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### Repository Citation

Benjamin A. Ellis, *“Time Enough” for Scrutiny: The Second Amendment, Mental Health, and the Case for Intermediate Scrutiny*, 25 Wm. & Mary Bill Rts. J. 1325 (2017), <http://scholarship.law.wm.edu/wmboj/vol25/iss4/5>

## “TIME ENOUGH” FOR SCRUTINY: THE SECOND AMENDMENT, MENTAL HEALTH, AND THE CASE FOR INTERMEDIATE SCRUTINY

Benjamin A. Ellis\*

### INTRODUCTION

When analyzing challenges to laws that burden a constitutional right, courts generally adopt some analytical framework for determining whether the burden the law places on exercising that right is appropriate. How are lower courts to decide which analytical framework to apply when the Supreme Court has not established one for a particular doctrinal area? This is the current situation in contemporary Second Amendment jurisprudence. Having interpreted the Second Amendment to protect an individual’s right to keep and bear arms in the home for self-defense in *District of Columbia v. Heller*,<sup>1</sup> the Supreme Court confirmed a constitutional right without providing an answer to the framework question.<sup>2</sup>

Specifically, the Court did not apply any of the traditional levels of judicial scrutiny to the law at issue in *Heller*.<sup>3</sup> Instead, the Court cautioned against deciding a question it felt was unnecessary on the facts before it.<sup>4</sup> “[N]othing” in the Court’s opinion, however, “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”<sup>5</sup> The Court had little to say about these “presumptively lawful” prohibitions, except that “there will be time

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\* JD, William & Mary Law School, 2017; BA, University of North Carolina at Chapel Hill, 2005. First, I would like to thank my family and my lovely partner, Kelsey Olivieri, for their love and support. Professor Allison Orr Larsen provided valuable comments in the early stages of this Note. Additionally, I would like to thank the *Journal’s* support staff, Jan Abbott and Dietra Baytop, for everything they have done to make Volume 25 possible. It would be remiss not to thank the following: the wonderful professors at William & Mary Law School, my friends, and, of course, Nikolai Gogol. Finally, but not least of all, I would like to thank the editors of the *William & Mary Bill of Rights Journal* for their work on this Note. Specifically, I’d like to thank Mariel Echemendia, Kate Lennon, Joe Ridgeway, Ana María Matías, Mary Johnston, Gordon Dobbs, and Ashley Eick for their comments and suggestions, all of which have made this Note better than it would have otherwise been. All remaining errors are my own.

<sup>1</sup> 554 U.S. 570 (2008).

<sup>2</sup> *Id.* at 628–29, 634–35 (noting that the law at issue would “fail constitutional muster” under “any of the standards of scrutiny that we have applied to enumerated constitutional rights,” and declining to establish a specific level of scrutiny for such challenges).

<sup>3</sup> *See id.*

<sup>4</sup> *See id.* at 628–29.

<sup>5</sup> *Id.* at 626.

enough to expound upon the historical justifications for [them] . . . if and when those exceptions come before us.”<sup>6</sup> No such challenges have since been decided by the Court. The Courts of Appeals, however, have dealt with many of these exceptions, and their approaches are crucial to answering the scrutiny question.<sup>7</sup>

Since *Heller*, the Courts of Appeals have, by a large majority, adopted some form of intermediate scrutiny in most Second Amendment challenges.<sup>8</sup> In 2014, however, the Sixth Circuit considered a challenge to a federal law banning gun possession for any individual who previously had been committed to a mental institution, or who had been adjudicated as a mental defective.<sup>9</sup> In *Tyler v. Hillsdale County Sheriff's Department (Tyler I)*,<sup>10</sup> a panel of the Sixth Circuit became the first Court of Appeals to apply strict scrutiny to a Second Amendment challenge.<sup>11</sup> The Sixth Circuit panel presented several arguments for the general application of strict scrutiny over intermediate scrutiny in Second Amendment cases.<sup>12</sup> Moreover, *Tyler I* was the first case in which a federal Court of Appeals has heard a challenge to a law restricting gun possession based on mental health concerns.<sup>13</sup>

Less than six months after the *Tyler I* decision, the Sixth Circuit vacated the opinion and granted a rehearing en banc.<sup>14</sup> Sitting en banc, the court in *Tyler v. Hillsdale County Sheriff's Department (Tyler II)*<sup>15</sup> rejected the previous panel's conclusion that strict scrutiny applies in Second Amendment challenges to laws restricting gun possession based on mental health concerns.<sup>16</sup> The Sixth Circuit thus fell in line with many of the other circuits in applying intermediate scrutiny in such cases.<sup>17</sup> Although the Sixth Circuit no longer splits with the other circuits on the scrutiny question, the general discussion of scrutiny in *Tyler I* and analysis of the arguments in favor of strict scrutiny for Second Amendment challenges is instructive. The *Tyler I* court's opinion provided a more in-depth discussion of the scrutiny question than any other earlier circuit court's opinion, marshaling many different

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<sup>6</sup> *Id.* at 635.

<sup>7</sup> *See infra* Section III.A.

<sup>8</sup> *See infra* Section III.A.; *see also* *Tyler v. Hillsdale Cty. Sheriff's Dep't (Tyler I)*, 775 F.3d 308, 326 (6th Cir. 2014), *vacated, reh'g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015) (“The general trend, [in Second Amendment cases], has been in favor of some form of intermediate scrutiny.”).

<sup>9</sup> *Tyler I*, 775 F.3d at 311.

<sup>10</sup> 775 F.3d 308 (6th Cir. 2014), *vacated, reh'g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>11</sup> *Id.* at 311, 328–29 (noting that the decision to apply strict scrutiny in this case put the Sixth Circuit at odds with the other circuits hearing Second Amendment challenges).

<sup>12</sup> *Id.* at 326–29.

<sup>13</sup> *Id.* at 311.

<sup>14</sup> *Id.* at 308.

<sup>15</sup> 837 F.3d 678, 681 (6th Cir. 2016) (en banc).

<sup>16</sup> *Id.* at 690–92.

<sup>17</sup> *Id.* at 692–93; *see infra* text accompanying notes 201–09, 211.

arguments in favor of strict scrutiny over intermediate scrutiny.<sup>18</sup> Importantly, the panel’s arguments were not dependent upon the specific facts in *Tyler I*, but, rather, if sound, would support the adoption of strict scrutiny across many types of Second Amendment challenges.<sup>19</sup> Although the Sixth Circuit, sitting en banc, ultimately rejected the application of strict scrutiny in the case of a law burdening the Second Amendment right due to mental health concerns,<sup>20</sup> because the Supreme Court has not yet decided the scrutiny question, the issue remains open.

This Note considers the question of which analytical framework, or level of judicial scrutiny, is applicable to Second Amendment challenges. Specifically, it considers which of the traditional levels of judicial scrutiny is applicable in Second Amendment challenges to laws that restrict gun possession for those with, or with a history of, mental health issues. Although couched within the discussion of gun possession statutes related to mental health, the arguments may apply to Second Amendment jurisprudence more broadly.

Of the traditional approaches, intermediate scrutiny, and not strict scrutiny, is the better approach. In his *Heller* dissent, Justice Breyer argued for an interest-balancing approach that is less stringent than strict scrutiny.<sup>21</sup> This approach allows a substantial degree of deference to legislatures, which is necessary for effective gun control, as argued below.<sup>22</sup> The adoption by the lower federal courts of a level of scrutiny less demanding than strict scrutiny, namely, intermediate scrutiny,<sup>23</sup> does not alone establish its appropriateness. It strongly suggests, however, that intermediate scrutiny is a doctrinally acceptable and practically workable standard in evaluating laws subject to Second Amendment challenges. This Note suggests this situation has the effect of shifting the burden of proof onto those who would apply the more stringent strict scrutiny standard. Three arguments in favor of strict scrutiny are considered below, but, as this Note argues, all three fail.<sup>24</sup> Each of the arguments either proves too much or is ultimately self-defeating.<sup>25</sup> Finally, it is suggested that strict scrutiny may not only be non-preferable, but may be doctrinally impossible in Second Amendment challenges.<sup>26</sup>

Importantly, establishing that intermediate scrutiny is generally preferable to strict scrutiny does not foreclose the possibility that strict scrutiny may sometimes be applicable. Some Courts of Appeals have held that when the law in question

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<sup>18</sup> *Tyler I*, 775 F.3d at 322–30.

<sup>19</sup> *See id.*

<sup>20</sup> *Tyler II*, 837 F.3d at 690–92.

<sup>21</sup> *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (“I would simply adopt . . . an interest-balancing inquiry explicitly.”).

<sup>22</sup> *See infra* Section I.A.

<sup>23</sup> *See infra* Section III.A.

<sup>24</sup> *See infra* Section III.B.

<sup>25</sup> *See infra* Section III.B.

<sup>26</sup> *See infra* Section III.B and text accompanying notes 242–48.

burdens “the core” of the Second Amendment right, strict scrutiny is applicable.<sup>27</sup> If intermediate scrutiny is the generally applicable standard, the question then becomes whether some form of intermediate scrutiny is capable of providing the appropriate deference to legislatures, while simultaneously respecting the core right of the Second Amendment. Because intermediate scrutiny is not a unitary standard, and admits of strong and weak readings, it can accomplish this balance.<sup>28</sup> All else being equal, a single, flexible standard is preferable to having two distinct standards.

Part I discusses the Supreme Court’s modern Second Amendment jurisprudence in *Heller* and *McDonald v. City of Chicago*<sup>29</sup> and argues that the *Heller* majority’s concern that an interest-balancing approach would give judges too much discretion is misguided.<sup>30</sup> Indeed, an approach less demanding than strict scrutiny is necessary to ensure the appropriate deference to legislatures.<sup>31</sup> Part II argues that, contrary to the views of a minority of judges, the scrutiny question in this context matters.<sup>32</sup> Part II also introduces the facts and reasoning of *Tyler I*.<sup>33</sup> Part III provides a tour of the Courts of Appeals, a discussion of the Sixth Circuit’s recent en banc decision in *Tyler II*, and draws certain lessons from the majority adoption of intermediate scrutiny among the circuits.<sup>34</sup> The Part then goes on to consider the arguments in favor of strict scrutiny and against intermediate scrutiny, and finds that all of the arguments fail.<sup>35</sup> Finally, Part III argues that the correct conception of intermediate scrutiny solves the problem of protecting the core right of the Second Amendment.<sup>36</sup> Therefore, strict scrutiny has no place in Second Amendment jurisprudence.

#### I. *DISTRICT OF COLUMBIA V. HELLER* AND THE SCRUTINY QUESTION

Contemporary Second Amendment jurisprudence begins with the Supreme Court’s 2008 case, *District of Columbia v. Heller*.<sup>37</sup> There, the Court held that the Second Amendment protects an individual’s right to keep a firearm in the home for the purpose of self-defense.<sup>38</sup> Two years later, in *McDonald*, the Court reiterated its

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<sup>27</sup> See, e.g., *Peruta v. County of San Diego*, 742 F.3d 1144, 1168 n.15 (9th Cir. 2014) (“Intermediate scrutiny is not appropriate, however, for cases involving the destruction of a right at the core of the Second Amendment.”), *rev’d*, 824 F.3d 919 (9th Cir. 2016) (en banc); *United States v. Masciandro*, 638 F.3d 458, 469 (4th Cir. 2011) (holding that strict scrutiny applies to laws burdening the “core right of self-defense in the home”), *cert. denied*, 565 U.S. 1058 (2011).

<sup>28</sup> See *infra* Section III.C.

<sup>29</sup> 561 U.S. 742 (2010).

<sup>30</sup> See *infra* Part I.

<sup>31</sup> See *infra* Part I.

<sup>32</sup> See *infra* Part II.

<sup>33</sup> See *infra* Section II.B.

<sup>34</sup> See *infra* Section III.A.

<sup>35</sup> See *infra* Section III.B.

<sup>36</sup> See *infra* Section III.C.

<sup>37</sup> 554 U.S. 570 (2008).

<sup>38</sup> See *id.* at 635 (striking down District of Columbia handgun ban).

position in *Heller* and held that the Second Amendment applies to the states via Fourteenth Amendment incorporation.<sup>39</sup> The *Heller* Court, however, in making its pronouncements on the Amendment’s proper interpretation, left many other issues unresolved and questions unanswered.<sup>40</sup>

This Part looks at the Court’s interpretation of the Second Amendment and notes a few of these unresolved issues and unanswered questions. Specifically, this Part addresses the Court’s assertion that certain restrictions on Second Amendment rights are “presumptively lawful,”<sup>41</sup> and its reluctance to decide the question of which level of judicial scrutiny applies in Second Amendment challenges.<sup>42</sup> Justice Breyer’s interest-balancing approach and its relevance to the scrutiny question are also discussed.<sup>43</sup> Finally, this Part introduces the two-step analysis adopted by many of the Courts of Appeals in the wake of *Heller* and *McDonald*.<sup>44</sup>

#### A. *The Heller Court on the Scrutiny Question*

The Second Amendment states, “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>45</sup> The *Heller* Court considered a District of Columbia handgun restriction making it a crime to possess an unregistered handgun.<sup>46</sup> This restriction also effectively prohibited the registration of handguns.<sup>47</sup> The Court held that the Second Amendment protects an individual’s right to keep a gun in the home for purposes of self-defense.<sup>48</sup> The Court struck down the law in question on the grounds that the “inherent right of self-defense” is “central to the Second Amendment right.”<sup>49</sup> The District of Columbia’s *total* prohibition on handgun possession, even in the home, violated that right.<sup>50</sup>

Although the Court recognized a strong Second Amendment right, it noted that like most rights, the right protected by the Second Amendment “is not unlimited[;]”

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<sup>39</sup> 561 U.S. at 791 (“[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

<sup>40</sup> The Court did not “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.” *Heller*, 554 U.S. at 626.

<sup>41</sup> *Id.* at 627 n.26.

<sup>42</sup> *See id.* at 628–29.

<sup>43</sup> *See id.* at 687–91 (Breyer, J., dissenting).

<sup>44</sup> *See infra* Section I.B.

<sup>45</sup> U.S. CONST. amend. II.

<sup>46</sup> *Heller*, 554 U.S. at 573 (majority opinion).

<sup>47</sup> *Id.* at 574–75 (citing D.C. CODE §§ 7-2501.1(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)) (“The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited.”).

<sup>48</sup> *Id.* at 635.

<sup>49</sup> *Id.* at 628.

<sup>50</sup> *Id.* at 628–29.

nor has it been historically understood to be unlimited.<sup>51</sup> Therefore, it would appear that certain restrictions on personal gun ownership may survive constitutional challenges even under *Heller*'s interpretation of the Second Amendment.<sup>52</sup>

Indeed, the Court suggested a number of such possible restrictions.<sup>53</sup> The majority was clear that, though it declined to

undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment, nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.<sup>54</sup>

These kinds of restrictions amount to “presumptively lawful regulatory measures.”<sup>55</sup> These “presumptively lawful” exceptions concern both restrictions on the types of *places* in which firearms may be possessed and restrictions on *who* can possess a firearm.<sup>56</sup> Because the right recognized by the *Heller* Court concerns “law-abiding, responsible citizens,” it appears that certain classes of individuals may be “disqualified from the exercise of Second Amendment rights.”<sup>57</sup>

Importantly, these statements concerning presumptively lawful restrictions on firearm possession are dicta.<sup>58</sup> Some courts, however, including the Sixth Circuit in *Tyler I & II*, take these statements seriously, but do not find them dispositive of the issues at hand.<sup>59</sup> This is at least in part because these presumptively lawful exceptions were repeated and reaffirmed by the Court in *McDonald*.<sup>60</sup>

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<sup>51</sup> *Id.* at 626 (“From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” (citations omitted)).

<sup>52</sup> *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015) (holding that “New York and Connecticut[’s prohibitions of] assault weapons and large-capacity magazines do not violate the Second Amendment.”).

<sup>53</sup> *See Heller*, 554 U.S. at 626–27.

<sup>54</sup> *Id.* at 626 (footnote omitted).

<sup>55</sup> *Id.* at 627 n.26.

<sup>56</sup> *See id.* at 626–27.

<sup>57</sup> *Id.* at 635.

<sup>58</sup> *See Tyler I*, 775 F.3d 308, 317 (6th Cir. 2014) (noting that the *Heller* Court’s statements to the effect that “the Second Amendment right to possess firearms does not extend to all individuals” is dicta), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>59</sup> *Tyler II*, 837 F.3d 678, 686 (6th Cir. 2016) (en banc) (noting that the court was bound to follow Supreme Court dicta, but stating that *Heller* “[did] not resolve this case[,]” but merely “established a presumption that such bans were lawful”); *Tyler I*, 775 F.3d at 317 (stating that the court could not “resolve this case” simply by relying on this dicta).

<sup>60</sup> 561 U.S. 742, 786 (2010).

These dicta raise a number of questions. First, how are courts to understand the meaning of “presumptively lawful?” Second, do restrictions on gun possession relating to the mental health, or mental health history, of an individual, such as § 922(g)(4) of the Federal Gun Control Act of 1968,<sup>61</sup> fall within these exceptions? And, finally, what, if anything, does this “presumptively lawful” language tell us about determining the appropriate level of scrutiny applicable in cases concerning laws falling under these exceptions?

Consider first the traditional levels of scrutiny. To survive intermediate scrutiny, a law “must be substantially related to an important governmental objective.”<sup>62</sup> Strict scrutiny is more demanding, making it more difficult for the challenged law to pass constitutional muster, and, thus, making it more likely a court will strike it down.<sup>63</sup> The more demanding approach of strict scrutiny requires that the law in question “further[ ] a compelling interest and [be] narrowly tailored to achieve that interest.”<sup>64</sup> Indeed, challenged laws, with one doctrinal area exception, are more often than not struck down under strict scrutiny.<sup>65</sup>

The *Heller* Court, however, declined to determine a standard of scrutiny for Second Amendment analysis.<sup>66</sup> The Court reasoned that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights,” the law under consideration “would fail constitutional muster.”<sup>67</sup> The Court did, however,

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<sup>61</sup> 18 U.S.C. § 922(g)(4) (2012) (making it unlawful for any individual who “has been adjudicated as a mental defective” or “has been committed to a mental institution” to possess a firearm).

<sup>62</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>63</sup> See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1267 (2007) (stating that many commentators consider strict scrutiny to be “strict in theory, but fatal in fact”). *But see* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (noting that laws may be upheld under strict scrutiny); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

<sup>64</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (plurality opinion of Roberts, C.J.)).

<sup>65</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006). Winkler’s study of federal court decisions between 1990 and 2003, concerning 459 decisions across five doctrinal areas (religious liberty, freedom of association, suspect class discrimination, fundamental rights, and freedom of speech), found that the survival rate of laws subject to strict scrutiny was on average thirty percent. *Id.* at 810, 815. Laws affecting all rights except religious liberty were struck down more often than not under strict scrutiny, with laws affecting religious liberty only being struck down under strict scrutiny in forty-one percent of cases. *See id.* at 815. Note, however, that the right to bear arms is not among the rights considered in this study. *Id.* Moreover, as mentioned in the Introduction, no federal court prior to the Sixth Circuit in *Tyler I* applied strict scrutiny to Second Amendment challenges. *See supra* note 11 and accompanying text.

<sup>66</sup> *See* *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

<sup>67</sup> *Id.*

rule out rational basis review, without commenting on the other traditional intermediate or strict scrutiny approaches.<sup>68</sup>

Insisting that “[t]he question matters,” Justice Breyer, in his dissent, took the majority to task for not deciding the scrutiny question.<sup>69</sup> Justice Breyer argued that the majority was simply wrong to claim that the District of Columbia handgun ban would fail under any standard of scrutiny.<sup>70</sup> First, the law in *Heller* would survive rational basis review.<sup>71</sup> Preventing gun-related accidents and violence by restricting the possession of handguns bears, at the very least, a “rational relation[.]” to this “‘legitimate’ life-saving objective.”<sup>72</sup>

Second, the result of applying strict scrutiny to laws restricting firearm possession is “far from clear,” because the majority “implicitly” rejected strict scrutiny “by broadly approving” the set of presumptively lawful exceptions.<sup>73</sup> Indeed, Justice Breyer suggested that the “adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible[.]” because nearly every regulation on gun possession will aim to further a compelling government interest—namely, protecting citizens through prevention of crime and ensuring public safety.<sup>74</sup> Because the purpose of almost any gun regulation will be to further a compelling government interest, what remains in the analysis is to determine whether the regulation “impermissibly burdens” the Second Amendment right in furthering that interest.<sup>75</sup> This involves, in practice, if not in theory, an interest-balancing inquiry.<sup>76</sup>

Instead of avoiding the scrutiny question in Second Amendment challenges, Justice Breyer would have adopted “an interest-balancing inquiry explicitly.”<sup>77</sup> Under such an approach, the question becomes “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”<sup>78</sup> In the course of such an inquiry, courts typically defer to the judgment of the legislature, which is better positioned to make determinations of fact and judgments concerning the effectiveness of the regulations.<sup>79</sup> Though Justice Breyer did not explicitly identify his proposed standard

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<sup>68</sup> *Id.* at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

<sup>69</sup> *See id.* at 687–91 (Breyer, J., dissenting).

<sup>70</sup> *Id.* at 687.

<sup>71</sup> *Id.* at 687–88.

<sup>72</sup> *Id.* at 688.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 689.

<sup>75</sup> *See id.*

<sup>76</sup> *Id.* (“[A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry . . .”).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 689–90 (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

<sup>79</sup> *Id.* at 690 (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195–96 (1997) (“In

with intermediate scrutiny, it appears to be more demanding than rational basis, but less demanding than strict scrutiny.

Consider how a law banning the possession of firearms by those individuals suffering from mental illness would fare under Justice Breyer’s interest-balancing approach. Congress’s purpose in enacting § 922(g) was to protect the public against firearm violence committed by individuals who are more likely to pose a threat to others or to themselves.<sup>80</sup> Is stripping the right to bear arms from individuals meeting the above criteria out of proportion with the benefits purportedly likely to be had in reduction of self-harm and harm to others via gun violence? The answer to the question is not obvious and would likely require, under this approach, an empirical investigation of the link between mental illness and gun violence. If that link is sufficiently strong, then the restriction is more likely to be upheld.

Though the question cannot be answered here, the important point is that there must be some sort of means-end analysis to make a determination. But even here, the interest-balancing approach would be deferential to legislatures in answering these questions.<sup>81</sup> It is simply not enough to accept the mental health restriction as “rationally related” to this government interest, without considering the force of the right recognized in *Heller*.<sup>82</sup> A strict scrutiny analysis’s presumption that mental health restrictions are unconstitutional is likewise inappropriate.<sup>83</sup>

The majority in *Heller* disavowed the analysis proposed by Justice Breyer, calling it a “judge-empowering ‘interest-balancing inquiry.’”<sup>84</sup> The majority distinguished Justice Breyer’s approach from the traditional levels of scrutiny, instead characterizing it as a “freestanding” interest-balancing approach.<sup>85</sup> In rejecting this approach, the majority noted that no other enumerated constitutional rights are subject to this kind of interest balancing and that this test would remove any guarantee provided by the right if it were subject to judges’ “assessments of its usefulness.”<sup>86</sup> The majority was primarily concerned with giving judges too much discretion in determining whether the right to bear arms may be subordinated to a governmental

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applying [an interest-balancing] standard the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”).

<sup>80</sup> See *United States v. Winchester*, 916 F.2d 601, 605 (11th Cir. 1990) (“The title of the statute, the Gun Control Act of 1968, leaves no doubt that the statutory purpose is to limit or control the possession of firearms. The statutory structure indicates that, in enacting section 922(g), Congress sought only to bar the possession of firearms by certain types of persons that it considered dangerous.”).

<sup>81</sup> *Heller*, 554 U.S. at 690 (Breyer, J., dissenting).

<sup>82</sup> See *id.* at 688–89.

<sup>83</sup> See *id.* (stating that the “constitutionality [of many gun regulations] under a strict-scrutiny standard would be far from clear”).

<sup>84</sup> *Id.* at 634 (majority opinion).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

interest of protecting citizens from gun violence.<sup>87</sup> These concerns arguably also counsel against adopting a less demanding, more deferential level of scrutiny, such as intermediate scrutiny.

The Court's concern is misplaced. Concerns about judicial discretion, or even activism, may take two forms in this context. On the one hand, the *Heller* majority's concern was that an interest-balancing approach would fail in its application to respect the right protected by the Second Amendment.<sup>88</sup> Arguably, judges applying such an approach would be more likely to uphold laws curbing Second Amendment rights in a way that is inconsistent with that right being fundamental. The interest-balancing approach would therefore be inconsistent with the holdings of *Heller*<sup>89</sup> and *McDonald*.<sup>90</sup> Though Justice Breyer does not identify his interest-balancing approach with intermediate scrutiny, the approach is certainly less stringent than strict scrutiny. Therefore, concerns about judicial discretion of this type counsels against adopting intermediate scrutiny.

The contrary concern about judicial discretion or activism is that the *Heller* majority's position may result in judges routinely striking down gun control laws under a demanding form of scrutiny. The current debate about gun control is extremely complex.<sup>91</sup> In crafting effective gun control focused on considerations of mental health, there are a myriad of problems.<sup>92</sup> The states have dealt with the problem of gun possession by the mentally ill in a variety of ways.<sup>93</sup> Some states "follow the lead of [§ 922(g)(4)]," and restrict gun possession for anyone previously involuntarily committed to a mental institution or adjudicated as a mental defective.<sup>94</sup> Other states expand the restriction to include those voluntarily committed to a mental institution.<sup>95</sup> A minority of states, such as Hawaii, prohibit gun possession

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<sup>87</sup> *Id.* at 634–35 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 634.

<sup>90</sup> 561 U.S. 742, 791 (2010) (noting that "an interest-balancing test [was] . . . specifically rejected").

<sup>91</sup> Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have A Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 1–2 (2013) (detailing recent incidents of gun violence, the political debate surrounding gun ownership restrictions for the mentally ill, and various doctrinal challenges after *Heller*).

<sup>92</sup> *Id.* at 1–3 (noting the political issues surrounding gun control and the various methods of interpreting the Supreme Court's dictum on whether the mentally ill fall within the scope of the Second Amendment's protections).

<sup>93</sup> *Id.* at 12 (noting three distinct approaches states have taken).

<sup>94</sup> *Id.* at 12 & n.78 (including Arkansas, Florida, Iowa, Ohio, Pennsylvania, and Utah).

<sup>95</sup> *Id.* at 12 & n.79 (including Delaware, the District of Columbia, Georgia, Illinois, and Massachusetts).

“by anyone who ‘[i]s or has been diagnosed as having a significant behavioral, emotional, or mental disorder . . . .’”<sup>96</sup>

These restrictions aim to reduce gun violence—violence which may cause harm to others or lead to self-harm.<sup>97</sup> In addition to the variation among state gun restrictions, the evidence that the mentally ill pose a higher risk of harm to others or self-harm is itself complicated.<sup>98</sup> A variety of factors are at play in determining whether the mentally ill are more likely to commit acts of violence with a firearm. For instance, the nature of the mental illness can vary the degree to which an individual is disposed to violence generally.<sup>99</sup> One study found “that 6.81% of people with a serious mental illness reported violent behavior in the past year . . . .”<sup>100</sup> Only 2.05% of people without a serious mental illness reported such behavior.<sup>101</sup> Within the former group, however, schizophrenics had a higher rate of weapon use than individuals with other types of mental illness or those without.<sup>102</sup> Moreover, schizophrenics “were almost twenty times more likely to commit homicide.”<sup>103</sup>

Drug use by the mentally ill also complicates the situation. Individuals with mental illness who also used drugs reported a “significantly higher prevalence of violence . . . than among [those who did not use drugs].”<sup>104</sup> The crucial finding, however, is that the mentally ill are more susceptible to drug abuse, which can lead to a higher rate of commission of violent acts.<sup>105</sup>

To be clear, the purpose of this discussion is not to claim that any particular gun control measure targeting the mentally ill or those with a history of mental illness is the correct approach. The purpose is simply to make clear that the problem of establishing effective gun control to reduce violence committed by the mentally ill is incredibly complex. The data supporting the finding that the mentally ill are more likely to commit acts of violence with a gun is complicated by the specific nature of the mental illness and the interplay between mental illness and drug use.<sup>106</sup> This

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<sup>96</sup> *Id.* at 12 (quoting HAW. REV. STAT. § 143-7(c)(3) (2011)).

<sup>97</sup> *Id.* (“These restrictions can be justified, if at all, by the government’s interest in reducing gun injuries and deaths. The causes may include accidents, aggressive acts, and self-harm.”).

<sup>98</sup> *See id.* at 12–22 (arguing that the evidence supporting the proposition that the mentally ill pose a greater threat of gun violence is both complicated by a variety of other factors and, to varying degrees, disputed in the literature on the subject).

<sup>99</sup> *Id.* at 14.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 15 (“[S]chizophreni[cs] had the highest weapon use: 8.58% as compared with 0.40% of individuals without a disorder.”).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 16.

<sup>105</sup> *See* John Monahan et al., *The MacArthur Violence Risk Assessment Study Revisited: Two Views Ten Years After Its Initial Publication*, 59 PSYCHIATRIC SERVS. 147, 149 (2008) (“Mental disorder has a significant effect on violence by increasing people’s susceptibility to substance abuse.”).

<sup>106</sup> *See id.*; Vars & Young, *supra* note 91, at 16.

complexity suggests that crafting legislation to deal with the problem is a daunting and fact-intensive enterprise. For these reasons, it may be difficult for legislatures to craft gun laws that narrowly target the appropriate groups or behaviors. It may be necessary for Congress to “cast a wider net than is necessary to perfectly remove the harm” posed by gun possession by the mentally ill.<sup>107</sup> The hope, of course, is that as the problem becomes better understood, that net may shrink.

The benefit of a prophylactic approach, like § 922(g)(4),<sup>108</sup> is that it “obviate[s] the necessity for large numbers of individualized determinations.”<sup>109</sup> The narrow tailoring requirement of strict scrutiny, would likely render vast amounts of gun restrictions unconstitutional,<sup>110</sup> thus undermining both Congress’s and the States’ attempts at combating gun violence by the mentally ill. Far from resulting in judicial activism, a less stringent approach is likely to be more deferential to legislatures. Congress and the States would be able to craft legislation to deal with this complex problem without a high likelihood that these efforts would be struck down before their effectiveness is determined. The less stringent approach, however, does not give legislatures free reign to pass any laws “rationally related” to minimizing gun violence, as the Court has expressly ruled out rational basis review.<sup>111</sup> Therefore, a standard weaker than strict scrutiny but stronger than rational basis review provides the best method for allowing legislatures to craft effective gun control measures without eviscerating the right to bear arms recognized in *Heller* and *McDonald*. It remains to be determined exactly what form this level of scrutiny should take.

To take stock, the *Heller* Court indicated that “longstanding” restrictions on gun possession by certain classes of individuals, e.g., felons, the mentally ill, are presumptively lawful, but did not determine the appropriate level of scrutiny for Second Amendment challenges.<sup>112</sup> The Court did rule out rational basis, however, which leaves intermediate scrutiny and the more demanding standard of strict scrutiny.<sup>113</sup>

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<sup>107</sup> *Tyler I*, 775 F.3d 308, 332 (6th Cir. 2014), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>108</sup> 18 U.S.C. § 922(g)(4) (2012).

<sup>109</sup> *Weinberger v. Salfi*, 422 U.S. 749, 782 (1975).

<sup>110</sup> *See Winkler, supra* note 65, at 815.

<sup>111</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

<sup>112</sup> *Id.* at 626–27 & n.26.

<sup>113</sup> Two other approaches are worth mentioning here. Eugene Volokh has argued for a Second Amendment analytical framework that does away with the traditional levels of scrutiny, and instead suggests courts should recognize four different categories of justifications for restrictions on Second Amendment rights: scope, burden, danger reduction, and government as proprietor. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLAL. REV. 1443, 1443 (2009). Stacey Sobel, on the other hand, has argued that Second Amendment cases should be reviewed under the undue burden test utilized in abortion cases. Stacy L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 489 (2012). Discussion of each of these approaches is beyond the scope

Strict scrutiny would undermine legislatures’ ability to pass effective gun control measures. A less stringent form of scrutiny would allow prophylactic measures, while simultaneously placing a check on how legislatures craft this legislation.

### *B. The Two-Step Analysis of the Circuit Courts*

The *Heller* Court’s indecision on the scrutiny question has left federal district and circuit courts with little guidance as to how to determine the appropriate level of scrutiny in Second Amendment challenges. The Sixth Circuit, and others, have developed a two-step approach to Second Amendment challenges.<sup>114</sup> The analysis begins by determining whether the challenged statute falls outside the scope of the Second Amendment right as it was understood at the time of the framing.<sup>115</sup> If the challenged law burdens conduct not protected by the Second Amendment as understood at the time of the framing, the analysis ceases.<sup>116</sup> If, however, this cannot be established, the court must apply the appropriate level of scrutiny.<sup>117</sup> This second step is why the scrutiny question matters in Second Amendment analysis. Some judges, however, have argued that the analysis should stop at step one.<sup>118</sup> The next part takes up this issue and introduces the facts and the Sixth Circuit panel’s decision in *Tyler I*.<sup>119</sup>

## II. DOES THE SCRUTINY QUESTION MATTER?

Before considering the question of which level of scrutiny applies to the Second Amendment, there is a threshold question: Does the scrutiny question even matter? The two-step analysis’s second step implies that it does, but a small minority of judges have argued that the analysis stops after the first step—the purely historical approach.<sup>120</sup> The historical approach rejects the application of any form of scrutiny to

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of this Note, as it seeks to answer the scrutiny question along the lines of one of the traditional levels of scrutiny applied in constitutional cases.

<sup>114</sup> See *Tyler II*, 837 F.3d 678, 685–86 (6th Cir. 2016) (en banc); *Tyler I*, 775 F.3d 308, 317–18 (6th Cir. 2014), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>115</sup> *Tyler II*, 837 F.3d at 685; *Tyler I*, 775 F.3d at 317–18.

<sup>116</sup> See, e.g., *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 375 (2012); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011).

<sup>117</sup> See *Greeno*, 679 F.3d at 518; *Marzzarella*, 614 F.3d at 95.

<sup>118</sup> See *infra* Part II.

<sup>119</sup> See *infra* Part II.

<sup>120</sup> See, e.g., *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1282 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“*Heller* and *McDonald* didn’t just reject interest balancing. The Court went much further by expressly rejecting Justice Breyer’s intermediate scrutiny approach, disclaiming cost-benefit analysis, and denying the need for empirical inquiry. By doing so, the Court made clear . . . that strict and intermediate scrutiny are inappropriate.”);

Second Amendment challenges.<sup>121</sup> Additionally, the *Heller* Court and the Sixth Circuit in *Tyler I* suggested that the scrutiny question alone did not decide the cases.<sup>122</sup> In *Heller*, the Court said the District of Columbia's handgun ban was unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."<sup>123</sup> The *Tyler I* court, though arguing for the application of strict scrutiny, predicted that "the application of strict scrutiny over intermediate scrutiny will not generally affect how other circuits decide various challenges to federal firearm regulations."<sup>124</sup>

The historical approach has significant difficulties in application, particularly to gun restrictions relating to mental illness. The *Tyler I* court's prediction is also questionable. Therefore, the question of scrutiny matters.

#### A. The Purely Historical Approach

Restrictions such as § 922(g)(4)'s restriction on gun possession for the mentally ill present a challenge for the historical approach. It is not clear or conclusive that restricting gun possession rights for the mentally ill (or for that matter, those previously committed to a mental institution) burdens the right protected by the Second Amendment as understood at the time of the framing.<sup>125</sup> As one commentator put it, "[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership."<sup>126</sup> Laws restricting gun possession by the mentally ill are a twentieth-century creation.<sup>127</sup> Without such laws in the eighteenth century, it is therefore difficult to determine the legal limits of gun possession by the mentally ill at the time of the founding.

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see also Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 821 (2015) ("[A] minority view has arisen to challenge the general consensus in the lower courts, with a small number of judges . . . insisting that Second Amendment questions instead must be answered on the basis of nothing other than constitutional text, history, and tradition.").

<sup>121</sup> See *Heller II*, 670 F.3d at 1282 (Kavanaugh, J., dissenting) (stating that because "*Heller* and *McDonald* rejected the use of balancing tests—including, therefore, strict or intermediate scrutiny—in fleshing out the scope of the Second Amendment right[,]” such standards are inapplicable in the Second Amendment context, and a categorical approach based on “text, history, and tradition” is required).

<sup>122</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008); *Tyler I*, 775 F.3d 308, 329 (6th Cir. 2014), *vacated, reh'g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>123</sup> *Heller*, 554 U.S. at 628.

<sup>124</sup> *Tyler I*, 775 F.3d at 329.

<sup>125</sup> See Carlton F.W. Larson, *Four Exceptions in Search of A Theory*: *District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376 (2009).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1376–77 (noting the Uniform Fire Arms Act of 1930, which “prohibited delivery of a pistol to any person of ‘unsound mind’” (footnote omitted)).

The purely historical approach meets with significant shortcomings.<sup>128</sup> The approach is difficult to apply due to the lack of specific gun restriction measures at the time of the founding.<sup>129</sup> Additionally, the approach is the minority view in the federal courts.<sup>130</sup> This points toward the need to adopt some form of means-end scrutiny for restrictions on Second Amendment rights. Indeed, the Sixth Circuit panel concluded that “[h]istory, text, and tradition, considered alone, are inconclusive” and that the “Second Amendment as understood in 1791 extended to at least some individuals previously committed to mental institutions.”<sup>131</sup>

#### B. *Tyler v. Hillsdale County Sheriff’s Department*

The Sixth Circuit panel’s suggestion that the scrutiny question does not matter is incorrect.<sup>132</sup> Although applying strict scrutiny instead of intermediate scrutiny may not have led to a different outcome in *Tyler I*,<sup>133</sup> when the scope of the question is broadened to mental health restrictions on gun possession generally, this is arguably not the case. To appreciate this distinction, and to bring the issues into sharper relief, consider the facts and reasoning in *Tyler I*.

In 1986, a Michigan probate court committed Tyler to a mental institution when his daughters became concerned that he posed a danger to himself following a messy divorce.<sup>134</sup> The probate court found that Tyler was, at the time, mentally ill, and that he posed a danger to himself and potentially to others.<sup>135</sup> Tyler remained at the mental health facility for less than one month and following his release showed no signs of mental health issues.<sup>136</sup> Although a 2012 psychological evaluation found

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<sup>128</sup> *Id.* at 1378 (“Specific eighteenth-century laws disarming the mentally ill . . . simply do not exist.”).

<sup>129</sup> *Id.*

<sup>130</sup> *See* Rostron, *supra* note 120, at 822 (“A small band of [judges] . . . call[ ] for a rigidly and purely backward looking approach.”).

<sup>131</sup> *Tyler I*, 775 F.3d 308, 322 (6th Cir. 2014), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015). The Sixth Circuit sitting en banc agreed. *Tyler II*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) (“In the face of what is at best ambiguous historical support, it would be peculiar to conclude that § 922(g)(4) does not burden conduct within the ambit of the Second Amendment as historically understood . . . [P]eople who have been involuntarily committed are not categorically unprotected by the Second Amendment.” (citation omitted)).

<sup>132</sup> *See Tyler I*, 775 F.3d at 329.

<sup>133</sup> *See id.* at 344 (Gibbons, J., concurring) (stating that “Tyler has a viable Second Amendment claim under either degree of scrutiny[.]” while expressing reservations about the application of strict scrutiny to Tyler’s case).

<sup>134</sup> *Id.* at 313–14 (majority opinion).

<sup>135</sup> *Id.* at 314.

<sup>136</sup> *Id.*

that Tyler was not then mentally ill, Michigan denied his attempt to purchase a firearm the previous year.<sup>137</sup> That decision was based on § 922(g)(4).<sup>138</sup>

Tyler filed suit in federal court in Michigan, claiming that § 922(g)(4) violated his Second Amendment rights.<sup>139</sup> The Michigan district court granted the defendant's motion to dismiss, holding that the Second Amendment did not extend to someone in Tyler's position.<sup>140</sup> Moreover, the district court argued that even if Tyler did fall under the Second Amendment's protection, the level of scrutiny for determining the constitutionality of § 922(g)(4) would be intermediate scrutiny.<sup>141</sup> The district court held that § 922(g)(4) survives intermediate scrutiny because intermediate scrutiny only requires that there be a "reasonable fit" and "not a perfect fit" between the statutory scheme and the government's important interest in "preventing firearm violence, public safety, and reducing self-inflicted violence."<sup>142</sup>

Section 922(g)(4) provides that the possession of a firearm by any person "who has been adjudicated as a mental defective or who has been committed to a mental institution" is unlawful.<sup>143</sup> That statute does not itself define "adjudicated as a mental defective" or "committed to a mental institution."<sup>144</sup> The ATF Federal Regulations, however, define a person as having been "[a]djudicated as a mental defective" when a "lawful authority" finds "that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs."<sup>145</sup> The Regulations state that a person has been "[c]ommitted to a mental institution" when there has been a "formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority."<sup>146</sup> This includes involuntary commitments, but not persons committed merely for observation or voluntarily admitted to a mental institution.<sup>147</sup>

Though § 922(g)(4) would appear to permanently strip an individual falling under it of her Second Amendment rights, Congress has provided for relief from

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<sup>137</sup> *Id.*

<sup>138</sup> 18 U.S.C. § 922(g)(4) (2012).

<sup>139</sup> *Tyler I*, 755 F.3d at 315. Tyler also brought Fifth and Fourteenth Amendment due process claims in the suit in district court, but the Sixth Circuit panel did not discuss those claims. *Id.*

<sup>140</sup> *Tyler v. Holder*, No. 1:12-CV-523, 2013 WL 356851, at \*5 (W.D. Mich. Jan. 29, 2013), *rev'd and remanded sub nom. Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308 (6th Cir. 2014).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> § 922(g)(4).

<sup>144</sup> *Id.*

<sup>145</sup> 27 C.F.R. § 478.11 (2014).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

these disabilities and a rehabilitation of the rights so restricted.<sup>148</sup> 18 U.S.C. § 925(c) provides that a person prohibited from possessing a firearm may apply to the Attorney General for relief, which the Attorney General may grant if the individual is not likely to pose a danger to himself or others.<sup>149</sup> In 1992, Congress defunded this program, and, in 2008, authorized federal grants to states to help them determine which individuals should be relieved of these disabilities, but only if the states had implemented their own relief from disabilities program.<sup>150</sup> Currently, only about half of the states have implemented such a program, with Michigan being among those states that have not.<sup>151</sup>

Congress, in enacting § 922(g), intended to ban possession of firearms by classes of individuals that it considered dangerous—either as threats to others or threats to themselves.<sup>152</sup> Can these restrictions be justified as either important or compelling government interests?<sup>153</sup> If the purpose of these restrictions is to prevent injuries and deaths due to gun violence, it seems the government interest is not only important, but compelling.<sup>154</sup> In the United States in 2013, there were 11,208 deaths due to homicide by firearm.<sup>155</sup> In the same year, the number of suicides by firearm was almost double that of homicides, at 21,175.<sup>156</sup> The number of deaths due to accidental discharge of firearms was 505.<sup>157</sup> These numbers suggest that preventing gun violence is an important and compelling government interest.<sup>158</sup> The compelling government interest requirement of strict scrutiny was thus met in Tyler’s case, according to the Sixth Circuit panel in *Tyler I*.<sup>159</sup>

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<sup>148</sup> 18 U.S.C. § 925(c) (2012).

<sup>149</sup> *Id.*

<sup>150</sup> *Tyler I*, 775 F.3d 308, 312–13 (6th Cir. 2014), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>151</sup> *Id.* at 313.

<sup>152</sup> *See* *United States v. Winchester*, 916 F.2d 601, 605 (11th Cir. 1990).

<sup>153</sup> The Sixth Circuit panel accepted that prevention of harm and death by firearm is a compelling government interest, and only struck down § 922(g)(4) as applied to Tyler on the grounds that it is not narrowly tailored to that interest. *Tyler I*, 775 F.3d at 331. In *Tyler II*, the Sixth Circuit, applying intermediate scrutiny, similarly held that prevention of harm and death by firearms was an important and legitimate government interest—indeed, a compelling one. *Tyler II*, 837 F.3d 678, 693 (6th Cir. 2016) (en banc) (“These interests are not only legitimate, they are compelling.”).

<sup>154</sup> *See* Vars & Young, *supra* note 91, at 12 (“The government obviously has a compelling interest in preventing firearm deaths.”).

<sup>155</sup> Jiaquan Xu et al., *Deaths: Final Data for 2013*, 64 NAT’L VITAL STAT. REP. 41 tbl.10 (2016), [http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_02.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf) [<https://perma.cc/434G-U25N>].

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Though the number of deaths by accidental discharge of firearms and homicide by firearms were lower in 2013 than they were in 2009, the number of suicides by firearms in 2013 increased by 2,440 deaths over 2009 numbers. Vars & Young, *supra* note 91, at 13 (reporting, in 2009, 554 accidental firearms deaths, 18,735 gun suicides, and 11,493 gun homicides).

<sup>159</sup> *See Tyler I*, 775 F.3d 308, 331 (6th Cir. 2014), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015) (“We have no trouble concluding that § 922(g)(4), which

Applying strict scrutiny, the Sixth Circuit panel held, in *Tyler I*, that § 922(g)(4) was not narrowly tailored to achieve these interests.<sup>160</sup> The court found that Tyler was not mentally ill at the time of his attempt to purchase a firearm or at the time of trial.<sup>161</sup> Because Michigan had not implemented a relief from disabilities program, the court held that § 922(g)(4) did not survive strict scrutiny, and, thus, was unconstitutional as applied to Tyler.<sup>162</sup>

Recall that in *Heller*, Justice Scalia argued that under any level of scrutiny the District of Columbia handgun law would fail.<sup>163</sup> Moreover, the constitutionality of § 922(g)(4) as applied to Tyler may not have turned solely on a determination of the level of scrutiny,<sup>164</sup> but this does not mean that other laws restricting Second Amendment rights or the same law in different circumstances also would not. Indeed, Vars and Young, considering a number of scrutiny approaches of varying strength in the context of mental health restrictions, convincingly argue that the level of scrutiny would frequently make a difference in the restriction's permissibility.<sup>165</sup> It appears that Justice Breyer was correct: "The question matters."<sup>166</sup>

### III. INTERMEDIATE VS. STRICT SCRUTINY

If the scrutiny question matters, which standard is appropriate? The appropriate level of scrutiny for Second Amendment challenges is intermediate scrutiny. The general approach taken by the Courts of Appeals since *Heller* has been overwhelmingly in favor of intermediate scrutiny—a deferential approach, similar in spirit to that advocated by Justice Breyer in his *Heller* dissent.<sup>167</sup> Of course, favoring intermediate scrutiny over strict scrutiny in the Courts of Appeals is not an argument that strict scrutiny is necessarily *doctrinally* inappropriate. However, from a practical standpoint, that the vast majority of the circuits have adopted intermediate scrutiny is a strong *prima facie* argument in its favor. The vast majority of circuit courts have found intermediate scrutiny to be a doctrinally appropriate and workable framework for Second Amendment challenges.<sup>168</sup> If the Supreme Court were to take up the

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prohibits possession of firearms by individuals 'adjudicated as a mental defective' or who have 'been committed to a mental institution,' furthers compelling interests.").

<sup>160</sup> *Id.* at 334.

<sup>161</sup> *See id.* at 314.

<sup>162</sup> *Id.* at 343.

<sup>163</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008). *But see id.* at 687–88 (Breyer, J., dissenting).

<sup>164</sup> *See Tyler I*, 775 F.3d at 323 (stating that the scrutiny question is "likely more important in theory than in practice").

<sup>165</sup> Vars & Young, *supra* note 91, at 16–22 (arguing that a variety of possible restrictions on gun possession by the mentally ill would have different constitutionality outcomes on the basis of reasonableness, intermediate scrutiny, and burden-based standards).

<sup>166</sup> *Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

<sup>167</sup> *See infra* Section III.A.

<sup>168</sup> *See Tyler I*, 775 F.3d at 329.

scrutiny question in a future case, this lower court precedent would likely be a strong motivation for the Court to adopt this framework as well. Moreover, as pointed out below, this preference for intermediate over strict scrutiny has not generally led to the kind of judicial activism the majority in *Heller* feared would arise under an approach that allows for judicial deference to legislatures.<sup>169</sup>

These considerations present a strong prima facie case for the application of intermediate scrutiny in Second Amendment challenges. In the absence of a prescription on scrutiny from the Supreme Court, and with most circuits opting for intermediate scrutiny, this argument shifts the burden to any court that seeks to apply the more stringent strict scrutiny in such cases. In this sense, intermediate scrutiny should be thought of as the default level of scrutiny of Second Amendment challenges—this default being abandoned only when arguments to the contrary support strict scrutiny.

The Sixth Circuit panel attempted to meet this burden by advancing several arguments that strict scrutiny is generally preferable to intermediate scrutiny in Second Amendment challenges.<sup>170</sup> For various reasons discussed below, all of these arguments fail. Additionally, the argument for strict scrutiny may necessarily fail because, given *Heller*'s “presumptively lawful” language, strict scrutiny in Second Amendment challenges is doctrinally impossible when the challenged law concerns one of the exceptions.<sup>171</sup>

The first section provides a tour of the Courts of Appeals' Second Amendment jurisprudence; details their application of intermediate scrutiny in Second Amendment challenges; discusses the Sixth Circuit en banc decision in *Tyler II*; and draws some lessons from this tour.<sup>172</sup> The second section considers and rebuts three arguments in favor of strict scrutiny over intermediate scrutiny.<sup>173</sup> Finally, the possibility of a bifurcation in scrutiny application is discussed and rejected.<sup>174</sup>

#### A. A Tour of the Circuits and *Tyler II*

The Sixth Circuit panel acknowledged that “[t]he strongest argument in favor of intermediate scrutiny is that the other circuits have adopted it.”<sup>175</sup> The Sixth Circuit sitting en banc also seemed to bolster its argument that intermediate scrutiny is the appropriate standard of review by noting the “near unanim[ity]” among the

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<sup>169</sup> See generally Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

<sup>170</sup> *Tyler I*, 775 F.3d at 326–28.

<sup>171</sup> See *infra* Section III.B.

<sup>172</sup> See *infra* Section III.A.

<sup>173</sup> See *infra* Section III.B.

<sup>174</sup> See *infra* Section III.C.

<sup>175</sup> *Tyler I*, 775 F.3d at 324. The court noted, however, that, while the other circuits have largely adopted intermediate scrutiny as the appropriate standard, things are less tidy than they seem. *Id.*

other circuits on the issue.<sup>176</sup> The First, Fourth, Seventh, and Ninth Circuits have all held that certain sections of 18 U.S.C. § 922 are subject to intermediate scrutiny.<sup>177</sup> The First Circuit held that § 922(g)(9), which categorically bans gun possession for domestic violence misdemeanants, is subject to intermediate scrutiny.<sup>178</sup> Importantly, this particular ban required a “‘strong showing,’ necessitating a substantial relationship between the restriction and an important governmental objective.”<sup>179</sup>

The Fourth and Ninth Circuits, while applying intermediate scrutiny in certain cases, apply strict scrutiny in others.<sup>180</sup> The Fourth Circuit, following its previous ruling in *United States v. Chester*,<sup>181</sup> held that intermediate scrutiny applied “when reviewing a Second Amendment challenge to 18 U.S.C. § 922(g)(9).”<sup>182</sup> When considering a law burdening the “core right of self-defense in the home,” however, strict scrutiny should be applied.<sup>183</sup>

The Ninth Circuit considered a challenge to § 922(g)(9) and held that intermediate scrutiny, and not strict scrutiny, applied.<sup>184</sup> The court, three months later, clarified this holding, stating that “intermediate scrutiny applied only because the conduct [regulated by the statute] fell within the scope of the Second Amendment but ‘outside [its] core.’”<sup>185</sup> This implies that strict scrutiny may apply when the core of the Second Amendment right—to keep a firearm in the home for self-defense—is implicated.

In *United States v. Skoien*,<sup>186</sup> the Seventh Circuit, sitting en banc, held that the appropriate level of scrutiny requires “some form of strong showing.”<sup>187</sup> The court equated this form of “strong showing” to a form of intermediate scrutiny demanding that § 922(g)(9) be “substantially related to an important governmental objective”—that is, pass intermediate scrutiny.<sup>188</sup> In *Skoien*, the defendant had two previous misdemeanor domestic violence convictions.<sup>189</sup> 18 U.S.C. § 922(g)(9), therefore, forbade Skoien from carrying a firearm in interstate commerce.<sup>190</sup> Skoien was

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<sup>176</sup> *Tyler II*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc).

<sup>177</sup> *Tyler I*, 775 F.3d at 324–25.

<sup>178</sup> *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (citing *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1303 (2011)).

<sup>179</sup> *Id.*

<sup>180</sup> See *United States v. Masciandaro*, 638 F.3d 458, 469–70 (4th Cir. 2011).

<sup>181</sup> 628 F.3d 673 (4th Cir. 2010).

<sup>182</sup> *Masciandaro*, 638 F.3d at 469.

<sup>183</sup> *Id.* at 470.

<sup>184</sup> *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014).

<sup>185</sup> *Tyler I*, 775 F.3d 308, 325 (6th Cir. 2014) (citing *Peruta v. County of San Diego*, 742 F.3d 1144, 1168 n.15 (9th Cir. 2014), *rev'd*, 824 F.3d 919 (9th Cir. 2016) (en banc)), *vacated, reh'g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>186</sup> 614 F.3d 638 (7th Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1303 (2011).

<sup>187</sup> *Id.* at 641.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 639.

<sup>190</sup> *Id.* (citing 18 U.S.C. § 922(g)(9) (2012)).

informed of this rule, but while on probation he was found to be in possession of three firearms.<sup>191</sup> The court considered a number of social science studies finding that individuals who have been violent in the past are more likely to be violent again.<sup>192</sup> Applying intermediate scrutiny, the Seventh Circuit held that § 922(g)(9) passed constitutional muster.<sup>193</sup> Judge Easterbrook’s opinion in *Skoien* has been a particularly influential application of this type of approach.<sup>194</sup> Though Judge Easterbrook called for “some form of strong showing,”<sup>195</sup> the form of intermediate scrutiny adopted in *Skoien* is “not a particularly demanding one.”<sup>196</sup>

The remaining circuits have all applied some form of intermediate scrutiny in challenges to various sections of 18 U.S.C. § 922.<sup>197</sup> Some of these circuits, for example, the Fourth and Ninth, have cautioned that the particular form of scrutiny applicable (intermediate or strict) may depend on the degree to which the law in question burdens the right, with greater burdens receiving a more demanding level of review.<sup>198</sup> None, however, have explicitly adopted strict scrutiny as the general level of scrutiny as the Sixth Circuit panel did in *Tyler I*.<sup>199</sup> The Sixth Circuit concluded, “[t]he general trend . . . has been in favor of *some form of intermediate scrutiny*.”<sup>200</sup>

Upon rehearing en banc, the Sixth Circuit joined the other circuits in applying intermediate scrutiny to a Second Amendment challenge when it held that “[i]ntermediate scrutiny is preferable in evaluating challenges to § 922(g)(4) and similar prohibitions.”<sup>201</sup> The court noted that the inherent risk to others posed by the right

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 642, 652 n.13.

<sup>193</sup> *Id.* at 642–44.

<sup>194</sup> Rostron, *supra* note 169, at 744.

<sup>195</sup> *Skoien*, 614 F.3d at 641.

<sup>196</sup> Rostron, *supra* note 169, at 746.

<sup>197</sup> See, e.g., *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (NRA I)*, 700 F.3d 185 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364 (2014); *Heller II*, 670 F.3d 1244 (2011); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010), *cert. denied*, 563 U.S. 990 (2011).

<sup>198</sup> See *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (applying a form of scrutiny stronger than that applied in *Skoien* “if not quite ‘strict scrutiny’”); *Skoien*, 614 F.3d at 641 (applying intermediate scrutiny when the core of the Second Amendment right was not implicated). *But see* *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (holding that § 922(g)(9) burdens conduct falling within the scope of the Second Amendment and applying intermediate scrutiny), *cert. denied*, 135 S. Ct. 187 (2014).

<sup>199</sup> See *Tyler I*, 775 F.3d 308, 324–26, 328 (6th Cir. 2014) (explaining holdings of other circuits and concluding that strict scrutiny should be applied), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>200</sup> *Id.* at 326 (emphasis added); see also *Tyler II*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc) (noting the near unanimity among the circuits in applying intermediate scrutiny to Second Amendment challenges).

<sup>201</sup> *Tyler II*, 837 F.3d at 692 (citing *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th

of self-defense by the use of firearms warrants application of intermediate scrutiny to § 922(g)(4), which gives Congress the necessary “considerable flexibility to regulate gun safety.”<sup>202</sup> Interestingly, the court rejected Tyler’s argument that § 922(g)(4) burdens the core of his Second Amendment right.<sup>203</sup> The court did not explicitly say, however, that strict scrutiny would have applied had it found that § 922(g)(4) burdened the core of the Second Amendment right.<sup>204</sup> However, the court’s discussion of the degree to which § 922(g)(4) burdens Tyler’s rights suggests that it left open the possibility that strict scrutiny may apply in a different set of circumstances, or when a different gun regulation is at issue.<sup>205</sup>

Finally, in applying intermediate scrutiny to Tyler’s circumstances, the court held that the governmental interest behind § 922(g)—“keep[ing] firearms out of the hands of presumptively risky people”<sup>206</sup>—was legitimate, and even compelling.<sup>207</sup> However, the court could not conclude that the government had met its burden of showing that § 922(g)(4) was substantially related to this legitimate and compelling interest.<sup>208</sup> The government’s evidence, based on the record before the court, did not “indicat[e] [a] *continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness.”<sup>209</sup> Therefore, the court reversed the district court, holding that Tyler had a viable Second Amendment claim, and remanded the case to the district court for application of intermediate scrutiny.<sup>210</sup>

The tour above shows that the courts, in opting for intermediate scrutiny, have been guided by a principal of judicial restraint—finding that most gun regulations pass constitutional muster even on *Heller*’s interpretation of the Second Amendment.<sup>211</sup> This restraint suggests that the courts have taken a more deferential approach to Second Amendment challenges. This approach is best. The problem of

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Cir. 2015) (“[I]ntermediate scrutiny makes sense in the Second Amendment context . . . . [Intermediate scrutiny] appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety.” (citation omitted)).

<sup>202</sup> *Id.* (quoting *Bonidy*, 790 F.3d at 1126).

<sup>203</sup> *Id.* at 691 (“To hold, as Tyler requests, that he is at the core of the Second Amendment despite his history of mental illness would cut too hard against Congress’s power to categorically prohibit certain presumptively dangerous people from gun ownership.”).

<sup>204</sup> *See id.*

<sup>205</sup> *See id.* (discussing how § 922(g)(4) “burdens only a narrow class of individuals who are not at the core of the Second Amendment”).

<sup>206</sup> *Id.* at 693 (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983)).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 699.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Rostron*, *supra* note 120, at 708 (“The lower courts have essentially made judicial restraint their guiding principle.”).

gun violence arises in myriad forms and for a variety of reasons. Legislatures, seeking its reduction, are set with a daunting task.

Because a deferential approach is preferable, intermediate scrutiny rather than strict scrutiny better tracks not only the explicit statements of courts as to what level of scrutiny they apply, but also seems motivated by this underlying guiding judicial principal. Recall that the *Heller* majority was concerned that the approach advocated by Justice Breyer in his dissent would largely eviscerate the right protected by the Second Amendment because that approach gave too much leeway to judges.<sup>212</sup> The tour of the circuits suggests otherwise.<sup>213</sup> Though the lower courts may have not adopted Justice Breyer’s interest-balancing approach in letter, they have adopted it in spirit.<sup>214</sup> That adoption has led to a form of judicial restraint in which the intermediate scrutiny standard “pushes more of the job of evaluating gun control laws away from judges and back to legislators.”<sup>215</sup>

This result, along with the near unanimity amongst the circuits in applying intermediate scrutiny, suggests that any court opting to apply the more demanding standard of strict scrutiny bears the substantial burden of showing its application is justified. In a sense, with the *Heller* Court’s silence on the matter, the lower courts over the years have established intermediate scrutiny as the “default” level of review for Second Amendment challenges.

### *B. The Arguments for Strict Scrutiny and Why They Fail*

In *Tyler I*, the Sixth Circuit panel presented several arguments in favor of strict scrutiny over intermediate scrutiny.<sup>216</sup> None of the arguments rely on any of the specific facts in *Tyler I*, nor do they rely on the particular statutory scheme at issue.<sup>217</sup> The arguments are general enough that, if successful, they would have broad implications for Second Amendment jurisprudence. For this reason, it is instructive to see why each of them fails. Although the following arguments in favor of strict scrutiny fail, some Courts of Appeals have held that both levels of scrutiny may apply, depending on whether a core or non-core Second Amendment right is implicated.<sup>218</sup> The possibility for a bifurcation in Second Amendment jurisprudence is therefore left open. For reasons discussed below, there should be no bifurcation in the level of scrutiny applied depending on the nature of the Second Amendment right implicated.<sup>219</sup>

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<sup>212</sup> District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

<sup>213</sup> See *supra* notes 175–210 and accompanying text.

<sup>214</sup> See *supra* notes 175–210 and accompanying text.

<sup>215</sup> Rostron, *supra* note 120, at 750.

<sup>216</sup> *Tyler I*, 775 F.3d 308, 326–29 (6th Cir. 2014), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>217</sup> See *id.*

<sup>218</sup> See *supra* Section III.A.

<sup>219</sup> See *infra* Section III.C.

Importantly, although the *Tyler II* court held that strict scrutiny did not apply to § 922(g)(4),<sup>220</sup> the court did not address the *Tyler I* court's arguments in favor of strict scrutiny in reaching that result.<sup>221</sup> To the extent these arguments could be utilized in an appropriate future case before the Supreme Court, it is useful to see how they fail, and therefore, ought not to persuade the Court to adopt strict scrutiny.

As the Supreme Court noted in *McDonald*, “the right to keep and bear arms . . . [is a] fundamental right[ ] necessary to our system of ordered liberty.”<sup>222</sup> From this, the Sixth Circuit panel concluded that this “strong language” suggests that strict scrutiny is applicable to restrictions on the right to bear arms.<sup>223</sup> The Supreme Court has never stated exactly what makes a right fundamental, but one possibility is that the Second Amendment is among the so-called “preferred rights,” which “include freedom of speech, freedom of religion, the right to vote, the right to marry, and the right to privacy.”<sup>224</sup> The *Tyler I* court conceded that even the First Amendment right of freedom of speech does not always trigger strict scrutiny.<sup>225</sup> This is not the only area where a fundamental right does not trigger strict scrutiny.<sup>226</sup> With respect to the right to privacy, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>227</sup> characterized the right at issue as “central to personal dignity and autonomy” and “central to the liberty protected by the Fourteenth Amendment.”<sup>228</sup> And yet, in that case, the Supreme Court applied the Undue Burden Test, which most commentators consider to be less stringent, and more deferential, than strict scrutiny.<sup>229</sup> The Court also applied a standard less demanding than strict scrutiny to the right recognized in *Lawrence v. Texas*,<sup>230</sup> which, though not clearly labeled “fundamental,” is considered by many commentators to be part of the same line of reasoning initiated in *Griswold v. Connecticut*<sup>231</sup> and continued through *Roe v. Wade*.<sup>232</sup>

These considerations show that the Supreme Court is more than willing to apply standards other than strict scrutiny to fundamental rights.<sup>233</sup> Proponents of such an

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<sup>220</sup> *Tyler II*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc).

<sup>221</sup> *See generally id.*

<sup>222</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

<sup>223</sup> *Tyler I*, 775 F.3d 308, 326 (6th Cir. 2014), *vacated, reh'g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>224</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 698 (2007).

<sup>225</sup> *Tyler I*, 775 F.3d at 326.

<sup>226</sup> *See infra* text accompanying notes 227–33.

<sup>227</sup> 505 U.S. 833 (1992).

<sup>228</sup> *Id.* at 851.

<sup>229</sup> *See, e.g.*, Winkler, *supra* note 224, at 699.

<sup>230</sup> 539 U.S. 558 (2003).

<sup>231</sup> 381 U.S. 479 (1965).

<sup>232</sup> 410 U.S. 113 (1973); *see* Winkler, *supra* note 224, at 699.

<sup>233</sup> Though fundamental rights do not always call for strict scrutiny, it is instructive to consider the empirical evidence about the survival rate of challenged laws affecting fundamental rights. In his 2006 study, Adam Winkler found that such laws survive strict scrutiny in only

argument would fail to adequately appreciate the amount of variation in the levels of scrutiny the Supreme Court has applied in cases concerning fundamental rights. Thus, the argument that the “fundamental right” language in *Heller* and *McDonald* suggests that strict scrutiny is preferable to intermediate scrutiny is without merit.

Second, the Sixth Circuit panel argued that the *Heller* Court “strongly indicated that intermediate scrutiny should *not* be employed.”<sup>234</sup> The crux of the panel’s argument is that intermediate scrutiny is simply the interest-balancing approach suggested by Justice Breyer in his dissent and explicitly disavowed by the majority.<sup>235</sup> Therefore, intermediate scrutiny is not applicable to Second Amendment challenges.

It is not entirely clear that Justice Breyer’s proposal equates to intermediate scrutiny as traditionally conceived (though, it is almost certainly closer to intermediate scrutiny than to strict).<sup>236</sup> This argument may conflate the two approaches in order to make the syllogistic leap from “the Court has rejected Justice Breyer’s interest-balancing approach” to “the Court has rejected intermediate scrutiny.”

This problem notwithstanding, the argument appears to prove too much. Strict scrutiny involves interest balancing as well. That is, the basic “logic” of intermediate scrutiny analysis and strict scrutiny analysis is very similar. The two standards differ, substantively, in the stringency of the requirements for the strength of the government’s interest in restricting the right in question and the degree of fit between the way the restriction is implemented and the government’s goal.<sup>237</sup> It seems that both levels of scrutiny involve a means-end analysis and, at least, some element of balancing interests.<sup>238</sup> If interest balancing of any kind is dispreferred, it is not clear how strict scrutiny does not meet with the same difficulty the court claims intermediate scrutiny meets with in this respect. The argument applies just as well to strict scrutiny; in that sense, the argument proves too much and is self-defeating.

The Sixth Circuit panel also argued that “intermediate scrutiny . . . has no basis in the Constitution.”<sup>239</sup> For this to be an argument in favor of strict scrutiny as opposed to intermediate scrutiny, the argument must not apply equally to strict scrutiny. That is, if there is also no constitutional basis for strict scrutiny, then strict scrutiny would succumb to the same argument. Or, if one accepted the argument as applying to strict scrutiny, but nevertheless claimed that strict scrutiny is independently

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twenty-four percent of cases (n=46) where fundamental rights are at stake. Winkler, *supra* note 65, at 815. Therefore, because the right protected by the Second Amendment is treated by the Court as a fundamental right, a restriction like § 922(g)(4) is more likely than not to be struck down under strict scrutiny.

<sup>234</sup> *Tyler I*, 775 F.3d 308, 328 (6th Cir. 2014), *vacated, reh’g en banc granted*, No. 13-1876 (6th Cir. Apr. 21, 2015).

<sup>235</sup> *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

<sup>236</sup> *See id.* at 688–90 (Breyer, J., dissenting).

<sup>237</sup> *See Tyler I*, 775 F.3d at 323.

<sup>238</sup> *See id.*

<sup>239</sup> *Id.* at 328.

motivated in these cases, one has to show that intermediate scrutiny does not receive similar, independent motivation.

This argument suffers a fate similar to the previous one: it proves too much. The term “strict scrutiny” is not found anywhere in the Constitution.<sup>240</sup> Nor is the general nature of the test found there in other terminology.<sup>241</sup> Therefore, the argument from a lack of constitutional basis applies to strict scrutiny as well. Moreover, if the previous counter-arguments are correct, there are no sufficient independent reasons for applying strict scrutiny that outweigh those for applying intermediate scrutiny. Therefore, this argument, like the previous three, fails to establish the primacy of strict scrutiny over intermediate scrutiny in Second Amendment challenges.

Finally, there are some reasons to doubt that strict scrutiny is possible if the “presumptively lawful” exceptions are to be upheld. Carlton Larson attempts to “reverse engineer” a standard of scrutiny for Second Amendment challenges.<sup>242</sup> In particular, he attempts to find a standard that fits with the “presumptively lawful” exceptions mentioned by the *Heller* Court—of which mental illness is one.<sup>243</sup>

Larson’s argument is somewhat cryptic, and requires some unpacking, but is, essentially, as follows: We must accept the exceptions to Second Amendment rights protection (e.g., exceptions for felonies; the mentally ill), though this language is dicta.<sup>244</sup> Laws banning the possession of guns for the mentally ill would likely fail strict scrutiny because, though the governmental interest of preventing the mentally ill from harming themselves or others is a compelling interest, many manifestations of restrictions aimed at achieving this goal would not satisfy strict scrutiny’s requirement of narrow tailoring.<sup>245</sup> If laws such as § 922(g)(4) cannot withstand strict scrutiny, then they are not permissible restrictions on Second Amendment rights.<sup>246</sup> The Supreme Court, however, has said that these restrictions are “presumptively lawful,” and so the Court could not have meant (or, at least, it is doctrinally difficult to make the claim) that strict scrutiny should apply in these cases.<sup>247</sup>

To sum up, all these arguments in favor of strict, over intermediate, scrutiny fail. In the face of independent arguments in favor of intermediate scrutiny, and its widespread application in the Courts of Appeals, these arguments do not meet the burden of showing that strict scrutiny is *generally* preferable to intermediate scrutiny. It

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<sup>240</sup> See Fallon, Jr., *supra* note 63, at 1268.

<sup>241</sup> See *id.* (observing that there is no “textual basis, nor any foundation in the Constitution’s original understanding, for the modern test under which legislation will be upheld against constitutional challenge only if ‘necessary’ or ‘narrowly tailored’ to promote a ‘compelling’ governmental interest” (footnote omitted)).

<sup>242</sup> See Larson, *supra* note 125, at 1373.

<sup>243</sup> See *id.*; see also *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

<sup>244</sup> See Larson, *supra* note 125, at 1372.

<sup>245</sup> See *id.*

<sup>246</sup> See *id.* at 1371–72.

<sup>247</sup> See *Heller*, 554 U.S. at 626–27 n.26.

remains to be determined if both levels of scrutiny are applicable, depending on the manner in which a law affects the Second Amendment right. Many circuits have expressly held as much,<sup>248</sup> and the Sixth Circuit in *Tyler II* left open this possibility.<sup>249</sup>

### C. Both Intermediate Scrutiny and Strict Scrutiny?

Having argued that strict scrutiny is not generally preferable to intermediate scrutiny in the Second Amendment context, one must consider whether Second Amendment jurisprudence should contemplate strict scrutiny when the law burdens “the core” of the Second Amendment right.<sup>250</sup> The question then becomes whether such a bifurcation in Second Amendment scrutiny analysis is necessary to protect the core right. The Fourth and Ninth Circuits have held that the application of strict scrutiny is appropriate when the law in question implicates the core of the Second Amendment right.<sup>251</sup> As seen above, in *Tyler II*, the Sixth Circuit held that § 922(g)(4) did not burden Tyler’s core Second Amendment right.<sup>252</sup> Nevertheless, the court’s analysis leading to its holding that § 922(g)(4) warrants intermediate scrutiny was couched in terms of determining the degree to which the statute burdened the Second Amendment right.<sup>253</sup> It stands to reason that, had either a different statute or a different set of facts been before the *Tyler II* court, the court may have found strict scrutiny appropriate if the statute implicated the core of the Second Amendment right.

The “core” of the Second Amendment is the right of individuals to keep a firearm in the home for self-defense.<sup>254</sup> However, simply because a statute implicates the core Second Amendment right, it does not necessarily follow that strict scrutiny must apply in order to secure the Amendment’s protections. Therefore, no such bifurcation of the scrutiny analysis is necessary—a single standard approach is sufficient. The reason lies in the nature of intermediate scrutiny itself.

Because intermediate scrutiny is not a unitary standard, judges have a degree of leeway in its application.<sup>255</sup> At the demanding end of the spectrum, a judge might require

<sup>248</sup> See *supra* Section III.A.

<sup>249</sup> See *supra* notes 204–05 and accompanying text.

<sup>250</sup> See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 469 (4th Cir. 2011).

<sup>251</sup> See, e.g., *Peruta v. County of San Diego*, 742 F.3d 1144, 1168 n.15 (9th Cir. 2014) (“Intermediate scrutiny is not appropriate, however, for cases involving the destruction of a right at the core of the Second Amendment.”), *rev’d*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Masciandaro*, 638 F.3d at 469 (holding that strict scrutiny applies to laws burdening the “core right of self-defense in the home”).

<sup>252</sup> *Tyler II*, 837 F.3d 678, 691 (6th Cir. 2016) (en banc).

<sup>253</sup> *Id.*

<sup>254</sup> See *Masciandaro*, 638 F.3d at 469 (holding that strict scrutiny applies to laws burdening the “core right of self-defense in the home”).

<sup>255</sup> See *Rostron*, *supra* note 169, at 746 (“Although courts sometimes refer to intermediate scrutiny as though it is a single or unitary standard, a judge purporting to apply intermediate scrutiny actually has a variety of options for how to proceed.” (footnotes omitted)).

scientific proof that the restriction reduces gun violence; at the less demanding end of the spectrum, a judge might require merely a plausible theory of how the restriction reduces the danger of gun violence.<sup>256</sup> Requiring more information at the demanding end of the spectrum, and subjecting the law to a stronger showing of intermediate scrutiny, is thus likely to secure the Second Amendment's fundamental, core right.

When the core of the Second Amendment is implicated by a gun restriction law, the stronger, more demanding reading of intermediate scrutiny should be triggered. When the core of the Second Amendment is not so implicated, the weaker reading should be applied. This approach solves two of the key problems created by the Court's opinion in *Heller*: (1) failure to provide an analytical framework that allows for appropriate deference to the legislatures' gun control measures, while (2) acknowledging and respecting that the core of the Second Amendment requires stronger protection from such legislation.<sup>257</sup> Strict scrutiny provides the wrong solution to the first problem, and it is unnecessary to solve the second.

#### CONCLUSION

It is time for the Supreme Court to decide the scrutiny question in Second Amendment challenges. Eight years have passed since *District of Columbia v. Heller*,<sup>258</sup> and six have passed since *McDonald v. City of Chicago*.<sup>259</sup> During this time, the Court has not settled the scrutiny question.

The question matters. The purely historical approach advocated by a small minority of judges is difficult to apply and of little help, particularly in the area of mental health.<sup>260</sup> The question also matters because the outcome of a case likely depends on how deferential a treatment the court gives to the legislature.<sup>261</sup> Intermediate scrutiny, having a less demanding "fit" requirement, is more deferential to legislatures than strict scrutiny. This deference is more likely to result in the challenged law being upheld. It also provides Congress and the States with the means to take prophylactic measures to curb gun violence perpetrated by certain groups which are more disposed to do so.<sup>262</sup>

The *Heller* majority's concerns with judicial discretion notwithstanding, an approach to scrutiny which is deferential to legislatures is preferable.<sup>263</sup> The complex fact-driven basis for crafting effective gun restriction legislation requires such an approach if important, and compelling, government interests are to be served. An

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<sup>256</sup> See *id.* at 746–47.

<sup>257</sup> See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>258</sup> *Id.*

<sup>259</sup> 561 U.S. 742 (2010).

<sup>260</sup> See *supra* Section II.A.

<sup>261</sup> See *supra* Section I.A.

<sup>262</sup> See *supra* Section I.A.

<sup>263</sup> See *supra* Section I.A.

approach similar in spirit to Justice Breyer’s interest-balancing approach is better suited to achieving this goal.<sup>264</sup> Though Justice Breyer does not identify his approach as intermediate scrutiny, the tour of the Courts of Appeals shows that almost all circuits generally apply intermediate scrutiny.<sup>265</sup> Intermediate scrutiny is more deferential to legislators than strict scrutiny, and thus fits within the general approach advocated by Justice Breyer.<sup>266</sup> Moreover, because the above arguments for generally applying strict scrutiny fail, intermediate scrutiny is the correct standard in Second Amendment challenges.<sup>267</sup>

Because intermediate scrutiny is not a unitary standard, it admits strong and weak readings.<sup>268</sup> Falling along a spectrum, how substantially related the law must be to furthering the government’s important interest is determined by whether or not the law implicates the Second Amendment’s core right.<sup>269</sup> Laws burdening the core of the right should be subject to a more demanding form of intermediate scrutiny.<sup>270</sup> Those burdening conduct outside the core should be subject to a less demanding form, such as that applied by the Seventh Circuit in *United States v. Skoien*.<sup>271</sup> This approach to intermediate scrutiny renders strict scrutiny unnecessary in the Second Amendment context. Moreover, strict scrutiny’s application is likely to render necessary and effective firearm regulation unconstitutional. Strict scrutiny, therefore, has no place in Second Amendment jurisprudence.

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<sup>264</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).

<sup>265</sup> See *supra* Section III.A.

<sup>266</sup> See generally Rostron, *supra* note 169.

<sup>267</sup> See *supra* Section III.B.

<sup>268</sup> See *supra* Section III.C.

<sup>269</sup> See Rostron, *supra* note 169, at 746, 754.

<sup>270</sup> See *supra* Section III.C.

<sup>271</sup> 614 F.3d 638 (7th Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1303 (2011).