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SECOND AMENDMENT LITIGATION FOLLOWING *DISTRICT OF COLUMBIA V. HELLER*: IMPLEMENTING A COMBINATION CATEGORICAL REGULATION & "UNDUE BURDEN" TEST FOR THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS FOR SELF-DEFENSE

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Second Amendment Litigation Following *District of Columbia v. Heller*: Implementing a Combination Categorical Regulation & "Undue Burden" Test for the Individual Right to Keep and Bear Arms for Self-defense

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> *"A well regarded Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."*[2]

I. Introduction

In our American Democracy, no law has sparked more criticism and debate with less guidance from the courts than the Second Amendment to the U.S. Constitution. In the over 200

years following its ratification,[3] the Second Amendment has only been interpreted by the U.S. Supreme Court a handful of times.[4] More significantly, in these few opinions, the Court has left open important questions regarding the nature and extent of the right. Specifically, the Court has never decided whether the Amendment confers an individual or collective right, nor has the Court proposed a standard of review under which allegedly infringing laws can be evaluated. Both of these outstanding questions present significant problems for our nation, given that at the end of the twentieth century, reports state that "75 to 86 million [Americans] own a total of about 200 to 240 million guns."[5] The Supreme Court, however, finally seems poised to define at least some of the contours of the Amendment in *District of Columbia v. Heller*,[6] a case that Constitutional Law scholars have already predicted will be a landmark decision.[7]

In deciding *District of Columbia v. Heller*, the United States Supreme Court should affirm the D.C. Circuit's adoption of a Second Amendment individual rights analysis. Furthermore, the Court should classify the individual right as fundamental and specifically announce that the Second Amendment protects the right to keep and bear arms for self-defense. Additionally, the Court should hold that the "undue burden" test should be the default framework under which the constitutionality of firearms legislation will be scrutinized, subject to certain categorical regulations.

This Article first provides background on the key issues involved in the Second Amendment debate: whether the Second Amendment confers an individual or collective right to keep and bear arms,[8] and whether the Second Amendment right should be subject to strict scrutiny, reasonable regulation / rational basis review, undue burden scrutiny, categorical regulation, or some other standard.[9] The Article then explores the *District of Columbia v. Heller* litigation, which will certainly resolve the 'nature of the right' question, and perhaps even

establish the appropriate standard of review.[10] Thereafter, this Article proposes justifications for the *Heller* Court to hold that the Second Amendment protects an individual fundamental right to keep and bear arms for self-defense, and that acts infringing on the right be subject to undue burden scrutiny as modified by certain categorical restrictions.[11] Finally, the Article analyzes how certain types of firearm legislation would be affected by this proposed standard of review.[12]

II. The Threshold Question: Who Holds the Rights Conferred By the Second Amendment?

The threshold question in Second Amendment jurisprudence is 'What kind of right is conferred by the Second Amendment?' Although 200 years have passed since three-quarters of the several states ratified the Second Amendment, the Supreme Court has yet to answer this question.[13] In the absence of meaningful guidance from the Court, lower federal and state courts have felt free to adopt their own theories as to the rights conferred by the Amendment. Scholars, too, have joined in this debate on all sides, supporting and denouncing different decisions and publishing new theories about Second Amendment rights. By and large, however, the models proposed and implemented by jurists and academics can be categorized into three predominate frameworks: the Collective Rights Model, the Limited Individual Rights (or Sophisticated Collective Rights) Model, and the Individual Rights Model.[14] What follows is merely intended to give the reader a summary of the arguments for each model in order to understand the context of the debate in *District of Columbia v. Heller* – more complete elaborations of the models are available elsewhere.

a. *The Collective Rights Model*

The first theory, the Collective Rights Model, suggests that the Second Amendment confers onto states a collective right to possess and use firearms in order to establish and maintain state-sponsored militias.[15] Supporters of this model, "collectivists," espouse the view

that citizens do not have an individual right to possess and use firearms.[16] Collectivists believe that the state's collective right follows from the text and history of the Amendment, Supreme Court precedent, notably the *United States v. Miller* decision, and the undesirable consequences that might result from recognition of an individual rights model.

According to collectivists, the Collective Rights Model is the only framework supported by the text and history of the Second Amendment. Proponents offer that the model is the only textually plausible conclusion from reading the Amendment's preamble and the operative clause together. Since the right to "keep and bear arms" is required of "[a] well regarded Militia" and is necessary to a "State['s]" security, the Second Amendment must only confer a right upon the states, since only states maintain and regulate militias. Furthermore, supporters believe that although the right is conferred upon the "people," that term refers to the state militia and not to individual citizens.[17] Proponents also offer that the circumstances surrounding the Amendment's passage in Congress, namely its genesis as a compromise measure for antifederalists who otherwise refused to pass the original Constitution, reinforce the notion that the framers intended to memorialize a right held by states, not by individuals. Since the antifederalists were concerned with the new federal government abusing its power over the states, and not states abusing their power over their citizens, collective rights proponents argue that the framers intended that the Second Amendment reserved rights to the states and not to individual citizens. Additionally, collective rights supporters point to late 18th Century American and English firearms prohibitions as evidence that at the time of the Second Amendment's passage, the right to possess a firearm was not commonly understood to be an individual right.[18]

Collective Rights Model supporters also point to the Supreme Court's rationale in *Miller* and other cases, as well as the jurisprudence of most federal judicial circuit courts, in defending

their model. In *United States v. Miller*,[19] the Supreme Court reversed the trial court's decision that the federal statute under which defendants were charged, banning the interstate transportation of unregistered firearms, violated defendants' Second Amendment rights.[20] Specifically, collective rights advocates cite *Miller*'s language that "[without] evidence tending to show that possession or use of [the firearm at issue] 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" as supporting the collective, not individual, rights theory.[21] Most federal courts have similarly interpreted *Miller* to endorse a collective right under the Second Amendment.[22]

Finally, some collectivists support this model because they find federal and state regulation of firearms to be desirable or necessary for public safety.[23] If the Second Amendment is found to protect collective rights, then presumably state laws restricting individual firearms possession and use will be upheld as not impugning Second Amendment rights.[24] This conclusion follows, because any act by the holder of the collective right, the state, that might infringe upon its own rights would likely be seen as a waiver of the right and not a constitutional violation.

This Collective Rights Model is the rule of law in a majority of federal appellate courts and is the view currently held by a minority of academics. Within the past ten to twenty years, however, support for this model has eroded, notably from leading academics, state legislators, and state courts.[25] This erosion has led most collectivists to alternatively endorse the Limited Individual Rights Model.

b. The Individual Rights Model

The Individual Rights Model espouses the view that the Second Amendment confers upon all citizens the individual right to keep and bear arms. Supporters believe that these individual rights follow from the text and history of the Amendment, the common law tradition, and Supreme Court precedent.

Like the collectivists, supporters of the Individual Rights Model, "individualists," claim that their framework is the only possible conclusion supported by the text and history of the Second Amendment. Individualists suggest that the individual nature of the right naturally follows from the Amendment's reservation of the rights to "the people", a constitutional term of art that is understood to mean "individuals" based upon its use both in the Bill of Rights and the Constitution generally.[26] Furthermore, individualists suggest that the Second Amendment, as a whole, would be an "inexplicable aberration" if it, unlike the other first nine Bill of Rights Amendments, was found to not to protect an individual right.[27] Additionally, state constitutions drafted soon after the U.S. Constitution also contained individual guarantees mirroring those in the Second Amendment, further suggesting that the right is not owned by the state, but rather the individual.[28]

In addition to the Second Amendment's text, individualists argue that the common law tradition supports their theory. The 1689 English Bill of Rights and its successor, the 1742 English Declaration of Rights explicitly articulate an individual right to keep and bear arms: "the subjects which are protestant may have arms for their defense suitable to their condition and as allowed by law."[29] Later, in his preeminent work, *Commentaries on the Laws of England*, Sir William Blackstone recognized the "right of the subject … [to] have[] arms for their defense" as one of the auxiliary rights which safeguarded absolute rights.[30] By using the term "right of the subject," Blackstone also unambiguously conveyed that the right to keep arms was an individual

right. In addition to these English sources, individualists also cite to the U.S. Supreme Court's decision in *United States v. Cruikshank*,[31] where the Court noted that "'bearing arms for a lawful purpose' … is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[32] Scholars have suggested that this, read in conjunction with a similar passage regarding the First Amendment, supports the view that the individual right to bear arms predated the Constitution, and the Second Amendment merely enumerated the citizens' preexisting individual right.

Individualists also point to the few Supreme Court cases dealing with or mentioning the Second Amendment in defending their model.[33] The first such case, *Dred Scott v. Sanford*,[34] is offered to demonstrate that the Court understood that Second Amendment rights were understood to belong to the "people" in the same sense that First, Fifth, Sixth, and Seventh Amendment rights, which are clearly individual in nature, belong to the "people."[35] The second oft cited case, *United States v. Miller*,[36] suggests that the Court has implicitly recognized the individual rights model. In *Miller*, the government asserted that the Collective Rights Theory should govern Second Amendment challenges; however, the court did not adopt the government's argument, instead finding that the weapon in question was not an "arm" such that it the federal statute would trigger Second Amendment scrutiny.[37]

c. *The Limited Individual Rights or Sophisticated Collective Rights Model*

The Limited Individual Rights or Sophisticated Collective Rights Model suggests that the Second Amendment protects an individual right in the limited context of service in a state militia.[38] This theory purports to be a hybrid, finding merit in parts of both the Collective Rights Model and the Individual Rights Model.[39] Although supporters of this model defend it on grounds similar to the collective right supporters – the text and history of the Amendment, *Miller*

and its progeny, and social concerns with an absolute individual right – the model is more defensible because its interpretation is more consistent with other constitutional provisions.

Proponents of this model offer a very similar justification as that offered by Collectivists. They too claim support for the Sophisticated Collective Rights Model from the Amendment's text and history and the Court's *Miller* decision. The Limited Individual Rights Model, however, is materially different from the Collective Rights Model in a crucial respect: the framework recognizes an individual right held by the "people" to keep and bear arms that is narrowly tailored to a citizen's service in the state militia. This key difference gains much credibility for the model over the purely collective view, as its use of the term "people" is consistent with its use elsewhere in the Constitution.

The Limited Individual Rights Model has not been explicitly adopted by any federal circuits, although some commentators suggest otherwise.[40] Courts have, however, disposed of some Second Amendment challenges on the grounds similar to the model's premise: that the rights allegedly infringed were not incident to military service. Critics of this scheme, however, have suggested that the limited individual rights position is merely an attempt by Collective Rights Model supporters to draw new lines in response to increasing scholarly support for the Individual Rights Model.[41]

III. The Follow-up Question: What Standard of Review Applies to the Alleged Infringement of Second Amendment Rights?

The companion question to the rights issue is that of the appropriate standard of review to be used to adjudicate Second Amendment challenges to federal and state[42] laws. The standard of review question will be crucial to the disposition of future Second Amendment litigation if the Court finds that the Second Amendment confers an individual right. A strict standard could frustrate any legislative attempts to regulate the manufacture, distribution, and possession of

firearms in the United States. A lax standard, however, could make Second Amendment into an empty shell that only preserves theoretical rights. If, however, the Court finds that the Second Amendment confers a collective right or an individual right connected only with militia service, then the importance of the standard of review question will be diminished based upon the narrow scope of the right. Since the standard of review question would largely be mooted by a finding that the Second Amendment confers collective or limited individual rights, this Section will assume that an individual right attaches the Second Amendment. Furthermore, this article assumes that the explicit right protected by the Second Amendment is the right to keep and bear arms for self-defense.[43]

a. *Strict Scrutiny*

The Court's first available option would be to apply strict scrutiny to actions infringing upon the Second Amendment right. If strict scrutiny were to attach, an allegedly infringing act will survive attack only if its proponent can prove the existence of a compelling governmental interest for the restriction and demonstrate that the restriction is necessary, or narrowly tailored, to furthering the interest.[44] Strict scrutiny is a very high hurdle and is cleared in only a small subset of cases.[45] The basis for applying strict scrutiny to the Second Amendment could be found either in the fundamental nature of the right, the importance of the right, or the status afforded to Bill of Rights Amendments.[46]

Supporters claim that the right to keep and bear arms for self-defense is fundamental, and strict scrutiny should apply, based upon prior Supreme Court precedent and the fundamental nature of the right. The Supreme Court's recent jurisprudence suggests that a right is fundamental where it is either "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."[47] The Court has already recognized fundamental rights in the

arenas of contraception,[48] marriage,[49] parenting,[50] and domestic travel,[51] and most fundamental rights receive strict scrutiny review.[52] Supporters suggest that the right to keep and bear arms is deeply rooted in the Nation's history based upon the right's placement in the Bill of Rights and numerous state constitutions, its foundations in the English common law, and mentions of the right in Supreme Court decisions.[53] Alternatively, supporters also argue that the right is implicit in the concept of ordered liberty.[54] Blackstone himself specifically enumerated the right as necessary to "protect and maintain … personal security, personal liberty, and private property."[55] Thus, since the right is both deeply rooted in the Nation's history and tradition and implicit in concepts of ordered liberty, supporters suggest that the right to keep and bear arms is a fundamental right deserving of strict scrutiny.

Alternatively, supporters also argue that the right deserves strict scrutiny protection due to the importance of the Bill of Rights Amendments. These supporters believe in strict scrutiny for the Second Amendment right based on the necessity of a "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."[56] This view is in accord with the Court's application of strict scrutiny to many of the rights in the Bill of Rights; however critics are quick to point out that this rule is not absolute, as some rights in the first ten Amendments do not receive strict scrutiny.[57] Supporters counter these critics by suggesting that strict scrutiny is the default standard by which Bill of Rights Amendments should be scrutinized.[58] Through these arguments, proponents believe that the importance attached to the right's embodiment in the Second Amendment should merit strict scrutiny protection.

b. Undue Burden

A second option would be to scrutinize laws allegedly interfering with the Second Amendment right under the Court's "undue burden" standard from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[59] The standard requires the act's defender to prove that the "purpose or effect [of the infringing action] is to place a substantial obstacle in the path of [an individual exercising the right.]"[60] The standard is less exacting than strict scrutiny, but it is still more rigorous than reasonable regulation / rational basis scrutiny. Although the Supreme Court has only applied the undue burden analysis in the factual context of abortion rights, the rationale underlying the *Casey* opinion is similar to that underlying the right to keep and bear arms for self-defense; thus, the under burden analysis may be standard by which Second Amendment challenges could be adjudicated.

Since *Casey*, the Court has not yet adopted the undue burden test as a governing standard of review for any rights outside of the abortion context.[61] The plurality in *Casey*, however, recognized that the undue burden analysis can apply to fundamental rights and constitutionally protected liberty interests other than abortion.[62] According to the *Casey* Court, undue burden scrutiny is an appropriate option where the right is one that can be regulated by the state in some manner without infringing upon the right.[63] Like the abortion interest, the right to bear arms for self-defense is not absolute. This fact is demonstrated by the Supreme Court's restrictions on types of firearms in *Miller*, Blackstone's ownership restrictions in his *Commentaries*, and the restricted right to keep and bear arms present in state constitutions passed in the late 18th Century. Thus, by satisfying the *Casey* inquiry, one can make a colorable argument that Second Amendment challenges should be judged under undue burden scrutiny. Furthermore, adopting the undue burden standard would still provide heightened review to infringements on the Second Amendment right, commensurate with the importance of a fundamental right. This standard,

however, would also give the government some leeway to enact non-burdensome restrictions that improve public safety or further other state interests.

c. Reasonable Regulation / Rational Basis

A third option would be to scrutinize laws allegedly interfering with Second Amendment rights under a rational basis or "reasonable regulation" standard. Under rational basis review, "a law will be upheld if it is rationally related to a legitimate government purpose."[64] Similarly, under the reasonable regulation test, courts ask "whether the challenged law is a reasonable method of regulating the right to bear arms."[65] Although these two tests are slightly different, this Article will treat them as one because in practice, nearly all governmental restrictions on the individual ownership of firearms would be permitted under either standard. This conclusion follows from the findings that the government firearm regulation would nearly always be reasonable and would be reasonably related towards the legitimate purpose improving public safety. Most state courts have adopted some form of the reasonable regulation / rational basis standard as governing challenges to the right to keep and bear arms, even where the state constitutional provision explicitly preserves an individual right.[66]

Reasonable regulation / rational basis scrutiny is most appropriate for "area[s] of general deference to the legislature."[67] Consistent with this philosophy, those who endorse the application of this test to Second Amendment rights argue that given the substantial threat to public safety posed by firearms, the most deferential of standards should be accorded to firearms regulation.[68] Constitutional scholars, including Adam Winkler and Erwin Chemerinsky, have also suggested that the "Reasonable Regulation" standard, utilized by nearly all state courts to interpret analogous 'right to bear arms' provisions in state constitutions, is the appropriate test for Second Amendment challenges based upon its deferential posture.[69]

d. Categorical Regulation

In dealing with Second Amendment rights, another available tool in the kit would be to create categorical rules or regulations for the Second Amendment either in lieu of or in conjunction with a broad-based standard of review.[70] Under categorical regulations, specifically indentified categories of conduct pertaining to the right are treated in a different manner than general conduct regarding the right. Similar categorical rules have been implemented in other Bill of Rights Amendments, including the First Amendment's freedom of speech framework, which employs strict scrutiny generally, but also contains categorical exceptions for obscenity, libel, and commercial speech.[71] Importing categorical rules for Second Amendment rights could carve out situational rules dealing with specific issues, while not governing the entirety of the right.

The idea of categorical rules for the Second Amendment has not been seriously explored by scholars or the courts; however, such rules would make sense given the parallels in rationale for their uses in the First and Second Amendments and the availability for such regulation for specific situations regarding Second Amendment rights. The use of such categorical rules in First Amendment free-speech jurisprudence stems from a common understanding that the clause's primary intent was to protect political speech, but had the incidental side-effects of protecting harmful speech such as obscenity and libel. By promulgating categorical rules, the Court effectively maintained the important individual right while withholding protection from its abusive side-effects. Similarly with the Second Amendment, it would be desirable to maintain the important individual right to bear arms for personal defense while withholding protection from harmful abuses of the right. Furthermore, by reference to federal and state legislation, one can easily recognize candidates for such categorical restriction: limits on the number of firearms

owned by one person; limits on types of firearms unsuitable for self-defense; and limits on possession for those who have demonstrated abuses of the right.

To some degree, the Supreme Court has already imported categorical regulation onto the Second Amendment through the *Miller* case. As mentioned *supra*, *Miller* carved out an entire area from the Second Amendment – weapons that are not "arms" under the Amendment – and held that they are not protected in any way by the amendment. *Miller*'s approach mirrors the Court's categorical approach to obscenity, libel, and commercial speech under the First Amendment to some degree; however, the Court has not endeavored to establish a "default" standard of review for when the categorical rule is inapplicable. Supporters of categorical regulation argue that much of the social concerns with protecting a fundamental right to bear arms could be alleviated via categorical restrictions targeted at unsavory practices that wrongly claim protection under the right.

IV. ***District of Columbia v. Heller***

In 1976, the District of Columbia passed arguably the most aggressive gun control legislative scheme in the United States. Among other things, the legislation barred the registration of handguns,[72] required firearms to be kept "unloaded and disassembled or bound by trigger lock" while in the home,[73] and required firearm owners to carry their license with them whenever moving the firearm.[74]

Prior to 2004, District of Columbia resident Dick Anthony Heller desired to keep a functional handgun in his home, and so he applied to the D.C. government for a handgun permit.[75] The District of Columbia, however, rejected Heller's application since Heller did not meet any of the exceptions to the general handgun prohibition, codified in D.C. Code § 7-2502(a)(4).[76] Believing that the handgun ban violated his Second Amendment right to keep and

bear arms, Mr. Heller and five other plaintiffs sought to challenge the law by filing a declaratory judgment action in the U.S. District Court for the District of Columbia.[77]

As the material facts were not disputed, both plaintiffs and defendants filed cross-motions for summary judgment and the district court decided the case in a 2004 opinion.[78] In its opinion, the court recited the three prevalent models of interpreting the Second Amendment and recognized that neither the U.S. Supreme Court nor the U.S. Court of Appeals for the District of Columbia Circuit had explicitly adopted any of the theories.[79] The court, however, rejected the Individual Rights Model, reasoning that only it was inconsistent with the Supreme Court's *Miller* decision.[80] The court also cited the persuasive authority of decisions from ten of the other eleven federal circuit courts and the District of Columbia Court of Appeals, which all explicitly rejected the Individual Rights Model.[81] The court granted defendant's motion, reasoning that since none of the plaintiffs were members of the District of Columbia militia, none have a Second Amendment right that might conflict with D.C. statutes.[82]

Plaintiffs appealed the district court's decision to the U.S. Court of Appeals for the District of Columbia Circuit. Before reaching the merits, the D.C. Circuit found that only Heller had standing on appeal because the other plaintiff-appellants had claimed prospective injuries; Heller, on the other hand, met standing requirements because had already been denied a handgun permit by the D.C. government.[83] Upon addressing the merits, the court began by acknowledging the deep division between authorities on which model should be applied to challenges based upon the Second Amendment: the Collective Rights Theory being supported by most of the federal appellate courts and half of the state appellate courts that have weighed in on the issue; and the Individual Rights Theory being supported by a minority of federal appellate courts, half of the state appellate courts, and most twentieth and twenty-first century scholars.[84]

The court gave particular emphasis to (1) the phrase "the people," which is present also in the First, Fourth, and Ninth Amendments – all of which have been interpreted to confer individual rights; [85] and (2) the placement of the Amendment in the middle of the Bill of Rights, within the amendments preserving individual rights.[86] The court further recognized that binding precedent hasn't explicitly adopted one model, but most of the U.S. Supreme Court's previous mentions of the Second Amendment all suggested that an Individual Rights Model was more appropriate than a Collective Rights Model.[87] In adopting the Individual Rights Model, the D.C. Circuit became only the second circuit to recognize that the Second Amendment confers an individual right on citizens.[88]

After announcing its adoption of the Individual Rights Model, the court also rejected respondent's additional arguments. Respondents argued that even if the Second Amendment confers an individual right, the Amendment does not apply to the District of Columbia because it is not a "free State". [89] The court, however, held that the term "free State" referred to the United States as a country, not to individual states, and that in any event, the individual rights conferred by the Amendment applied to all American citizens, not just citizens of one of the several states.[90] Respondents also proposed that an individual right under the Second Amendment would not invalidate the District of Columbia's laws because modern handguns are not "arms" that are protected by the Second Amendment. [91] The court also rejected this argument, adopting the reasoning of sister circuits which have interpreted *Miller* to hold that most modern handguns are "arms" under the Amendment.[92]

Judge Henderson dissented from the D.C. Circuit's opinion in Heller on the grounds that the Second Amendment is inapplicable to the D.C. laws because the District of Columbia is not a "state" for Second Amendment purposes. The dissent held that since the District of Columbia is

a creature of the federal government and not a free state, the purpose of the Amendment is frustrated. Accordingly, the operative clause, guaranteeing the right to keep and bear arms must be inapplicable to the D.C. laws, and the district court's grant of summary disposition to defendant-respondents should be affirmed. Since the case could be decided on this ground, the dissent found it unnecessary to articulate whether the Second Amendment grants an individual, collective, or hybrid right.[93]

Following the D.C. Circuit's denial of an en banc rehearing, defendants petitioned the U.S. Supreme Court for writ of certiorari.[94] Defendants alleged that the certiorari was necessary to resolve a circuit split, as the court's recognition of an individual right under the Second Amendment conflicted with the decisions of nine other federal circuits.[95] Additionally, Defendants alleged that the D.C. Circuit's opinion was erroneous on three points: (1) that the Second Amendment protects firearms possession only in connection with state militia service;[96] (2) that the Second Amendment only prohibits federal, and not state or local, interference with firearm possession rights;[97] and (3) the D.C. laws would not violate the Second Amendment under any interpretive framework.[98] Plaintiffs agreed that the Court should grant certiorari, but instead suggesting that it do so to correct federal and state appellate courts that have misinterpreted the Court's Second Amendment jurisprudence by denying the existence of a fundamental right to possess firearms.[99] The U.S. Supreme Court granted certiorari; however, review was limited to the issue of "[w]hether the following provisions-D.C.Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02-violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes."[100]

V. In deciding *District of Columbia v. Heller*, the U.S. Supreme Court Should Recognize that the Second Amendment Protects an Individual Right and the

Court Should Adopt an Combined "Undue Burden" & Categorical Rules Standard of Review for Second Amendment Challenges

In deciding *D.C. v. Heller*, the United States Supreme Court should recognize that the Second Amendment protects an individual right to keep and bear arms for self-defense and the Court should apply an "undue burden" standard of review with certain categorical regulations in scrutinizing the D.C. statutes. The individual model makes the most sense because it is the best supported by the text and history of the Amendment and Supreme Court precedent. Additionally, a combination of categorical regulation and "undue burden" standard of review makes the most sense because it provides adequate protection to the fundamental rights in the Second Amendment, while providing limited latitude to governments to enact some firearm regulations.

a. The Individual Right Model is the Most Consistent with the Text and History of the Amendment and Supreme Court Precedent

As discussed in Part II, *supra*, all three models of Second Amendment rights can make colorable claims as to being supported by the text and history of the Amendment and Supreme Court precedent. Upon weighing the relative strength of these claims, however, the Individual Rights Model clearly appears to be the most correct interpretation of the rights conferred in the Amendment.[101] As such, the U.S. Supreme Court should hold that the Second Amendment confers an individual right to keep and bear arms for self-defense onto all citizens, including Mr. Heller.

Regarding textual arguments, the individualists' use of the text of the Second Amendment is more complete than that of the individualists. The collective model first suffers from the fatal flaw of reading the term "the people" in a manner inconsistent with the rest of the Constitution. Under the collectivists' model, one could make analogous arguments to

collectivize individual assembly, search and seizure, and other unenumerated rights. In as much as the hypothetical collectivization of other individual rights is absurd, so too is the notion that "the people" in the Second Amendment refers to anything other than individuals. Second, Collectivists are unable to rationalize the placement of the right to bear arms with other individual rights in the beginning of Bill of Rights. Finally, the collectivists' strongest textualist argument, that the Individual Model wholesale disregards the Second Amendment's preamble, is not fatal for Individualists because it was common practice at the time of the Amendment's passage to insert preambles without affecting an act's substantive rights.[102]

The individual rights approach is also preferable because it is better supported by the history of Second Amendment than other models. An individual right to self-defense is well supported by the common law tradition, as demonstrated in Blackstone's writings and the English Declaration of Rights. Furthermore, the fact that contemporaneous state constitutions adopted similar language that explicitly recognized an individual right to keep and bear firearms also strongly suggests that the framers sought to protect an individual right. Finally, the historical events cited by collectivists and sophisticated individualists do not truly support the theory that the right belongs to the states or is limited to state militia service. Instead, their sources, such as early Pennsylvania firearms regulations and anti-federalist texts, are more appropriately viewed as dealing with the appropriate standard of review with state's efforts to regulate firearms.

The Court should further adopt the individual rights view of the Second Amendment because it is more consistent with the Court's precedent than either of the other models. Though the nature of the rights issue is technically one of first impression, the Court's prior decisions in *Dred Scott* and *Miller* provide persuasive support for individualists: *Dred Scott* positively

suggests this position, while *Miller* implicitly rejects the counter-position. Although collectivists give great predictive value to the number of federal appellate courts supporting their position, the collectivist position is weakened by a lack of support from Supreme Court cases. Additionally, the more recent federal appellate decisions on the matter have taken the individualist position, further weakening the persuasiveness of collectivist federal appellate opinions. Instead, the Court should remain consistent with the *Dred Scott* dicta and government's rejected arguments in *Miller* by adopting the individualist model.

b. Categorical Regulations with "Default" Undue Burden Scrutiny is the Most Consistent with Supreme Court Precedent, Constitutional Jurisprudence, and the Relevant Interests Involved

As discussed in Part III, *supra*, scholars and courts have all made strong arguments as to what standard of review should govern acts that allegedly infringe on the Second Amendment. Given, however, the individual and fundamental nature of the right to keep and bear arms for self-defense and the government's important counter-interest in public safety, undue burden scrutiny with certain categorical regulations clearly appears to be the most appropriate review standard for the Second Amendment. As such, the U.S. Supreme Court in *Heller* should hold that the constitutionality of an act that allegedly infringes on the Second Amendment should depend on whether the purpose or effect of the act is to place a substantial obstacle in the path of an individual exercising his right to right to keep and bear arms for self-defense.

As a threshold matter, regardless of the question of the level of scrutiny that the Court will adopt in *Heller*, the Court should, as it did for the First Amendment, adopt categorical rules for the Second Amendment that establish certain situations which are not protected by the Amendment: limits on the number of firearms owned by one person; limits firearms and accessories unsuitable for self-defense; and limits on possession for those who have

demonstrated abuses of the right. Just as the right to 'free speech' is focused on political speech and non-political speech is subject to categorical regulation, the right to 'keep and bear arms' is aimed at self-defense and these non-self-defense related uses must logically be subject to categorical regulation. Furthermore, a categorical restriction on the type of arms protected by the Second Amendment is also necessary to adhere to the Court's stare decisis in *Miller*, where the Court created a categorical restriction on the style of firearms protected by the Amendment.

In addition to categorical regulations, the Court should also use *Heller* as an opportunity to adopt the undue burden test as the standard governing Second Amendment rights because it strikes an appropriate balance between the competing interests of the individual's fundamental right to self-defense and the legislature's interest in public safety. On one hand, a rational basis / reasonable regulation standard is inappropriate to balance these interests because it is too deferential to the legislature and not mindful enough of the importance of the right. Through application of these standards, there exists very few, if any, 'unreasonable' firearms laws and the Second Amendment's fundamental right to self-defense becomes illusory at best. [103] On the other hand, strict scrutiny is also inappropriate because it would make the right nearly absolute, thereby preventing adequate accommodation of the government's public safety interest. Instead, both interests would be better served by an intermediate standard, the undue burden analysis, which properly focuses the inquiry on the effects of the government's act on the individual's exercise of the right. In this manner, the undue burden standard recognizes the importance of the constitutional guarantee while still allowing for non-invasive governmental regulation.

The Court should also adopt the undue burden analysis for Second Amendment protections based upon its fit with previous constitutional jurisprudence. As mentioned *supra*, fundamental rights and constitutional guarantees from the Bill of Rights do not *per se* receive

strict scrutiny; however, it is indeed rare for either to receive rational basis / reasonable regulation review. Instead, as demonstrated by the Court's adoption of the undue burden analysis in *Casey*, the Court is willing to instead review such important rights with a form of heightened review that falls short of strict scrutiny. By doing this, and not applying rational basis / reasonable regulation analysis, the Court is also able to properly focus the inquiry on the importance and nature of the individual right instead of on the power of the legislature. Since the right to keep and bear arms for self-defense purpose is similar in importance and stature to the rights involved in *Casey*, the Court has a similar basis to adopt the undue burden standard to test the constitutionality of the D.C. gun laws in *Heller*.

VI. Impact of an Individual Rights Second Amendment Categorical Regulations / "Undue Burden" Framework on Existing Firearm's Legislation

Assuming that, for the reasons given above, the U.S. Supreme Court does indeed find that the Second Amendment guarantees an individual right to keep and bear arms for self-defense in *District of Columbia v. Heller*, the Court's decision will likely prompt a nationwide reevaluation of existing gun laws.[104] Few scholars believe that the Court will announce a detailed framework by which firearm regulations should be evaluated;[105] however, for the reasons given *supra*, inferior federal and state courts should evaluate the constitutionality of such regulations under categorical regulations and an undue burden test. This section seeks to demonstrate how just such a framework would be applicable to the most common types of firearms regulation: conceal and carry permits; storage and safety requirements; mandatory waiting periods; and weapon-style and accessory restrictions.

a. Conceal and Carry Permits

Today, 49 of the 50 states currently have enacted some form of concealed weapon regulation[106] and some jurisdictions prohibit the practice by individuals outright.[107] Prohibitions

and outright bans on concealed weapons began in the early nineteenth century to combat a spike in violent crime, and similar justifications are given today in defense of the laws' persistence.[108] Meanwhile, critics of such regulations refute the connection between concealed weapons and violence, instead suggesting that the deterrent effect of concealed weapons actually decreases violence.[109] Under this Article's proposed framework for the Second Amendment, however, this debate is moot; instead, the proper inquiry is whether an outright or partial ban on concealed weapons has the purpose or effect of placing a substantial obstacle in the path of individuals exercising their right to keep and bear arms for self-defense.

Under the proposed framework, courts will likely uphold concealed weapon registration requirements but invalidate statutes that outright prohibit or significantly restrict one's ability to carry a concealed weapon. As a preliminary matter, registration requirements will likely be upheld provided that there is not an onerous waiting period, exurbanite fee, or other attached requirement that may inhibit exercise of the right. More interesting, however, is the matter of concealed weapons bans. Those who believe that these laws do not present an undue burden will argue that individuals can exercise the self-defense right to the same degree by wearing their firearms on their person in an unconcealed manner.[110] Those who seek to invalidate the laws will counter this argument by saying that such an alternative would be unduly burdensome, as social customs generally disapprove of an individual displaying a firearm in public without some corresponding dangerous situation. Under such laws, individuals would be presented with the non-choice of violating social norms by brandishing a firearm on their person or relinquishing their right by going without a firearm. Thus, it is likely that this effective non-choice burdens the right and renders concealed weapons bans unconstitutional.

b. Storage and Safety Requirements

Currently, at least eighteen states have child access protection laws that "hold gun owners [criminally] liable if they leave guns easily accessible to children and a child improperly gains access to the weapon."[111] Under many of these statutes, the only sure-fire prevention against criminal liability is to (1) store the firearm in an unloaded condition; (2) lock the loaded firearm in a gun safe; (3) employ a gun-lock on the loaded firearm; or (4) store the loaded firearm in an inaccessible area. The District of Columbia statutes at issue in Heller, similar to the other 18 states, also require firearms to be kept "unloaded and disassembled or bound by trigger lock" while in the home.[112] Again, like the social debate over concealed weapons laws, the debate over the merits of storage and safety requirements is moot under the proposed Second Amendment framework. Instead, we are concerned with whether mandatory firearm storage and safety requirements have the purpose or effect of placing a substantial obstacle in the path of individuals exercising their right to right to keep and bear arms for self-defense.

Under the proposed framework, courts will likely uphold only those required firearm storage and safety measures that still allow for a firearm owner to make her weapon active in a timely manner such that she can adequately defend herself in event of an emergency.[113] To arrive at this conclusion, we must first note the purpose for the Second Amendment right under the proposed framework is self-defense, and if this purpose is frustrated by laws or other regulations, then the right cannot be fully exercised and is unduly burdened. Thus, the relevant inquiry for courts is whether the firearms storage and safety are so onerous that the firearm cannot be made ready for its intended purpose. Under this test, it is likely that statutes requiring owners to keep guns unloaded or stored away from ammunition may fail, because it would take too long to load and prepare the firearm for self-defense against a home-invader.[114] Less onerous restrictions, however, such as quick-enabled fingerprint gun safes may be upheld under this same

test because they prepare the firearm for self-defense quickly enough for effective use by the individual.[115] Thus, it is likely that the District of Columbia statute, and the statutes of other states, would be struck down; however, they may be replaced by other similar restrictions that achieve the same goals in firearm safety but also allow individuals to effectively exercise their Second Amendment right.

c. Mandatory Waiting Periods

Currently, eighteen states impose some waiting period for individuals wishing to purchase firearms for authorized dealers. These waiting periods can be as short as two days (Wisconsin) to as long as six months (New York), or in some cases (Michigan) the waiting period is seemingly unlimited.[116] The federal government also used to have a five-day mandatory waiting period under the Brady Act; however, in 1998, the waiting period was replaced by a requirement that dealers run an instantaneous background check via a federally-administered eligibility database while the customer waits at the counter.[117] Although such background checks are generally supported by all sides on gun debates, under this Article's proposed framework for the Second Amendment, inquiry is still required as to whether mandatory waiting periods on firearms purchases have the purpose or effect of placing a substantial obstacle in the path of individuals exercising their right to keep and bear arms for self-defense.

Under the proposed framework, courts will likely uphold mandatory waiting periods that only span a few days and will strike down mandatory waiting periods of over one week and those of an indefinite duration, provided that these waiting periods be waivable upon a showing of necessity. Admittedly, it is difficult if not impossible to determine a precise period of time that demarks the point after which further waiting constitutes an undue burden on the right.

Some would argue that any waiting time, be it minutes or hours, places an obstacle in the path of exercising the right. A vivid example of this argument, as unrealistic as it may be, is that of an individual who knows that she is the target of an imminent attack and seeks to defend herself by immediately purchasing a firearm. In that situation, a wait of any appreciable time would directly infringe upon her Second Amendment right. Supporters of waiting periods, however, would argue that the more typical situation is that a purchaser does not have an immediate need for a firearm based upon self-defense concerns and a waiting period of a few days would consequently not burden the right.[118] The tension between these two positions is likely resolved by reference to the Court's opinion in *Casey*, which applied the same undue burden analysis. In *Casey*, the Court upheld Pennsylvania's requirement of a 24-hour waiting period for women seeking abortions, but only because the statute permitted the waiting period to be avoided "in the event of a medical emergency."[119] Similarly, here, short waiting periods for firearm purchases will likely be found permissible, so long as the waiting period is exempted for emergency self-defense situations, such as the hypothetical described above.[120]

d. Weapon-style and Accessory Restrictions

A slew of federal laws have prohibited the sale and manufacture of many types of firearms, ammunition, and accessories based upon their particularly destructive nature. Currently, federal laws prohibit the sale of fully automatic weapons (manufactured after 1986), specific semi-automatic / assault weapons, weapons that do not trigger metal detectors, firearm silencer accessories, and certain super-strong ammunitions.[121] Similarly, some states and municipalities, including the District of Columbia, have enacted prohibitions on individual possession and ownership of handguns.[122] Like many other firearm restrictions, these statutes

have been passed in response to the use of such firearms in criminal activities in an effort to curb the underlying crimes.

Under the proposed framework, courts will likely uphold prohibitions on weapons that cannot be reasonably connected with the right to self-defense, such as automatic and semi-automatic weapons and assorted accessories and ammunition, but they will strike down prohibitions on commonly accepted firearms used for self-defense, such as handguns. As mentioned *supra*, the proposed framework has categorical rules for firearms that are not reasonably connected with self-defense purposes because such weapons are not reasonably connected with the Second Amendment right.[123] Thus, federal and state regulations within this category are not subject to undue burden analysis and will likely survive diminished scrutiny.[124] Handguns, however, are reasonably connected with self-defense; thus, restrictions on handgun possession and ownership will not be subsumed into the categorical regulation and instead will face undue burden analysis. Since handguns are likely the best choice of firearms for personal protection outside of the home, based on their portable size and concealability,[125] handgun bans will likely be struck down as unduly burdening the right to keep and bear arms for self-defense.

VII. Conclusion

In deciding *District of Columbia v. Heller*, the United States Supreme Court should affirm the D.C. Circuit's adoption of a Second Amendment individual rights analysis by specifically describing the Second Amendment as protecting the fundamental right to keep and bear arms for self-defense. This classification of the right is well supported by the text and history of the Amendment, Supreme Court precedent, and the Court's test for fundamental rights. Additionally, the Court in *Heller* should hold that the "undue burden" test should be the default framework under which the constitutionality of firearms legislation will be scrutinized, subject to

certain categorical regulations. This dual-track framework is well supported by analogous constitutional scrutiny schemes in the abortion and free speech arenas and is the most appropriate for the competing interests present in the Second Amendment realm.

By explicitly recognizing the Second Amendment's individual, fundamental right to keep and bear arms for self-defense and adopting a combination "undue burden" / categorical regulation scrutiny standard in *Heller*, the Supreme Court would make significant positive strides toward the desirable result of a cohesive and more complete Second Amendment jurisprudence.

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[2] U.S. CONST. AMEND. II.
[3] U.S. Nat'l Archives & Records Admin., *A More Perfect Union: The Creation of the U.S. Constitution*, http://www.archives.gov/exhibits/charters/constitution_history.html (last visited Apr. 18, 2008).
[4] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Lewis v. United States, 445 U.S. 95 (1980); United States v. Miller, 307 U.S. 174 (1939); Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876); *Federal Cases Regarding the 2nd Amendment*, http://www.firearmsandliberty.com/fedcases.2nd.html (last visited Jan. 24, 2007).
[5] JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 1 (1998).
[6] District of Columbia v. Heller, No. 07-290, __ U.S. ___, 128 S.Ct. 645 (Nov. 20, 2007).
[7] Michael Anthony Lawrence, Op-Ed., *Court Should Side With Individual Gun Rights*, DETROIT FREE PRESS, Mar. 18, 2008, *available at* http://www.freep.com/apps/pbcs.dll/article?AID=/20080318/OPINION02/803180328/1068/OPINION.
[8] *See infra* Part II.
[9] *See infra* Part III.
[10] *See infra* Part IV.
[11] *See infra* Part V.
[12] *See infra* Part VI.
[13] *See supra* note 4.
[14] Kenneth A. Klukowski, Note, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. L.J. 167, 174-76 (2008); Katharine E. Kohm, Casenote, Parker v. District of Columbia*: Putting the "I's" in Militia*, 42 U. RICH. L. REV. 807, 809 (2008).
[15] *See* Klukowski, *supra* note 14, at 175.
[16] *See id.*
[17] Brandon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm"*, 21 HARV. J. L. & PUB. POL'Y 719, 730 (1998); *see* ROBERT J. SPITZER, THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER THE LAW 56 (2001) ("the meaning of 'the people' in the Second Amendment is indeed different than its meaning elsewhere in the Bill of Rights or Constitution").
[18] Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1107-08 (2000). Massey, however, also notes that most of these prohibitions were aimed at disenfranchised classes – women, non-Protestants, non-property owners – and did not disturb the rights of white, protestant males. *Id.* at 1108.
[19] 307 U.S. 174 (1939).
[20] *Id.* at 183.
[21] Kohm, *supra* note 14, at 811. Individual rights supporters, however, rely upon this same passage to demonstrate the Court's support for their model. *Id.*

[22] Scott Loughrey, *How the Gun Lobby Has Stolen the Second Amendment*, http://www.media-criticism.com/Guns_US_Miller_2001.html (last visited May 17, 2008).
[23] IS GUN OWNERSHIP A RIGHT? 7 (Kelly Doyle ed. 2005) ("Most of the organizations that support greater enforcement of gun control laws also support the collective-rights interpretation of the Second Amendment.").
[24] *Kohm*, *supra* note 14, at 811.
[25] Richard A. Allen, *What Arms? A Textualist's View of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 191, 191-92 (2008).
[26] *See* SPITZER, *supra* note 17, at 57; United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("'the people' seems to have been a term of art employed in select parts of the Constitution. . . . [I]t suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments … refers to a class of persons . . . .").
[27] *See* Christopher J. Schmidt, *An International Human Right to Keep and Bear Arms*, 15 WM. & MARY BILL RTS. J. 983, 984-85 (2007); Stephanie Francis Ward, *Gun Control on the Burner: Experts Disagree Whether Supreme Court Will Hear Appeal of D.C. Court Ruling*, ABA J. E-REPORT, Mar. 16, 2007.
[28] *See* Massey, *supra* note 18, at 1102; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 811-12 (1998) (noting that four states guaranteed the "right of the people to bear arms" in their pre-1791 state constitutions).
[29] *See* DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 37-38 (1986).
[30] *See id.* at 49-50 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 144 (1765)).
[31] 92 U.S. at 553. In *United States v. Cruikshank*, the Court's first decision regarding the Second Amendment, the government charged defendant members of the Ku Klux Klan of conspiring to deprive African-Americans from, among other things, keeping and bearing arms in violation of the Second Amendment. *Id.* at 542, 545. The Court affirmed the dismissal of the charge, holding that the Second Amendment "has not other effect than to restrict the powers of the national government" and not the actions of private individuals. *Id.* at 553.
[32] *See* Federal Cases Regarding the 2nd Amendment, *supra* note 4; The Supreme Court and the Second Amendment, http://www.guncite.com/gc2ndsup.html (last visited Apr. 16, 2008).
[33] *See* Klukowski, *supra* note 14, at 171 ("When the nature of the Second Amendment has been commented on by the Supreme Court, it has implicitly adopted the individual right view in dicta.").
[34] 60 U.S. 393 (1857)
[35] *Id.* at 450 ("no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding."); *see* Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir. 2007), *cert. granted* District of Columbia v. Heller, No. 07-290, __ U.S. ___, 128 S.Ct. 645 (Nov. 20, 2007).
[36] 307 U.S. 174 (1939).
[37] *See* Patrick L. Aultice, *United States vs Miller: Court Opinion and Documents*, http://www.titleii.com/BardwellOLD/miller_compilation.html (transcribing the Government's brief) (last visited May 16, 2008).
[38] Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 947-48 (2008).
[39] TriggerFinger.org, *The District's Argument, Strained But Not Isolated*, Mar. 15, 2007, http://www.triggerfinger.org/weblog/entry/7186.jsp.
[40] Michael Barone, *A Decision of Historic Importance*, U.S. NEWS, Oct. 19, 2001, *available at* http://www.usnews.com/usnews/opinion/baroneweb/mb_011019.htm.
[41] Barnett, *supra* note 38, at 947-48.
[42] For the proposes of this Article, the author assumes that the Court would find the Second Amendment to be incorporated under the Fourteenth Amendment's due process doctrine. *See* Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007).
[43] This right, as announced, could likely stand on its own as a fundamental right without the Second Amendment. This theory, however, is the subject for a different Article.
[44] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5 at 541 (3d ed. 2006).
[45] *See id.*, § 6.5 at 542.

[46] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 693-99 (2007).
[47] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989); Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986).
[48] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
[49] *See* Loving v. Virginia, 388 U.S. 1 (1967).
[50] *See* Santosky v. Kramer, 455 U.S. 745 (1982).
[51] *See* Saenz v. Roe, 526 U.S. 489 (1999).
[52] CHEMERINSKY, *supra* note 44, § 10.1.1 at 792.
[53] Massey, *supra* note 18, at 1131.
[54] *Cf.* IS GUN OWNERSHIP A RIGHT? 4 (Kelly Doyle ed. 2005) ("The only other country in the world that has a right-to-arms provision in its federal constitution is Mexico.")
[55] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136, 139 (1765), *available at* http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm.
[56] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
[57] *See* Jack Balkin, *Strict Scrutiny for Second Amendment Rights?*, BALKINIZATION, Mar. 21, 2008, http://balkin.blogspot.com/2008/03/strict-scrutiny-for-second-amendment.html (noting that infringements of rights guaranteed by the First, Fourth, Seventh, and Eighth Amendments have not always triggered strict scrutiny).
[58] *Cf.* Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and* Heller v. District of Columbia, 75 TENN. L. REV. (forthcoming 2008) (describing how some scholars now believe that "strict scrutiny is not necessarily the default standard of review for provisions of the Bill of Rights that indubitably guarantee 'individual' rights.").
[59] Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992).
[60] *Id.* at 878; Gonzales v. Carhart, 127 S. Ct. 1610, 1626-27 (2007).
[61] *See* Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2495 (1998). This Article's author also ran a search on WestLaw in the 'Supreme Court' database for the term "undue burden" on May 14, 2008, to confirm the continuing validity of this assertion.
[62] Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 876 (1994).
[63] *Casey*, 505 U.S. at 873-74.
[64] CHEMERINSKY, *supra* note 44, § 6.5 at 540.
[65] Winkler, *supra* note 46, at 717.
[66] *See id.* at 686.
[67] CHEMERINSKY, *supra* note 44, § 6.5.
[68] Winkler, *supra* note 46, at 720.
[69] *See* Brief of Law Professors Erwin Chemerinsky and Adam Winkler, as Amici Curiae in Support of Petitioner, District of Columbia v. Heller, No. 07-290 (U.S. Jan. 11, 2008); Winkler, *supra* note 46, at 716.
[70] *See* Winkler, *supra* note 46, at 689.
[71] *Id.*
[72] D.C. Code § 7-2502.02(a)(4) (2008).
[73] D.C. Code § 7-2507.02 (2008).
[74] D.C. Code § 22-4504 (2008).
[75] Complaint at ¶ 2, Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004).
[76] *Id.*
[77] *Id.*
[78] *Parker*, 311 F. Supp. 2d at 109-10, *rev'd* 478 F.3d 370 (D.C. Cir. 2007), *cert. granted* District of Columbia v. Heller, No. 07-290, __ U.S. ___, 128 S.Ct. 645 (Nov. 20, 2007).
[79] *Id.* at 105, 108-09.
[80] *Id.* at 105-06.
[81] *Id.* at 106-08, 109.
[82] *Id.* at 109.
[83] *Parker*, 478 F.3d at 375-76, *cert. granted Heller*, 128 S.Ct. at 645.
[84] *Id.* at 380.
[85] *Id.* at 381.
[86] *Id.* at 383.

[87] *Id.* at 391-95 (citing Dred Scott v. Stanford, 60 U.S. 393 (1857); Robertson v. Baldwin, 165 U.S. 275 (1897); United States v. Miller, 307 U.S. 174 (1939)).
[88] *See* United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).
[89] *Parker*, 478 F.3d at 395-97.
[90] *Id.*
[91] *Id.* at 397-401.
[92] *Id.* at 387-401.
[93] *Id.* at 404 (Henderson, J., dissenting). The dissent even went so far as to suggest that the majority's discussion on the appropriate framework for Second Amendment claims was "another fifty-plus pages to the pile [of dicta]." *Id.* at 401-02.
[94] Petition for a Writ of Certiorari, District of Columbia v. Heller, No. 07-290 (U.S. Sept. 4, 2007).
[95] *Id.* at 2, 8-11.
[96] *Id.* at 2, 11-18.
[97] *Id.* at 2, 18-21.
[98] *Id.* at 2, 21-30.
[99] Brief in Response to Petition for Certiorari, District of Columbia v. Heller, No. 07-290 (U.S. Oct. 4, 2007).
[100] District of Columbia v. Heller, No. 07-290, __ U.S. ___, 128 S.Ct. 645 (Nov. 20, 2007).
[101] Massey, *supra* note 18, at 1099 ("we are left with the strong possibility that the Second Amendment protects individual firearms possession in some manner and to some degree….").
[102] *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 472 (1995); Volokh, *supra* note 28.
[103] *See* Winkler, *supra* note 46, at 717 (suggesting that there have been at most 20 federal and state firearms laws struck down under the rational basis / reasonable regulation test in the over 200 years of American history).
[104] Klukowski, *supra* note 14, at 167.
[105] Although some believe that the Supreme Court may articulate such a standard in the near future. *See id.*
[106] *See* CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 2-4 (1999) (noting that Kentucky and Louisiana were the first states to adopt concealed weapons legislation in 1813 and today all states except Vermont have some form of regulation).
[107] *See* Tracy Bateman Farrell, *Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons*, 33 A.L.R.6th 407, § 2 (2008); HARRY HENDERSON, GUN CONTROL 42-43 (2005).
[108] CRAMER, *supra* note 106, at 139 (The historical justification for such laws was to curb the spike in violence rates, particularly murder and manslaughter rates, in part due to the outlawing of "dueling" in the southern U.S.).
[109] Concealedcampus.com, *Answers to the Most Common Arguments Against Concealed Carry on College Campuses*, http://www.concealedcampus.org/arguments.htm (last visited May 16, 2008).
[110] *See* Sam Howe VerHovek, *Why Not Unconcealed Guns*, N.Y. TIMES, Sept. 3, 1995.
[111] Brady Campaign to Prevent Gun Violence, *Child Access Prevention Laws State Summaries*, http://www.bradycampaign.org/facts/issues/?page=capstate (last visited May 17, 2008).
[112] D.C. Code § 7-2507.02 (2008).
[113] Justice Roberts properly framed this inquiry during oral arguments by asking "how long does it take to remove the trigger lock and make the gun operable?" Transcript of Oral Argument at 83, District of Columbia v. Heller, 128 S.Ct. 645 (No. 290).
[114] Jacob Sullum, *Safety in Defenselessness: The District of Columbia Tries to Save its Gun Law by Misreading it*, ReasonOnline, http://www.reason.com/news/show/125426.html (last visited May 18, 2008) ("Th[e D.C.] 'safe storage' requirement makes it pretty hard to use *any* gun for self-defense, except maybe as a club.")
[115] *See* Richard A. Baker, *Handgun Safe Information*, SECURITY WORLD NEWS, Dec. 30, 2007, http://www.securityworldnews.com/articles/5144/1/Handgun-Safe-Information/Page1.html ("[Biometric pads] read your fingerprints and unlock instantly.").
[116] Brady Campaign to Prevent Gun Violence, *Background Checks and Waiting Periods for Firearm Purchases: State-by-State Breakdown*, http://www.bradycampaign.org/facts/issues/?page=waitxstate (last visited May 18, 2008) (Michigan's does not have a specific waiting period; instead, it is governed by the requirement that the permit be issued "with due speed and diligence.")
[117] HENDERSON, *supra* note 107, at 40-41.
[118] The inherent tension between these two positions was noted by U.S. Senator Dick Durbin during congressional debate regarding renewing a federal waiting period on handgun purchases. Press Release, Handgun Control, Lawmakers Introduce Bill to Permanently Reinstate Brady Waiting Period (Feb. 24, 1999), *available at*

http://www.commondreams.org/pressreleases/feb99/022499c.htm. "It's hard to understand why a person would need a gun immediately. Bringing back the waiting period isn't about more government, it's about fewer gun crime victims." *Id.*

[119] Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 885 (1992).

[120] This distinction may prove to be an academic point, as many states would likely migrate away from state background checks and towards the federal database as a result of the proposed framework. This would likely occur because the federal database's nearly instantaneous background checks would likely survive undue burden scrutiny while still fulfilling the governmental interest of keeping firearms out of the hands of those most likely to abuse them.

[121] *See* HENDERSON, *supra* note 107, at 37-39.

[122] *Id.* at 39; *see* D.C. Code § 7-2502.02(a)(4) (2008).

[123] This categorical rule, as mentioned *supra*, reinforces and supports the Court's holding in *Miller*.

[124] Similarly, federal and state laws that enhance criminal penalties where the underlying crime was committed with a firearm would be upheld under categorical restrictions. This conclusion follows, because there is no connection between the culpable act, carrying a weapon during the commission of a crime, and the right to self-defense. Like the analysis performed on other firearm regulations, however, this result does not depend on the intent of the legislation, even though pro-gun and anti-gun groups alike agree on the desirability of criminal firearm enhancement statutes. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZEN'S GUIDE TO GUN CONTROL 113 (1987).

[125] *See* Internetarmory.com, *Gun Selection: Self-defense*, http://www.internetarmory.com/gun_selection_self_defense.htm (last visited May 16, 2008).