected under the Second Amendment); Kates, *supra* note 130, at 259-60 (arguing lineal descendants of the rifles and pistols of colonial times are protected under the Second Amendment).

170. *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007), *aff'd sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) ("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 . . . [T]he Second Amendment protects the possession of the modern-day equivalents of the colonial pistol.").

171. *Heller* clarified the protected status and unprotected status of two firearms. *Heller*, 128 S. Ct. at 2816-22. Handguns are protected under the Second Amendment, and sawed-off shotguns are not. *Id.* Therefore, handguns must pass the "in common use at the time" standard, while sawed-off shotguns do not. *Id.* at 2817. The Court, other courts, and legal scholars seem to all suggest that the limitation standard refers to colonial weapons while keeping in mind technological advances. See, e.g., *id.* at 2815-16; *Parker*, 478 F.3d at 398; Kates, *supra* note 130, at 259. So, beyond handguns, present-day shotguns and rifles should similarly pass the in-common-use limitation. See *Parker*, 478 F.3d at 398. However, just as *Miller* stated and *Heller* restated, sawed-off shotguns are outside the scope of arms protected by the Second Amendment. *Heller*, 128 S. Ct. at 2816; *United States v. Miller*, 307 U.S. 174, 178 (1939). But why is this so if regular shotguns are likely protected? The muzzle velocity for a bullet fired from a regular shotgun as compared to a sawed-off shotgun is larger. See M. Große Perdekamp et al., *Effect of Shortening the Barrel in Contact Shots from Rifles and Shotguns*, 122 INT'L J. LEGAL MED. 81, 82 (2008), available at <http://www.springerlink.com/content/m174w770m32t1825/fulltext.pdf> (finding a 7% decrease in the muzzle velocity of the sawed-off shotgun slug). Does the barrel length make a firearm not in common use? Or is it that sawed-off shotguns pass the in-common-use limitation but then fail as being unusual and dangerous because of their concealable nature, despite having a decreased velocity?

termining a weapon's protected or unprotected status.<sup>172</sup> Whatever the approach may be, it is likely that separating the weapons that fall within the scope of the Second Amendment from those that do not will create a blurry line, prompting further debate.

For now, utilizing the Court's inexact guidance, imagine the hypothetical previously described where an individual who was not a former felon was arrested inside his home. Within the home, police officers found a handgun and a fully automatic machinegun. The individual was charged and convicted with violating section 7-2502.01(a) and subsections (a)(2) and (a)(4) of section 7-2502.02 of the District of Columbia Criminal Code, which effectively criminalized the possession of a handgun and a fully automatic machinegun.<sup>173</sup> The reviewing court properly determined the man was a qualified individual for Second Amendment purposes and, thus, was constitutionally protected under the Amendment. The reviewing court must now move to the second step of the proposed standard of review and verify whether the handgun and the fully automatic machinegun fall within the scope of "arms" protected under the Second Amendment. To do so, the court should apply the "in common use at the time" limitation expressed in *Heller*.<sup>174</sup> While the Court did not give much direction for doing so, the Court, as indicated, seems to have provided some tools to apply to the analysis. For example, is the weapon in question, keeping in mind technological progression, of the type intended to be protected by the Framers? Is the weapon in question dangerous and unusual?

Applying the test to the weapons in this hypothetical is still no easy task. While the handgun certainly passes the in-common-use standard,<sup>175</sup> for now, assume the fully automatic machinegun is considered not in common use at the time and, therefore, is not protected. Taking that assumption into consideration, the reviewing court would need only to find that section 7-2502.02(a)(2) passed mere rationality because fully automatic machineguns, while "arms," would not qualify as "arms" protected by the Second Amendment. The ban would easily pass rationality and the reviewing court would need to go no further in its review. On the other hand, because both the individual and the handgun fall within the scope of people and weapons constitutionally protected by the Second Amendment, the challenge passes the first two steps of the test and the court must now move to the third and final step to decide the constitutionality of the law banning handgun possession.<sup>176</sup>

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172. *Heller*, 128 S. Ct. at 2817.

173. *See supra* notes 142-44.

174. *Heller*, 128 S. Ct. at 2817.

175. *Id.* at 2821-22.

176. *See id.* at 2817-22.

## C. THE HPS TEST—THE THIRD STEP

The fact that a qualified individual is challenging a law restricting a qualified weapon does not automatically render the law unconstitutional. Nor would such a situation automatically result in a presumption that the law was unconstitutional. The occasion of having a qualified individual challenging a law restricting a qualified weapon means only that a reviewing court would need to move to the last step of the proposed framework.

At the center of the individual right, deeply rooted in history and tradition, lay the fundamental elements of defense of self and home.<sup>177</sup> It was these two elements that seemed to shape the Court's opinion in *Heller*.<sup>178</sup> And it is these two elements that form the foundation of the Second Amendment analytical framework proposed—the HPS test. The function of the HPS test is to guide a reviewing court in determining the proper level of scrutiny to apply to a Second Amendment challenge. In other words, the HPS test helps determine whether or not there is a presumption that the challenged law violates an individual's Second Amendment rights.

Despite having a narrow scope, the Court's decision revealed an emphasis placed on the localities reached by the challenged laws.<sup>179</sup> The Court drew a distinction between a law that has a restricting effect inside the home from one that restricts individuals outside the home.<sup>180</sup> Possession of a handgun is clearly protected within the home.<sup>181</sup> Outside the home in sensitive places, which are schools and government buildings, the right to possess a firearm is clearly unprotected.<sup>182</sup> While little else was said, it is this distinction by the Court that suggests the extent of a law's locality reach plays a key role in determining the burden placed on the Second Amendment right and, therefore, factors heavily on the level of review used by a court.<sup>183</sup> The Court referred only to inside the home and sensitive places directly, but in making the distinctions, the Court seemed to draw two lines that effectively divided the possible reach of a restricting law into three different localities: (1) inside the home—"home," (2) outside the home other than sensitive places—"public," and (3) "sensitive places."<sup>184</sup> Thus, a locality scheme appeared:

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177. See *supra* notes 63-64 and accompanying text.

178. See *supra* notes 63-64 and accompanying text.

179. *Heller*, 128 S. Ct. at 2817 ("The prohibition extends . . . to the *home*, where the need for defense of self, family, and property is *most acute*." (emphasis added)).

180. See *id.* at 2816-17 (stating that there is no Second Amendment protection within sensitive places, yet within the home the Second Amendment protection is "most acute").

181. *Id.* at 2821-22.

182. *Id.* at 2817.

183. *Id.* at 2817-21 (expressing the fundamental nature the home has in regards to the Second Amendment right).

184. See *id.* at 2817.

## Home—Public—Sensitive Place

The use of a locality scheme as a framework in the process of reviewing challenges regarding other enumerated rights is not a new concept.<sup>185</sup> For example, the enumerated right to freedom of speech in the First Amendment has a locality scheme that shapes the standard of review determination for certain First Amendment challenges.<sup>186</sup> The First Amendment locality scheme similarly has three different localities: (1) traditional public forum, (2) designated public forum, and (3) nonpublic forum.<sup>187</sup> Depending upon the type of forum (locality) being regulated, the standard of review fluctuates.<sup>188</sup>

Similarly, the locality scheme drawn by the Court shapes the HPS test. The function of the locality scheme is to establish, just as the Court did, the reach of the restriction in order to help determine the strength of the Second Amendment right being infringed so that the appropriate level of review can be implemented.<sup>189</sup> Establishing a law's reach is straightforward. Simply ask if the law in question burdens an individual's ability to keep and bear arms within their home, outside their home, or in sensitive places. While the reach of a law plays a key role in determining the level of review, the reach is effectively a heavy factor within the determination of the burden placed on the Second Amendment right.<sup>190</sup> The focus placed on the locality reach of a challenged law was not the only burden factor stressed by the Court, and, similarly, the standard of review for a First Amendment challenge is not only dependent upon its locality scheme analysis.<sup>191</sup> After analyzing the locality forum affected by a speech restriction, a second fac-

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185. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 479-81 (1988) (using different forums as a measuring tool to determine the appropriate standard of review regarding the right to free speech).

186. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

187. *Id.* at 44-46.

188. In a traditional public forum, a content-based law will initiate a strict scrutiny level of a review. *United States v. Grace*, 461 U.S. 171, 177 (1983). Similarly, in a designated public forum, a content-based law will face strict scrutiny. *Perry Educ. Ass'n*, 460 U.S. at 45. When a law is content neutral and affects a traditional or designated forum, the review will be at a level of intermediate scrutiny. See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000); *Frisby*, 487 U.S. 474. A law reaching a nonpublic forum, whether content neutral or content based, will only have to be reasonable and viewpoint neutral, which would be less than intermediate scrutiny. *Perry Educ. Ass'n*, 460 U.S. at 45.

189. *Heller*, 128 S. Ct. at 2817 ("The prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute.").

190. *Id.* at 2817-22 (looking also to the burden on self-defense); see also *Frisby*, 487 U.S. at 479-81 (stating First Amendment review looks at forum affected and whether the restriction is content based).

191. See *supra* notes 186-90 and accompanying text.

tor determining whether the restriction is content based or content neutral must be analyzed.<sup>192</sup>

In *Heller*, along with the locality reach, the extent of the burden placed on the lawful purposes protected by the Second Amendment was examined.<sup>193</sup> In identifying the individual right of the Second Amendment, the Court stated that hunting and self-defense are lawful purposes that are protected.<sup>194</sup> In doing so, the Court made known the importance of the lawful purpose of self-defense.<sup>195</sup> The Court associated self-defense to the purpose of the individual right granted by the Second Amendment over sixty times.<sup>196</sup> Self-defense was not just linked as a purpose of the individual right; it was claimed as being “central to” and the “core” of the Second Amendment right.<sup>197</sup> In addressing the challenged D.C. laws, the Court stressed the fact that the ban on handguns and storage requirements burdened an individual’s ability to defend oneself, and, as a result, the Court employed a heightened scrutiny.<sup>198</sup> It is clear that the more a law infringes on the ability of an individual to possess and use a weapon in self-defense, the greater the constitutional protection grows and, thus, the more skeptical a court should be when determining the constitutionality of such a law.<sup>199</sup> The burden on lawful purposes, such as self-defense, coupled with the locality scheme form the HPS test.<sup>200</sup>

A burden on self-defense can be produced in two ways. One way would be prohibiting a weapon altogether.<sup>201</sup> A law banning the possession of a class of weapons (handguns) or particular weapons (forty-five caliber handguns or a particular forty-five caliber brand) eliminates an individual’s ability to use the banned weapon(s) for self-defense and, therefore, places a high burden on self-defense. The accessibility of other unrestricted weapons

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192. *Frisby*, 487 U.S. at 479-81.

193. *Heller*, 128 S. Ct. at 2818 (stating the restrictions make it “impossible for citizens to use [handguns] for the core lawful purpose of self-defense”).

194. *Id.* at 2801.

195. *Id.* at 2817-18.

196. *See, e.g., id.* at 2803 (“That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen’s right to self-defense is strong evidence that that is how the founding generation conceived of the right.” (emphasis added)); *see also id.* at 2818 (“[The district’s trigger lock law] makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional.” (emphasis added)).

197. *Id.* at 2817-18.

198. *Heller*, 128 S. Ct. at 2817-22.

199. *Id.*

200. The two factors of locality, reach and burden on lawful purposes, act analogous to the forum and content determination in First Amendment reviews. *Frisby v. Schultz*, 487 U.S. 474, 497-81 (1998).

201. *See, e.g., D.C. CODE §§ 7-2502.01(a), 7-2502.02(a)(4)* (2008) (requiring registration of all firearms while simultaneously prohibiting the registration of a handgun).

does not play a role in measuring the burden a particular law places on self-defense.<sup>202</sup> For example, the burden established by a law banning the possession of all shotguns is neither reduced nor even affected by the fact that handgun or rifle possession is not banned.<sup>203</sup> Similarly, the burden established by a law banning the possession of a particular handgun is neither reduced nor even affected by the fact that other handguns are not banned.<sup>204</sup> The second way to burden self-defense is to restrict the manner in which an individual obtains and keeps a weapon.<sup>205</sup> For example, a law requiring an individual to wait a certain period of time before being able to gain possession of a purchased weapon eliminates an individual's ability to use the weapon for self-defense during the required waiting period and, thus, places a burden on self-defense.

In the first situation, where a qualified weapon is either prohibited or effectively prohibited, the goal of the law is to protect the public by taking the firearm out of the possession of individuals, and, thus, the law is burden based, like a content based speech restriction.<sup>206</sup> From these types of laws, the burden on self-defense, the core lawful purpose of the Second Amendment right, will always be substantial because such laws will disarm individuals of the firearm and, as a result, should elicit a judicial scrutiny higher than rationality.<sup>207</sup> Manner restricting laws that pertain to obtaining and possessing weapons, however, will not automatically bolster a standard of review higher than rationality.<sup>208</sup> Similarly, the goal of a manner restriction is also to protect the public, but manner restrictions would not always have the purpose or effect of disarming qualified individuals from possessing a qualified weapon and, therefore, would not always be considered burden based. For instance, if one law required an individual to wait a couple of weeks to a month between the dates of purchasing a weapon and picking up the purchased weapon, its purpose would not be to disarm individuals and, as a result, would not be considered burden based. Instead, its purpose would likely be to ensure the purchasing individual is qualified under the Second Amendment to purchase a weapon. While the couple of weeks to a month waiting period would burden an individual's ability to possess the firearm, the burden would not compare to a law requiring a multiple month

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202. *Heller*, 128 S. Ct. at 2819 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms . . . is allowed.").

203. *See supra* note 202 and accompanying text.

204. *See supra* note 202 and accompanying text.

205. *See, e.g.*, D.C. CODE § 7-2507.02 (2008) (requiring a firearm to be stored in certain conditions).

206. *See supra* notes 186-89 and accompanying text.

207. *See Heller*, 128 S. Ct. at 2817-18 & n.27.

208. *See supra* note 205 and accompanying text.

waiting period. There is a significant difference in the burden placed on lawful purposes, specifically self-defense, when comparing two laws requiring different length waiting periods. A multiple month waiting period would not only increase the burden on an individual's ability to possess a firearm, it would also appear directed more as an intent to disarm than to ensure a person's qualified status. In a manner restriction the extent of the burden placed on self-defense is relevant to the constitutionality of a manner-restricting law through the determination of whether such a law is burden based or neutral.

The function of determining the burden placed on self-defense, among other lawful purposes, is to help ascertain whether the law violates the Second Amendment right, given that self-defense is "central" to and the "core" of the right.<sup>209</sup> Once the effected locale(s) and burden placed on the individual right are established, the two elements establish the level of judicial review a court should use.<sup>210</sup> But, what relevance does a law reaching to the home, the public, or a sensitive place have?

### 1. Home

Regarding the home locale, the Court plainly stated that the Second Amendment individual right "surely elevates above all other interests the right . . . to use arms in defense of . . . home."<sup>211</sup> Specifically, in identifying the effect of the laws in question, the Court pointed to their reach and, in particular, the fact that the reach or enforceability of the restriction advanced by the challenged laws extended to inside the home.<sup>212</sup> Even though the holding was narrow in scope, the Court made clear that the home holds a vital position pertaining to the Second Amendment right.<sup>213</sup> The Court was clear in stating that the home is where the individual right is deemed to be the strongest,<sup>214</sup> just as speech is deemed to be the strongest in the traditional public forum.<sup>215</sup> The emphasis on the fact that the ban extended to the home strongly suggests the significance that a law's reach has on determining the burden placed on the Second Amendment.<sup>216</sup> Given the home's strength relating to the individual right protected by the Second Amendment, the home, as a locale, operates as a presumption-forming factor re-

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209. *Heller*, 128 S. Ct. at 2817-18.

210. *See id.* at 2817-22; *see also* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

211. *Heller*, 128 S. Ct. at 2821 (emphasis added).

212. *Id.* at 2818.

213. *See supra* notes 211-12 and accompanying text.

214. *Heller*, 128 S. Ct. at 2817.

215. *United States v. Grace*, 461 U.S. 171, 177 (1983).

216. *See Heller*, 128 S. Ct. at 2817-22.

garding the burden placed on a challenger's Second Amendment right and, therefore, acts as a presumption-forming factor regarding the level of scrutiny. What is that presumption? The Court did not state the level of review applied; however, there is no doubt it was a level of heightened scrutiny.<sup>217</sup> This note asserts that, given the role the home played in *Heller* and its similar nature to First Amendment traditional forum, a firearm restriction extending to the home locale forms a heavy presumption of strict scrutiny.<sup>218</sup> But, that is not to say that no firearm restriction is permitted to reach the home.

As stated earlier, the affected locale was not the only burden-measuring factor. The Court was clear in stating that the right to self-defense is essential to and the core lawful purpose of the right protected under the Second Amendment.<sup>219</sup> In not so few words, it was implicit that the Second Amendment individual right, at its most fundamental level, is firmly grounded in the aspect of self-defense in the home.<sup>220</sup> As a result, a firearm restriction that is burden based and extends to the home will have to overcome the court's highest skepticism by providing a compelling interest and being narrowly tailored to achieving that interest.<sup>221</sup> So, just as a restriction on a traditional public forum that is content based, a complete ban restriction on the home that is burden based will illicit strict scrutiny. The level of scrutiny applied to a manner restriction reaching the home will depend on whether the restriction is burden based or burden neutral. If there is a sufficient burden on self-defense as a result of a manner restriction, the restriction would face strict scrutiny. However, just as a speech restriction on a traditional public forum that is content neutral, a manner restriction that is burden neutral and reaches the home will face intermediate scrutiny.<sup>222</sup>

Imagine the hypothetical previously described where an individual who was not a former felon was arrested inside his home. Within the home, police officers found a handgun and a fully automatic machinegun. The individual was charged with and convicted of violating section 7-2502.01(a)(1) and subsections (a)(2) and (a)(4) of section 7-2502.02 of the District of Columbia Criminal Code, which effectively criminalized the possession of a handgun and a fully automatic machinegun.<sup>223</sup> The ban on

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217. *Id.* at 2817-18 & n.27.

218. *Id.* at 2817-21; *see supra* notes 183-87, 199 and accompanying text.

219. *Heller*, 128 S. Ct. at 2817-18.

220. *See id.*

221. *See supra* notes 186-89, 201 and accompanying text.

222. *See supra* note 193 and accompanying text.

223. D.C. CODE § 7-2502.01(a) (2008) (requiring all firearms to be registered); D.C. CODE § 7-2502.02(a)(2) (2008) (prohibiting the registration of fully automatic machineguns); D.C. CODE § 7-2502.02(a)(4) (2008) (prohibiting the registration of handguns).

the fully automatic machinegun needs only to meet the rational-basis test because such a law would not pass the second step.<sup>224</sup> Now, the handgun ban must be analyzed by the HPS test. The ban reaches the home locale because possession of a handgun within a home is illegal. Completely prohibiting qualified individuals from possessing qualified weapons within their home is burden based and puts a substantial burden on the “core lawful purpose of self-defense”<sup>225</sup> and, therefore, elicits strict scrutiny. Under the HPS test, just as in *Heller*, the ban on handguns would be unconstitutional.

## 2. Sensitive Place

What relevance does a law reaching to a sensitive place have? The sensitive place locale, just like the home, operates as a presumption-forming factor when reviewing a challenged law, but the presumption is different. The Court clearly stated, “nothing in our opinion should be taken to cast doubt on longstanding . . . laws forbidding the carrying of firearms in sensitive places.”<sup>226</sup> It was made strikingly clear that guns are not protected in sensitive places. Unlike the home, sensitive place analysis starts and stops with the locality-reach presumption. The Second Amendment does not protect an individual’s right to possess a firearm within a sensitive place.<sup>227</sup> As a result, the presumption created by a law extending only to sensitive places will be that of rational basis. A reviewing court would only need to find that the firearm-restricting law was rationally related to a legitimate government interest. So, under the HPS test, in line with the Court’s statement, a complete prohibition on firearm possession within sensitive places would withstand any Second Amendment challenge if rational.

What about the other element of the HPS test? What about the burden placed on lawful purposes, specifically on self-defense? A constitutional ban on firearm possession within sensitive places seems to directly conflict with the Court’s focus on the Second Amendment individual right of self-defense.<sup>228</sup> Simply put, it does conflict with an individual’s ability to use a firearm for self-defense purposes. However, the burden on self-defense, or any other lawful purpose for that matter, within sensitive places was a non-issue to the Court and is a nonissue within the HPS test analysis. While the Court did not elaborate on its statement, it was clear in *Heller* that the Second Amendment does not confer a right to possess firearms within sensitive places. Within the HPS test, the burden placed on lawful purposes, such as

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224. See *supra* Part III.B.

225. *Heller*, 128 S. Ct. at 2818.

226. *Id.* at 2816-17.

227. See *supra* notes 62-63, 178-84 and accompanying text.

228. See *Heller*, 128 S. Ct. at 2817-22.

self-defense, does play an important role. However, unlike the home locale where the right to self-defense is at its strongest, the right to armed self-defense through the lawful purposes of firearm possession protected by the Second Amendment in sensitive places is not a *right* at all. As a result, burden based and burden neutral gun laws affecting only sensitive places start and stop with a standard of rational basis. Similar to the first and second step, the sensitive place locale acts as a categorical rule to the Second Amendment.

### 3. *Public*

The public, within the locality scheme, illuminates the narrow scope of the *Heller* decision. Within the home, guns are protected, and, vice versa, within sensitive places, guns are not protected. Between the two, outside the home and outside schools and government buildings, however, represents a significant grey area left unanswered by the Court. What right does the Second Amendment protect regarding firearm possession on streets and sidewalks or in parks, stores, and restaurants? Such areas were not addressed in *Heller*.<sup>229</sup> This note does not contend or intend to engage in the exhaustive analysis required to answer such a question. However, for the purposes of this note, it is necessary to identify the implicit suggestions presented by the Court that indicate the strength the Second Amendment has within the public locale in order to extract the resulting affect the public locale has on a reviewing court's standard of review.

There are at least four instances where the Court appears to hint at the consequences of the individual right upon public-oriented-firearm restrictions. First, the Court's clarity regarding home and sensitive places seems to shed light on the role the Second Amendment plays within public areas. Fundamental to the Second Amendment right is possession of weapons in the home;<sup>230</sup> conversely, in sensitive places, the right is nonexistent.<sup>231</sup> Between the heightened scrutiny of the home and rational basis of sensitive places lie public areas. By simply working off the Court's distinction between the two locales, it is quite sensible to picture public areas, the public locale of the HPS test, as striking a middle ground between the heightened scrutiny and rational basis protections of home and sensitive places, respectively.

The next two references by the Court seem to support a *middle ground* level of protection afforded by the Second Amendment within the public locale. In detailing the individual right, the Court expressed that the right

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229. See *supra* Part III.C.

230. See *supra* Part III.C.1.

231. See *supra* Part III.C.2.

was not absolute.<sup>232</sup> In doing so, the Court stated, as an example, that the majority of challenges to bans on the concealing and carrying of firearms in public were upheld under the Second Amendment.<sup>233</sup> Such a statement seems to certainly point towards Second Amendment protection in public areas, striking a balance between fundamental and nonexistent rights. Due to the narrowness of the opinion, it could be argued that such a statement could just as easily imply that, similar to sensitive places, an individual has no Second Amendment protection in public. However, if firearms were afforded no protection outside of the home, it would be an idea quite inconsistent with the rest of the opinion. Such an argument overlooks the fact that the individual right was stated to protect a person's ability to possess a firearm for self-defense, hunting, and other recreational purposes.<sup>234</sup> Hunting and recreational purposes, such as target shooting, are, in reality, only outside-the-home activities, so it would be difficult to say that firearm possession outside the home is unprotected. And, arguably, rightly so, the Second Amendment individual right's *core* lawful purpose of self-defense is most needed outside the home.<sup>235</sup>

Lastly, the Court on multiple occasions stated that self-defense within Heller's home was the *core, central* protection of the individual right.<sup>236</sup> The Court was explicit in saying that the home is where Second Amendment protection is "most acute."<sup>237</sup> If the individual right of the Second Amendment only protected firearm possession within the home, the phrases chosen by the Court would lose their meanings. It would not make sense for the Court to accentuate the heightened level of protection if there was not a broader scope of protection offered by the Second Amendment. Therefore, it should be clear that the Second Amendment affords some level of protection outside the home, albeit at a level less than acute. However, simply because the protection would not be where the right is "most acute"<sup>238</sup> does not necessarily mean that the right would be protected at a reduced level.<sup>239</sup>

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232. *Heller*, 128 S. Ct. at 2816-17.

233. *Id.* at 2816.

234. *Id.* at 2801, 2818.

235. *Id.* at 2818. In Chicago, between June 16, 2007, and February 20, 2009, 779 homicides were committed. EveryBlock, Chicago, <http://chicago.everyblock.com/crime/by-type/homicide/by-date/2007-06-16,2009-02-20/> (last visited Mar. 3, 2009). Of those homicides, only 177 (22.72%) were committed within the home locale, leaving the other 602 (77.29%) Chicago homicides to occur in the public locale. EveryBlock, Chicago, <http://chicago.everyblock.com/crime/by-primary-type/homicide/> (last visited Mar. 3, 2009).

236. *Heller*, 128 S. Ct. at 2817-18.

237. *Id.* at 2817.

238. *Id.*

239. "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1991) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

The level of protection afforded to the keeping and bearing of firearms by individuals outside the home will undoubtedly be a hotly debated topic. Yet, looking to the text of *Heller* one more time, a “middle ground” level of protection appears. Justice Breyer, in his dissent, argued for intermediate scrutiny in the form of an interest-balancing approach as the review standard for the entire individual right.<sup>240</sup> The majority responded to the argument, stating, “We know of no other enumerated constitutional right whose *core* protection has been subjected to a freestanding ‘interest-balancing’ approach.”<sup>241</sup> While the majority rejected the intermediate level interest-balancing approach, it plainly did so in the context of deciding the facts of *Heller*—useable handgun in the home—which, as addressed, is at the heart of the Second Amendment protection.<sup>242</sup> An intermediate-scrutiny approach, requiring a court to examine the competing interests involved and compelling the law to be substantially tailored to meeting significant governmental interests, appears as a strong fit for the appropriate standard of review for the public portion of the locality scheme within the HPS test.<sup>243</sup> However, the HPS test is not just based on the affected locality. A law affecting the public locale would only form a presumption of intermediate scrutiny. Within the HPS test, the law still must be distinguished as burden based or burden neutral. And similar to a content-based restriction within a nonpublic forum, a burden-based law reaching to the public would call for intermediate scrutiny, while a burden-neutral law would illicit a rationality standard of review.<sup>244</sup>

#### IV. IMPLEMENTING THE ANALYTICAL FRAMEWORK TO *HELLER*'S UNADDRESSED ISSUES

The Court hinted at a presumptive constitutional nature of conceal carry laws but never explicitly stated such an idea.<sup>245</sup> The Court also chose not to address the licensing requirement.<sup>246</sup> So, imagine the following hypothetical: Within D.C., it is illegal to possess any firearm without having a firearm owner's identification card. It is also illegal to possess any con-

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Yet, nonpolitical speech, or speech not of the *fullest and most urgent application*, can still be reviewed under the same level of scrutiny. *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 177 (1983) (stating content-based restrictions on *any* free speech within a traditional public forum must pass strict scrutiny).

240. *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting).

241. *Id.* at 2821 (majority opinion) (emphasis added).

242. *Id.*

243. *See supra* notes 186-89 and accompanying text.

244. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

245. *Heller*, 128 S. Ct. at 2816.

246. *Id.* at 2819; *see also* D.C. CODE §§ 22-4504(a), 22-4506 (2001).

cealed firearm on an individual's person in public. A thirty-five-year-old, nonfelon, nonmentally ill man was charged and convicted of violating those two laws when he was caught on a public sidewalk carrying a concealed handgun and did not have a firearm owner's identification card to possess the gun. The man challenged the laws as violating the Second Amendment.

Applying the proposed framework requires looking first to the individual making the challenge. The challenger qualifies as an individual protected under the Second Amendment and, therefore, passes the first step of the proposed test.<sup>247</sup> Next, the two laws place restrictions on all "firearms," not just the arms that do not qualify for Second Amendment protection, and, therefore, restrict firearms qualified for Second Amendment protection. As a result, the challenge would pass the second step of the proposed test.<sup>248</sup> Last, the two laws must pass the HPS test.

Addressing the licensing law, an individual cannot legally possess a firearm, even within his or her home, without having a license. Therefore, the licensing law reaches the home and prompts a skeptical review. However, the second factor of the test—burden on lawful purposes—will help determine the level of skepticism. The licensing law is burden based because the procedure for issuing a license is subjective and disqualifies qualified individuals.<sup>249</sup> The licensing law should illicit strict scrutiny because the law reaches the home and is burden based.<sup>250</sup> As a result, the law should be held unconstitutional. However, if the licensing law was objective, the law's purpose, among others, would likely be to ensure an individual was a qualified person under the Second Amendment. Such a licensing law would be burden neutral and, therefore, would illicit intermediate scrutiny and should pass judicial review.

The conceal carry law reaches the public locale, prompting a skeptical review. Looking to the second factor of the test becomes slightly more difficult regarding the conceal carry law. The objectives behind a legislature enacting a conceal carry law could be reducing crime, preventing injuries, and saving lives. But the purpose of such a law is burden based—decreasing the possession of firearms in order to meet the listed objectives. For that reason, a conceal carry law places a substantial burden on an individual's ability to defend himself with a firearm. However, this law does not extend to the home but to the public, and, as a result, the fact that the law is burden based should place the level of review at some form of intermediate scrutiny, which it would likely pass.<sup>251</sup>

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247. See *supra* Part III.A.

248. See *supra* Part III.B.

249. See D.C. CODE §§ 22-4504(a), 22-4506 (2001). See generally *Heller*, 128 S. Ct. 2783.

250. See *supra* Part III.C.1.

251. See *supra* Part III.C.3.

## V. CONCLUSION

In *Emerson*, the first federal appellate court case to find there to be an individual right to keep and bear arms, the court stated:

[While] the Second Amendment does protect individual rights, . . . those rights may . . . 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.<sup>252</sup>

In attempting to spell out the standard of review, the court seemed confused.<sup>253</sup> While spelling out strict scrutiny, the court included reasonable-ness.<sup>254</sup> Looking to the proposed analytical framework, the inclusion of reasonableness is no longer confusing.

The first step of the test is to determine if the challenger is qualified for Second Amendment protection. A mentally ill individual, felon, or adolescent is disqualified from protection. As a result, a law restricting firearm possession by any of these individuals must only meet mere rationality. Next, the law must be reviewed for whether it is restricting qualified weapons or just unqualified weapons. If the restriction is on unqualified weapons, such as sawed-off shotguns, the standard of review will be mere rationality. However, if restricting a qualified weapon, the restriction faces the HPS test. Using the locality scheme and burden based/neutral factors, the law must be analyzed in order to determine the appropriate level of review. Home and burden based prompts strict scrutiny. Home and burden neutral prompts intermediate scrutiny. Public and burden based prompts intermediate scrutiny, while public and burden neutral prompts reasonable/rational basis. Sensitive place and either burden based or burden neutral prompt rational basis.

The proposed analytical three-step test includes the possibility of strict scrutiny, but it also allows for “particular cases that are *reasonable* and not inconsistent” with the individual right to keep and bear arms.<sup>255</sup> A law banning firearm possession by felons and the mentally ill is in every sense of the word a “reasonable” restriction. A law restricting the possession of atomic bombs and rockets is in every sense of the word a “reasonable” restriction. A law banning firearm possession within government buildings is

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252. United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001) (emphasis added).

253. See *supra* notes 102-05 and accompanying text.

254. See *supra* notes 102-05 and accompanying text.

255. *Emerson*, 270 F.3d at 264 (emphasis added).

in every sense of the word a “reasonable” restriction. The implications of the proposed test will not eliminate the ability to create effective gun control legislation. The government will just need to work a little harder when regulating firearm possession.

“*Heller* is merely the opening salvo in a series of litigations that will ultimately resolve what weapons and persons can be regulated and what restrictions are permissible.”<sup>256</sup> The proposed test does not answer exhaustively what people are qualified. Is a person who commits felony tax evasion a person intended to be disqualified? The proposed test also does not answer exhaustively what weapons can be regulated. And how does a court interpret the “in common use” limitation? These issues will be resolved by later cases, but the future litigation should use the categorical rules, locality scheme, and burden factor developed in the proposed analytical framework in this note to mold Second Amendment doctrine.

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256. Levy, *supra* note 17, at A22.

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