Seventh Circuit Review

Volume 6 | Issue 1 Article 11

9-1-2010

Scrutinizing the Seventh Circuit: How the Court Failed to Address the "Levels of Scrutiny" Quagmire in *United States v. Skoien*

Kyle J. Pozan
IIT Chicago-Kent College of Law

SEVENTH CIRCUIT REVIEW Volume 6, Issue 1 Fall 2010

SCRUTINIZING THE SEVENTH CIRCUIT: HOW THE COURT FAILED TO ADDRESS THE "LEVELS OF SCRUTINY" QUAGMIRE IN *UNITED STATES V. SKOIEN*

KYLE J. POZAN*

Cite as: Kyle J. Pozan, *Scrutinizing the Seventh Circuit: How the Court Failed to Address the "Levels of Scrutiny" Quagmire in* United States v. Skoien, 6 SEVENTH CIRCUIT REV. 337 (2010), *at* http://www.kentlaw.edu/7cr/v6-1/pozan.pdf.

INTRODUCTION

In an emphatic proclamation that may have far-reaching implications for Second Amendment jurisprudence, the Supreme Court recently held that the right to keep and bear arms for self-defense is fundamental to our scheme of ordered liberty.[1] In a plurality opinion, the Court in *McDonald v. City of Chicago* declared that the Second Amendment right to keep and bear arms for self-defense is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.[2]

Similar to the First and Fourth Amendments, the Second Amendment codifies a pre-existing right[3] and has recently been the focus of two of the most prominent Supreme Court decisions in the

* J.D. candidate, May 2011, Chicago-Kent College of Law, Illinois Institute of Technology; B.A., Political Science, 2008, Indiana University Bloomington.

[1] *See* McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3050 (2010) (plurality opinion).

[2] *Id.*; *see* District of Columbia v. Heller, 554 U.S. 570, 570–71 (2008) [hereinafter *Heller I*].

[3] *McDonald*, 130 S. Ct. at 3066; *Heller I*, 554 U.S. at 591–92.

past decade. Discussion concerning the Second Amendment is not reserved for the recondite and esoteric debates of academia. Rather, the discussion extends to the public forum, where there are arguments on the scope of the right to keep and bear arms, rallies that demand rigorous gun control laws,[4] and theories regarding the intent of the Framers of the Bill of Rights that divide the public, politicians, and scholars.

The Supreme Court's ruling in *McDonald* was preceded by the landmark case of *District of Columbia v. Heller* (*Heller I*).[5] The Supreme Court affirmed the decision of the District of Columbia Circuit, invalidating a law banning the possession of handguns in the District of Columbia, but in doing so neglected to identify a precise level of judicial scrutiny;[6] rather, the Court left the difficult task of determining the applicable level of scrutiny to the various federal courts, a challenge they would be forced to face when presented with subsequent challenges to laws banning the possession of firearms. The decision not to address the judicial scrutiny quandary in *Heller I* was mimicked by the Court in *McDonald* and has subsequently been followed by a number of federal courts.[7] Recently, when presented with the opportunity to address the "'levels of scrutiny' quagmire"[8] left unanswered by *Heller I* and *McDonald*,[9] the Seventh Circuit

[4] Saul Cornell, *The Second Amendment Under Fire: The Uses of History and the Politics of Gun Control*, HISTORY MATTERS (Jan. 2001), http://historymatters.gmu.edu/d/5200.

[5] *Heller I*, 554 U.S. at 570–71.

[6] *Id.* at 571 ("Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster.").

[7] *See* cases cited *infra* notes 128–29.

[8] United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) [hereinafter *Skoien III*].

[9] *See* McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3066 (2010); *Heller I*, 554 U.S. at 627–29.

declined to engage in meaningful judicial review.[10] This Comment will critique the Seventh Circuit's decision.

This Comment will begin with a brief discussion of *Heller I* and will examine the impact of the Supreme Court's proclamation that the right to keep and bear arms for self-defense is a right that precedes the Constitution. Part II introduces the Lautenberg Amendment to the Gun Control Act of 1968, a statute that bars individuals convicted of misdemeanor crimes of domestic violence from possessing firearms.[11] This section begins with the history behind the enactment of the Lautenberg Amendment and ends with the Supreme Court's interpretation of the amendment in the context of Second Amendment jurisprudence after *Heller I*. Part II also analyzes the factual background and procedural history leading up to the Seventh Circuit's decision in *United States v. Skoien* (*Skoien III*), and will include a critique of the court's decision in the aforementioned case. It will be suggested that the Seventh Circuit erred by failing to confront the "'levels of scrutiny' quagmire"[12] when presented with the opportunity in *Skoien III*. Part III will attempt to discern why a majority of courts after *Heller I* applied the doctrine of intermediate scrutiny to legislation that infringed on the right to keep and bear arms for self-defense. This Comment will conclude with an abridged review of *McDonald* and will suggest that there is sufficient case law to provide a foundation for the application of strict scrutiny analysis to the Lautenberg Amendment.

I. *DISTRICT OF COLUMBIA V. HELLER*

Heller I is a watershed case wherein the Supreme Court struck down the District of Columbia's handgun ban because the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and

[10] *Skoien III*, 614 F.3d at 641.
[11] 18 U.S.C. § 922(g)(9) (2006).
[12] *Skoien III*, 614 F.3d at 641–42.

home."[13] In *Heller I*, special police officer Dick Anthony Heller brought an action challenging the District's handgun ban on Second Amendment grounds and sought to enjoin the District from enforcing the aforementioned gun control statute.[14] The Supreme Court embarked on a lengthy review of historical texts to aid in interpreting the Second Amendment.[15] The Court highlighted post-ratification sentiments, pre-Civil War case law, and post-Civil War legislation and concluded that precedent does not preclude the espousal of the original understanding of the Second Amendment.[16] Following a searching inquiry and textualist reading of the Second Amendment, the Court held that the Second Amendment codifies a pre-existing right to keep and bear arms for self-defense.[17] Therefore, the Court declared unconstitutional the District of Columbia's ban on the possession of handguns under its interpretation of the Second Amendment.[18] The Court, however, maintained that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms," which are "presumptively lawful" under the Court's ruling.[19] The Court then identified a number of "presumptively lawful" regulatory measures, specifically prohibitions on the possession of firearms by felons and the mentally ill,[20] and stated that it "identif[ies] these presumptively lawful regulatory measures only as examples; [the] list does not purport to be exhaustive."[21] In addition, the Court in *Heller I* suggested that the two exacting levels of heightened scrutiny—intermediate scrutiny and strict scrutiny—should

[13] *Heller I*, 554 U.S. at 635.

[14] *Id.* at 574–76.

[15] *Id*. at 605–27.

[16] *Id*.

[17] *Id.* at 625.

[18] *Id.* at 635.

[19] *Id.* at 626, 627 n.26.

[20] *See, e.g.*, 18 U.S.C. § 922(g)(1); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009).

[21] *Heller I*, 554 U.S. at 627 n.26.

be applied to laws that interfere with the Second Amendment right to keep and bear arms for the defense of self, family, and property.[22]

The Court's decision in *Heller I* has resulted in a myriad of challenges to existing firearm legislation. By rejecting the collective rights interpretation of the Second Amendment,[23] the Supreme Court enabled the Second Amendment to be incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.[24] Justice Stevens, writing in dissent, cautioned that the *Heller I* ruling would leave lower federal courts without a clear standard for resolving challenges to existing firearm legislation.[25] Justice Stevens was correct to caution against the Court's decision in *Heller I*. As evidenced by the recent Seventh Circuit case, *Skoien III*, the federal courts have had difficulty adjudicating Second Amendment challenges to laws that infringe on the Second Amendment. In *Skoien III*, the Court of Appeals for the Seventh Circuit upheld the constitutionality of the Lautenberg Amendment in the face of a Second Amendment challenge.[26] However, the court parroted the majority in *Heller I* and refused to apply a specific standard of scrutiny.[27]

II. *UNITED STATES V. SKOIEN*

Defendant Steven Skoien was convicted in 2006 of domestic battery in a Wisconsin circuit court and sentenced to two years' probation.[28] As a condition of his probation and in correspondence

[22] *Id.* at 628–29; *see id.* at 628 n.27.

[23] *Id.* at 579–80; *see* United States v. Skoien, 857 F.3d 803, 807 (7th Cir. 2009) [hereinafter *Skoien II*]; Gillespie v. City of Indianapolis, 185 F.3d 693, 711 (7th Cir. 1999).

[24] *See* McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (holding that the right to keep and bear arms is fundamental to our scheme of ordered liberty).

[25] *Id.* at 718–19 (Breyer, J., dissenting).

[26] *Skoien III*, 614 F.3d 638, 642 (7th Cir. 2010).

[27] *See id.*

[28] *Skoien II*, 587 F.3d. at 806.

with 18 U.S.C. § 922(g)(9), Skoien was prohibited from possessing a firearm.[29] In 2007, his probation officer learned that he had purchased a deer-hunting license.[30] In light of the aforementioned discovery, the probation officer believed that Skoien had purchased a firearm, and probation agents searched his home as a result.[31] Upon searching Skoien's property, Wisconsin probation agents discovered a Winchester twelve-gauge shotgun, shotgun ammunition, a statute-issued tag for a gun deer kill in the name of Steven Skoien, and a deer carcass in Skoien's garage.[32] Skoien was subsequently indicted by a federal grand jury for possessing a firearm in violation of 18 U.S.C. § 922(g)(9).[33]

A. Skoien's Second Amendment Claim

Skoien filed a motion to dismiss the indictment on the grounds that § 922(g)(9) violated his Second Amendment right to keep and bears arms.[34] At the time that Skoien filed his motion to dismiss, Seventh Circuit precedent precluded him from alleging that § 922(g)(9) contravened the Second Amendment.[35] As a result, the district court denied Skoien's motion to dismiss.[36] Shortly after the

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Defendant's Motion to Dismiss Indictment at ¶ 2, United States v. Skoien, 2008 WL 4682598 (W.D. Wis. Aug. 27, 2008) (No. 08-cr-12-bbc) [hereinafter *Skoien I*]; *see* U.S. CONST. amend. II.

[35] *See* Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) (holding that the link between the ability to "keep and bear Arms" and "a well regulated Militia" is suggestive of the fact that the right does not extend to individuals, but rather to the people collectively and only to the extent necessary to protect their interest in protection by a militia); *see also* United States v. Price, 328 F.3d 958, 961 (7th Cir. 2003) (stating that § 922(g)(9) is constitutional under the "collective rights" model for interpreting the Second Amendment).

[36] *Skoien I*, 2008 WL 4682598, at *1.

aforementioned denial, the Supreme Court in *Heller I* held that the Second Amendment protects an individual's right to possess a firearm for a lawful purpose, unrelated to service in a militia.[37] Consequently, Skoien filed a motion to reconsider the motion to dismiss the indictment.[38]

In the defendant's brief, a considerable amount of emphasis was placed on *Heller I*,[39] which struck down the District of Columbia's handgun ban because it was too broad, extending to an entire class of arms that is overwhelmingly chosen by American society for the lawful purposes of self-defense and hunting.[40] Skoien claimed that the Winchester twelve-gauge shotgun is "clearly an 'arm' that is overwhelmingly chosen by American society for the lawful purpose of hunting."[41] Furthermore, in light of the fact that the Court in *Heller* declared that the Second Amendment codified a pre-existing individual right to keep and bear arms, Skoien argued that the court in the instant case must declare unconstitutional § 922(g)(9) if it determines that the statute is not narrowly tailored to serve a compelling governmental interest.[42]

Judge Barbara Crabb of the Western District of Wisconsin considered the motion to dismiss filed by Skoien, which alleged that § 922(g)(9) violated the Second Amendment to the United States Constitution.[43] Skoien acknowledged that the Court of Appeals for the Seventh Circuit upheld the constitutionality of § 922(g)(9), but argued

[37] *Heller I*, 554 U.S. 570, 625–26 (2008).

[38] *See generally* Brief in Support of Defendant's Motion to Reconsider Motion to Dismiss Indictment, *Skoien I*, 2008 WL 4682598 (No. 08-cr-12-bbc).

[39] *See generally id.*

[40] *Heller I*, 554 U.S. at 625–30 (only the sorts of weapons that were in common use at the time the Second Amendment was ratified are protected).

[41] Brief in Support of Defendant's Motion to Reconsider Motion to Dismiss Indictment, *supra* note 38, at 3.

[42] *Id. at* 4–5.

[43] *Skoien I*, No. 08-cr-12-bbc, 2008 WL 4682598, at *1 (W.D. Wis. Aug. 27, 2008).

that the statute should be reevaluated in light of the recent Supreme Court decision in *Heller I*.[44]

In her analysis, Judge Crabb noted that the Court in *Heller* held that the Second Amendment right to bear arms protects an individual right to possess and carry weapons in case of confrontation, but stated that the Court did not address the constitutionality of § 922(g)(9).[45] In addition, Judge Crabb mentioned that the majority cautioned against interpreting its decision as a suggestion that all gun laws and firearm restrictions are unconstitutional.[46] Rather, the Court declared that its opinion does not cast doubt on the countless longstanding prohibitions on the possession of firearms by certain groups of individuals.[47] Skoien, however, urged the court to review § 922(g)(9) using the doctrine of strict scrutiny, which requires a court to examine any legislative action that impinges upon a fundamental right or involves the use of a suspect classification to ensure that it is narrowly tailored to serve a compelling governmental purpose.[48]

Skoien urged the court to consider the doctrine of strict scrutiny when rendering its decision.[49] In the opinion of the court, Judge Crabb acknowledged that strict scrutiny may be the appropriate standard to apply to a legislative effort to restrict firearm possession, but noted that it was unnecessary to resolve the issue in the instant case.[50] The

---

[44] *Id.*

[45] *Id.*; *see Heller I*, 554 U.S. at 582–83.

[46] *Skoien I*, 2008 WL 4682598, at *1.

[47] *Id.* (quoting *Heller I*, 554 U.S. at 626–27) ("[N]othing in our 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, or laws imposing conditions and qualifications on the commercial sale of arms.").

[48] *Id.*; *see* Sklar v. Byrne, 727 F.2d 633, 636 (7th Cir. 1984) ("Where the legislative classification works to the disadvantage of a constitutionally suspect class[,] . . . then courts may uphold the classification only if it is 'precisely tailored to serve a compelling governmental interest.'").

[49] Brief in Support of Defendant's Motion to Reconsider Motion to Dismiss Indictment, *supra* note 38, at 4–5.

[50] *Skoien I*, 2008 WL 4682598, at *1.

court declared that § 922(g)(9) passes constitutional muster under the doctrine of strict scrutiny because it is narrowly tailored to achieve a compelling governmental interest.[51] The government has a compelling interest in protecting the families of individuals convicted of misdemeanor crimes of domestic violence because they pose the greatest harm to their families.[52] The court noted that the Supreme Court's acknowledgement of the existence of "longstanding prohibitions on the possession of firearms by felons" in *Heller*[53] is an express recognition of the fact that an individual may forfeit his right to keep and bear arms under the Second Amendment when he commits a crime determined by the legislature to be of a serious nature.[54] Furthermore, the court noted that in enacting § 922(g)(9), Congress designated misdemeanor crimes of domestic violence as being serious in nature.[55]

Judge Crabb then considered whether existing Seventh Circuit precedent upholding § 922(g)(9), based on the interpretation of the Second Amendment right to keep and bear arms as a collective right, should be upheld in light of *Heller I*.[56] The court referenced the Seventh Circuit decision in *Gillespie v. City of Indianapolis*, which served as precedent in the district court case.[57] The *Gillespie* court had noted that the Court of Appeals for the Seventh Circuit held that *United States v. Miller* and its progeny confirm that the Second Amendment does not establish an individual right to possess a firearm independent from the role that possession of a firearm might play in maintaining a militia.[58] Therefore, the court reasoned that § 922(g)(9)

[51] *Id.* ("[Section 922(g)(9)] is narrowly tailored: it applies only to persons who have been found guilty by a court of domestic violence.").

[52] *Id.*

[53] *Heller I*, 554 U.S. 570, 626.

[54] *Skoien I*, 2008 WL 4682598, at *1.

[55] *Id.*

[56] *Id.* at *2.

[57] *Id.*

[58] Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) ("The link that the [Second Amendment] draws between the ability 'to keep and bear Arms' and '[a] well regulated Militia' suggests that the right protected is limited, one

is constitutional in the Seventh Circuit up and until either the Court of Appeals for the Seventh Circuit or the Supreme Court specifically rules to the contrary.[59] Judge Crabb proceeded to emphasize that the Court of Appeals for the Seventh Circuit previously upheld the constitutionality of 18 U.S.C. § 922(g)(1), the felon-in-possession statute,[60] and that "[c]onstitutionally speaking, there is nothing remarkable about the extension of federal firearms disabilities to persons convicted of misdemeanors, as opposed to felonies."[61] Therefore, Judge Crabb denied the motion to dismiss the indictment.[62] After reviewing precedent in the Seventh Circuit and in consideration of the recent Supreme Court decision in *Heller I*, the court found that § 922(g)(9) is constitutional under the Second Amendment.[63]

B. The Court of Appeals for the Seventh Circuit

Skoien appealed the denial of his motion to dismiss.[64] The defendant's argument on appeal was that § 922(g)(9), known colloquially as the Lautenberg Amendment, violated his right to keep and bear arms under the Second Amendment.[65] On appeal, the Court of Appeals for the Seventh Circuit engaged in a comprehensive review

---

that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia."); *see* United States v. Miller, 307 U.S. 174, 178 (1939) (holding that in the absence of a nexus between the firearm and the preservation or proficiency of a well-regulated militia, it cannot be said that the Second Amendment guarantees an individual right to keep and bear arms).

[59] *Skoien I*, 2008 WL 4682598, at *2.

[60] *See* United States v. Price, 328 F.3d 958, 961 (7th Cir. 2003) (establishing that even under the individual rights model for interpreting the Second Amendment, the right to keep and bear arms can be restricted); *accord* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001).

[61] *Gillespie*, 185 F.3d at 706.

[62] *Skoien I*, 2008 WL 4682598, at *2.

[63] *Id.*

[64] *See* Defendant-Appellant's Reply Brief at 1, *Skoien II*, 587 F.3d 803 (7th Cir. 2009) (No. 08-3770).

[65] *Skoien II*, 587 F.3d. at 807.

of the recent Supreme Court decision in *Heller I*. Writing for the court, Judge Sykes concluded that intermediate scrutiny was the appropriate standard of review for Skoien's Second Amendment challenge to the constitutionality of § 922(g)(9).[66] After reiterating that the doctrine of intermediate scrutiny requires that a law be substantially related to an important governmental interest, Judge Sykes stated that the government has the burden of establishing "a reasonable fit between its important interest in reducing domestic gun violence and the means chosen to advance that interest," namely the permanent disarmament of domestic violence misdemeanants under the Lautenberg Amendment.[67] Accordingly, the court vacated the indictment and remanded the case to the district court with instructions to apply the doctrine of intermediate scrutiny.[68]

To determine whether the doctrine of intermediate scrutiny or strict scrutiny should apply when reviewing the constitutionality of § 922(g)(9), Judge Sykes noted that the Court in *Heller* held that the Second Amendment secures an individual pre-existing right to keep and bear arms for the defense of self, family, and home.[69] After a thorough analysis of the text of the Second Amendment and the founding-era sources of its original conventional meaning, the Supreme Court in *Heller I* held that the Second Amendment does not declare a collective right to keep and bear arms, but rather it guarantees an individual right to armed defense not limited to service in a militia.[70]

In *Heller I*, the Court highlighted the importance of logical nexus between the operative clause and the prefatory clause of the Second Amendment.[71] The Court began with an analysis of the language of the operative clause: "the right of the people to keep and bear Arms,

[66] *Id.* at 816.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 807; *see Heller I*, 554 U.S. 570, 591–95 (2008).
[70] *Heller I*, 554 U.S. at 598–99; *Skoien II*, 587 F.3d. at 807.
[71] *Heller I*, 554 U.S. at 577–78; *Skoien II*, 587 F.3d. at 806.

shall not be infringed."[72] The majority in *Heller I* proceeded to consult historical sources of information to identify the meaning of the language of the operative clause at the time of its codification.[73] The Supreme Court determined that the elements of the operative clause of the Second Amendment guarantee an individual right to keep and bear arms in case of confrontation, a meaning that is confirmed by the fact that the right to keep and bear arms is a natural right.[74] The Seventh Circuit noted that the Court analyzed the prefatory clause of the Second Amendment: "[a] well regulated Militia, being necessary to the security of a Free State."[75] The majority in *Heller* considered the aforementioned militia clause alongside the relevant historical background and concluded that the clause was not a limitation on the scope of the right to keep and bear arms, but rather it described the motivating purpose behind codifying the pre-existing right.[76] The Court concluded that the right was codified in the Second Amendment to prevent the federal government from disarming the citizenry.[77] The Seventh Circuit found this reasoning to be highly persuasive. Judge Sykes then noted that the Court invalidated the District of Columbia's handgun ban[78] as unconstitutional "[u]nder any of the standards of scrutiny that [the Supreme Court] ha[s] applied to enumerated

[72] *Skoien II*, 587 F.3d. at 806; *see* U.S. CONST. amend. II.

[73] *Heller I*, 554 U.S. at 592–96.

[74] *Heller I*, 554 U.S. at 592 ("[The right to keep and bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second [A]mendment declares that it shall not be infringed . . .").

[75] *Skoien II*, 587 F.3d at 807; *see* U.S. CONST. amend. II.

[76] *Skoien II*, 587 F.3d at 807.

[77] *Heller I*, 554 U.S. at 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right [to bear arms]; most undoubtedly [they] thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right . . . was codified.").

[78] *Skoien II*, 587 F.3d at 808.

constitutional rights."[79] In a statement that has the potential to become as revered as the famous footnote in *United States v. Carolene Products*,[80] the Court stated that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[81] The majority in *Skoien II* noted that this list was not exhaustive, and the Supreme Court identified these presumptively lawful prohibitions only as examples.[82]

Judge Sykes noted that the limiting language from *Heller I* is not mandatory authority, but rather it is persuasive dicta.[83] Judge Sykes observed that the Supreme Court failed to shed light on the requisite standard of scrutiny that should be applied when reviewing these presumptively lawful regulatory measures.[84] Therefore, Judge Sykes reasoned that all gun laws, aside from those that are categorically invalid under *Heller I*, must be independently justified.[85]

The court reasoned that *Heller* established a framework for analyzing Second Amendment cases.[86] Under this framework, a determination must first be made as to whether the gun law at issue is within the scope of the right to keep and bear arms as it was publicly understood when it was codified in the Second Amendment.[87] Judge

[79] *Heller I*, 554 U.S. at 628.

[80] *See* 304 U.S. 144, 153 n.4 (1938) (stating that an exception to the presumption of constitutionality may be made and a heightened standard of judicial review may be required where "legislation appears on its face to be within a specific prohibition of the Constitution" or is aimed at a "discrete and insular minorit[y]").

[81] *Heller I*, 554 U.S. at 626.

[82] *Skoien II*, 587 F.3d at 808; *see Heller I*, 554 U.S. at 626 n.26.

[83] *Skoien II*, 587 F.3d. at 808.

[84] *Id.*

[85] *Id.* ("[B]eyond [the Court's reference to presumptively lawful regulatory measures], it is not entirely clear whether [the aforementioned language] should be taken to suggest that the listed firearms regulations are presumed to fall outside the scope of the Second Amendment right as it was understood at the time of the framing or that they are presumptively lawful under even the highest standard of scrutiny applicable to laws that encumber constitutional rights.").

[86] *Id.*

[87] *Id.* at 809.

Sykes noted, "If the government can establish [that a gun law falls outside the public understanding of the right], then the analysis need go no further."[88] If, however, the law at issue regulated conduct falling within the scope of the right, Judge Sykes declared that the law will be upheld only if the government can satisfy the applicable level of scrutiny.[89] The court reasoned that the level of scrutiny is dependent on "the degree of fit required between the means and the end [and] how closely the law comes to the core of the right and the severity of the law's burden on the right."[90] Thus, the court in *Skoien II* established a nexus test to determine the applicable level of scrutiny that a court must apply if a law regulates conduct falling within the scope of the right to keep and bear arms under the Second Amendment.

Judge Sykes proceeded to employ the framework in *Heller I* to ascertain whether § 922(g)(9) violated Skoien's Second Amendment right to keep and bear arms. The court stated that it would be difficult to argue that a traditional hunting shotgun falls outside the scope of the Second Amendment at the time of its adoption.[91] The majority in *Heller I* highlighted the importance of long guns used for hunting during the founding era;[92] ergo, Judge Sykes stated that the possession of standard hunting shotguns did not fall outside the parameters of the right as it was publicly understood when the Bill of Rights was ratified.[93] However, the government did not try to justify § 922(g)(9) on a historical basis.[94] Therefore, Judge Sykes proceeded to the second inquiry under *Heller I*, which required the court to determine

[88] *Id.*

[89] *Id.*

[90] *Id.* (noting that this framework emphasizes the importance that the Supreme Court placed on the original meaning of the Second Amendment right to keep and bear arms, while simultaneously "attempt[ing] to reconcile the Court's invalidation of the D.C. gun ban 'under any standard of scrutiny' with its reference to the existence of 'presumptively lawful' exceptions to the right to keep and bear arms.").

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 810.

whether the restriction on Skoien's right to bear arms is justified under the applicable standard of review.[95] Noting that the Court in *Heller I* rejected rational basis review,[96] the minimum level of scrutiny, Judge Sykes reasoned that gun laws that severely restrict the core right under the Second Amendment are subject to an exacting scrutiny.[97] Pointing to the Supreme Court's dicta regarding presumptively lawful firearm laws, the court determined that strict scrutiny does not apply to § 922(g)(9).[98] Judge Sykes stated, "The Second Amendment challenge in this case is several steps removed from the core constitutional right identified in *Heller* [*I*]."[99] Moreover, the court noted that Skoien based his constitutional challenge on the right to possess his shotgun for the purpose of hunting, and not on the right of self-defense.[100] Therefore, because § 922(g)(9) does not severely burden Skoien's Second Amendment right to possess a firearm for self-defense, Judge Sykes held that intermediate scrutiny is the appropriate standard of review.[101] Under intermediate scrutiny, a challenged law will be upheld if the government establishes that the law is substantially related to an important governmental interest.[102] Here, the court held that reducing domestic violence qualifies as an important governmental interest.[103] Furthermore, the court stated that a substantial nexus existed between the permanent disarmament of domestic violence misdemeanants under § 922(g)(9) and the government's goal of preventing firearm-

[95] *Id.*

[96] *Heller I*, 554 U.S. 570, 628 n.27 (2008).

[97] *Skoien II*, 587 F.3d. at 811.

[98] *Id.* at 812 ("[T]he [Supreme] Court's willingness to presume the constitutionality of various firearms restrictions—especially prohibitions on firearms [sic] possession by felons—gives us ample reason to believe that strict scrutiny does not apply here.").

[99] *Id.*; *see Heller I*, 554 U.S. at 635 (holding that at the core of the Second Amendment is the "right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

[100] *Skoien II*, 587 F.3d. at 812.

[101] *Id.*

[102] Clark v. Jeter, 486 U.S. 456, 461 (1988).

[103] *Skoien II*, 587 F.3d. at 812.

related violence against domestic partners.[104] Therefore, the court vacated Skoien's conviction and remanded the case for further proceedings consistent with the aforementioned opinion.[105]

C. Rehearing En Banc

In *Skoien III*, the Seventh Circuit granted rehearing en banc and affirmed the district court's decision, holding that the Lautenberg Amendment is constitutional.[106] Chief Judge Easterbrook, writing for the majority, refused to address the "'levels of scrutiny' quagmire."[107] The Chief Judge thought it sufficient that the government's goal of "preventing armed mayhem" is an important governmental objective.[108] Furthermore, Chief Judge Easterbrook reasoned that "[b]oth logic and data" establish a substantial relationship between the Lautenberg Amendment and the government's objective of "preventing armed mayhem."[109] Although the court declined to apply a specific standard of scrutiny, it is evident that the court in *Skoien III* implicitly applied intermediate scrutiny analysis to uphold the Lautenberg Amendment.[110] Chief Judge Easterbrook, writing that "the goal of [the Lautenberg Amendment], preventing armed mayhem, is an *important* governmental objective,"[111] and "[b]oth logic and data establish a *substantial* relation between [the Lautenberg Amendment]

[104] *Id.*

[105] *Id.*

[106] *Skoien III*, 614 F.3d 638, 645 (7th Cir. 2010).

[107] *Id.* at 641–42.

[108] *Id.*

[109] *Id.* at 642.

[110] *See id.*; *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) (holding that a law survives intermediate scrutiny if it is substantially related to an important governmental interest).

[111] *Skoien III*, 614 F.3d at 642 (emphasis added).

and [preventing armed mayhem],"[112] used terms of art that indicate the application of intermediate scrutiny review.[113]

It is important to note that *Skoien III*, decided less than one month after *McDonald*, makes no mention of the Court's holding that the Second Amendment is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.[114] This point is alluded to by Judge Sykes, the sole dissenting judge in *Skoien III*.[115] By failing to address the Court's decision in *McDonald*, Judge Sykes argued that "the pertinent question is how contemporary gun laws should be evaluated to determine whether they infringe the Second Amendment right [to keep and bear arms for self-defense]."[116] In addition, the Seventh Circuit neglected to examine the corpus of case law that applies strict scrutiny where a law infringes upon a right that is fundamental to our scheme of ordered liberty.[117]

III. SECOND AMENDMENT JURISPRUDENCE AFTER *HELLER I*

Despite the perspicuous holding in *Heller I*, the Supreme Court's unwillingness to delve into the "'levels of scrutiny' quagmire"[118] has burdened the federal courts with the task of adjudicating Second Amendment challenges without a clear method for doing so. Consequently, courts inconsistently utilize a number of approaches to

[112] *Id.* (emphasis added).

[113] *See Clark*, 486 U.S. at 461.

[114] *See* McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (plurality opinion).

[115] *Skoien III*, 614 F.3d at 648 (Sykes, J., dissenting).

[116] *Id.*

[117] *See, e.g.*, *McDonald*, 130 S. Ct. at 3023; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995); Duncan v. State of Louisiana, 391 U.S. 145, 150 (1968); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (quoting Grosjean v. American Press Co., 297 U.S. 233, 243–44 (1936)).

[118] *Skoien III*, 614 F.3d at 641–42.

adjudicate Second Amendment challenges.[119] In *Heller v. District of Columbia* (*Heller II*), an action was brought challenging the Firearms Registration Amendment Act, which was enacted in response to the Court's ruling in *Heller I*, on Second Amendment grounds.[120] The plaintiffs challenged three provisions of the new act: the firearms registration procedures, the prohibition on assault weapons, and the prohibition on devices that feed large capacity ammunition into firearms.[121]

Heller II began with an overview of the various approaches used by courts to adjudicate Second Amendment challenges in the wake of *Heller I*.[122] The court in *Heller II* determined that five approaches have been used by courts to review laws accused of violating the Second Amendment.[123] The first method used by courts is to issue a ruling without applying a specific standard of scrutiny.[124] Rather, these courts have simply determined whether the law at issue is a presumptively lawful longstanding prohibition as identified by *Heller I*.[125] Other courts have attempted to tackle the judicial scrutiny quandary as it applies to Second Amendment challenges.[126] A small number of courts have applied the doctrine of strict scrutiny to Second

[119] *See, e.g.*, United States v. Masciandaro, 648 F. Supp. 2d 779, 787–90 (E.D. Va. 2009) (holding that the challenged law is constitutional "under any elevated level of constitutional scrutiny"); United States v. Booker, 570 F. Supp. 2d 161, 162–63 (D. Me. 2008) ("A useful approach is to ask whether a statutory prohibition against the possession of firearms by felons and the mentally ill is similar enough to the statutory prohibition [at issue] to justify its inclusion in the list of 'longstanding prohibitions' [contained in the *Heller* dictum]").

[120] Heller v. District of Columbia, 698 F. Supp. 2d 179, 181 (D.D.C. 2010) [hereinafter *Heller II*].

[121] *Id.* at 185.

[122] *Id.*

[123] *Id.*

[124] *See supra* note 119.

[125] *See id.*

[126] *See, e.g., Heller II*, 698 F. Supp. 2d at 185.

Amendment challenges,[127] while the majority of courts have held that intermediate scrutiny is the proper standard of review.[128] A fourth approach taken by courts involves applying elements of the undue burden test that is typically applied in the abortion context.[129] Finally, a small number of courts have combined the above-mentioned approaches to form a hybrid method for reviewing Second Amendment challenges.[130]

In *Heller II*, the court concluded that intermediate scrutiny is the appropriate standard of review.[131] The court reasoned that the Court in *Heller I* "did not explicitly hold that the Second Amendment right is a fundamental right,"[132] and therefore strict scrutiny did not apply.[133] Although the majority in *Heller I* suggested that a heightened standard of review should be applied to laws that interfere with the Second Amendment right to keep and bear arms, the court in *Heller II* reasoned that "[i]f the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly."[134]

---

[127] *See, e.g.*, United States v. Engstrum, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (upholding the constitutionality of the Lautenberg Amendment under strict scrutiny because it serves a compelling governmental interest and is narrowly tailored to serve this interest).

[128] *See, e.g.*, United States v. Miller, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009); United States v. Marzzarella, 595 F. Supp. 2d 596, 606 (W.D. Pa. 2009).

[129] *Heller II*, 698 F. Supp. 2d at 185–86; *see, e.g.*, Nordyke v. King, 563 F.3d 439, 459–60 (9th Cir. 2009), *vacated on reh'g en banc*, 611 F.3d 1015 (9th Cir. 2010); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

[130] *Heller II*, 698 F. Supp. 2d at 186; *see e.g.*, *Skoien II*, 587 F.3d 803, 812 (7th Cir. 2009).

[131] *Heller II*, 698 F. Supp. 2d at 186.

[132] *Id.* at 187.

[133] *Id.*

[134] *Id.* ("The court will not infer such a significant holding based on the *Heller* majority's oblique references to the gun ownership rights of eighteenth-century English subjects."); *see* United States v. Darrington, 351 F.3d 632, 635 (5th Cir. 2003) ("if [a court] intended to recognize that the individual right to keep and bear arms is a 'fundamental right,' in the sense that restrictions on this right are subject to

In *United States v. Yanez-Vasquez*, the defendant was charged with possession of a firearm in violation of 18 U.S.C. § 922(g)(5).[135] The defendant argued that the statute, which prohibits the possession of a firearm by an illegal alien, violates his Second Amendment right to keep and bear arms.[136] In *Yanez-Vasquez*, the court rebuffed the defendant's contention that strict scrutiny should apply.[137] The court declined to apply strict scrutiny because *Heller I* did not expressly declare that the Second Amendment right to keep and bear arms is a fundamental right.[138]

In the wake of the Supreme Court's decision in *Heller I*, it is evident that a number of courts, adjudicating cases challenging legislation under the Second Amendment, are engaging in a literal reading of the Court's dictum. The *Heller I* dictum regarding presumptively lawful longstanding prohibitions has been interpreted by courts to disqualify the use of strict scrutiny review for Second Amendment claims.[139] A second, related problem, illustrated by a handful of courts, is an unwillingness to engage in meaningful judicial scrutiny. Rather than engage in meaningful judicial review, a number of courts merely determine whether the Lautenberg Amendment is "presumptively lawful" under *Heller I*. In *United States v. White*, the court proclaimed that they were tasked with "decid[ing] whether the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence . . . warrants inclusion on [*Heller I*'s] list of presumptively lawful longstanding prohibitions."[140] This approach is problematic because judicial scrutiny is disregarded. Rather than assessing whether the means and ends of a statutory prohibition are related to an important or

'strict scrutiny' by the courts and require a 'compelling state interest,' *it would have used these constitutional terms of art*.") (emphasis added).

[135] United States v. Yanez-Vasquez, No. 09-40056-01-SAC, 2010 WL 411112, at *1 (D. Kan. Jan. 28, 2010).

[136] *Id.*

[137] *Id.* at *5.

[138] *Id.*

[139] *See* cases cited *supra* notes 119–20.

[140] United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010).

compelling governmental interest, the court merely determines whether the prohibition at issue is analogous with the brief list of presumptively lawful longstanding prohibitions identified in *Heller I*.[141] Moreover, courts engaging in this unmethodical standard of review fail to heed the words of the Court in *Heller I.* The Court stated that there a number of "longstanding prohibitions on the possession of firearms,"[142] and emphasized that these prohibitions are "*presumptively* lawful."[143] Yet the court in *White* and *Skoien III* appear to ignore the term "presumptively."[144] Neither court engaged in the heightened standard of review required by *Heller I*.[145] Had the Court desired to establish a neoteric standard of review based on presumptively lawful longstanding prohibitions on the possession of firearms, it would have done so explicitly. In addition, the Court would not have referred to these longstanding prohibitions as being "presumptively lawful" in nature if it intended for this locution to serve as a standard of judicial review.

Expanding on *Heller I*, *McDonald v. City of Chicago* is a landmark Supreme Court case that places federal courts in a position to implement strict scrutiny review in the area of Second Amendment jurisprudence.[146] Justice Alito, writing for the plurality, held that the Second Amendment right to keep and bear arms for self-defense is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.[147] The Court in *McDonald*, charged with determining whether the Second Amendment right to keep and bear arms applied to the States, exercised the legal doctrine of incorporation to hold that the Second Amendment is

[141] *See, e.g., id.* at 1205–06.
[142] *Heller I*, 554 U.S. 570, 626 (2008).
[143] *Id.* at 627 n.26 (emphasis added).
[144] *Id.*
[145] *See id.* at 628 n.27; *Skoien III*, 614 F.3d 638, 641 (7th Cir. 2010).
[146] *See generally* McDonald v. City of Chicago, Ill., 130 S. Ct. 3020 (2010).
[147] *Id*. at 3050 (plurality opinion).

applicable to the States through the Due Process Clause of the Fourteenth Amendment.[148]

The Due Process Clause of the Fourteenth Amendment states, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law."[149] Drawing largely on the historical record surrounding the framing and incorporation of the Fourteenth Amendment,[150] Justice Alito held that the right to keep and bear arms for self-defense is fundamental to our scheme of ordered liberty.[151]

The Court's decision in *McDonald* may have profound implications for the manner in which courts evaluate the constitutionality of laws prohibiting the possession of firearms. It is "widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."[152] These rights are so "deeply rooted in this Nation's history and tradition,"[153] that they are fundamental to our scheme of ordered liberty.[154] Accordingly, the

[148] *Id.*

[149] U.S. CONST. amend. XIV.

[150] *McDonald*, 130 S. Ct. at 3036–44.

[151] *Id.* at 3042; *see* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). *But cf. McDonald*, 130 S. Ct. at 3059–62 (Thomas, J., concurring) (Although Justice Thomas agreed with the Court that the right to keep and bear arms is applicable to the States through the Fourteenth Amendment, he argued that incorporation through the Privileges or Immunities Clause, rather than the Due Process Clause, is a more straightforward path. Justice Thomas stated that "fundamental" rights, some of which are not enumerated in the Constitution, are a legal fiction that arose in response to the marginalization of the Privileges or Immunities Clause following the Court's decision in the *Slaughter-House Cases*); Slaughter-House Cases, 83 U.S. 36 (1873) (determining that there is a sharp distinction between the privileges and immunities of state and those of federal citizenship, and the Privileges or Immunities Clause protects only the latter category of rights from State infringement).

[152] *McDonald*, 130 S. Ct. at 3066; *Heller I*, 554 U.S. 570, 592 (2008) (emphasis in original).

[153] *McDonald*, 130 S. Ct. at 3023 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[154] *See supra* note 146; Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

Court reversed the judgment of the Seventh Circuit and remanded the case for further proceedings in accordance with their decision.[155]

IV. A CASE FOR THE ADOPTION OF STRICT SCRUTINY REVIEW

In light of *McDonald*, there is ample evidence to support the application of strict scrutiny review to legislation that infringes on the Second Amendment right to keep and bear arms for self-defense. Although the right is not unqualified, laws encumbering fundamental rights are often subjected to strict scrutiny review.[156]

Strict scrutiny was conceived by implication in a footnote of *United States v. Carolene Products*[157] and is currently the most exacting form of judicial scrutiny. To withstand strict scrutiny review, the government has the burden of proving that the challenged law is narrowly tailored to further a compelling governmental interest.[158] Supreme Court precedent often requires that laws restricting fundamental rights be evaluated under strict scrutiny,[159] as intermediate scrutiny is an insufficient standard of review for legislation that infringes on fundamental rights. Intermediate scrutiny is a less exacting form of scrutiny and requires that a law be substantially related to an important governmental objective.[160] In other words, a court need not find that the government's purpose is compelling, but it must characterize the objective as important. In

[155] *McDonald*, 130 S. Ct. at 3050.

[156] *See supra* note 117. *But see* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (holding that the First Amendment right to freedom of speech, while a fundamental right in nature, is subject to a flexible standard of review for ballot-access restrictions).

[157] *See supra* note 80 and accompanying text.

[158] Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (upholding the admissions policy of the University of Michigan Law School).

[159] *See* cases cited *supra* note 117.

[160] Clark v. Jeter, 486 U.S. 456, 461 (1988).

order to trigger intermediate scrutiny, a law must "implicate an important, though not constitutional, right."[161]

Legal scholars and judicial opinions have suggested that strict scrutiny is an outcome-determinative standard of judicial review. According to legal scholar Paul Kahn, "[C]ontemporary equal protection law has essentially identified 'exacting' judicial scrutiny with judicial invalidation."[162] The Supreme Court has echoed these sentiments, noting that "[o]nly rarely are statutes sustained in the face of strict scrutiny."[163] In fact, this is an easy argument to make when reviewing Warren Court decisions. The Warren Court used strict scrutiny review to invalidate a number of laws and extend constitutional protections to various fundamental rights.[164] "[O]nce the Court sorts the case into one or another constitutional bin [strict scrutiny or rational basis], the outcome is virtually foreordained."[165] This argument has been reiterated in the wake of *Heller I*,[166] but it remains unfounded.[167]

---

[161] United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999); *see* Eisenbud v. Suffolk County, 841 F.2d 42, 45 (2d Cir. 1988).

[162] Paul W. Kahn, *The Court, The Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 6 (1987).

[163] Bernal v. Fainter, 467 U.S. 216, 220 n.6 (1984) (citing Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

[164] *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (invalidating a statutory prohibition of welfare benefits to residents of less than one year because it impermissibly restricted the right to travel); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (invalidating legislation banning miscegenation); Sherbert v. Verner, 374 U.S. 398, 405–06 (1963) (invalidating a law restricting the freedom of religious expression); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 805 (2006).

[165] Winkler, *supra* note 164, at 807 (quoting JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 55 (1997)).

[166] *E.g.*, *Skoien II*, 587 F.3d 803, 813 (7th Cir. 2009) (noting that strict scrutiny is a demanding standard of judicial review that is intentionally difficult to overcome, "in deference to the primacy of the individual liberties the Constitution secures.");

Strict scrutiny is not "strict in theory, but fatal in fact."[168] The phrase "strict in theory and fatal in fact,"[169] penned by Gerald Gunther, has become "one of the most quoted lines in legal literature"[170] and has been parroted in numerous judicial opinions.[171] Recently, the Supreme Court has attempted to expunge the belief that strict scrutiny is an outcome-determinative test, always resulting in invalidation of the challenged legislation. In *Adarand Constructors, Inc. v. Pena*, Justice O'Connor declared that the Court intended to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[172] Justice O'Connor argued that requiring strict scrutiny is the most effective way to ensure that courts consistently engage in a detailed examination of both the ends and means of a challenged law.[173] In *Johnson v. California*, Justice O'Conner again argued against the notion that strict scrutiny is fatal in fact, writing that "[t]he fact that strict scrutiny applies 'says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.'"[174] In a recent case, *Grutter v. Bollinger*, the Supreme Court upheld the affirmative action admission policy at the University of Michigan Law School.[175] Justice O'Connor, writing for the majority, declared that the school's use of race in its admissions

Dennis A. Henigan, *The* Heller *Paradox*, 56 UCLA L. REV. 1171, 1197 (2009) (arguing that the discussion of presumptively lawful longstanding prohibitions on the possession of firearms in *Heller* must be read as an implicit rejection of strict scrutiny review).

[167] *See supra* note 158.

[168] *Adarand*, 515 U.S. at 237 (quoting Gunther, *supra* note 163, at 8).

[169] Gunther, *supra* note 163, at 8.

[170] Kathleen M. Sullivan, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002).

[171] *See Adarand*, 515 U.S. at 237; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 361–62 (1978).

[172] *Adarand*, 515 U.S. at 237.

[173] *Id.*

[174] Johnson v. California, 543 U.S. 499, 515 (2005) (quoting *Adarand*, 515 U.S. at 229–30).

[175] 539 U.S. 306, 339 (2003).

policy was narrowly tailored to further a compelling interest in the unique education benefits that emanate from a diverse student body.[176] A number of legal scholars have aligned themselves with Justice O'Connor. According to Adam Winkler, "[S]trict scrutiny exists precisely to permit regulation where ordinarily none is allowed."[177] Others have argued that strict scrutiny review is becoming less rigorous, as evidenced by the aforementioned decisions. Ashutosh Bhagwat argued that the relaxation of strict scrutiny review is due to a sudden willingness by the Court to engage in genuine inquiry of legislative purposes.[178]

In *Grutter*, Justice O'Connor asserted that "context matters" when strict scrutiny is applied.[179] Context is equally relevant to a determination of the applicable standard of review in *Skoien III*. In *Skoien II*, Judge Sykes noted the importance of context in the First Amendment sphere. Judge Sykes, in an attempt to analogize the First Amendment right to freedom of speech with the Second Amendment, noted that "[i]n the First Amendment free-speech context, the rigor of this heightened form of review tends to fluctuate with the character and degree of the challenged law's burden on the right".[180] In the realm of election regulations, laws that restrict the right to expressive association are subject to varying levels of scrutiny depending upon the nature and severity of the burden on the right; laws that impose severe burdens are subject to strict scrutiny, while regulatory measures imposing more modest burdens are reviewed more leniently.[181] In the Second Amendment realm, while recent decisions have focused on the relationship between the right of "law-abiding, responsible citizens to

[176] *Id.* at 343.

[177] Winkler, *supra* note 164, at 805.

[178] Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL L. REV. 297, 299 (1997).

[179] *Grutter*, 539 U.S. at 327.

[180] *Skoien II*, 587 F.3d 803, 813 (7th Cir. 2009).

[181] *Id.*; *see, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).

use arms in defense of hearth and home,"[182] the Court in *Heller I* stated that Americans valued the ancient right to keep and bear arms for self-defense *and hunting*.[183] Judge Sykes acknowledged this ancient right, but argued that the right to keep and bear arms for hunting was not analogous to the core Second Amendment right identified in *Heller I*.[184] However, the decisions in *Skoien II* and *Skoien III* neglected to take context into account. While the court in *Skoien II* failed to consider the legislative intent behind the enactment of the Lautenberg Amendment, the court in *Skoien III* neglected to evaluate the severity of the burden imposed by the amendment. The Lautenberg Amendment imposes a severe burden on the right to keep and bear arms for self-defense under the Second Amendment;[185] the amendment "bars *all* persons who have been convicted of a domestic-violence misdemeanor from *ever* possessing a firearm for *any* reason."[186] The court emphasized that "[i]t is a comprehensive lifetime ban; . . . [t]here are no exceptions."[187] This is a considerable burden for an individual to bear. Irrespective of whether Skoien had focused his constitutional challenge on the core Second Amendment right of self-defense, as identified in *Heller I*,[188] his conviction under § 922(g)(9) will permanently bar Skoien from possessing a firearm "for *any* reason,"[189] including self-defense.

When examined alongside *McDonald*, the nature of the imposition and severity of the burden on the right to keep and bear arms for self-defense under the Lautenberg Amendment necessitates the use of strict scrutiny.

[182] *See Heller I*, 554 U.S. 570, 635 (2008).
[183] *Id.* at 599.
[184] *Skoien II*, 587 F.3d at 812.
[185] *See infra* note 235.
[186] *Skoien II*, 587 F.3d at 811 (emphasis in original).
[187] *Id.*
[188] *See id.* at 812.
[189] *Id.* at 811.

A. Narrow Tailoring

To pass constitutional muster, legislation subject to strict scrutiny review must be narrowly tailored to further a compelling governmental interest.[190] Narrow tailoring requires serious, good faith consideration of reasonable alternatives that would achieve the government's legislative goal.[191] Narrow tailoring does not, however, require an exhaustive review of every conceivable alternative.[192] It is therefore imperative to evaluate the objective of the legislature in ratifying § 922(g)(9).

The Lautenberg Amendment to the Gun Control Act of 1968 is a sweeping regulatory statute that was enacted to prevent the use of firearms in violent domestic disputes.[193] Amid a growing concern that permitting domestic aggressors to possess firearms would have grave consequences for domestic victims, the Lautenberg Amendment was enacted to disqualify individuals convicted of misdemeanor crimes of domestic violence from possessing firearms.[194] Senator Lautenberg sought to disarm domestic aggressors because "[e]ven after a split, the individuals involved often by necessity have a continuing relationship of some sort."[195]

In *Heller I*, the Supreme Court noted that its decision does not cast doubt on a number of longstanding prohibitions on the possession of firearms by well-defined groups of individuals.[196] The Lautenberg Amendment has been categorized as a lawful prohibition on the possession of firearms,[197] and states in relevant part:

[190] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
[191] Grutter v. Bollinger, 539 U.S. 306, 339 (2003).
[192] *Id.*
[193] 142 CONG. REC. S2646-01 (1996) (statement of Sen. Frank Lautenberg).
[194] *Id*.
[195] *Id*. at S2646-02.
[196] *Heller I*, 554 U.S. 570, 626 (2008).
[197] *See Skoien III*, 614 F.3d 638, 642 (7th Cir. 2010).

> It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[198]

While the provisions of 18 U.S.C. § 922(g) have been a source of legal controversy, the judiciary has upheld the constitutionality of the Lautenberg Amendment.[199] In *United States v. Hayes*, the Supreme Court took the opportunity to examine the Lautenberg Amendment and inquire into the reasoning behind its enactment.[200] In *Hayes*, the defendant was indicted and charged under § 922(g)(9) for possessing firearms after having been convicted of a misdemeanor crime of domestic violence.[201] The defendant was originally charged and convicted in 1994 under a West Virginia statute that did not require a domestic relationship between the aggressor and victim, but rather was a common battery prohibition.[202] The defendant moved to dismiss the indictment on the grounds that § 922(g)(9) applies only to individuals previous convicted of an offense that specifies, as an element, a domestic relationship between the offender and victim.[203] Writing for the majority, Justice Ginsburg reasoned that construing § 922(g)(9) to exclude persons who engaged in domestic abuse and were convicted under a generic use-of-force statute—one that does not require a

[198] 18 U.S.C. § 922(g)(9) (2006).

[199] *See* United States v. White, 593 F.3d 1199, 1205 (11th Cir. 2010) (holding that § 922(g)(9) warrants inclusion on the list of presumptively lawful longstanding prohibitions on the possession of firearms); *In re* United States, 578 F.3d 1195, 1200 (10th Cir. 2009) (order granting petition for writ of mandamus) ("Nothing suggests that the *Heller* dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of misdemeanor domestic violence.").

[200] *See generally* 129 S. Ct. 1079 (2009).

[201] *Id.* at 1087.

[202] *Id.* at 1083.

[203] *Id.*

domestic relationship—"would frustrate Congress' manifest purpose."[204] The government must, however, prove the existence of a domestic relationship in order to establish that the underlying misdemeanor qualifies as a predicate offense.[205] In order to substantiate her claim, Justice Ginsburg looked to § 921(a)(33)(A), which defines the term "misdemeanor crime of domestic violence" as an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[206]

Justice Ginsburg determined that the definition contained in § 922(a)(33)(A) contains two requirements: First, a misdemeanor crime of domestic violence must "[have], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon";[207] and second, the crime must be "committed by" an individual who has a particular domestic relationship with the victim as identified by the statute.[208] In her opinion, Justice Ginsburg noted that existing felon-in-

---

[204] *Id.* at 1087.

[205] *Id.*

[206] 18 U.S.C. § 921(a)(33)(A) (2006); *see* United States v. White, 593 F.3d 1199, 1204 (11th Cir. 2010) (holding that the defendant's relationship with his live-in girlfriend constituted a domestic relationship for the purposes of §§ 922(g)(9) and 921(a)(33)(A)); United States v. Shelton, 325 F.3d 553, 563 (5th Cir. 2003) (holding that defendant's concession that he lived with his girlfriend was sufficient to satisfy the domestic relationship requirement under §§ 922(g)(9) and 921(a)(33)(A)).

[207] 18 U.S.C. § 921(a)(33)(A)(ii).

[208] *Id.*; *Hayes*, 129 S. Ct. at 1084.

possession laws failed to keep firearms out of the hands of persons who engaged in domestic abuse,[209] writing that the language of § 921(a)(33)(A) does not require that the predicate offense include, as an individual element, the existence of a domestic relationship between the offender and victim.[210] Rather, it is sufficient that the prior crime was an offense committed by the defendant against a domestic victim as proscribed by § 921(a)(33)(A)(ii).[211] Accordingly, the Court in *Hayes* held that "Congress defined 'misdemeanor crime of domestic violence' to include an offense 'committed by' a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime."[212]

Dissenting from the majority in *Skoien III*, Judge Sykes reiterated many of the arguments made in *Skoien II*. A number of these assertions are analogous with the Court's holding in *Hayes*.[213] Judge Sykes noted that the statutory definition of misdemeanor crime of domestic violence limits the applicability of § 922(g)(9) to persons who used or attempted to use physical force, or threatened the use of a deadly weapon against a domestic victim.[214] The statute thus applies only to a narrowly defined class of violent offender: "only those who have already used or attempted to use force or have threatened the use of a deadly weapon against a domestic victim are banned from possessing firearms."[215]

While attempting to analogize the Lautenberg Amendment to the list of presumptively lawful longstanding prohibitions on the possession of firearms in *Heller I*, the court in *White* inadvertently

---

[209] *Hayes*, 129 S. Ct. at 1093; *see* 142 CONG. REC. S2646-02 (1996) (statement of Sen. Frank Lautenberg).

[210] *Hayes*, 129 S. Ct. at 1084.

[211] *Id.*

[212] *Id.* at 1089.

[213] *See Skoien III*, 614 F.3d 638, 650 (7th Cir. 2010) (Sykes, J., dissenting).

[214] *See* 18 U.S.C. § 921(a)(33)(A)(ii) (2006); *Skoien II*, 587 F.3d 803, 816 (7th Cir. 2009).

[215] *Skoien II*, 587 F.3d at 816; *see Skoien III*, 614 F.3d at 650 (Sykes, J., dissenting).

called attention to the narrow tailoring of the Lautenberg Amendment.[216] By noting that the Lautenberg Amendment was designed to "close [a] dangerous loophole" that permitted domestic abusers to possess firearms,[217] the court highlighted an element of the Lautenberg Amendment that exudes narrow tailoring: it was enacted to close a loophole. A 'loophole' is defined as "[a]n ambiguity, omission, or exception . . . that provides a way to avoid a rule without violating its literal requirements."[218] In the eyes of Congress, domestic abusers were narrowly escaping felony convictions.[219] As a result, the Lautenberg Amendment was enacted to bring domestic violence misdemeanants under the scope of the felon-in-possession ban.

The *White* court proceeded to note that the felon-in-possession ban, a presumptively lawful prohibition under *Heller I*,[220] results in both an armed robber and tax evader losing their right to possess a firearm under § 922(g)(1).[221] The court contrasted this outcome with that of an individual convicted under the Lautenberg Amendment.[222] For the Lautenberg Amendment to apply, an individual must have first acted violently toward a family member or domestic partner, a predicate offense demonstrated by a misdemeanor crime of domestic violence conviction.[223] Although the court illustrated this distinction to substantiate its claim that the Lautenberg Amendment warrants inclusion in the list of presumptively lawful prohibitions recognized in *Heller I*,[224] the court perfectly distinguished an overinclusive law from a law that is underinclusive. In determining whether challenged legislation is narrowly tailored, courts favor laws that are

---

[216] *See* United States v. White, 593 F.3d 1199, 1205–06 (11th Cir. 2010).

[217] *Id.* at 1205 (citing 142 CONG. REC. S2646-02 (1996) (statement of Sen. Frank Lautenberg)).

[218] BLACK'S LAW DICTIONARY 962 (8th ed. 2004).

[219] *White*, 593 F.3d at 1205.

[220] *Id.*

[221] *Id.* at 1206.

[222] *Id.*

[223] *Id.*

[224] *Id.*

underinclusive rather than overinclusive.[225] In *White*, the court noted that the felon-in-possession ban in § 922(g)(1) "does not distinguish between the violent and non-violent offender."[226] Thus, the domestic violence misdemeanant ban under the Lautenberg Amendment, which applies only to a particular class of abusive misdemeanants, is narrowly tailored.

B. Compelling Governmental Interest

In *Korematsu v. United States*,[227] an early Supreme Court case involving the application of strict scrutiny review, the Court determined that "[p]ressing public necessity" may sometimes warrant interference with constitutional rights.[228] Courts are likely to uphold challenged legislation when there is a pressing public necessity, such as national security.[229] A pressing public necessity must still be narrowly tailored, irrespective of the nature of the necessity.[230] In *Grutter*, Justice O'Connor noted that, in the area of race based classifications, "[w]here the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, *I conclude that only those measures the State must take . . . to prevent violence*, will constitute a 'pressing public necessity.'"[231] Today, "pressing public policy," frequently termed

[225] *See* Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) ("[Legislative] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 293 n.6 (11th Cir. 2003) ("narrow tailoring . . . prohibits regulations [of adult businesses] that are *substantially broader than necessary*") (alteration in original) (emphasis added).

[226] *White*, 593 F.3d at 1206.

[227] 323 U.S. 214, 216 (1944).

[228] *Id.*; *accord* Grutter v. Bollinger, 539 U.S. 306, 351 (2003).

[229] *Korematsu*, 323 U.S. at 216.

[230] *Grutter*, 539 U.S. at 351.

[231] *Id*. at 353 (emphasis added).

"compelling governmental interest,"[232] is still without a bright-line rule.

The Gun Control Act of 1968 has long prohibited the possession of a firearm by any individual convicted of a felony.[233] In 2006, the 104th United States Congress saw the opportunity to extend the prohibition to include individuals convicted of a misdemeanor crime of domestic violence.[234] Senator Frank Lautenberg of New Jersey, the sponsor of the provision, sought to close the dangerous loophole that enabled a person convicted of a crime involving domestic violence to possess a firearm.[235] The senator recognized that existing prohibitions against felony possession failed to keep firearms out of the hands of domestic abusers because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies."[236] Senator Lautenberg referenced data from a New England Journal of Medicine report, indicating that a gun inside the residence of a home with a history of domestic abuse results in a five hundred percent increase in the likelihood that a woman would be murdered.[237] Crimes of domestic violence involve persons who share a history together,[238] yet many who commit these heinous offenses are never prosecuted.[239] One-third of individuals who commit crimes of domestic violence and are charged with misdemeanors would be charged as felons if the act were committed against a stranger.[240]

Senators Patricia Murray and Dianne Feinstein joined Senator Lautenberg in supporting the amendment because "the gun is the key ingredient most likely to turn a domestic violence incident into a

[232] *Id.*
[233] United States v. Hayes, 129 S. Ct. 1079, 1082 (2009).
[234] 142 CONG. REC. S2646-01 (1996) (statement of Sen. Frank Lautenberg).
[235] *Id*. at S2646-02.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] 142 CONG. REC. S8831-06 (1996) (statement of Sen. Frank Lautenberg).
[240] *Id.*

homicide."[241] Senator Feinstein cited ineffective and outdated laws as the reason many domestic violence offenders are not charged as felons.[242] The senator also proclaimed that plea bargains and the reluctance of victims to cooperate, either out of fear of additional violence or an unwillingness to partake in an overwhelming trial, result in misdemeanor convictions for crimes that ordinarily are felonies.[243]

By enacting § 922(g)(9), it is evident that Congress endeavored to narrow the gap that permitted individuals convicted of misdemeanor crimes of domestic violence to possess a firearm. Senator Lautenberg and his colleagues were concerned that permitting aggressors to possess firearms would have parlous consequences for domestic violence victims.[244] In the First Amendment free speech context, a federal statute banning the broadcast of indecent material during a specified period of time during the day passed constitutional muster because the government has a valid interest in supplementing parental supervision of children's exposure to indecent material and promoting the well-being of minors.[245]

The Lautenberg Amendment satisfies two compelling governmental interests. The domestic violence misdemeanant firearm ban closes a dangerous loophole that previously allowed individuals who engaged in serious spousal or child abuse to possess a firearm. Were it not for mitigating circumstances, these individuals would be convicted as felons and subject to the felon-in-possession handgun ban under § 922(g)(9). By keeping firearms out of the hands of violent domestic offenders, the Lautenberg Amendment also serves the compelling governmental interest of preventing violence against spouses and children.[246] Furthermore, based on the assertion that the

[241] 142 Cong. Rec. S10379-01 (1996) (statement of Sen. Patricia Murray).

[242] *Id.* at 10380 (statement of Sen. Dianne Feinstein).

[243] *Id.*

[244] *See* 142 CONG. REC. S2646-02 (1996) (statement of Sen. Frank Lautenberg).

[245] Action for Children's Television v. FCC, 58 F.3d 654, 678 (D.C. Cir 1995).

[246] *See supra* note 193.

government has both a legitimate and compelling interest in preventing crime,[247] one would be hard-pressed to challenge the assertion that the government has a strong interest in preventing domestic abusers from possessing firearms.[248]

CONCLUSION

Some may question the significance of debating the appropriate standard of scrutiny for laws that infringe on the Second Amendment right to keep and bear arms.[249] However, in the absence of an explicit standard of review for Second Amendment jurisprudence, the federal courts are left without a clear standard for resolving challenges to existing firearm legislation.

The view of the Rehnquist Court, that strict scrutiny is strict in theory and not fatal in fact, should herald the use of strict scrutiny review in adjudicating challenges to laws that strike at the core Second Amendment right to keep and bear arms for self-defense.[250] Shortly after the Supreme Court's landmark decision in *McDonald*, wherein the Court held that the Second Amendment right to keep and bear arms for self-defense is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment,[251] the Seventh Circuit was presented with the opportunity to address the "'levels of scrutiny' quagmire"[252] left unanswered by *Heller I*.[253]

---

[247] *See* United States v. Salerno, 481 U.S. 739, 749 (1987).

[248] *See* 142 CONG. REC. S2646-02 (1996) (statement of Sen. Frank Lautenberg); *see also* Matthew Miller et al., *State-Level Homicide Victimization Rates in the U.S. in Relation to Survey Measures of Household Firearm Ownership, 2001–2003*, 2/1/07 SOC. SCI. & MED. 656 (2003).

[249] *Cf.* Metro Broad., Inc. v. FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). *But cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (Stevens, J., dissenting).

[250] *See Heller I*, 554 U.S. 570, 634–35 (2008).

[251] McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3050 (2010) (plurality opinion).

[252] *Skoien III*, 614 F.3d 638, 641–42 (7th Cir. 2010).

Rather than attempting to determine the appropriate standard of judicial scrutiny, the Seventh Circuit acknowledged that the Lautenberg Amendment need only satisfy heightened scrutiny to pass constitutional muster.[254] Thus, by turning a blind eye to recent federal practice, the Seventh Circuit overlooked an opportunity to solidify its position as a dynamic, erudite court by pioneering the implementation of strict scrutiny review for legislation that unconstitutionally interferes with the core Second Amendment right.

[253] *See Heller I*, 554 U.S. at 626–30.
[254] *See Skoien III*, 614 F.3d at 641–42.