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Avoiding the Second Amendment Scrutiny Quagmire: A Pragmatic Test for Second Amendment Challenges Based on International Evidence

CAMERON SCHLAGEL*

INTRODUCTION

The regulation of firearms in the United States is a very contentious and oft-debated topic. One of the primary issues is defining the scope of the Second Amendment's right to bear arms. After analyzing the efficacy of various international firearm regulations, this note will propose that Second Amendment challenges be evaluated under a new pragmatic test. The Second Amendment is especially unique in an international comparative context because the United States is arguably the only country to include a right to bear arms in its Constitution.¹ As a result, Americans are very divided over, and very passionate about, the regulation of firearms.² Further muddying the water, the scope of the

* J.D., class of 2017, Loyola Law School, Los Angeles; Editor-in-Chief, *Loyola of Los Angeles International & Comparative Law Review*, Vols. 39 & 40. I would like to thank Professor Allan Ides for his guidance and thoughtful commentary on this Note, as well as Professor Kimberly West-Faulcon for encouraging me to consider going beyond the traditional standards of review, which led me to develop the "pragmatic" standard of review proposed herein. I would also like to thank the editors and staff of the *Loyola of Los Angeles International & Comparative Law Review* for their hard work and commitment to excellence.

1. *Firearms-Control Legislation and Policy*, LAW LIBRARY OF CONGRESS 2 (2013), <http://loc.gov/law/help/firearms-control/index.php> ("[a]mong the countries surveyed only Mexico was found to have an express provision in its Constitution that recognizes the right of inhabitants to bear arms"); see also Wendy Cukier, Tania Sarkar, & Tim Quigley, *Firearm Regulation: International Law and Jurisprudence*, 6 CAN. CRIM. L. REV. 99, 116 (2001) ("There is no right to bear arms under any international human rights instrument. In terms of domestic rights guarantees, the United States appears to be the only jurisdiction in which such a right may have any semblance of a legal or constitutional basis"); Ricardo N. Cordova, *The Tree's Acorns and The Gun's Clips: The Battle Between Gun Control Advocates and The Constitutions of the United States, Ireland, and Australia*, 10 CHI.-KENT J. INT'L & COMP. L. 1 (2010).

2. See generally Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard Of Scrutiny Should Apply To Gun-Control Laws?*, 105 NW. U. L. REV. 85 (Oct. 27, 2010)

Second Amendment “right to bear arms” is less than clear. It was not until recently that the Supreme Court defined the extent to which the Second Amendment protects an individual’s right to own and possess a firearm. In 2008, the Supreme Court addressed and clarified the scope of protection afforded by the Second Amendment in *District of Columbia v. Heller*.³ Writing for the *Heller* majority, Justice Scalia stated the Second Amendment “confers an *individual* right to keep and bear arms . . .”⁴ and that like the First and Fourth Amendments, the Second Amendment “codified a *pre-existing* right.”⁵ Two years later, in *McDonald v. City of Chicago*,⁶ the Court further defined its Second Amendment jurisprudence when it held the Second Amendment right recognized by *Heller* is incorporated by the Due Process Clause of the Fourteenth Amendment thereby making the right equally applicable to the Federal Government and the States.⁷ Following these two seminal Supreme Court decisions, various laws regulating the possession or use of firearms have been challenged across the country.

Adjudicating Second Amendment challenges has been particularly difficult for post *Heller-McDonald* courts because, while the determinations made by the Court in *Heller* and *McDonald* significantly clarified the scope of contemporary Second Amendment jurisprudence, the Court did not determine the appropriate judicial standard of review applicable to Second Amendment challenges.⁸ As a result, lower courts are divided over whether Second Amendment challenges should be reviewed under strict scrutiny, intermediate scrutiny or a type of tiered scrutiny.⁹ Choosing the standard of review to apply to cases where

(discussing their respective opinions regarding the efficacy of gun-control in the context of choosing a Second Amendment standard of review).

3. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

4. *Id.* at 622 (emphasis added).

5. *Id.* at 592 (emphasis in original).

6. *McDonald v. City of Chicago*, III, 561 U.S. 742 (2010).

7. *Id.* at 791.

8. See generally, Jason T. Anderson, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547 (2009) (discussing the *Heller* decision, specifically that the Supreme Court declined to adopt a judicial standard of review applicable to Second Amendment cases, and arguing that the Intermediate standard of review is most appropriately applicable to Second Amendment cases); Rosenthal & Malcolm, *supra* note 2 (debating both the *Heller* and *McDonald* holdings, their effect on gun regulation, and the applicable standard of review).

9. See generally *United States v. Chovan*, 735 F.3d 1127, 1133 (9th Cir. 2013) (noting that other circuits have evaluated Second Amendment cases using “varying rationales”); Larisa Vaysman, *Sixth Circuit Holds Ban On Gun Possession After Commitment to Mental Institution Violates Second Amendment*, SQUIRE PATTON BOGGS: SIXTH CIRCUIT APP. BLOG (Dec. 18, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-holds-ban-on-gun-possession-after-commitment-to-mental-institution-violates-second-amendment/> (stating that in

government regulation of a constitutional right is challenged is particularly important because the standard of review directly affects the viability of the law or regulation at bar.¹⁰ Due to the unique nature of the interests at stake in Second Amendment challenges—the constitutional right to bear arms on one side and governmental concerns for public safety on the other—lower courts have been unable to agree on the standard of review applicable to Second Amendment challenges.

Proponents of gun regulations claim there is a direct correlation between the availability of firearms and high homicide rates in the United States.¹¹ From this premise, proponents argue that government regulations which aim to limit the use and possession of firearms will result in a decrease in homicides and mass shootings such as the Sandy Hook tragedy.¹² Proponents often cite the strict firearms regulations adopted by other developed nations such as Australia and the United Kingdom.¹³ Meanwhile, those opposed to gun regulations claim that strict governmental regulation of firearms results in increased homicide rates.¹⁴ The basis for the opposition's claim is that firearm regulations typically deprive law-abiding citizens of their right to bear arms, while criminals—

Tyler v. Hillsdale County Sheriff's Dept., the court held “alone and in opposition to nine other circuits” by applying the strict scrutiny standard of review to a Second Amendment case involving the right of a person previously committed to a mental institution to own a gun).

10. See DONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 18.3(a)(i) (2014).

11. See e.g., Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/society-and-culture/us-gun-policy-global-comparisons/p29735> (last updated June 24, 2015) (stating that “The United States . . . has about 35-50 percent of the world’s civilian owned guns . . . It ranks number one in firearms per capita. The United States also has the highest homicide-by-firearm rate among the world’s most developed nations”). John Donohue, *Gun Control: What We Can Learn From Other Advanced Countries*, NEWSWEEK, Oct. 3, 2015, <http://www.newsweek.com/gun-control-what-we-can-learn-other-advanced-countries-379105>.

12. See Donahue, *supra* note 11.

13. *Id.*; see also Anthony Faiola, *After Shooting Tragedies, Britain Went After Guns*, WASH. POST, Feb. 1, 2013, https://www.washingtonpost.com/world/europe/after-shooting-tragedies-britain-went-after-guns/2013/01/31/b94d20c0-6a15-11e2-9a0b-db931670f35d_story.html.

14. See e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (1998) (discussing the contributing factors behind criminal behavior and the ineffectiveness of gun-control regulations); David Paulin, *Piers Morgan and The Failure of British Gun Control: Could The CNN Host Really Be So Ignorant of His Own Country's Recent History?*, FRONTPAGE MAG, Jan. 1, 2013, <http://www.frontpagemag.com/fpm/171264/piers-morgan-and-failure-british-gun-control-david-paulin> (discussing the similarity between the Newtown, Conn., school massacre and how anti-gun pundits like Piers Morgan neglect statistics from countries like the UK).

who are, by definition, not law-abiding—continue to use and possess firearms at higher rates.¹⁵

The next logical progression of the Supreme Court's Second Amendment jurisprudence would be to determine the judicial standard of review applicable to Second Amendment challenges. The Court's determination is particularly important because it will have a long standing impact on the scope of the Second Amendment right to bear arms and the viability of governmental firearm regulations in the United States. Consistent with Justice Stephen Breyer's opinion that international law can be particularly relevant to the Supreme Court's contemporary constitutional interpretation,¹⁶ this note suggests the Court's decision must be guided by a comparative analysis of the history and statistical efficacy of firearms regulations in other developed nations. Contrary to the United States, many other developed nations have long histories of strict governmental firearms regulations. Thus, there is a relatively large body of empirical research analyzing the efficacy of firearm regulations in these countries, an analysis of which, would be valuable to guide the Court's ultimate decision.

Part I of this note will briefly discuss the comparatively unique constitutional guarantee of the right to bear arms in the United States, the current state of the Supreme Court's Second Amendment jurisprudence and how lower courts have addressed the standard of review issue. Part II will consist of an in-depth analysis of the history and statistical efficacy of firearm regulations in: Australia, Canada, and Great Britain/UK. Part III will discuss the implications of choosing a standard of review and, after synthesizing the information presented in Parts I and II, will suggest

15. See generally Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?: A Review of International and Some Domestic Evidence*, 30 HARV. J. L. & PUB. POL'Y 650 (2007).

16. See, e.g., Stephen Breyer, *The Supreme Court in an Interdependent World*, WALL STREET J., Sept. 14, 2015, <https://www.wsj.com/articles/the-supreme-court-in-an-interdependent-world-1442272247>; Nina Totenberg, *Law Beyond Our Borders: Justice Breyer Is On A Mission*, N.P.R., Sept. 14, 2015, 5:02 AM, <http://www.npr.org/2015/09/14/439514086/law-beyond-our-borders-justice-breyer-is-on-a-mission>; Adam Liptak, *Justice Breyer Sees Value in a Global View of Law*, N.Y. TIMES, Sept. 12, 2015, https://www.nytimes.com/2015/09/13/us/politics/justice-breyer-sees-value-in-a-global-view-of-law.html?_r=0; Robert Barnes, *Breyer says understanding foreign law is critical to the Supreme Court's work*, WASH. POST, Sept. 12, 2015, https://www.washingtonpost.com/politics/courts_law/breyer-says-understanding-foreign-law-is-critical-to-supreme-courts-work/2015/09/12/36a38212-57e9-11e5-8bb1-b488d231bba2_story.html?utm_term=.dd47241090d6; Andrew Strickler, *In Globalized World, Breyer Urges Closer Look at Foreign Law*, LAW 360, Apr. 14, 2016, 8:30 PM, <https://www.law360.com/articles/782885/in-globalized-world-breyer-urges-closer-look-at-foreign-law>.

that the Court adopt the pragmatic test proposed herein as the judicial standard of review for Second Amendment challenges.

PART I

Judicial review of an alleged government violation of a constitutionally protected right is predicated upon the application of a particular standard of review. Standards of review provide a framework for the trier of fact to determine whether the challenged law has infringed upon a constitutionally protected right.¹⁷ The amount of judicial deference given to the legislature is determined by the purpose of the legislative act and the degree of relationship between the “asserted governmental end”¹⁸ and the type of protected conduct being infringed upon.¹⁹

Strict scrutiny and intermediate scrutiny are “quintessential balancing inquiries that focus ultimately on whether a particular government interest is sufficiently compelling or important to justify an infringement on the individual right in question.”²⁰ Strict scrutiny has traditionally been applied to cases involving “preferred liberties entitled to more stringent judicial protection.”²¹ This particularly austere standard of review requires the law at bar to be “narrowly tailored”²² to further a “compelling governmental interest.”²³ Put another way, the government “bears the burden of proving that the law is in fact necessary to achieve a compelling state interest”²⁴ and that the law is “the least restrictive means of achieving the government’s purpose.”²⁵ In comparison to strict scrutiny, intermediate scrutiny is a more flexible standard of review, allowing for a (minimal) degree of deference to the legislature.²⁶ Laws reviewed under the intermediate scrutiny standard will be upheld if they “serve important governmental objectives and . . . are substantially related to achievement of those objectives.”²⁷

17. See Anderson, *supra* note 8, at 556.

18. ROTUNDA & NOWAK, *supra* note 10.

19. *Id.*; see also *Ezell v. City of Chicago*, 651 F.3d 684, 707 (7th Cir. 2011).

20. *Tyler v. Hillsdale County Sheriff’s Dep’t*, 775 F.3d 308, 323 (6th Cir. 2014) (quoting *Heller v. District of Columbia* (Heller II), 670 F.3d 1244, 1281 (D.C. Cir. 2011)), *rev’d en banc*, 837 F.3d 678 (6th Cir. 2016).

21. Anderson, *supra* note 8, at 563 (internal quotations omitted).

22. *Ezell*, 651 F.3d at 707 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

23. Anderson, *supra* note 8, at 562.

24. *Id.*

25. *Id.* at 561.

26. *Id.* at 560–61.

27. *Id.* at 562 (internal quotations omitted).

Generally, although not mandated by the Court in *Heller*, most circuit courts have evaluated Second Amendment challenges by applying a two-step approach where the court “(1) asks whether the challenged law burdens the conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.”²⁸ While the first step of this approach is vitally important, the second step—in which the court determines and applies the appropriate standard of review—is the topic discussed in this note. In the context of the standard of review, it is worth noting that the majority in *Heller* rejected the use of the interest-balancing inquiry or rational basis review proposed by Justice Breyer in his dissenting opinion.²⁹ Based on the rejection of Justice Breyer’s proposed approach, it follows that post-*Heller* courts are likely confined to the application of one of the remaining two standards: the strict scrutiny standard of review or the intermediate scrutiny standard of review³⁰—neither of which, this note argues, is appropriate for review of Second Amendment challenges. Although Justice Breyer’s interest-balancing approach was rejected, it remains useful to an analysis to determine the appropriate standard of review, and is, thus, discussed in Part III of this note. The majority of lower courts have chosen to apply intermediate scrutiny to Second Amendment challenges, while others have applied some other level of scrutiny—less than strict scrutiny—such as a “multi-tiered”³¹ or “hybrid”³² approach where the standard of review depends on the type of Second Amendment conduct being regulated.³³ One Sixth Circuit panel,³⁴ that was subsequently reversed, has

28. *United States v. Chovan*, 735 F.3d 1127, 1136 (joining the Third, Fourth, Seventh, and Tenth Circuits in evaluating Second Amendment claims under the two-step approach).

29. See *Heller*, 554 U.S. at 634 (Justice Scalia stating that “[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding interest balancing approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really* worth insisting upon.”).

30. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 469 (4th Cir. 2011) (where the appellate court, discussing the standard of review for Second Amendment cases, stated that “The Court did . . . rule out a rational basis review . . . [and] by listing several ‘presumptively lawful regulatory measures’ . . . the Court provided a hint as to the types of governmental interests that might be sufficient to withstand Second Amendment challenges, as well as the contexts in which those interests could be successfully invoked” (citation omitted)).

31. *Tyler*, 775 F.3d at 324.

32. *Id.* at 325.

33. *Id.* (noting that the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits have all either adopted an approach based on the conduct being regulated, similar to First Amendment standards of review, or employed a level of scrutiny less than strict (arguably intermediate) but allowed for the future imposition of strict scrutiny or intermediate scrutiny depending on the circumstances).

34. *Tyler*, 775 F.3d at 328–29 (setting forth the court’s reasons for choosing strict scrutiny over intermediate scrutiny).

determined that strict scrutiny should be applied to Second Amendment challenges.³⁵

The division among the circuits created in the wake of *Heller* and *McDonald* has been noted by one court, which stated that “[t]he appropriate level of scrutiny that courts should apply in Second Amendment cases . . . remains a difficult, highly contested question,”³⁶ and “*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations . . . The general trend, however, has been in favor of some form of intermediate scrutiny.”³⁷

PART II: A SURVEY OF INTERNATIONAL FIREARMS-CONTROL LEGISLATION

A. Common Regulatory Themes Among Other Developed Nations

The majority of developed nations around the world regulate the possession and use of firearms more strictly than the United States.³⁸ Many of the countries surveyed began regulating firearms to respond to mass shootings similar to the shootings at Columbine High School and Sandyhook Elementary in the United States.³⁹ One of the common themes among other developed countries is the requirement for citizens to obtain a firearm license.⁴⁰ All the countries discussed in this note have adopted some form of a licensing requirement.⁴¹ While the prerequisites for obtaining a firearm license varies among the countries discussed in this section, national licensing requirements are among the most apparent differences between the regulatory approach of other developed nations and that of the United States. Additionally, many countries do not recognize concerns for self-defense as a valid reason to obtain a firearm

35. However, it could be argued that the standard of review the Seventh Circuit has utilized is more closely related to strict scrutiny than intermediate scrutiny. *See Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (“a more rigorous showing than that applied in *Skoien* should be required, if not quite strict scrutiny”).

36. *Tyler*, 775 F.3d at 326.

37. *Id.*

38. *See generally, Firearms-Control Legislation and Policy*, *supra* note 1 (the comparative analysis of “the different legal approaches taken by eighteen countries and the European Union with regard to ownership, possession, and other activities involving firearms” by the Law Library of Congress generally supports the contention that the firearm regulations in the United States are among the most lenient in the world).

39. *Id.* at 1–2.

40. *Id.*

41. *See id.* at 4–12 table 1.

license.⁴² The general requirement for firearm licenses notwithstanding, this view stands in stark contrast to the majority viewpoint in the United States that—arguably—the “core” protection of the Second Amendment is the right to possess a firearm for self-defense within one’s home.⁴³ Other common themes present among most, if not all, the countries surveyed include: requiring criminal background checks, determinations of mental and physical health (often ascertained through the disclosure and examination of an individual’s medical records or through independent fitness examinations), performance of a firearm safety course and/or test, minimum age requirements, laws regulating the means by which firearms are transported and stored, and proof of residency in the jurisdiction.⁴⁴

*B. Firearms Regulation by Country:
Australia, Canada, and Great Britain*

1. Australia

Australia has some of the most comprehensive firearms regulations in the world. Under the Australian Constitution’s commerce provisions, the federal government has the power to regulate the cross-border trade of firearms, while the State and Territorial governments of Australia carry the responsibility to adopt specific and more localized firearms regulations.⁴⁵ The Australian Constitution does not contain any guarantee of the right to bear arms.⁴⁶ Prior to a mass shooting in 1996, Australian firearms regulations were relatively lenient compared to their international counterparts.⁴⁷ In response to a mass shooting in the Port Arthur area, where a lone gunman carrying a semiautomatic rifle killed thirty-five people and wounded eighteen others, the state and federal governments of Australia agreed to the National Firearms Agreement (“NFA”) proposed by the Australian Police Ministers’ Council (“APMC”) in 1996.⁴⁸ The provisions of the agreement were based in large part on findings made by the National Committee on Violence,

42. *See id.*

43. After the Supreme Court’s decision in *Heller*, many legal scholars have interpreted Justice Scalia’s majority opinion as limiting the “core” of the second amendment right to the purpose of self-defense in one’s home. *See* Anderson, *supra* note 8, at 555, 574; Rosenthal & Malcolm, *supra* note 2, at 447. This interpretation of Justice Scalia’s *Heller* opinion will be discussed in more detail in Part III of this note.

44. *Firearms-Control Legislation and Policy*, *supra* note 1, at 4–12 table 1.

45. *Id.* at 17.

46. *Id.*

47. *Id.*

48. *Id.* at 16–17.

which had been established in 1988 to study methods for the prevention of violent crime.⁴⁹ After the universal adoption of the agreement, various firearms regulations imposed by each respective state and territory underwent considerable revisions to reflect the new national standard for the regulation of firearms.⁵⁰ The agreement also led to the formation of a national buyback program “to encourage firearms owners and dealers to surrender [newly] prohibited weapons.”⁵¹

The uniform approach of the 1996 NFA established regulations which include, but are not limited to: (1) national bans on the import of semi-automatic assault weapons⁵² and their corresponding parts or implements, and on any trade or resale of said firearms within Australia;⁵³ (2) categorical classification of firearms making it easier to regulate groups of firearms based on common characteristics;⁵⁴ (3) permit requirements for every type of firearm with a twenty-eight-day waiting period after the application is complete;⁵⁵ and (4) restrictions on the purchase of ammunition and requirements for the storage of firearms.⁵⁶

Prerequisites for permit approval include: (1) applicants must be at least eighteen years of age and are required to complete a standardized safety training course, and (2) applicants must demonstrate a “genuine reason”—not including self-defense—to obtain a permit.⁵⁷ Permits may be refused based on the presence of criminal convictions for violent offenses within the five years prior to the permit application or “reliable evidence of a mental or physical condition which would render the applicant unsuitable for owning, possessing, or using a firearm.”⁵⁸

Each respective Australian state or territory amended their previous firearms regulations to conform to the guidelines contained in the NFA.⁵⁹ Additionally, the Australian national government established a twelve-

49. *Id.* at 17.

50. *Firearms-Control Legislation and Policy*, *supra* note 1, at 17–18.

51. *Id.* at 18.

52. *Id.* at 19 (described as all semi-automatic self-loading and pump action longarms, and all parts, including magazines, for such firearms, included in License Category D, and control of the importation of those firearms included in License Category C”).

53. *Id.*

54. *Id.* (e.g., firearms such as “certain semiautomatic and self-loading rifles and shotguns,” which are included in categories C and D, are strictly regulated and must be stored in approved gun safes).

55. *Id.* at 20.

56. *Firearms-Control Legislation and Policy*, *supra* note 1, at 20–21 (ammunition may only be purchased in limited quantities within a given period and firearms and ammunition must be stored in separate locked containers).

57. *Id.* at 20.

58. *Id.* at 21 (quotations omitted).

59. *Id.* at 21.

month grace period, a firearms buyback program, and a nationwide education program to encourage compliance with the new regulations.⁶⁰ The resolution also provided for the imposition of “severe penalties” for any breaches of the new regulations at the end of the grace period.⁶¹ In a 2008 study, the Australian Institute of Criminology (“AIC”) determined the various states and territories had generally complied with the provisions of the 1996 agreement.⁶²

The buyback program led to the surrender of more than six-hundred thousand firearms.⁶³ One study stated that “[i]n terms of the absolute number of guns destroyed, Australia’s gun buyback ranks as the largest destruction of civilian firearms in any country over the period 1991–2006.”⁶⁴ Notwithstanding the general success of the buyback program, there was an increase in the illegal trade of firearms in Australia after the implementation of the 1996 agreement.⁶⁵ To curb this problem, the APMC enacted the National Firearm Trafficking Policy Agreement in July 2002.⁶⁶ This agreement provided for increased border control, national regulations of firearm manufacturing, heightened recording requirements for firearms dealers, and harsher penalties for violations of the 1996 agreement and/or the 2002 agreement.⁶⁷ In October 2002, a lone gunman with several handguns killed two people and injured five others at Monash University in Melbourne, Victoria.⁶⁸ The gunman was a licensed firearm owner who, as determined at his trial, suffered an apparent “mental impairment.”⁶⁹ This incident led the legislature to enact further regulations to restrict the import, use, and possession of certain types of handguns.⁷⁰ As part of the regulatory scheme, the Australian parliament also enacted the National Handgun Buyback Act in 2003,

60. *Id.*

61. *Id.*

62. *Firearms-Control Legislation and Policy*, *supra* note 1, at 21.

63. *Id.* at 22.

64. *Id.* (quoting Andrew Leigh & Christine Neill, *Do Gun Buybacks Save Lives? Evidence from Panel Data*, 12 AM. LAW & ECON. REV. 510 (2010), http://andrewleigh.org/pdf/GunBuyback_Panel.pdf).

65. *Id.*

66. *Id.*

67. *Id.* at 22–23.

68. *Firearms-Control Legislation and Policy*, *supra* note 1, at 23.

69. *Id.*

70. The new handgun regulations prohibited the sale of handguns with a caliber exceeding .38 (with limited exception for participation in a “specifically accredited sporting event”), a barrel length less than 120-mm for semiautomatic handguns and 100-mm for single shot handguns, and a magazine capacity exceeding 10 rounds. *Id.* at 24.

which compensated citizens who surrendered handguns that were not in compliance with the new restrictions.⁷¹

a. Impact and Statistical Efficacy of Australia's Firearm Regulations

Following the adoption of the 1996 agreement, the AIC established a national monitoring program to track the incidence of homicide and violent crime, as well as the type of weapons used in the commission of these crimes.⁷² Due in large part to the AIC's program, as well as additional independent studies, there is an abundance of statistical information regarding the use of firearms in violent crimes. This information provides a basis from which a discussion can be had over whether there is a positive relationship between strict governmental regulation of firearms and the rate of homicides and violent crimes. Several economists, professors, and legal scholars have analyzed the statistics provided by the AIC and reached differing conclusions regarding whether Australia's strict regulatory scheme has had a substantial impact on the violent crime rates.⁷³

A 2003 report by representatives of the AIC found a 47% decrease in firearm-related deaths over a period from 1991 to 2001.⁷⁴ Firearm suicides accounted for 77% of the firearm-related deaths, while firearm homicides accounted for 15%.⁷⁵ It is worth noting that a number of scholars have criticized the inclusion of suicide deaths in studies analyzing the efficacy of firearm regulations.⁷⁶ Notwithstanding the importance of suicide prevention, one criticism of including those statistics is that, in general, the primary purpose of firearm regulations is to reduce the use of firearms in association with violent crimes.⁷⁷

71. *Id.* at 18.

72. *Id.*

73. See Wang-Sheng Lee & Sandy Suardi, *The Australian Firearms Buyback and Its Effect on Gun Deaths* (Melbourne Institute of Applied Economic and Social Research, Working Paper No. 17/08), http://www.melbourneinstitute.com/downloads/working_paper_series/wp2008n17.pdf; Jeanine Baker & Samara McPhedran, *Gun Laws and Sudden Death: Did the Australian Firearms Legislation of 1996 Make a Difference?*, BR. J. CRIMINOLOGY (2006), <http://armsandthelaw.com/archives/GunLawsSudden%20DeathBJC.pdf>; Christine Neill & Andrew Leigh, *Weak Tests and Strong Conclusions: A Re-Analysis of Gun Deaths and the Australian Firearms Buyback*, 12 AUSTL. NAT'L U. CTR. ECON. POL'Y, Discussion Paper No. 555, <https://digitalcollections.anu.edu.au/bitstream/1885/45285/3/DP555.pdf>.

74. Jenny Mouzos & Catherine Rushforth, *Firearms Related Deaths in Australia, 1991–2001*, AIC TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE No. 269, at 1 (Nov. 2003), <http://www.aic.gov.au/publications/current%20series/tandi269/view%20paper.html>.

75. *Id.* at 2.

76. See Baker & McPhedran, *supra* note 73; Lee & Suardi, *supra* note 73; LOTT, *supra* note 14.

77. See, e.g., LOTT, *supra* note 14, at 10–11.

Additionally, because of the political nature of firearm regulation, there is a tendency for individuals to point to these studies as evidencing the efficacy of firearm regulations without disclosing the fact that the overall decline in “firearm-related deaths” is primarily due to a substantial decrease in suicide deaths.⁷⁸ In addition to the reports prepared by the AIC, other non-governmental studies have utilized the statistics collected by the AIC, as well as other intergovernmental organizations, to analyze the efficacy of Australian firearm regulations.⁷⁹

A 2006 study by Jeanine Baker and Samara McPhedran analyzed the effects of the NFA on firearm-related deaths and was published in the *British Journal of Criminology*.⁸⁰ Baker and McPhedran analyzed data obtained from the Australian Bureau of Statistics, the AIC, and the National Injury Surveillance Unit, focusing on the period ranging from 1979–2004.⁸¹ The stated goal of the study was to “[o]bjectively determine whether the intervention of the 1996 NFA . . . achieved the early predictions of a reduction in all ‘types’ of firearm-related deaths.”⁸² Baker and McPhedran concluded that “examination of the sudden death categories presented here indicates that evidence [of] overall reductions is tenuous at best, with only firearm suicide rates post-NFA being significantly different from those predicted and the observed rates.”⁸³ They found the rate of firearm suicides continued to decline before and after the implementation of the NFA.⁸⁴ However, the authors noted the poor reliability of suicide statistics due to the rate of suicide being “[h]ighly influenced by other societal changes,”⁸⁵ confounding the ability to discern any effect on firearm suicides that may have resulted from the NFA.⁸⁶ Analysis of firearm homicide statistics reflected a pattern of steady decline in firearm homicides prior to the implementation of the NFA, which remained on a consistent course after the NFA’s implementation in 1996.⁸⁷ Based on the lack of a statistically significant

78. See, e.g., Margot Sanger-Katz, *Gun Deaths Are Mostly Suicides*, N.Y. TIMES, Oct. 8, 2015, http://www.nytimes.com/2015/10/09/upshot/gun-deaths-are-mostly-suicides.html?_r=0 (explaining that there is a common misconception in America when we think about gun deaths; we focus on homicide).

79. See Baker & McPhedran, *supra* note 73; Lee & Suardi, *supra* note 73; Neill & Leigh, *supra* note 73.

80. Baker & McPhedran, *supra* note 73.

81. *Id.* at 3–4.

82. *Id.* at 3.

83. *Id.* at 10.

84. *Id.* at 5, 10–11.

85. *Id.* (employment levels, financial well-being, and the increased availability of suicide prevention programs or support networks were among the societal changes noted by the authors).

86. Baker & McPhedran, *supra* note 73, at 10.

87. *Id.* at 7.

decline in firearm homicides after the NFA was implemented, Baker and McPhedran found “the NFA had no effect on firearm homicide in Australia.”⁸⁸ Furthermore, the authors noted “a ground-breaking Australian study” which found that, “over 90 percent of firearms used to commit homicide were not registered and the perpetrators were not licensed.”⁸⁹

Later, in a 2007 study, economists Christine Neill and Andrew Leigh “highlight[ed] important flaws” in the analytical approach taken by Baker and McPhedran, and stated their disagreement with Baker and McPhedran’s conclusion that “the gun buy-back and restrictive legislative changes had no influence on firearm homicide in Australia.”⁹⁰ Neil and Leigh disagreed with Baker and McPhedran’s use of non-firearm deaths as a control group and a test for method substitution, from which they argued Baker and McPhedran could “draw virtually any conclusion they wish.”⁹¹ The authors found that re-analyzing the data over a longer period “[s]trengthens the evidence against the null hypothesis that the NFA had no effect on firearm suicides or homicides, and more than doubles the estimated number of lives saved.”⁹² Neil and Leigh emphasized that the “high degree of variability” in the data suggests the time series approach employed by Baker and McPhedran “cannot conclusively answer the question of whether the NFA cut gun deaths.”⁹³ Neil and Leigh concluded that, “to the extent that time series evidence points anywhere, it is towards the conclusion that the NFA reduced gun deaths.”⁹⁴

In arguably the most comprehensive study to date, Wang-Sheng Lee and Sandy Suardi re-analyzed the same data as previous studies over the same extended time period as Neil and Leigh in an attempt to “resolve the debate surrounding the effects of the NFA.”⁹⁵ Lee and Suardi employed an extensive battery of structural break tests⁹⁶ and conducted a

88. *Id.*

89. *Id.* at 11.

90. Neill & Leigh, *supra* note 73, at 1 (quoting Baker & McPhedran, *supra* note 73, at 9).

91. *Id.* at 9.

92. *Id.* at 12.

93. *Id.* at 13.

94. *Id.*

95. Lee & Suardi, *supra* note 73, at 3 (The authors noted the existence of a “considerable rhetorical debate regarding the impact of the NFA on firearm homicide” in Australia despite considerable research using homicide statistics from the same source).

96. The authors first examined the stationarity of the data and the order of the ARIMA model, and subsequently tested the data utilizing the Quandt Test, the Bai Sequential Multiple Break Test, and the Bai and Perron Test, all of which are structural break tests. *Id.*

“rigorous analysis” of the available data.⁹⁷ The authors also analyzed the rate of homicides and suicides, by means other than a firearm, to determine whether the NFA had any “substitution effects—that reduced access to firearms may have led those bent on committing homicide or suicide to use alternative methods.”⁹⁸ Lee and Suardi found “[l]ittle evidence to suggest that [the NFA] had any significant effects on firearm homicides and suicides.”⁹⁹ Additionally, they found no evidence of any substitution effects.¹⁰⁰ Lee and Suardi ultimately concluded that “although gun buybacks appear to be a logical and sensible policy that helps placate the public’s fears, the evidence so far suggests that in the Australian context, the high expenditure incurred to fund the 1996 gun buyback has not translated into any tangible reduction in terms of firearm deaths.”¹⁰¹

2. Canada

Canada has a history of relatively strict gun control measures, with strict gun control laws being passed as early as 1976.¹⁰² Currently, firearms in Canada are regulated on the federal level under the 1995 Firearms Act and Part III of the Criminal Code (“CFA”).¹⁰³ The “[p]ossession, transport, and storage of firearms” all fall within the provisions of the CFA and corresponding provisions of the Criminal Code.¹⁰⁴ Additionally, Canadian provinces, territories, and municipalities may impose additional firearm regulations.¹⁰⁵ The Criminal Code classifies firearms into three categories of regulated firearms under the 1995 Act: restricted, prohibited, and non-restricted.¹⁰⁶ Firearms are separated into these categories based on common characteristics such as the typical use of the firearm (e.g., hunting) or physical characteristics, such as fully automatic firearms.¹⁰⁷

97. *Id.*

98. *Id.* at 4, 23.

99. *Id.* at 23.

100. *Id.*

101. *Id.* at 23–24.

102. Catherine F. Sproule & Deborah J. Kennett, *The Use of Firearms in Canadian Homicides 1972–1982: The Need for Gun Control*, 30 CAN. J. CRIMINOLOGY 31, 32 (1988).

103. *Firearms-Control Legislation and Policy*, *supra* note 1, at 52. The CFA is codified as: Firearms Act, S.C. 1995, c. 39 (Can.) [hereinafter CFA].

104. *Id.* at 53.

105. *Id.* at 52.

106. *Id.* at 52–53.

107. *Id.* at 53 (the non-restricted category includes “ordinary shotguns and rifles”; the restricted and prohibited categories include rifles “that can be folded to shorter than . . . 26 inches,” most types of handguns, and fully automatic or military style firearms).

Under the Firearms Act, citizens are required to obtain a license—known as a Possession and Acquisition License (“PAL”)—in order to purchase or possess a firearm or to buy ammunition.¹⁰⁸ PAL’s are “generally valid for five years, and must be renewed before they expire.”¹⁰⁹ Licenses are only issued if the applicant is at least eighteen-years-old and has “met certain public-safety criteria and is allowed to possess and use firearms.”¹¹⁰ To obtain a license for a non-restricted firearm, applicants must pass the Canadian Firearms Safety Course (“CFSC”) and corresponding tests.¹¹¹ For the restricted or prohibited categories of firearms, applicants “must pass the Canadian Restricted Firearms Safety Course (“CRFSC”) in addition to the CFSC.”¹¹² The acquisition and possession of firearms in the restricted or prohibited categories is strictly regulated.¹¹³ Generally, firearms in the aforementioned categories may only be possessed in the licensee’s residence, can only be transported and/or used under very limited circumstances,¹¹⁴ and cannot be transferred to another license holder without being verified by “an approved verifier.”¹¹⁵

The CFA also requires applicants to pass a comprehensive background check, which “consider[s] criminal, mental, addiction and domestic violence records.”¹¹⁶ Additionally, each applicant is also required to present third party character references.¹¹⁷ Applicants are screened through a two-tiered process which “[e]ntails submitting an application requesting that the applicant provide detailed personal information; when this application is assessed by the CFP, special attention is given to those applying for a Prohibited and Restricted

108. *Id.*

109. *Firearms-Control Legislation and Policy*, *supra* note 1, at 55.

110. *Id.* at 53 (quoting *Canadian Firearms Program: Frequently Asked Questions – General*, RCMP, <http://www.rcmp-grc.gc.ca/cfp-pcaf/faq/index-eng.htm#al> (last updated Sept. 21, 2012)).

111. *Id.*

112. *Id.* at 54.

113. *Id.*

114. *See id.* (The limited circumstances include, for example, target practice or use in a target shooting competition).

115. *Firearms-Control Legislation and Policy*, *supra* note 1, at 54–55.

116. The Act states that in addition to criminal background checks, authorities must also consider whether the applicant “has been treated for a mental illness . . . that was associated with violence or threatened or attempted violence . . . or has a history of behavior that includes violence or threatened or attempted violence on the part of the person against any person.” *Id.* at 56 (quoting *Canada – Gun Facts, Figures and the Law*, GUNPOLICY.ORG, <http://www.gunpolicy.org/firearms/region/canada>) (last updated Dec. 21, 2012); *see also* CFA, *supra* note 103, § 5(2)(b).

117. *See Firearms-Control Legislation and Policy*, *supra* note 1, at 56.

Firearm License.”¹¹⁸ The screening process does not terminate when an applicant is approved for a license.¹¹⁹ After an applicant has been granted a license, they are subject to ongoing screening where a licensee may be flagged for review if the licensee violates one of the provisions for “continuous eligibility.”¹²⁰ Furthermore, licensees are subject to laws which regulate the methods of storing, transporting, or displaying firearms, as well as the firearm laws or regulations of the licensee’s province.¹²¹

a. Impact and Statistical Efficacy of Canada’s Firearm Regulations

Due in part to the Canadian government maintaining a comprehensive database tracking crime statistics, a number of studies have been conducted to examine the efficacy of Canada’s Firearm legislation on firearm-related deaths.¹²² A majority of independent studies have either found that the Firearms Act has had no effect on gun violence or that the effect has been statistically insignificant.¹²³ While there have been studies showing that the Firearms Act has led to a reduction in suicides involving a firearm,¹²⁴ there is little, if any, scholarly analysis purporting to show the effectiveness of the Firearms Act in

118. *Id.* at 56 (quoting Royal Canadian Mounted Police, RCMP Canadian Firearms Program: Program Evaluation – Final Approved Report 38 (Feb. 2010), <http://www.rcmp-grc.gc.ca/pubs/fire-feu-eval/eval-eng.pdf>).

119. *Id.*

120. *Id.*

121. *Id.* at 56–57 (Non-restricted firearms are required to be secured with a locking device that prevents the firearm from being fired and to be stored in an area or container that is difficult to break into. All firearms must be unloaded and locked in a secure container during transportation. Holders of restricted and/or prohibited firearm licenses must also obtain a transportation permit from the local authority.).

122. *Id.* at 58. See e.g., *Canada – Gun Facts, Figures and the Law*, *supra* note 116 (discussing Canadian firearm regulations); Robert J. Mundt, *Gun Control and Rates of Firearms Violence in Canada and the United States*, 32 CAN. J. CRIMINOLOGY 137, 152 (1990) (stating that Canadian firearm regulations has had little “perceptible impact” on homicide statistics); Gary A. Mauser, *Evaluating Canada’s 1995 Firearm Legislation*, 17 J. FIREARMS & PUB. POL’Y 1 (2005) (stating “[t]here has been no discernible impact on public safety by the firearm program”) [hereinafter *Evaluating Canada’s 1995 Firearm Legislation*]; Caillin Langmann, *Canadian Firearms Legislation and Effects on Homicide 1974 to 2008*, 27 J. INTERPERSONAL VIOLENCE 2303 (2012) (concluding that the data “failed to demonstrate a beneficial association between [firearms] legislation and firearm homicide rates between 1974 and 2008”).

123. See *Evaluating Canada’s 1995 Firearm Legislation*, *supra* note 122 and accompanying text.

124. See Jean Caron, *Gun Control and Suicide: Possible Impact of Canadian Legislation to Ensure Safe Storage of Firearms*, 8 Archives Suicide Res. 361, 374 (2004), <http://www.tandfonline.com/doi/pdf/10.1080/13811110490476752> (finding a reduction in firearm suicides).

reducing violent crimes involving a firearm in Canada.¹²⁵ The studies showing a decrease in the use of firearms in homicides tend to predate the implementation of the Firearms Act, but remain useful given that Canada progressively increased its regulation of gun ownership.¹²⁶ One such study examined data, ranging from 1969–1985 and found Canada’s adoption of stricter firearms laws “[w]as associated with a decrease in the use of firearms for homicide but an increase in the use of all other methods for homicide.”¹²⁷ However, examination of post-Firearms Act scholarly research suggests the implementation of the Canadian Firearms Act has not yielded the results members of parliament expected, which is not to say that the Firearms Act has been a failure.

In a 2005 paper, Professor Gary Mauser examined “[t]he organizational problems of the [Canadian] firearms program and evaluate[d] its effectiveness in improving public safety.”¹²⁸ Mauser’s first critique is focused on the cost of implementing the firearm registry.¹²⁹ At first, Canadian lawmakers estimated implementing the registry would cost no more than \$2 million—quite different than the \$1 billion the program actually cost.¹³⁰ The increase in cost is attributable to the Canadian government underestimating the problems that would arise with the database, as well as the cost of running and maintaining such a large database.¹³¹

The next logical question is whether the ends justified the means—whether Canadian gun control improved public safety.¹³² Mauser analyzed Canadian crime statistics from 2003 and the various sub categories of reported incidents which were classified as “gun crimes.”¹³³ “Illegal possession of a weapon” (47%) and “other offensive weapons charges” (21%)¹³⁴ accounted for the largest percentage of Canadian

125. See Sproule & Kennett, *supra* note 102, at 34 (stating that the use of firearms in Canadian homicides has declined since the implementation of strict gun control in 1976).

126. See, e.g., *id.* (studying data from 1972–1982, before the implementation of the CFA).

127. *Id.* (citing Antoon A. Leenaars & David Lester, Summary, *Effects of Gun Control on Homicide in Canada*, 75 PSYCHOL. REP. 81 (1994), <http://www.amsciepub.com/doi/abs/10.2466/pr0.1994.75.1.81> (by subscription)).

128. *Evaluating Canada’s 1995 Firearm Legislation*, *supra* note 122, at 1.

129. *Id.*

130. *Id.*

131. *Id.* at 3.

132. *Id.* at 8 (the stated purpose of the CFA was to “improve public safety”).

133. *Id.*

134. “Other offensive weapons charges” includes, for example, non-violent crimes under the Canadian Criminal Code such as Carrying a concealed weapon (R.S.C. 1985, c. C-46, s. 90), Unauthorized possession of a firearm (R.S.C. 1985, c. C-46, s. 91), and Carrying weapon while attending public meeting (R.S.C. 1985, c. C-46, s. 89).

firearm crimes.¹³⁵ Violent crimes such as robbery and homicide involving a firearm accounted for 18% and 1%, respectively, making up a much smaller percentage of the total gun crimes charged in Canada in 2003.¹³⁶ While the Canadian legislature did not expressly define the primary focus of its goal to “improve public safety” (*i.e.* curbing the use of firearms in violent crime), Mauser believes the most important goal of the CFA is to “reduce the overall level of criminal violence.”¹³⁷ Mauser found that since the early 1990s, violent crime rates have remained relatively unchanged and seem to be unaffected since the implementation of the Firearms Act.¹³⁸ Furthermore, Mauser found evidence of method substitution, where criminals use other weapons to commit violent crimes, after firearm restrictions were implemented.¹³⁹ He also opines that “it is misleading and untrue to claim that gun death *per se* is central to public safety . . . [because] gun deaths [in Canada] are primarily suicides.”¹⁴⁰ For example, in 2001, there were 822 total gun deaths in Canada, 651 of which were suicides.¹⁴¹ In light of this information, Mauser states that “[i]n evaluating public safety, we need to avoid being misled by overly simple concepts like gun death,”¹⁴² which is “[t]oo heterogeneous to be useful in guiding policy.”¹⁴³ Focusing specifically on homicide trends, the homicide rate in the United States is actually declining faster than in Canada.¹⁴⁴ The Canadian homicide rate has remained relatively constant since at least two years prior to the implementation of the Firearms Act.¹⁴⁵ “[The Canadian homicide rate] was 31% in 1993, and 29% in 2003,” with the proportion involving firearms remaining constant over that same time period, around 24%.¹⁴⁶

135. *Id.* at 8, table 1.

136. *Id.*

137. *Id.* at 9; *see also id.* at 10 (the Justice Minister responsible for the Canadian Firearms Act “claimed that the reason for the gun registry was to save lives”).

138. *Id.* at 8–9.

139. *Id.*; *see also* Gary A. Mauser, *Ten Myths About Firearms and Violence in Canada*, 23 J. FIREARMS & PUB. POL’Y 76, 81 (2011) (“Over the past 10 years, firearms were involved in approximately as many homicides as knives”) [hereinafter *Ten Myths About Firearms and Violence in Canada*].

140. *Evaluating Canada’s 1995 Firearm Legislation*, *supra* note 122, at 12, table 2.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 14.

145. *Id.*

146. *Id.*

Based on his analysis of the pertinent data, Mauser believes the CFA has “failed to improve public safety or to save lives.”¹⁴⁷ Alternatively, Mauser believes there are more effective ways to improve public safety.¹⁴⁸ He suggests more cost-effective measures, such as increasing prison sentences for violent criminals, increasing court budgets, and improving immigration screening procedures to more effectively prohibit migrants with violent records.¹⁴⁹

In its brief to the Standing Committee on Public Safety and National Security regarding Bill C-391, a measure to repeal the requirement to register non-restricted firearms, the Coalition for Gun Control (“Coalition”) offered a different perspective on some of the issues previously discussed by Mauser.¹⁵⁰ The Coalition based its opposition to the bill on a number of premises citing: (1) declining rates of firearm death since the enactment of stricter firearms regulations; (2) the high costs of gun death and injury; and (3) meeting international obligations to combat the illegal gun trade.¹⁵¹

In discussing “firearm death,” the Coalition primarily based its recommendations on the notable decline in suicide deaths involving a firearm.¹⁵² Contrary to Professor Mauser, who suggested that addressing suicide deaths in the gun control discussion distorts the statistics of homicide and violent crime involving firearms, the Coalition noted a relationship between suicide and homicide.¹⁵³ “Risk factors for suicide and homicide are closely linked, consequently many homicides, including 50% of domestic homicides involving firearms, end in suicide.”¹⁵⁴ The Coalition conceded that “establishing causal relationships between complex factors is difficult.”¹⁵⁵ This concession

147. *Evaluating Canada’s 1995 Firearm Legislation*, *supra* note 122, at 84; *see also Ten Myths About Firearms and Violence in Canada*, *supra* note 139, at 77, 91 (stating that targeting law abiding firearm owners is not an effective solution because, “the probability of a law abiding Canadian firearms owner committing murder is less than one-half that of the typical Canadian” and “There is no empirical support for the claim that stronger gun laws have helped reduce gun violence. In fact, the use of firearms in homicide has increased by 24% since the beginning of the long-gun registry”).

148. *Evaluating Canada’s 1995 Firearm Legislation*, *supra* note 122, at 16.

149. *Id.*

150. *See Discussion of Private Member’s Bill C-391: Brief to the Standing Committee on Public Safety and National Security*, COALITION FOR GUN CONTROL (May 2010), http://guncontrol.ca/wp-content/uploads/2015/03/CGC_Brief_C391final.pdf [hereinafter *Coalition Brief to the Standing Committee*].

151. *Id.* at 5–6.

152. *Id.*

153. *Id.* at 3.

154. *Id.*

155. *Id.* at 5.

notwithstanding, it further stated that “[f]irearm deaths in Canada have declined with stricter controls on firearms”¹⁵⁶ To support its proposition, the Coalition cited the decline in the number of Canadians killed with firearms over a period spanning from 3.8 per 100,000 in 1995 to 2.45 per 100,00 in 2005,¹⁵⁷ a decline which was admittedly “driven by a significant reduction in suicides with firearms.”¹⁵⁸ The Coalition also noted a decrease in the number of murders with rifles and shotguns from 0.21 per 100,000 in 1995 to 0.1 per 100,000 in 2008, as well as a decline in the number of robberies with firearms from 22 per 100,000 in 1995 to 14 per 100,000 in 2008.¹⁵⁹

In addition to its discussion of firearm deaths, the Coalition also addressed the relative cost of the firearms registry and the international “norm to license gun owners and register firearms.”¹⁶⁰ While it recognized the high cost and efficiency problems of maintaining the firearm registry, the Coalition stated that cost is “dwarfed by the costs of gun death and injury.”¹⁶¹ According to the Coalition, the savings from discontinuing the registration of unrestricted firearms would lead to an increase in the cost of police investigations and the costs associated with a theoretical increase in firearm-related injuries and deaths.¹⁶² It also referenced a report from the Geneva-based Small Arms Survey which found that the estimated decrease in gun injuries and deaths in Canada since 1995 “equals savings up to \$1.4 billion Canadian dollars a year.”¹⁶³ Finally, the Coalition references international standards and policy developments surrounding gun control.¹⁶⁴ “Canada’s gun control law has helped reduce the diversion of legal guns into illegal markets and is seen, by many, to be part of our obligation under specific international agreements as well as international human rights law.”¹⁶⁵

While the Coalition’s arguments and analysis offer a contrasting perspective to that of Professor Mauser, it represents a minority viewpoint that Canada’s firearms regulations have made a statistically significant impact on the prevention of violent crime involving firearms.

156. *Coalition Brief to the Standing Committee*, *supra* note 151, at 5.

157. *Id.*

158. *Id.* at 5–6.

159. *Id.* at 6.

160. *Id.*

161. *Id.* at 2.

162. *Coalition Brief to the Standing Committee*, *supra* note 151, at 6.

163. *Id.* (citing *Small Arms Survey 2006*, GRADUATE INST. INT’L STUD. GENEVA (Aug. 3, 2006)).

164. *Id.*

165. *Id.*

3. Great Britain

Great Britain has a long history of strict gun control policies which, similar to Australia, are often referenced by policymakers as a model for firearms regulations in the United States.¹⁶⁶ The Firearms Act of 1968, which is currently the foundational piece of firearms legislation in Britain, was preceded by less comprehensive legislation dating back to 1819-1820.¹⁶⁷ For an extended period of time, the British Bill of Rights of 1688 was understood to protect the right of citizens to maintain arms, “which Parliament had no authority to breach in literal terms.”¹⁶⁸ Following the French revolutionary wars, thousands of unemployed soldiers returned to England and to poor economic conditions.¹⁶⁹ In August 1819, after an extended period of worker protests and riots, Magistrates in the town of Manchester ordered the local militia members to open fire on a crowd that would not disperse.¹⁷⁰ Dozens of people were killed and hundreds were wounded in the event, which came to be known as the Peterloo Massacre.¹⁷¹ In the months following the massacre, the British parliament passed a number of bills restricting individual liberties, among which was the Seizure of Arms Act.¹⁷² This act gave local justices of the peace broad power to “enter any place day or night . . . to search for and confiscate weapons kept for a purpose dangerous to the public peace,” based on the testimony of only a single witness.¹⁷³ Lord Rancilffe, among others, voiced his deep concerns regarding the infringement on individual liberties authorized by the Seizure of Arms Act.

The principles upon which it was founded, and the temper in which it was framed appeared to him to be so much at variance with the free spirit of their venerated constitution, and so contrary to that undoubted right which the subjects of this country had ever possessed—the right of retaining arms for defence of themselves, their families, and property—that he

166. *Firearms-Control Legislation and Policy*, *supra* note 1, at 89.

167. JOYCE L. MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 94–95 (Harvard Univ. Press 2002).

168. COMMITTEE ON HOME AFFAIRS, SECOND REPORT: CONTROLS OVER FIREARMS, 1999–2000, H.C.95-II, App. 8, Part I, ¶ 2 (UK), <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/95/95ap25.htm> [hereinafter SECOND REPORT].

169. MALCOLM, *supra* note 167, at 94–95.

170. *Id.*

171. *Id.* at 95.

172. *Id.*

173. *Id.* at 96 (internal quotations omitted).

could not look upon it without expressing his disapprobation and regret.¹⁷⁴

Following the Seizure of Arms Act, the right to keep arms was vigorously protected by Parliament into the 20th century.¹⁷⁵ Despite a large population increase from 1751–1871,¹⁷⁶ England was experiencing a tremendous decline in the rates of violent crime.¹⁷⁷ However, Parliament was determined to enact more comprehensive restrictions on firearms, and in 1870 introduced the “Gun Licence Act,” which created a national gun registration system.¹⁷⁸ During both World Wars, the British government believed armed civilians were necessary to the common defense and loosened the restrictions on firearms.¹⁷⁹ However, during the periods following each respective world war, the British government subsequently tightened restrictions on firearms.¹⁸⁰ “In time of peril the government turned readily to armed civilians for help. When danger passed and peace returned, it was determined to disarm those same civilians.”¹⁸¹

In 1968, all the previously enacted firearms laws were consolidated and amended to comprise the Firearms Act.¹⁸² From 1968 to present day, the restrictions under the 1968 Act have been amended and increased, often in response to a tragic shooting.¹⁸³ Today, the 1968 Act, and its contemporary amendments, include comprehensive requirements for obtaining a firearm certificate,¹⁸⁴ safe storage and transport requirements for certificate holders, a total ban on purchasing or possessing a handgun, and strict prohibitions on the manufacturing, possession, purchase, and

174. MALCOLM, *supra* note 167, at 96–97.

175. SECOND REPORT, *supra* note 168, App. 8, Part I, ¶ 2.

176. See MALCOLM, *supra* note 167, at 116 (in 1751 there were around 6.5 million people in England. By 1871 the population had grown to 21.4 million).

177. *Id.*

178. *Id.* at 117–22.

179. *Id.* at 140, 156–63.

180. MALCOLM, *supra* note 167, at 140–41, 159–60.

181. *Id.* at 141.

182. *Firearms-Control Legislation and Policy*, *supra* note 1, at 90.

183. *Id.* at 90–93 (The Hungerford Massacre in 1988 where a lone gunman killed himself and sixteen others; the Dublane Massacre in 1997 where a lone gunman killed sixteen elementary school children; and Cumbria in 2010 where a lone gunman with lawfully possessed firearms killed twelve people and wounded twenty-five others).

184. *Id.* at 99 (Applicants must have two character references, be a British resident in good standing, and have a good reason for possessing, purchasing, or acquiring a firearm or ammunition. Applicants are also subject to a Medical history check which includes police checking with the applicant’s personal physician to determine if there is “evidence of alcoholism, drug abuse, or signs of personality disorder”).

sale of prohibited military style weapons.¹⁸⁵ Once an applicant is granted a firearm certificate, which must be renewed every five years, the holder is subject to conditions of firearm ownership.¹⁸⁶ Conditions include restrictions on the use of certain firearms (e.g. rifles may only be used for target shooting) and secure storage requirements.¹⁸⁷ The conditions of ownership are strictly enforced.¹⁸⁸ For example, in 2000, a Queen's lawyer named Arthur Farrer had his certificate revoked after he told his mother where he stored his gun and the location of the keys to the cupboard.¹⁸⁹ The Court of Appeal upheld the revocation despite the fact that Farrer's mother had never handled guns nor had any interest in guns.¹⁹⁰

Firearm certificates may be revoked if the holder is "a danger to public safety; of intemperate habits; of unsound mind; unfit to be entrusted with such a firearm; a prohibited person under the Firearms Act; or no longer has 'good reason' for possession."¹⁹¹ The police provide detailed guidance on how the terms should be construed or interpreted. For instance, the category of "intemperate habits" includes "evidence of alcohol or drug abuse; aggressive or antisocial behavior . . . or hostility towards a group of people."¹⁹² Other categorical criteria include determining whether the certificate holder has any criminal convictions or involvement in criminal activities, or whether the individual has been subject to any period of detention under the Mental Health Act.¹⁹³ Similarly, convictions for crimes such as drunk driving have been upheld as being valid grounds for revocation or denial.¹⁹⁴

In addition to the pre- and post-certificate requirements and conditions, strictly enforced criminal penalties and minimum sentencing guidelines are an integral aspect of Britain's firearm regulatory structure.¹⁹⁵ For example, a conviction for unlawfully possessing a firearm carries a mandatory minimum five-year sentence.¹⁹⁶

185. *Id.* at 99 (Military style weapons include, but are not limited to, any firearm that is capable of firing missiles, any self-loading rifled gun chambered for a caliber exceeding .22, and any weapon with a self-contained gas cartridge system).

186. *Id.* at 100.

187. *Id.*

188. *Firearms-Control Legislation and Policy*, *supra* note 1, at 100.

189. *Id.*

190. *Id.*

191. *Id.* at 101.

192. *Id.*

193. *Id.* at 102.

194. *Firearms-Control Legislation and Policy*, *supra* note 1, at 101.

195. *Id.* at 105–6.

196. *Id.* at 106.

a. Impact and Statistical Efficacy of Great Britain's Firearm Regulations

Due to the lengthy history of British firearms regulations, analyzing the criminal statistics maintained by the British government is not an easy task due to the “mass of primary and secondary legislation”¹⁹⁷ that comprises the contemporary system of British firearm regulations.¹⁹⁸ In a Memorandum to an inquiry by the House of Commons Select Committee on Home Affairs in 1999–2000, Mr. Colin Greenwood noted encountering these issues in his analysis.¹⁹⁹ One example of the complexity underlying the statistics is that the term “firearm” is “all embracing and includes imitations, airguns, and ‘supposed’ firearms.”²⁰⁰ Additionally, the firearm offenses recorded by the police include damage exceeding £20, the real value of which has reduced over the years.²⁰¹ “A broken window which cost £10 to replace in 1980 would cost £24.40 to replace in 1998 and so would be recorded in the statistics if it was broken by a ‘firearm.’”²⁰² Due to this complexity, when analyzing raw data from the British police, it is impossible to know whether an entry recorded as an “offense in which a firearm was used” was a homicide or a teenager breaking a window with a pellet gun.²⁰³ Nevertheless, Greenwood was able to conduct a time series analysis of data for robberies and homicides involving firearms from 1969–1997.²⁰⁴ Greenwood stated:

All the evidence that can be found from these sources shows that when there were no controls on firearms the rate of armed crime was very low and it remained so until the mid 1960s when it began to escalate. But the rate of legal firearms ownership was declining and has continued to decline whilst the rate of armed crime has grown.²⁰⁵

Analysis of the pertinent data led Greenwood to conclude that statistical evidence shows that extending the regulations on legally owned firearms is unlikely to reduce the rate of violent crimes involving a firearm.²⁰⁶ In their submission to the same committee inquiry, Kate Broadhurst and Professor John Benyon—members of the Scarman

197. SECOND REPORT, *supra* note 168, App. 8, Part I, ¶ 119.

198. *Id.*

199. *Id.* App. 8, Part II, ¶ 18.

200. *Id.*

201. *Id.* at App. 8, Part II, ¶ 16.

202. *Id.*

203. SECOND REPORT, *supra* note 169, App. 8, Part I, ¶ 18.

204. *Id.* at App. 8, Part II, ¶¶ 25–27.

205. *Id.* at App. 8, Part II, ¶ 15.

206. *Id.* at App. 8, Part II, ¶ 100.

Center at the University of Leicester—reached the same conclusion as Greenwood.²⁰⁷

Due to the lack of comparative research in Europe on the issue of gun control, Broadhurst and Benyon were commissioned to conduct a two-year study of the different gun-control regimes in the European Union and surrounding countries.²⁰⁸ Broadhurst and Benyon found that because violent crimes like robbery and homicide rarely involve legally owned firearms, “further bans on guns are unlikely to bring about reductions in gun-related crime.”²⁰⁹ From 1982–1997, the number of homicides involving a firearm peaked at seventy-seven in 1987, but remained relatively steady on average.²¹⁰ However, the category of “other violence against persons” involving firearms, which accounts for a large majority of firearm crime over the time period (average of 1,900 offenses per year), 64% of the crimes were committed with air weapons—BB guns or pellet guns.²¹¹ “In 1997, the Home Office figures for England and Wales revealed that 7,506 [firearm] offenses out of the total of 12,410 (60%) involved air weapons.”²¹² Thus, air weapons make up the majority of the overall statistics of firearm usage in crimes.²¹³ Given that air weapons are typically used in crimes involving property damage, the above statistic is particularly troubling because it inflates the total number of firearm crimes. That statistic is somewhat misleading, especially if the goal of firearms regulation is to reduce violent crimes and homicides.

In the 2010–2011 session of the House of Commons, the Home Affairs Committee released its third report on Firearms Control.²¹⁴ In its report, the Committee recognized that it is, “difficult to form an accurate assessment [about the extent to which firearms regulations have had an effect on crime], given the limitations of available data.”²¹⁵ However, after hearing “contrasting views” the Committee determined “[t]here is considerable evidence, although it is not clear cut, that well-designed legislation to regulate and restrict the legal supply of firearms can reduce gun crime.”²¹⁶ The committee’s recommendation was based in part on

207. *Id.* at App. 11, ¶ 4.1.

208. *Id.* at App. 11, ¶ 2.2.

209. SECOND REPORT, *supra* note 169, at App. 11, ¶ 4.1.

210. *Id.* at App. 11, ¶ 4.6.

211. *Id.* at App. 11, ¶ 4.9.

212. *Id.* at App. 11, ¶ 5.1.

213. *Id.*

214. See COMMITTEE ON HOME AFFAIRS, THIRD REPORT: CONTROLS OVER FIREARMS, 2010–2011, H.C. 447-I (UK), <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmhaff/447/447i.pdf> [hereinafter THIRD REPORT].

215. *Id.* at 56, ¶ 2.

216. *Id.* at 19, ¶ 35.

testimony by Professor Squires who countered the statistical ineffectiveness of the current regulations²¹⁷ by cautioning the use of official statistics due to flaws in the reporting and recording of crimes involving firearms.²¹⁸ Squires argued that “there are approximately fifty-five types of offenses that can be committed before a weapon is pointed at anyone . . .” and “estimates suggest that the total UK gun crime figure would rise by as much as 60%” if those offenses were documented.²¹⁹ Additionally, Squires argued that previous research has indicated that very serious firearms crimes, such as attempted murder, may not be reported.²²⁰ The Committee also heard “moving evidence” from individuals who had been affected by gun crime.²²¹ Ultimately, the Committee concluded the following:

On the basis of data submitted to the Cullen Inquiry, and that collected more recently by Professor Squires and the Gun Control Network, we are concerned about the use of legal firearms in domestic incidences [T]he UK has strict gun laws and comparatively low levels of gun crime. The link should not be overstated—there is no direct correlation in recent UK history between levels of gun ownership and gun crime trends. However, it is fair to assume at least in part that this demonstrates the success of the licensing regime . . . which enables authorities to satisfy themselves that those owning firearms are fit to do so.²²²

In conclusion, the statistical evidence related to the effectiveness of British firearms regulation remains contested. However, the majority of evidence seems to suggest that, at the very least, British firearms regulations have not had a statistically significant effect on the rates of violent crimes involving firearms.

217. James Slack, *Culture of Violence: Gun Crime Goes Up by 89% In A Decade*, DAILY MAIL, Oct. 27, 2009, <http://www.dailymail.co.uk/news/article> (A 2009 government report showed, “the total number of firearm offences in England and Wales . . . increased from 5,209 in 1998/99 to 9,865 [in 2008/09] – a rise of 89[%].” Furthermore, “[t]he number of people injured or killed by guns . . . has increased from 864 in 1998/99 to a provisional figure of 1,760 in 2008/09, an increase of 104[%]”).

218. THIRD REPORT, *supra* note 214, at 8, ¶ 8.

219. *Id.* (“what gets recorded in the criminal statistics by the Home Office is only the criminal misuse of firearms . . . even simple illegal possession of a firearm which . . . attracts a five-year penalty, is not recorded as gun crime in the Home Office data.”).

220. *Id.* at 9, ¶ 9.

221. *Id.* at 9, ¶ 11.

222. *Id.* at 56–57, ¶¶ 2, 4 (emphasis added).

PART III: DETERMINING A SECOND AMENDMENT STANDARD OF REVIEW

After examining the representative statistics on the efficacy of firearms regulations in Australia, Canada, and Great Britain in Part II, one thing is clear—it remains difficult for scholars to reach a consensus regarding the statistical results of gun control. The complexity and lack of consensus in this area should, in itself, guide the process for determining a standard of review to apply to Second Amendment challenges in the United States. Once a court determines that the law at bar burdens the conduct protected by the Second Amendment, it must then choose which standard of review it will apply to determine whether the infringement is constitutionally permissible.²²³ Current constitutional standards of review such as the rational basis test, intermediate scrutiny, or strict scrutiny are not adequately suited to review Second Amendment challenges due to the unique governmental and constitutional interests at stake.²²⁴ The governmental objectives present in every Second Amendment case—public safety interests and violence prevention—will always satisfy the “government interest” prong²²⁵ of any of the current tests. This section will examine the standards of review under which post-*Heller* appellate courts have reviewed the Second Amendment challenges, the difficulties that courts and legal scholars have faced in choosing a standard of review, and whether any of the current constitutional standards of review provide sufficient framework for courts to address the unique interests raised in Second Amendment challenges. This note submits that the current constitutional standards of review are not sufficiently designed so as to address the unique nature of Second Amendment challenges and that the Court should adopt a new and pragmatic form of scrutiny for reviewing Second Amendment challenges.

223. See *supra* text accompanying note 28.

224. See *Heller*, 554 U.S. at 689 (Breyer, S., dissenting) (suggesting the Court adopt an interest-balancing inquiry rather than any current constitutional standard of review because of “[t]he fact that important interests lie on both sides of the constitutional equation . . . review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny).”).

225. See ROTUNDA & NOWAK, *supra* note 10, § 18.3(a)(ii) (the rational basis test requires the government to have a “legitimate” purpose for imposing the law); *id.* at § 18.3(a)(iv) (intermediate scrutiny requires an “important” governmental interest); *id.* at § 18.3(a)(iii) (strict scrutiny requires a “compelling” governmental interest).

*A. Traditional Levels of Scrutiny
in Post-Heller Second Amendment Challenges*

To better understand the need for adopting the proposed form of pragmatic scrutiny, one must examine the applicability of the traditional levels of scrutiny to Second Amendment challenges. The language used by the Supreme Court when it held that the right granted by the Second Amendment is a “pre-existing . . . fundamental right”²²⁶ makes it clear that the right for an individual to keep and bear arms is within a category of fundamental rights granted by the Constitution²²⁷ that are entitled to the highest level of protection.²²⁸ It logically follows that Second Amendment challenges should be reviewed subject to a form of heightened scrutiny under which other fundamental rights that are part of this category are reviewed.²²⁹ Strict scrutiny remains the standard of review most often applied to challenges involving fundamental constitutional rights which must be protected against government infringement.²³⁰ For example, strict scrutiny is almost always applied to those rights protected under the Equal Protection Clause of the Fourteenth Amendment, such as when “a governmental act classifies people in terms of their ability to exercise a fundamental right.”²³¹ Strict scrutiny is also applied to the review of legislation limiting fundamental constitutional rights protected under the due process guarantee of the Fifth Amendment.²³² The application of strict scrutiny to legislation limiting the rights protected by the Fifth or Fourteenth Amendments, ensures that these rights will be given the highest level of constitutional protection, unless the law burdening the right is narrowly tailored to achieve a compelling governmental interest.²³³ In other words, if a compelling governmental interest exists, the government must construct the law in a

226. See *Heller*, 554 U.S. at 592–93.

227. See *Chovan*, 735 F.3d at 1149 (Bea, C., concurring).

228. *Id.* (citing *United States v. Engstrum*, 609 F.Supp.2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny “because *Heller* classified the Second Amendment right alongside the First and Fourth Amendments which are traditionally analyzed under strict scrutiny . . .”).

229. *Chovan*, 735 F.3d at 1149 (Bea, C., concurring). See generally ROTUNDA & NOWAK, *supra* note 10, at §18.3(a)(iii) (“Under the due process guarantee, the Court often employs strict scrutiny . . . in reviewing legislation which limits fundamental constitutional rights. However, the Court will also use this standard of review under the equal protection guarantee . . . when the governmental act classifies people in terms of exercising a fundamental right . . . [and] when the governmental classification distinguishes between persons, in terms of any right, upon some ‘suspect’ basis . . .”).

230. See ROTUNDA & NOWAK, *supra* note 10, § 18.3.

231. *Id.*

232. *Id.*

233. *Id.*

way that it imposes the least possible burden on the protected right in the course of achieving that interest.²³⁴ Professor Joyce Malcolm, recognizing the traditional connection between the application of strict scrutiny and challenges involving fundamental constitutional rights,²³⁵ has noted that “fundamental rights are not to be separated into first and second class status; the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights.”²³⁶

An analysis of relevant case law and a variety of commentary discussing the Second Amendment standard of review, shows that lower courts in the post-*Heller* era have had difficulty choosing and/or applying traditional levels of scrutiny to Second Amendment challenges.²³⁷ The majority of lower courts and legal scholars have concluded that strict scrutiny is not a viable standard of review for Second Amendment challenges because laws reviewed under strict scrutiny are presumptively unconstitutional and rarely upheld.²³⁸ Thus, if strict scrutiny were to be adopted, a large number of current firearm regulations would be deemed unconstitutional and state legislatures would be faced with limited options to address issues of public safety, which involve regulating firearms.²³⁹ A distinct minority has argued that most governmental regulations burdening conduct protected by the Second Amendment would not only be able to survive strict scrutiny, but should be required to survive strict scrutiny.²⁴⁰ Indeed, proponents of this argument claim that in Second Amendment cases where intermediate scrutiny was applied, the challenged regulation likely would have survived strict scrutiny due to predominating governmental objective to protect the lives

234. *Id.*

235. Rosenthal & Malcolm, *supra* note 2, at 102, 103.

236. *Id.*

237. *Post-Heller Litigation Summary*, LAW CENTER TO PREVENT GUN VIOLENCE (Mar. 31, 2015), <http://www.smartgunlaws.org/gun-laws/the-second-amendment/post-heller-litigation-summary>.

238. *See, e.g., Masciandaro*, 638 F.3d at 469 (noting that the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits have all either adopted an approach based on the conduct being regulated, similar to First Amendment standards of review, or employed a level of scrutiny less than strict (arguably intermediate) but allowing for the future imposition of strict scrutiny or intermediate scrutiny depending on the circumstances).

239. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1468–70 (2009).

240. *See Chovan*, 735 F.3d at 1149 (Bea, C., concurring) (“scholarly analysis shows that federal courts uphold around thirty percent of the laws they analyze under strict scrutiny . . . [m]oreover, federal courts uphold Congressional statutes under strict scrutiny about half the time.”) (citation omitted).

of citizens.²⁴¹ Furthermore, with proper attention to detail, the law can surely be narrowly tailored to meet that objective. In a survey of all Second Amendment cases reviewed under strict scrutiny, Tina Mehr and Professor Adam Winkler found that none of the regulations at bar were invalidated despite being reviewed under Strict Scrutiny.²⁴² Because there is always a compelling objective present, public safety, the central question is whether firearm regulations should be required to meet strict scrutiny's "narrow tailoring" standard or intermediate scrutiny's "substantial relationship" standard.

Judge Carlos Bea, in his concurring opinion in *United States v. Chovan*, argued for a similar approach when he acknowledged that 18 U.S.C. § 922(g)(9)—"prohibit[ing] persons convicted of domestic violence misdemeanors from possessing firearms for life"²⁴³—would have survived strict scrutiny despite the majority electing to apply intermediate scrutiny.²⁴⁴ Judge Bea argued for the application of strict scrutiny to Second Amendment challenges by analogizing Second Amendment challenges to those raised in freedom of association cases "often involv[ing] governmental action that restricts association based on the status or conduct of the individuals, just as § 922(g)(9) restricts the right to keep and bear arms for particular persons based on their status and previous conduct."²⁴⁵ He further stated that "[i]n both cases [...] this governmental action is often directed towards preventing violence and preserving public safety."²⁴⁶ *Chovan* is just one example supporting the argument that, despite the majority electing to apply intermediate scrutiny, the law at bar likely would have survived, and arguably should have been subject to, strict scrutiny. The line of reasoning employed by the majority in *Chovan*, and most other circuits, fosters inconsistency in Second Amendment jurisprudence, which, in *Heller*, prompted Justice Scalia to cast aside any notion of an interest-balancing inquiry, writing that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."²⁴⁷

241. *Id.* at 1150; see also Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONSTITUTION SOC'Y L. & POL'Y 4 (Oct. 2010), https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf.

242. See Mehr & Winkler, *supra* note 243, at 4, 6.

243. *Chovan*, 735 F.3d at 1129–30.

244. *Id.* at 1150 (Bea, C., concurring) (stating that "based on the data the majority discuss in detail, the government interest in public safety and preventing gun violence is sufficiently compelling and narrowly tailored to satisfy those prongs of strict scrutiny analysis").

245. *Id.*

246. *Id.*

247. *Heller*, 554 U.S. at 634.

Yet, notwithstanding the arguments in favor of applying strict scrutiny to Second Amendment challenges, most circuits have adopted the application of intermediate scrutiny.²⁴⁸ One predominating reason is that, given the usual nature of the governmental interest at stake in Second Amendment challenges,²⁴⁹ many circuits have recognized that applying strict scrutiny might cause some types of gun control regulations to fail, which could potentially result in lives being lost at the hands of citizens who are subsequently entitled to own or carry a firearm.²⁵⁰ Taking into account the governmental interest at bar, these circuits have been reluctant to apply the more draconian standard of strict scrutiny to Second Amendment cases.²⁵¹ In *United States v. Masciandaro*, the Fourth Circuit held that the regulation in 36 C.F.R. § 2.4(b)—prohibiting loaded firearms from being carried in a motor vehicle in national park areas—did substantially burden Masciandaro’s Second Amendment right.²⁵² In reaching its holding, the Fourth Circuit applied intermediate scrutiny to § 2.4(b), aiding the court to reach its final determination that the government had a substantial interest in protecting the safety of park visitors—often times families with small children—and that § 2.4(b) was reasonably adapted to serve that interest.²⁵³ In choosing intermediate scrutiny, the court compared the Second Amendment right to commercial speech and its “subordinate position” relative to other categories of speech.²⁵⁴ The court further added that “[if we were] to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to ‘prevent[] armed mayhem’ in public places”²⁵⁵ The Fourth Circuit seems to suggest that by subjecting laws limiting Second Amendment rights to strict scrutiny, the court’s

248. See generally Anderson, *supra* note 8; Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s A Court to Do Post-McDonald?*, 21 CORNELL J. L. & PUB. POL’Y 489 (2012). Cf. *Tyler v. Hillsdale County Sheriff’s Dept.*, 775 F.3d 308, 328–29 (6th Cir. 2014), *rev’d en banc*, 837 F.3d 678 (6th Cir. 2016) (stating that “[other] circuits have generally applied intermediate scrutiny in Second Amendment challenges”).

249. *i.e.*, the safety and security of the public.

250. See, e.g., *Masciandaro*, 638 F.3d at 471 (stating “were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to ‘prevent[] armed mayhem’ in public places”); *Chovan*, 735 F.3d at 1135 (noting that the Seventh Circuit has applied intermediate scrutiny because there is arguably a high association with firearms causing injury or death in domestic situations).

251. *Masciandaro*, 638 F.3d at 471.

252. *Id.* at 460.

253. *Id.* at 473–74.

254. *Id.* at 471 (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)).

255. *Id.*

decision, in some cases, would result in the upheaval of gun control regulations, possibly giving way to violence at places like national parks. However, keeping the aforementioned in mind, it must be noted that despite both parties in *Masciandaro* questioning whether the disputed area in their case²⁵⁶ was one of the “sensitive places” referenced by Justice Scalia in *Heller*,²⁵⁷ the Fourth Circuit Court declined to address the issue, stating that “even if Dangerfield Island is not a sensitive place . . . § 2.4(b) still passes constitutional muster under the intermediate scrutiny standard.”²⁵⁸ If the court had addressed whether the area where Masciandaro had parked his vehicle was a sensitive area, the court’s opinion may have been more easily reconciled with *Heller*.

Similar to the Fourth Circuit’s opinion in *Masciandaro*, other commentators have argued against the application of strict scrutiny by suggesting relatively violent hypotheticals that involve death or destruction, seemingly in an effort to draw attention to the possible consequences of protecting Second Amendment rights over upholding laws targeting gun control.²⁵⁹ Professor Lawrence Rosenthal, as part of a discussion on gun regulations in the city of Chicago, has suggested that the Court’s ruling in *Heller* “seems to clinch the case for a right of gang members and drug dealers to carry firearms.”²⁶⁰ In his view, crime rates and the incidences of gang violence in Chicago would increase dramatically as a result of gun control efforts being overturned in favor of protecting a group of citizens’ Second Amendment rights.²⁶¹ According to Professor Rosenthal, a vigorous conception of the Second Amendment could “enable urban street gangs to act as occupying armies,”²⁶² committing murders and other gun-related crimes at an exceedingly high rate.²⁶³ However, according to Professor Rosenthal, violence could still be curbed by enacting strict gun control regulations

256. Specifically, Masciandaro argued a parking area along a public highway was not within the national park area.

257. *Heller*, 554 U.S. at 626–27.

258. *Masciandaro*, 638 F.3d at 473.

259. See generally Rosenthal & Malcolm, *supra* note 2 (Professor Rosenthal’s uses violent hyperbole throughout his discussion of the Second Amendment standard of review); Adam Liptak, *Supreme Court Gun Ruling Doesn’t Block Proposed Controls*, N.Y. TIMES, Dec. 18, 2012, <http://nyti.ms/TvzxGO> (discussing the effect of the *Heller* and *McDonald* holdings on gun control after the school shooting in Newtown, Conn.); *Post-Heller Litigation Summary*, *supra* note 237 (commenting on the Post-*Heller* judicial landscape, and the emerging jurisprudential patterns related to Second Amendment challenges).

260. Rosenthal & Malcolm, *supra* note 2, at 443.

261. See *id.*

262. *Id.* at 442.

263. *Id.*

in cities like Chicago and ensuring that these regulations will not be subject to strict scrutiny.²⁶⁴

The method utilized by Professor Rosenthal and the Fourth Circuit, in an effort to address those who favor the adoption of strict scrutiny, finds success by using hyperbole such as “urban street gangs acting as occupying armies”²⁶⁵ or a failure to prevent “armed mayhem in public places,”²⁶⁶ to draw attention to the possible consequences of adopting strict scrutiny as the Second Amendment standard of review. Such hyperbole is common when it comes to discussing the Second Amendment, which further illustrates the polarizing nature of Second Amendment issues and the difficulty of balancing the competing interests present on both sides of the argument. However, a large volume of studies and data exist which contradict the alleged efficacy of gun control regulations and cast doubt upon the violent hypotheticals advanced by Professor Rosenthal and, to an extent, the Fourth Circuit.²⁶⁷ For example, the number of murders involving the use of firearms in Chicago in 2010—a year in which the city strictly enforced stringent gun laws and “stop and frisk tactics”²⁶⁸—“equaled the number of American soldiers killed during the same period in Afghanistan and Iraq together.”²⁶⁹ Even government commissioned studies by the U.S. National Academy of Sciences and the notoriously anti-gun U.S. Centers for Disease Control have “failed to identify any gun control that had reduced violent crime, suicide, or gun accidents.”²⁷⁰ Recent data from the Pew Research Center also reveals that the gun homicide rate is down forty-nine percent since 1993,²⁷¹ while another study shows that law enforcement efforts and firearms education programs have proved more effective at reducing gun violence than many of the gun control regulations discussed in this note.²⁷² The disagreement among courts and scholars, and the hyperbolic arguments often associated with the Second Amendment, underscores the

264. *Id.* at 456–57.

265. *Id.* at 457.

266. *Masciandaro*, 638 F.3d at 471.

267. See Margaret Weigel, *Law and Policies That Attempt to Reduce Gun Violence*, Journalist’s Resource (Mar. 7, 2013); Margot Sanger-Katz, *Gun Deaths Are Mostly Suicides*, N.Y. TIMES (Oct. 8, 2015) http://www.nytimes.com/2015/10/09/upshot/gun-deaths-are-mostly-suicides.html?_r=0.

268. Rosenthal & Malcolm, *supra* note 2, at 441.

269. *Id.* at 457.

270. Kates & Mauser, *supra* note 15, at 654 (citing Charles F. Wellford et al., *Firearms and Violence: A Critical Review*, NAT’L RESEARCH COUNCIL 6–10 (2004); Task Force on Community Preventative Services, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 MORTALITY & MORBIDITY WKLY. REP. (RR-14 RECOMMENDATIONS & REP.) 11, 16 (2003), <http://www.cdc.gov/mmwr/pdf/rr/rr5214.pdf>).

271. Weigel, *supra* note 269.

272. *Id.*

difficulty lower courts have encountered in determining which standard of review should apply to Second Amendment challenges.

B. Interest-Balancing Inquiry

Although the *Heller* majority expressly rejected Justice Breyer's proposed interest-balancing inquiry,²⁷³ reviewing the approach is informative for two reasons. First, given the unexpected passing of Justice Scalia in February 2016, the composition of the Court will change, which could affect how the Court approaches Second Amendment issues in the future. Second, Justice Breyer raises a number of important issues in his dissent such as the applicability of traditional constitutional standards of review to Second Amendment challenges²⁷⁴ and the role played by empirical data in Second Amendment challenges.²⁷⁵

One of Justice Breyer's main contentions in his *Heller* dissent is that the majority erred by not choosing a standard of review to be applied to Second Amendment challenges.²⁷⁶ In *Heller* the Respondent urged the Court to adopt strict scrutiny as the standard of review,²⁷⁷ while the Petitioners suggested a "reasonableness test."²⁷⁸ In discussing the Respondent's proposal of strict scrutiny, Justice Breyer took the position that the majority implicitly rejects strict scrutiny "by broadly approving a set of laws—prohibitions on concealed carry weapons, forfeiture by criminals of the Second Amendment right . . .—whose constitutionality under a strict scrutiny standard would be far from clear."²⁷⁹ Justice Breyer further commented that adopting strict scrutiny would be "impossible" because there is always a compelling state interest in Second Amendment cases.²⁸⁰ "Thus, any attempt *in theory* to apply strict scrutiny . . . will *in*

273. See *supra* text accompanying note 30.

274. *Heller*, 554 U.S. at 687–89 (Breyer, S., dissenting).

275. *Id.* at 691, 694–96.

276. *Id.* at 687 (stating: "I therefore begin by asking a process-based question: How is a court to determine whether a particular firearm regulation . . . is consistent with the Second Amendment?" and "The majority is wrong when it says that the District's law is unconstitutional '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.'" (alteration in original)).

277. See Initial Brief of Appellee-Respondent at 79–81, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 U.S. S. Ct. Briefs LEXIS 141.

278. See Initial Brief of Appellant-Petitioner at 69–74, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 U.S. S. Ct. Briefs LEXIS 7 (stating that "governments may impose 'reasonable restrictions' on the exercise of any Second Amendment right. The United States [Solicitor General] agrees that 'reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse' are constitutional.").

279. *Heller*, 554 U.S. at 688 (Breyer, S., dissenting).

280. *Id.* at 689.

practice turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other”²⁸¹ Where complex interests lie on both sides of constitutional questions, “the Court generally asks 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.”²⁸² Justice Breyer’s approach would “defer[] to a legislature’s empirical judgments . . . [because] a legislature is likely to have greater expertise and greater institutional factfinding [sic] capacity.”²⁸³ Justice Breyer also pointed out the Court’s lack of prior experience as a reason for giving a certain degree of deference to legislative judgements.²⁸⁴

After outlining the framework of his interest-balancing inquiry, Justice Breyer proceeded to examine “the facts as the legislature saw them when it adopted the District statute.”²⁸⁵ The local council committee that recommended adopting the District statute in 1976 cited, “‘startling statistics’ regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District.”²⁸⁶ The Committee Report further referenced the high number of murders committed by “previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication . . . ,”²⁸⁷ and statistics showing a strong correlation between handguns and crime.²⁸⁸ Justice Breyer then looked at contemporary statistics, which were gathered from the Petitioner’s briefs in their *amici*.²⁸⁹ These statistics included studies pertaining to firearm-related deaths in the United States,²⁹⁰ firearm-related injuries,²⁹¹ the relationship between handguns and firearm-related

281. *Id.* (emphasis in original).

282. *Id.* at 689–90.

283. *Id.* at 690.

284. *Id.* at 690–91.

285. *Heller*, 554 U.S. at 693 (Breyer, S., dissenting).

286. *Id.* at 694 (citing Firearm Control Regulations Act of 1975 (Council Act No. 1-142), Hearing and Disposition before the House Committee on the District of Columbia, 94th Cong., 2d Sess., on H. Con. Res. 694, Ser. No. 94-24, p. 25 (1976)).

287. *Id.* at 694.

288. *Id.* at 695.

289. *Id.* at 696.

290. *Id.* (citing a Dept. of Justice study ranging from 1993–1997, finding that of the total firearm-related deaths, 51% were suicides, 44% were homicides, 3% were accidents, and another 2% were attributed to either legal interventions or undetermined causes).

291. *Heller*, 554 U.S. at 696–97 (Breyer, S., dissenting) (of firearm-related injuries, “62% resulted from assault, 17% were unintentional, 6% were suicide attempts, 1% were legal interventions, and 13% were of unknown causes”).

deaths and injuries,²⁹² the prevalence of handgun use among criminals,²⁹³ and the higher rate of firearm-related deaths and injuries in urban areas compared to rural areas.²⁹⁴ The Respondent and his *amici* did not always disagree with the figures submitted by the Petitioner, but rather argued the handgun ban would not help solve the crime and accident problems on which it was intended to affect.²⁹⁵ Among the statistics cited by the Respondent and his *amici*, were studies showing an increase in violent crime in the District,²⁹⁶ studies analyzing the effect of strict gun laws in twenty European countries—as well as some domestic studies—showing that “strict gun laws are correlated with *more* murders. . . ,”²⁹⁷ evidence that firearm ownership has been proven to have a beneficial effect for self-defense,²⁹⁸ and lastly, that “evidence suggests that [laws criminalizing gun possession] will have the effect only of restricting law-abiding citizens, but not criminals, from acquiring guns.”²⁹⁹

Drawing upon the legislative history of the District’s ban and the statistical evidence presented by the Petitioners, Respondent, and their respective *amici*, Justice Breyer determined that while Respondent’s evidence may have been “enough to convince many legislatures . . . not to adopt total handgun bans [T]he question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them.”³⁰⁰ Justice Breyer did not discount any of the statistics or facts presented by the Respondent, such as the fact that crime increased subsequent to the ban, but rather determined that “*after it does not mean because of it.*”³⁰¹ Justice Breyer reached the ultimate conclusion that the studies presented by the Respondent “do not by

292. *Id.* at 697–98 (“From 1993–1997, 81% of firearm-homicide victims were killed by handgun In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns.”).

293. *Id.* at 698 (“In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said they were armed with a handgun.”).

294. *Id.* at 698–99 (“the linkage of handguns to firearm deaths and injuries appears to be much stronger in urban than in rural areas”).

295. *Id.* at 699.

296. *Id.* at 699–700 (Justice Breyer stating: “Indeed, a comparison with 49 other major cities reveals that the District’s homicide rate is actually substantially *higher* relative to [] other cities than it was before the handgun restriction went into effect.”).

297. *Heller*, 554 U.S. at 700 (Breyer, S., dissenting).

298. *Id.* at 700–01 (“one study estimated that there were 2.2-to-2.5 million defensive uses of guns (mostly brandishing, about a quarter involving the actual firing of a gun) annually.”).

299. *Id.* at 701 (citing Brief for President Pro Tempore of Senate of Pennsylvania as *Amicus Curiae* at 35, 36, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07–290), 2008 U.S. S. Ct. Briefs LEXIS 182).

300. *Id.* at 702.

301. *Id.* (emphasis in original).

themselves show that [the legislature’s predictive judgments] are incorrect,” but merely controversial. At the conclusion of his interest-balancing inquiry, Justice Breyer ultimately determined the handgun ban and the governmental interests which it purported to serve, did not “disproportionately burden Amendment-protected interests[.]”³⁰²

Justice Breyer correctly observes in his *Heller* dissent, that applying any of the current heightened scrutiny standards to Second Amendment challenges necessarily turns into an interest-balancing inquiry.³⁰³ Indeed, Justice Breyer’s opinion highlights the very complex nature of the competing interests in Second Amendment challenges, which are very different than other constitutional challenges that are reviewed under either one of the traditional standards of means-end scrutiny. Attempts to apply either of the traditional levels of scrutiny to Second Amendment challenges becomes a futile exercise in semantics rather than a substantive analysis of the constitutionality of the law at bar. And, while Justice Breyer’s interest-balancing inquiry would, in theory, address many of the issues underlying review of Second Amendment challenges subject to either of the traditional standards, it is a freestanding approach with very little framework to guide lower courts evaluating Second Amendment challenges. Adopting Justice Breyer’s approach might very well lead to further division among the circuit courts. The fact is, judges are likely to have different views regarding the sufficiency of legislative inquiries or whether the statute’s benefit to public safety is proportional to the burden it places on the Second Amendment rights of law-abiding citizens. Thus, adopting an interest-balancing inquiry would do little to remedy the current inconsistencies in Second Amendment jurisprudence, or the difficulty lower courts have encountered in their review of Second Amendment challenges. This note proposes a new standard of review which would provide a degree of judicial discretion through the incorporation of certain aspects of Justice Breyer’s test, while also providing a sufficient framework to guide lower courts through the complexities of Second Amendment challenges.

C. A Pragmatic Test for Second Amendment Challenges

In challenges involving a constitutional right, “the government cannot rely on speculation or conjecture to support the government interest.”³⁰⁴ The form of scrutiny proposed herein would bridge the gap

302. *Id.* at 706–14 (emphasis in original).

303. *Heller*, 554 U.S. at 689 (Breyer, S., dissenting).

304. *Mance v. Holder*, 74 F.Supp.3d 795, 810 (citing *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

between intermediate and strict scrutiny, while also incorporating some aspects of Justice Breyer's interest-balancing approach. Under this pragmatic test, the government would bear the initial burden to make a "showing"³⁰⁵ that (1) there is a verifiable basis for the imposition of the law; and (2) that the law is specifically adapted³⁰⁶ so as to avoid unnecessary³⁰⁷ collateral infringement on the Second Amendment rights of law-abiding citizens. The required strength of the government's "showing" would be determined based on a sliding scale under which the court would weigh factors such as the specificity of the law at bar, the type of restriction,³⁰⁸ the degree to which the law burdens constitutionally protected conduct, and whether, in the words of Justice Breyer, "there are practical less burdensome ways of furthering [the governmental] interests."³⁰⁹ For example, broad, categorical, or indiscriminate restrictions would require a "substantial showing,"³¹⁰ while restrictions drafted with a certain degree of specificity as to the conduct or class of individuals which it would affect, would only require a "reasonable showing." Once the court has determined the strength of showing the government must make, it would then proceed to determine whether the law at bar satisfies the two-pronged test.

The framework for this pragmatic test is based in part upon the "showing" of empirical evidence adopted by Judge Posner and the Seventh Circuit.³¹¹ Reviewing Second Amendment challenges subject to this pragmatic test would ensure the Second Amendment right is not unnecessarily regulated or restricted to accomplish a goal that is either statistically improbable or overly broad in nature. The incrementalism by

305. *Showing*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining showing as "the act or an instance of establishing through evidence and argument.") *Showing*, WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Philip B. Gove et al. eds., 2002) (defining showing as "[P]erformance in a test of skill or power or of comparative effectiveness; proof . . . of a matter of fact or law.")

306. Defined as: "in regard to the matter in question; with reference to a quality or condition that is specified or inherent." WEBSTER'S, *supra* note 305, specifically. Defined as: "suited by nature, character, or design to a particular use, purpose, or situation." *Id.*, adapted.

307. *Unnecessary*, BLACK'S LAW DICTIONARY, *supra* note 309 (defining unnecessary as "not required under the circumstances.")

308. For example, a time, place, and manner restriction (a type of restriction which Justice Scalia referenced in *Heller* as being presumptively constitutional) compared with a categorical ban on a type of firearm.

309. *Heller*, 554 U.S. at 693 (Breyer, S., dissenting).

310. *Substantial*, BLACK'S LAW DICTIONARY, *supra* note 305 (defining substantial as "strong, solid, and firm; Considerable in amount or value; real and not imaginary; having actual, not fictitious, existence."); *Substantial*, WEBSTER'S, *supra* note 305 (defining substantial as "[s]omething having substance or actual existence.")

311. See *Moore v. Madigan*, 702 F.3d 933, 939–40 (7th Cir. 2012).

which the British right to bear arms has been almost completely eliminated evidences the necessity of this consideration. Historically, the regulation of firearms in Great Britain has been driven by knee jerk reactions by Parliament without any regard as to whether empirical data justifies the financial cost or the damage done to individual liberties by imposing further regulations on firearms. If the Court chose to review Second Amendment challenges subject to strict scrutiny, it would be foreclosing on many gun regulations which might actually improve public safety. Choosing the less strict standard of intermediate scrutiny would leave too much room for discretionary judgments, which could lead to the piecemeal derogation of the right to bear arms in the United States.³¹² Because of the complex competing interests on both sides of Second Amendment challenges, it is reasonable to require the government to make some level of heightened showing of reliable empirical data to support the imposition of regulations limiting the exercise of the Second Amendment right. The proposed framework would ensure that the Second Amendment rights of law-abiding citizens are sufficiently protected, while also allowing for the imposition of common sense and empirically-based gun regulations. Furthermore, this framework would, in theory, foster consistency in Second Amendment jurisprudence by establishing a clear standard for both the government and judges to rely upon when considering the viability of firearm regulations. It would also encourage further scholarly research into the connection between guns, crime, criminal psychology, the use of firearms in society, the effectiveness of education and prevention programs, and the methods used by law enforcement to combat gun violence. As Baker and McPhedran stated in their study on Australia's firearm statistics:

If policy is to be truly effective, it must have clearly defined outcomes and it must be able to bring about those outcomes. The desired, and implied, outcome of firearms legislation is to achieve an improvement in public health and safety by minimizing firearms abuse and misuse. Such aims may be difficult to achieve when legislation is drafted in the political arena [F]irearms policy development should be based on empirical data, careful evaluation of that empirical data, and community understanding and acceptance of the proposed legislation.³¹³

Because judges are not in the position to make policy, it is reasonable to require the legislature to conduct an objective inquiry and

312. See Anderson, *supra* note 8, at 561.

313. Baker & McPhedran, *supra* note 73, at 12–13.

formulate the most effective and efficient means to implement a policy, with reliable data supporting its imposition. If the government can provide sufficient empirical data to support the imposition of a particular firearm regulation, it follows that the law can surely be specifically adapted so as to advance the governmental objective while also avoiding unnecessary collateral infringement on the Second Amendment rights of law-abiding citizens.

The strength of this test can be demonstrated by applying it to the longstanding tradition of prohibiting felons from possessing firearms. The imposition of this particular regulation can easily be justified by referencing the underlying criminal recidivism statistics. Criminal recidivism rates have been thoroughly studied and analyzed to produce reliable data regarding the likelihood of criminal recidivism based on six “criminal history categories” (“CHC”).³¹⁴ For example, criminals in CHC I have, “a substantially lower risk of recidivating within two years (13.8%) than do offenders in CHC VI (55.2%).”³¹⁵ Thus, if one were to apply the proposed pragmatic test to this example, it would meet constitutional muster. The government would only be required to make a moderate inquiry due to the nature of the interests at stake and the fact that the constitutional rights of felons have been traditionally limited in these types of circumstances. Based on the recidivism rates, which tend to demonstrate that convicted felons are far more likely to be involved in a subsequent crime after their release, the government would meet its burden to show there is a verifiable basis for the imposition of the law. Second, because the law only applies to convicted felons, there is very little threat of any collateral infringement on the rights of law-abiding citizens.

Judge Richard Posner of the Seventh Circuit Court of Appeals, as well as the Seventh Circuit in general, have effectively incorporated the use of statistics to evaluate Second Amendment challenges.³¹⁶ Moreover,

314. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, U.S. SENTENCING COMMISSION 1 (May 2004), <https://www.ussc.gov/research/research-publications/measuring-recidivism-criminal-history-computation-federal-sentencing-guidelines>.

315. *Id.* at 6.

316. *See Moore*, 702 F.3d at 940; *see also United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (per curiam) (declaring a law prohibiting illegal drug users from possessing a firearm constitutional, based in part on studies showing a connection between substance abuse and violent crime. “Ample academic research confirms the connection between drug use and violent crime. For example, nearly four times as many adults arrested for serious crimes had used an illegal drug in the previous year than had not.”); *United States v. Skoien*, 614 F.3d 638, 644 (7th Cir. 2010) (upholding a law prohibiting convicted domestic violence misdemeanants from possessing a firearm. The court based its opinion on the state’s “strong showing” that reliable empirical data

the Seventh Circuit's analysis in three major Second Amendment cases demonstrates the benefit of requiring the government to make a strong showing of empirical data to support the imposition of the challenged regulation. In *United States v. Skoien*, the majority declined to delve deeply into the "levels of scrutiny quagmire," but instead required the government to make a strong showing to support the imposition of the challenged regulation.³¹⁷ The regulation before the court in *Skoien* prohibited domestic violence misdemeanants from possessing a firearm.³¹⁸ The court upheld the law as constitutional.³¹⁹ In so concluding, the Seventh Circuit determined an overwhelming amount of research showed, first, very high recidivism rates among convicted domestic violence misdemeanants (*Skoien* himself was a recidivist).³²⁰ Secondly, research demonstrated a very high mortality rate when firearms are involved in domestic violence incidents.³²¹ Thus, the court determined the government met its burden to make a strong showing that prohibiting a class of persons who are statistically likely to be involved in multiple domestic violence incidents as well as statistically prone to using firearms in the course of said incident, was a necessary measure to protect public safety.³²² An additional factor in the court's conclusion was that the regulation before the court provided for "expungement, pardon, or restoration of civil rights" whereby, upon a proper showing, an individual would no longer be prohibited from possessing a firearm.³²³

Similarly, in *United States v. Yancey*, the Seventh Circuit upheld a federal law prohibiting illegal drug users from possessing a firearm.³²⁴ After requiring the government to make the same strong showing as in

demonstrated a very high recidivism rate (ranging from 40% to 80%) among domestic violence misdemeanants, coupled with the fact that incidents of domestic violence involving a firearm are twelve times more likely to result in death).

317. *Skoien*, 614 F.3d at 641–42.

318. *Id.* at 639.

319. *See id.* at 645.

320. *Id.* at 645.

321. *Id.* at 643.

322. *Id.* at 644–46.

323. *Id.* at 644.

324. *Yancey*, 621 F.3d at 685 ("[h]abitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms."); *see also* Don B. Kates & Clayton E. Cramer, *Symposium, The Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L. J. 1339, 1361 (2009) ("[t]he Founders viewed the right to arms as inextricably linked with the right to vote as incidents of full citizenship: those who were armed were entitled to vote and those who voted were entitled to bear arms. Thus, it is particularly relevant to note that the right to vote may constitutionally be denied to convicted criminals and the insane. By parity of reasoning it seems clear that persons convicted of serious criminal offenses may be prohibited from possessing guns.").

Skoien, the court determined the government met its burden by providing a large number of studies which demonstrated a strong connection between illegal drug use and violent crime.³²⁵ “Ample academic research confirms the connection between drug use and violent crime. For example, nearly four times as many adults arrested for serious crimes had used an illegal drug in the previous year than had not.”³²⁶ Additionally, and similar to *Skoien*, the court noted that illegal drug users could regain their right to possess a firearm by ending their drug abuse.³²⁷

Most recently, in *Moore v. Madigan*, the plaintiffs challenged the constitutionality of an Illinois law prohibiting people from carrying a gun “ready to use (loaded, immediately accessible—that is, easy to reach—and uncased),” with few exceptions, primarily for law enforcement.³²⁸ Judge Posner, writing for the majority, determined that based on the available empirical data, the government failed to make a strong showing to support the challenged regulation.³²⁹ Judge Posner stated, “Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety.”³³⁰ While the majority did conduct a limited historical analysis of prohibitions similar to the challenged regulation, it largely relied upon theoretical and empirical evidence in reaching its conclusion.³³¹ First, the court rejected the argument that the *Heller* opinion was narrowly limited to the right to possess a firearm for self-defense within one’s home.³³² The court stated, “a Chicagoan is a good deal more likely to be attacked on the sidewalk in a rough neighborhood than in his apartment building on the 35th floor of the Park Tower” and that “[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”³³³

Next, the court addressed available empirical evidence examining relevant trends related to the carriage of firearms in public.³³⁴ On this

325. *Yancey*, 621 F.3d . at 685–87.

326. *Id.* at 686 (citing *Illicit Drug Use Among Persons Arrested for Serious Crimes*, OFFICE OF APPLIED STUD., SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. 2–3 (2005), <http://www.oas.samhsa.gov/2k5/arrests/arrests.pdf>).

327. *Id.*

328. *Moore*, 702 F.3d at 934.

329. *Id.* at 942.

330. *Id.*

331. *Id.*

332. *Id.* at 937.

333. *Id.* (In reaching its conclusion the court referenced a number of historical records including Blackstone’s description of the right to bear arms for self-preservation “[a]s a fundamental natural right of Englishmen, on a par with seeking redress in the courts or petitioning the government”).

334. *Moore*, 702 F.3d at 937.

point, the court found the majority of studies to be, at best, inconclusive in demonstrating an association between public carriage of firearms and crime rates in general or murder rates in particular.³³⁵ The court noted studies which, in an indirect way, reached a different conclusion.³³⁶ However, the court found these studies unpersuasive because they either did not address the issue before the court (i.e. the connection between public carriage of firearms and crime rather than increased gun ownership and crime),³³⁷ or the study had been rebutted or its methods called into question by subsequent research examining the same data.³³⁸ The court concluded stating, “In sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law.”³³⁹ The court determined that in *Heller* the Supreme Court unambiguously determined the Second Amendment right would not depend on “causal counts.”³⁴⁰ “If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way.”³⁴¹

The three Seventh Circuit cases discussed above demonstrate the benefits of referencing empirical data as part of the court’s determination of whether the challenged law permissibly or impermissibly burdens the Second Amendment right. As demonstrated by these three opinions from different panels on the Seventh Circuit, placing the burden on the government to make a showing of empirical data supporting the imposition of the regulation facilitates consistency in Second Amendment jurisprudence. Additionally, the results of these cases meet the goal set forth in the introduction to this note—that application of the proposed pragmatic test would both protect the right afforded to law

335. *Id.* at 937–38 (quoting Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 59 (2005) (“Based on findings from national law assessments, cross-national comparisons, and index studies, evidence is insufficient to determine whether the degree or intensity of firearms regulation is associated with decreased (or increased) violence.” (internal quotations omitted))); Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009) (“Based on available empirical data, therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.”).

336. *Moore*, 702 F.3d at 938.

337. *See id.* (citing Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1112 (2001)).

338. *See id.* at 939 (citing Ian Ayres & John J. Donohue III, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977–2006*, 6 ECON. J. WATCH 218, 224 (2009)).

339. *See id.* at 939.

340. *Id.*

341. *Id.*

abiding citizens by the Second Amendment and also permit pragmatic regulation of that right in circumstances where empirical data supports, to the requisite degree, the need for the regulation. Furthermore, under the proposed pragmatic test, judges retain a certain amount of discretion, albeit not an unlimited amount, to determine what level of showing the government is required to make depending upon the unique circumstances of each case.

CONCLUSION

The Second Amendment right to bear arms is uniquely enshrined in the United States Constitution and American culture. A balance must be struck between the competing interests which unavoidably arise on each side of Second Amendment considerations. A survey of the genesis and efficacy of firearms regulations in Australia, Canada, and the UK tends to show that empirical data can play an important role in the process of judicial review of Second Amendment challenges in the United States. Furthermore, Second Amendment challenges cannot be appropriately reviewed under one of the traditional standards of scrutiny. Justice Breyer's interest balancing test does not provide a sufficient framework for lower courts and its application would lead to inconsistencies in Second Amendment jurisprudence, much like what currently exists. The proposed pragmatic test incorporates aspects of both the traditional standards of scrutiny as well as the interest balancing test. Adoption of this pragmatic test would enable legislatures to enact evidence-based firearms regulations, while also protecting the Second Amendment rights of law-abiding citizens. Additionally, it would foster consistency in Second Amendment jurisprudence, and eliminate the risk of lower courts getting stuck in the scrutiny quagmire.