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Fitting a Gun in a Circle–a How-To Guide: A Comprehensive Look at the Standard of Review for Gun Regulations Under the Second Amendment

BETH COPLOWITZ*

In District of Columbia v. Heller, the Supreme Court's landmark Second Amendment case, the Court held that the right to bear arms is an individual right aimed at self-defense in the home. Two years later, McDonald v. City of Chicago extended this right to the states through the Fourteenth Amendment. However, lower courts were left with little guidance on what level of scrutiny to apply to gun regulations. As a result, courts have applied various levels of scrutiny including intermediate scrutiny, strict scrutiny, a two-step inquiry that leads to either intermediate or strict scrutiny, and an undue burden standard. Of these, courts seem to favor the hybrid two-step test.

This Comment will propose a more comprehensive and workable method to determine what standard of review to apply to gun regulations—the circle model used in the context of church autonomy and freedom of religion protected

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by the First Amendment. This model advocates an epicenter comprised of a core right that has two concentric circles revolving around the epicenter. The farther away one moves from the core, the fewer rights one has and the less scrutiny should be applied to any regulations falling within those circles. The circle model would provide guidance on what level of scrutiny to apply to regulations depending on where in this model they fall. This Comment will concentrate specifically on the "who." The Author will demonstrate how to apply this model to different types of individuals to determine where in this model these individuals fall and thus what level of scrutiny to apply to regulations targeting them.

INTRODUCTION

"At 2:09 a.m., a warning appeared on the club's Facebook page: 'Everyone get out of pulse and keep running.'"[1] It was Latin night at Pulse, a gay nightclub, and what should have been a night full of spirited salsa dancing turned into a deadly nightmare.[2] Omar Mateen, who called 911 during the attack to pledge allegiance to ISIS,[3] opened fire at the Orlando nightclub on June 12, 2016, between 2:02 AM and 5:15 AM,[4] killing forty-nine people and wounding fifty-three.[5] Individuals locked themselves in bathroom stalls and played dead while waiting for the police to arrive.[6] One survivor, Angel Colon, who was shot three times in the leg, miraculously stayed silent as Mateen continued to shoot his hand and hip.[7] Those trapped inside the club frantically called and messaged friends and relatives.[8] Mateen legally purchased the two weapons he used at Pulse the week before the shooting.[9] This horrific attack marks "the deadliest mass shooting in the United States."[10]

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[1] Ariel Zambelich, *3 Hours in Orlando: Piecing Together an Attack and Its Aftermath*, NPR: THE TWO-WAY (June 26, 2016, 5:09 PM), http://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update.

[2] *Id.*

[3] Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016, 11:05 AM), http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/.

[4] Zambelich, *supra* note 1.

[5] *Id.*; Ellis, *supra* note 3.

[6] Jack Healy & John Eligon, *Orlando Survivors Recall Night of Terror: 'Then He Shoots Me Again'*, N.Y. TIMES (June 17, 2016), http://www.nytimes.com/2016/06/18/us/pulse-nightclub-orlando-mass-shooting.html?rref=collection%2Fnewseventcollection%2F2016-orlando-shooting&action=click&contentCollection=us&region=rank&module=package&version=highlights&contentPlacement=2&pgtype=collection&_r=0.

[7] *Id.*

[8] *Id.*; Ellis, *supra* note 3.

[9] Zambelich, *supra* note 1.

[10] Ellis, *supra* note 3; Zambelich, *supra* note 1. It should be noted that over the course of writing this paper, I had to rewrite the introductory paragraph several times due to the number of mass shootings in America that took place over the span of a few months. I wanted to open with the most recent American shooting, and unfortunately, the difficulty in staying current sheds light on the terrible reality of the frequency of mass shootings.

In *District of Columbia v. Heller*,[11] the Supreme Court's landmark Second Amendment case, the Court held that the right to bear arms is an individual right aimed at self-defense in the home.[12] Two years later, *McDonald v. City of Chicago*[13] extended this right to the states through the Fourteenth Amendment.[14] However, after *Heller* and *McDonald*, many questions were left unanswered, such as "'the scope of [the *Heller*] right beyond the home[15] and the standards for determining whether and how the right can be burdened by governmental regulation.'"[16] *Heller* did state, however, that the right to bear arms is not absolute and many longstanding handgun regulations are "presumptively lawful."[17] It is no surprise that after these decisions some would advocate for stricter gun regulations,[18]

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[11] 554 U.S. 570 (2008).

[12] *Id.* at 635.

[13] 561 U.S. 742 (2010).

[14] *Id.* at 750 ("We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.").

[15] *See* Moore v. Madigan, 702 F.3d 933, 935–36, 940 (7th Cir. 2012) ("Nor can we ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one's home."); Kachalsky v. County of Westchester, 701 F.3d 81, 94 (2d Cir. 2012) (recognizing that regulating the carrying of a firearm in public did implicate the Second Amendment, but that it did not burden the core right of self-defense in the home—a "critical difference" between this case and Heller because the government's authority to regulate handguns "is qualitatively different in public than in the home"). *But see* Woollard v. Gallagher, 712 F.3d 865, 875–76 (4th Cir. 2013) (declining to decide whether the Second Amendment protections apply outside the home).

[16] *Woollard*, 712 F.3d at 874 (quoting United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011)); *see Kachalsky*, 701 F.3d at 89 ("What we know from [*Heller* and *McDonald*] is that Second Amendment guarantees are at their zenith within the home. What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government.") (citation omitted).

[17] 554 U.S. at 627 n.26.

[18] Max Ehrenfreund & Zachary A. Goldfarb, *11 Essential Facts About Guns and Mass Shootings in the United States*, WASH. POST: WONKBLOG (June 18, 2015), http://www.washingtonpost.com/news/wonkblog/wp/2015/06/18/11-essential-facts-about-guns-and-mass-shootings-in-the-united-states/ (Many Americans support the right to bear arms as well as specific restrictions, such as background checks, assault weapons bans, and a federal database to track guns. Fifty-eight percent of Americans said they favored stricter gun control laws in a 2012

especially in light of the large number of mass shootings in America in 2016 alone[19]—such as the one in Orlando described above.

Amid this confusion, courts and commentators have struggled to grapple with what level of scrutiny to apply to gun regulations. Courts are split on this issue and have applied various levels of scrutiny to determine whether gun regulations pass constitutional muster.[20] These levels of scrutiny range from intermediate scrutiny to strict scrutiny, to a two-step inquiry that leads to either intermediate or strict scrutiny, to an undue burden standard.[21] Of these, courts seem to favor the hybrid two-step test.[22]

In order to provide courts with a more comprehensive and workable method to determine what standard of review to apply to gun regulations, the circle model used in the context of church autonomy and freedom of religion protected by the First Amendment should

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Gallup poll following a school shooting in Newton, Connecticut). *But see* Art Swift, *Less Than Half of Americans Support Stricter Gun Laws*, GALLUP (Oct. 31, 2014), http://www.gallup.com/poll/179045/less-half-americans-support-stricter-gun-laws.aspx (forty-seven percent of Americans said they favored stricter gun control laws in a 2014 Gallup poll).

[19] *Mass Shootings - 2016*, GUN VIOLENCE ARCHIVE, http://www.gunviolencearchive.org/reports/mass-shooting (last visited Dec. 27, 2016).

[20] *See* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); GeorgiaCarry.Org., Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011) [hereinafter *Heller II*]; Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); Nordyke v. King, 644 F.3d 776, 782–84, 786 (9th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010); United States v. Engstrum, 609 F. Supp. 2d 1227, 1231–32 (D. Utah 2009); United States v. Booker, 570 F. Supp. 2d 161, 163–64 (D. Me. 2008).

[21] *See* sources cited *supra* note 20.

[22] Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller's "Schools" and "Government Buildings,"* 92 NEB. L. REV. 537, 558 (2014) ("The overwhelming majority of federal courts of appeals that have entertained post-*Heller* Second Amendment claims have adopted a two-step approach for analyzing such claims.") (citation omitted); Daniel J. Bolin & Brent O. Denzin, *When All Heller Breaks Loose: Gun Regulation Considerations for Zoning and Planning Officials Under the New Second Amendment*, 44 URB. LAW. 677, 683 (2012) (stating that the majority of courts that have announced a standard of review for challenged gun regulations have adopted the two-step test).

be adopted.[23] This model advocates an epicenter comprised of a core right that has two concentric circles revolving around the epicenter.[24] The farther away one moves from the core, the fewer rights one has and the less scrutiny should be applied to any regulations falling within those circles.[25] Using this model would provide guidance to courts to better determine whether gun regulations focusing on the "who, what, where, and how" pass constitutional muster. Specifically, this model would provide guidance on what level of scrutiny to apply to such regulations depending on where in this circle model they fall.

This Comment will concentrate specifically on the "who" and propose a working model using the circle diagram to determine what standard of scrutiny to apply to regulations targeting specific individuals. Although regulations that focus on the "what, where, and how,"—regulations focusing on what type of guns can be used,[26] whether they can be used in the home versus outside of the home,[27] and regulations relating to open carry versus concealed carry[28]—would certainly benefit from further analysis and provide useful guidance to the courts, they are not the focus of this Comment. The Author will use examples of gun regulations targeting specific individuals to show how this model would work and will provide guidance on what level of scrutiny to apply to individuals falling within certain circles around the core right of self-defense in the home.

Part I will examine the decisions of *Heller* and *McDonald* as they relate to the evolution of the right to bear arms and the uncertainty they created among lower courts struggling to determine what level of scrutiny to apply to gun regulations. Part II will discuss the various levels of scrutiny lower courts have applied and commentators have advocated post-*Heller*. Part III will describe the circle model of the Second Amendment by initially providing an overview of how it has been used in relation to church autonomy and the First

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[23] *See* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979).

[24] *See id.*

[25] *See id.* at 1539–40.

[26] *See, e.g.*, Fla Stat. §§ 790.16; 790.221 (2016).

[27] *See, e.g.*, Fla. Stat. §790.251 (2016).

[28] *See, e.g.*, Fla. Stat. §790.25 (2016).

Amendment. Part III will then explain why this model, which in the Second Amendment context builds off pre-existing models such as Justice Breyer's interest-balancing approach as well as the two-step and sliding-scale models, allows for nuance and structure, making it best-suited for examining Second Amendment regulations. This section will then demonstrate how to apply this model to different types of individuals to determine where in this model they fall and thus what level of scrutiny to apply to regulations targeting them. Therefore, even if readers do not agree with the specific application of the model presented herein, the approach itself still works, allowing a reader to choose where in the model he believes an individual should fall. The Comment will conclude with final thoughts.

I. *HELLER* AND *MCDONALD*—PRECEDENT-SETTING CASES WITHOUT MUCH PRECEDENT

The Second Amendment proscribes that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[29] Based on recent jurisprudence, we now know that at the very least, an individual has a fundamental right to bear arms in the home for the purpose of self-defense.[30]

In *District of Columbia v. Heller*,[31] the Supreme Court considered whether a District of Columbia prohibition on the possession of usable handguns in the home violated the Second Amendment.[32] Respondent Heller, a D.C. special police officer, applied to register a handgun he wished to keep at home, but the District refused.[33] Heller filed a lawsuit in the Federal District Court for the District of Columbia seeking to enjoin the city from barring the registration of

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[29] U.S. CONST. amend. II.

[30] District of Columbia v. Heller, 554 U.S. 570, 581, 635 (2008).

[31] 554 U.S. 570.

[32] *Id.* at 573–75 (The District of Columbia law banned handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; prohibited any person from carrying an unlicensed handgun, but authorized the police chief to issue one-year licenses; and required residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device.).

[33] *Id.* at 575.

handguns, from enforcing the licensing requirement, and from enforcing the trigger-lock requirement because these requirements banned the use of functional firearms in the home.[34]

The Supreme Court held that "the Second Amendment right is exercised individually and belongs to all Americans," thus establishing that there is a fundamental, individual right to bear arms in the home for self-defense.[35] The Second Amendment does not protect the right of individuals to "carry arms for *any sort* of confrontation"[36]—"the inherent right of self-defense has been central to the Second Amendment right,"[37] and the need for self-defense is most acute in the home.[38]

However, the Court made clear that the right to bear arms is not absolute and can be regulated by stating that although the "Second Amendment conferred an individual right to keep and bear arms . . . the right was not unlimited, just as the First Amendment's right of free speech was not . . . ."[39] The Court further established that limitations can be imposed on the Second Amendment by drawing attention to lawful, longstanding prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places, and laws imposing conditions and qualifications on the commercial sale of arms.[40] In one of the opinion's most important footnotes, the Court went on to explain that the longstanding prohibitions or regulations it listed were not an exhaustive list, but were mere examples of lawful regulations.[41]

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[34] *Id.* at 575–76.

[35] *Id.* at 581.

[36] *Id.* at 595.

[37] *Id.* at 628.

[38] *Id.* ("[T]he home [is] where the need for defense of self, family, and property is most acute.").

[39] *Id.* at 595.

[40] *Id.* at 626–27 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms.").

[41] *Id.* at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.").

Most significantly, the Supreme Court did not establish what level of scrutiny should be applied to gun regulations in this landmark case.[42] The majority merely held that the handgun ban in question was unconstitutional, regardless of the standard of scrutiny applied.[43] This was because the handgun ban in *Heller* was a prohibition of an

> entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.[44]

In his dissent, Justice Breyer rejected the use of strict scrutiny because the laws the majority claimed were presumptively lawful and constitutional would not survive strict scrutiny, so this could not actually be the standard.[45] Additionally, he noted that adoption of a true strict scrutiny standard of review to evaluate the constitutionality of gun regulations would be "impossible" because this standard is really a balancing test in disguise.[46] Practically every gun regulation advances a "'primary concern of every government—a concern for the safety and indeed the lives of its citizens.'"[47] Using the strict scrutiny standard will "*in practice* turn into an interest-balancing inquiry," so an interest-balancing inquiry should be explicitly adopted.[48] Thus, Justice Breyer overtly recommended an interest-

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[42] *Id.* at 628–29.

[43] *Id.* ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster.").

[44] *Id.* (citation omitted).

[45] *Id.* at 688 (Breyer, J., dissenting).

[46] *Id.* at 689.

[47] *Id.* (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

[48] *Id.* (The interests protected by the Second Amendment will be weighed against the governmental public-safety concerns, with the "only question being

balancing inquiry that "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."[49] The Court rejected this approach as too free-wheeling[50] because it would require the judiciary to rule on a case-by-case basis "whether a constitutional right is actually worth insisting upon."[51] Moreover, as the Court stated, requiring firearms in the home to be kept inoperable at all times "makes it impossible for citizens to use them for the core lawful purpose of self-defense" and is unconstitutional.[52] Thus, the Second Amendment protects an individual's right to self-defense in his home.[53]

More recently, in *McDonald v. City of Chicago*,[54] the Supreme Court relied on the Court's holding in *Heller*[55] and stated that self-defense is a basic right and "individual self-defense is 'the central component' of the Second Amendment right."[56] The Court held that the Second Amendment right to possess a handgun in the home for self-defense "is fully applicable to the States" under the Due Process

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whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.").

[49] *Id.* at 689–90.

[50] *Id.* at 634 (majority opinion) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

[51] Michael J. Habib, Note, *The Future of Gun Control Laws Post-McDonald and Heller and the Death of One-Gun-Per-Month Legislation*, 44 CONN. L. REV. 1339, 1367 (2012).

[52] *Heller*, 554 U.S. at 630.

[53] *Id.* at 635.

[54] The city of Chicago and the village of Oak Park had laws similar to the District of Columbia's, effectively banning the possession of handguns by private citizens. Petitioners filed suit, alleging that the handgun ban and ordinances violated the Second and Fourteenth Amendments. Chicago and Oak Park argued that their laws were constitutional because the Second Amendment was not applicable to the States. McDonald v. City of Chicago, 561 U.S. 742, 750, 752 (2010).

[55] *Id.* at 780 ("[O]ur central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."); *see* Alex Poor, *Bearing the Burden of Denial: Observations of Lower Court Decisions Misapplying Supreme Court Precedent in Second Amendment Cases*, 67 S.M.U. L. Rev. 401, 402, 411 (2014).

[56] *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599).

Clause of the Fourteenth Amendment.[57] Furthermore, the Supreme Court in *McDonald* echoed *Heller* in holding that the challenged gun regulation at issue in *Heller* "would fail constitutional muster" under "any of the standards of scrutiny"[58] and did not establish what level of scrutiny to apply to gun regulations,[59] leaving lower courts in a state of confusion as to what level of review to apply.

II. AN ARRAY OF SCRUTINY

Because the Court "did not announce a standard for lower courts to apply" in enforcing the Second Amendment right in *Heller* and *McDonald*,[60] lower courts, left to their own devices, have applied various degrees of scrutiny.[61] The most popular has been a two-step inquiry,[62] but before explaining that standard, this Comment will examine the other various levels of scrutiny courts have applied to gun regulations.

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[57] *Id.* at 750, 759, 791. In *Malloy v. Hogan*, the Supreme Court, based on the Due Process Clause of the Fourteenth Amendment, held that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* at 759, 765 (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964)). The Court held that "particular Bill of Rights guarantees or remedies" applied to the states. *Id.* at 766. The Second Amendment right is incorporated in the concept of due process because the right to keep and bear arms, *i.e.* the right to self-defense, is "fundamental to *our* scheme of ordered liberty" and "'deeply rooted in this Nation's history and tradition.'" *Id.* at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The "Framers and ratifiers of the Fourteenth Amendment" considered the right to keep and bear arms "necessary to our system of ordered liberty." *Id.* at 778.

[58] *Heller*, 554 U.S. at 628–29.

[59] *Id.* at 687 (Breyer, J., dissenting) ("How is a court to determine whether a particular firearm regulation . . . is consistent with the Second Amendment? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?").

[60] Bolin & Denzin, *supra* note 22, at 680.

[61] Caroline L. Moran, *Under the Gun: Will States' One-Gun-Per-Month Laws Pass Constitutional Muster After Heller and McDonald?*, 38 SETON HALL LEGIS. J. 163,174, 176 (2014).

[62] *See infra* note 118.

A. *Competing Views Among Lower Courts*

1. STRICT SCRUTINY

Few courts have adopted strict scrutiny,[63] requiring that in order for a law to be upheld, it must be necessary to achieve a compelling state interest[64] and it must be narrowly tailored to achieve this interest.[65] Despite this supposedly rigorous standard, the courts that have applied strict scrutiny have upheld challenged gun regulations as constitutional.[66]

2. INTERMEDIATE SCRUTINY

Few courts have applied intermediate scrutiny,[67] requiring that in order for a regulation to be upheld, it must be substantially related to an important governmental objective.[68] In *United States v. Skoien*,[69] defendant Steven Skoien was convicted of two misdemeanor counts of domestic violence and as a result violated 18 U.S.C. § 922(g)(9) when he was found in possession of a shotgun.[70] Skoien appealed his two-year imprisonment sentence, contending that § 922(g)(9) violated the Second Amendment.[71]

In evaluating Skoien's claim, the Seventh Circuit applied intermediate scrutiny to determine that "a law banning individuals convicted of domestic violence misdemeanors from possessing guns bore a 'substantial relation' to the important government objective

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63 Moran, *supra* note 61, at 174, 176; *see, e.g.*, United States v. Engstrum, 609 F. Supp. 2d 1227, 1231–32 (D. Utah 2009); United States v. Booker, 570 F. Supp. 2d 161, 163–64 (D. Me. 2008).

64 Habib, *supra* note 51, at 1366.

65 Moran, *supra* note 61, at 177.

66 *Booker*, 570 F. Supp. 2d at 164–65; *Engstrum*, 609 F. Supp. 2d at 1235.

67 United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010).

68 Habib, *supra* note 51, at 1366.

69 614 F.3d 638.

70 *Id.* at 639.

71 *Id.*

of 'preventing armed mayhem.'"[72] Although the court did not explicitly explain why it adopted an intermediate level of scrutiny,[73] it compared Second Amendment regulations to First Amendment regulations that were examined under an intermediate scrutiny framework.[74] The Seventh Circuit merely noted that applying intermediate scrutiny is "prudent," that § 922(g)(9) is valid because it is substantially related to an important governmental objective—preventing armed mayhem—and that "we need not get more deeply into the 'levels of scrutiny' quagmire."[75]

In determining that § 922(g)(9) is constitutional, the court stated that because the recidivism rate is high among domestic violence offenders, "there are substantial benefits in keeping the most deadly weapons out of the hands of domestic abusers."[76] The court also noted that domestic abusers often commit acts that if committed against strangers would be felonies, as well as the fact that firearms are deadly in domestic abuse.[77]

3. THE UNDUE BURDEN STANDARD

Some courts[78] have suggested the use of the undue burden standard used in abortion jurisprudence[79] as the standard of scrutiny that should be used to assess whether a challenged gun regulation is constitutional. In the abortion context, an undue burden is a regulation that places a "substantial obstacle in the path of a woman seeking an

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[72] Stephen Kiehl, Comment, *In Search of A Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1161 (2011) (footnote omitted); *see Skoien*, 614 F.3d at 642 ("[T]he goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective.").

[73] Although the court did explain that a rational basis standard would be inappropriate because under this standard any law is valid if a justification for it can be imagined. *Skoien*, 614 F.3d at 641.

[74] *Id.*

[75] *Id.* at 641–42.

[76] *Id.* at 644; *see* Kiehl, *supra* note 72, at 1161.

[77] *Skoien*, 614 F.3d at 643–44.

[78] *See, e.g.*, Nordyke v. King, 644 F.3d 776, 782–84, 786 (9th Cir. 2011).

[79] Bolin & Denzin, *supra* note 22, at 683 n.41 ("pre-viability abortion regulations are unconstitutional if they impose an 'undue burden' on a woman's right to terminate her pregnancy").

abortion of a nonviable fetus."[80] The Supreme Court stated that "an undue burden is an unconstitutional burden."[81] According to the undue burden standard, regulations that substantially burden, or place a substantial obstacle in the way of a core right, should receive heightened scrutiny.[82]

The Ninth Circuit, in *Nordyke v. King*, addressed "whether the Second Amendment prohibits a local government from banning gun shows on its property."[83] Originally, the Ninth Circuit adopted an undue burden standard when it held that "only regulations that substantially burden the right to keep and to bear arms should receive heightened scrutiny."[84] In explaining its application of an undue burden standard, the court reasoned that *Heller* and *McDonald* "urged a 'substantial burden' approach based on the Supreme Court's evaluation of a regulation's relationship to the 'core right' protected by the Second Amendment."[85] The court held that the undue burden test would avoid "many of the difficult empirical questions as to the effectiveness of gun regulations that would arise under a strict scrutiny test."[86]

While applying the undue burden standard, the Ninth Circuit found that the county ordinance did not substantially burden the Second Amendment as the "ordinance did not make it materially more difficult to obtain firearms or create a shortage of places to purchase guns in and around the county, because it merely eliminates gun shows on government property."[87]

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[80] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) ("[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.").

[81] *Id.*

[82] Bolin & Denzin, *supra* note 22, at 682–83; *see Nordyke*, 644 F.3d at 782–84, 786.

[83] *Nordyke*, 644 F.3d at 780.

[84] Bolin & Denzin, *supra* note 22, at 682 (footnote omitted); *see Nordyke*, 644 F.3d at 782–84, 786.

[85] Bolin & Denzin, *supra* note 22, at 682–83 (footnote omitted); *see Nordyke*, 644 F.3d at 783.

[86] Bolin & Denzin, *supra* note 22, at 683 (footnote omitted); *see Nordyke*, 644 F.3d at 785.

[87] Bolin & Denzin, *supra* note 22, at 683 (footnote omitted); *see Nordyke*, 644 F.3d at 787–88.

Some courts and commentators have criticized the undue burden test "based on its similarity to Justice Breyer's 'interest-balancing' approach that was rejected by the *Heller* and *McDonald* Courts."[88] In particular, the undue burden's substantial obstacle inquiry in relation to a specific regulation is closely related to Justice Breyer's interest-balancing approach, which "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."[89] As one federal judge remarked on the similarity, "this court strongly doubts that the *Heller* majority envisioned the undue burden standard when it left for another day a determination of the level of scrutiny to be applied to firearms laws."[90]

Nordyke v. King has had a long and complicated procedural history since first reaching the Ninth Circuit twelve years before that court's most recent opinion in 2012.[91] In its most recent ruling, the court failed to adopt any standard of scrutiny.[92] The Ninth Circuit left the undue burden test "in further limbo by declining to apply any test in affirming the dismissal of the Second Amendment challenge after the county reinterpreted its ordinance . . . ."[93] The Ninth

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[88] Bolin & Denzin, *supra* note 22, at 683 (footnote omitted); *see* Kiehl, *supra* note 72, at 1156; Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 446–47 (2011) (Despite *Heller*'s rejection of the interest-balancing test, this approach may be inescapable in Second Amendment jurisprudence as evidenced by the "historical acceptance of concealed-carry prohibitions [that] cannot be explained by anything other than this very type of interest-balancing . . . ." To avoid contradicting *Heller*'s rejection of interest-balancing, "the Court may utilize a different form of words, such as an undue burden test, but in practical operation, its approach is likely to be little different" than the interest-balancing approach.).

[89] District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).

[90] Kiehl, *supra* note 72, at 1156 (quoting *Heller II*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010)).

[91] 681 F.3d 1041, 1043 (9th Cir. 2012).

[92] *Id.* at 1045 (O'Scannlain, J., concurring) ("But I cannot agree with the majority's approach, which fails to explain the standard of scrutiny under which it evaluates the ordinance.") (footnote omitted).

[93] Bolin & Denzin, *supra* note 22, at 683 (footnote omitted); *see Nordyke*, 681 F.3d at 1044 (majority opinion) ("No matter how broad the scope of the Sec-

Circuit adopted a similar approach to gun regulations as the Court in *Heller*[94] when it stated that the plaintiffs "in the present case . . . cannot succeed, no matter what form of scrutiny applies to Second Amendment claims."[95] Thus, it is unclear whether courts will continue applying the undue burden test.[96]

4. THE TWO-STEP TEST—A HYBRID OF STRICT AND INTERMEDIATE

Another test adopted by lower courts to evaluate the constitutionality of gun regulations is the two-step test[97] first adopted by the Third Circuit in *United States v. Marzzarella*.[98] Under this approach, "modeled after the approach in First Amendment cases,"[99] courts first ask whether the challenged regulation imposes a burden on conduct that falls within the scope of the Second Amendment's protection.[100] This means courts must determine whether a gun regulation has a historical basis, indicating it was within the scope of the Second Amendment at the time of ratification.[101] If it does not fall

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ond Amendment—an issue that we leave for another day—it is clear that, as applied to Plaintiffs' gun shows and as interpreted by the County, this regulation is permissible.").

94 *Heller*, 554 U.S. at 628–29 (stating that the ban of handguns in the home would fail to pass constitutional muster under any standard of scrutiny).

95 *Nordyke*, 681 F.3d at 1045.

96 *Id.* at 1045 n.2 (O'Scannlain, J., concurring) ("All that is clear from the majority's approach is that the majority cannot be evaluating the ordinance under strict scrutiny."); *see also* Bolin & Denzin, *supra* note 22, at 683 (explaining that the Ninth Circuit left the substantial burden test in limbo).

97 *See* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); GeorgiaCarry.Org., Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); *Heller II*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

98 614 F.3d at 89.

99 Bolin & Denzin, *supra* note 22, at 681; *see Marzzarella*, 614 F.3d at 89 n.4 (explaining that the Court will look to First Amendment doctrine to inform its analysis of the Second Amendment).

100 Pratt, *supra* note 22, at 558.

101 *Ezell*, 651 F.3d at 702–03; *Marzzarella*, 614 F.3d at 89; *Chester*, 628 F.3d at 680; *Reese*, 627 F.3d at 800–01.

within the historical scope of the Second Amendment, then the regulation is constitutional.[102] If the "historical evidence is inconclusive"[103] or suggests that the regulation does "burden conduct that the Second Amendment protects . . . courts will ask whether it passes muster under the appropriate level of heightened review"—either strict or intermediate scrutiny. [104]

During this second step, courts will choose a level of scrutiny "based on how close the burdened right comes to the core of the Second Amendment's guarantee and how severely the challenged [regulation] burdens that right."[105] Regulations that burden the core Second Amendment right of armed self-defense in the home should be evaluated using strict scrutiny.[106] Laws that do not burden the core right should be evaluated using intermediate scrutiny.[107] This two-step test "combines both a historical *and* an interest-balancing inquiry."[108] This two-step hybrid approach was first adopted by the Third Circuit, and was later adopted by the Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits.[109]

Closely related to the two-step model, the application of a sliding-scale model to Second Amendment regulations has been suggested by commentators to determine what level of scrutiny to apply.[110] This model has proven useful in other contexts such as evaluating regulations restricting freedom of speech and the right to vote.[111] Under the sliding-scale model, "the level of scrutiny utilized

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[102] Pratt, *supra* note 22, at 558.

[103] *Ezell*, 651 F.3d at 703.

[104] Pratt, *supra* note 22, at 558.

[105] *Id.* at 558–59.

[106] Moran, *supra* note 61, at 177; *see, e.g.*, *Marzzarella*, 614 F.3d at 89, 96–97.

[107] Moran, *supra* note 61, at 177; *see, e.g.*, *Marzzarella*, 614 F.3d at 89, 97.

[108] Lindsay Colvin, *History, Heller, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L. J. 1041, 1058 (2014).

[109] *See* sources cited *supra* note 97.

[110] Michael J. Habib, *The Second Amendment Standard of Review: The Quintessential Clean-Slate for Sliding-Scale Scrutiny*, 37 ADMIN. & REG. L. NEWS 13, 13 (2012) ("[T]he Second Amendment provides the quintessential 'clean slate' to apply a rarely utilized level of judicial review that can be called 'sliding scale scrutiny.'"); Habib, *supra* note 51, at 1369–70, 1373.

[111] Habib, *supra* note 110, at 14 (In explaining the sliding-scale model's application in other contexts: "[w]hile strict scrutiny is generally applied to laws that

by a court in assessing the constitutionality of a restrictive regulation will vary between strict and intermediate scrutiny, based on the impact the regulation has on the core of the right."[112] The sliding-scale model is a "hybrid level of scrutiny."[113] This model is essentially the same as the two-step model[114] adopted by the Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits.[115] Under the sliding-scale model, any law that restricts the core right to bear arms is subject to strict scrutiny, and any law that does not restrict the primary purpose or core of the right to bear arms, "but rather regulates how one may exercise that right," is subject to intermediate scrutiny.[116] Thus, since *Heller* and *McDonald*, lower courts have applied various standards of scrutiny to gun regulations.

B. *The Verdict is In—Two-Step Wins*

Despite a lack of clear precedent of what level of scrutiny to apply to Second Amendment challenges,[117] the majority of lower courts have applied the two-step test as the prevailing standard of

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restrict the right to free speech and the right to vote, intermediate scrutiny is used in First Amendment regulations that target the time, manner, and place, but not content, of speech, and in ballot access cases when the issue is the right to appear on a ballot. This means that, for purpose of the First Amendment and the right to vote, undoubtedly fundamental rights, there are multiple levels of scrutiny that may apply.").

[112] *Id.* at 13.

[113] Habib, *supra* note 51, at 1370.

[114] *See* Bolin & Denzin, *supra* note 22, at 680, 683 (To apply the two-part test, courts must first decide whether a challenged law restricts conduct falling within the scope of the Second Amendment, and if it does not, the inquiry is complete. If the law restricts the core right to bear arms, it is subject to strict scrutiny. Regulations that do not restrict the core right but are lawful under *Heller* are subject to an intermediate level of scrutiny that depends on the type of conduct being regulated and the degree to which the law burdens the right.).

[115] *See* sources cited *supra* note 97.

[116] Habib, *supra* note 110, at 14–15. According to proponents of the sliding-scale model, it "would balance the burden of government regulation in the interest of public safety with the fundamental right to bear arms and be a more fitting level of scrutiny for this unique right." *Id.* at 14. This model "will weigh the means by which one seeks to exercise the right to bear arms with the end result that the regulation will have on the interests protected by the right." *Id.* at 14-15.

[117] Poor, *supra* note 55, at 402, 417 (the Supreme Court did specify that rational basis scrutiny and Justice Breyer's interest-balancing approach are inappropriate standards of review).

review for gun regulations.[118] As will be discussed below, the proposed use of the circle model in the Second Amendment context will build upon the two-step hybrid test of strict and intermediate scrutiny to provide courts with a more workable method of establishing what level of scrutiny to apply to specific gun regulations.[119]

III. THE CIRCLE MODEL AND THE SECOND AMENDMENT—AN OBVIOUS COLLABORATION

A. *The Circle Model and the First Amendment—A Genesis Story*

The circle model was first proposed in the context of church autonomy and freedom of religion protected by the First Amendment to explain to what extent religious organizations should be allowed to discriminate based on the First Amendment's free exercise of religion and when the government should be allowed to regulate such discriminatory practices.[120] Bruce Bagni suggests that the traditional balancing approach for "resolving religious organizations' claims of exemption from antidiscrimination laws" based on free exercise of religion and church autonomy "has led to unsatisfactory and conflicting results"[121] to the "detriment of both first amendment values and the national commitment to eradicate discrimination."[122]

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[118] Pratt, *supra* note 22, at 558 ("The overwhelming majority of federal courts of appeals that have entertained post-*Heller* Second Amendment claims have adopted a two-step approach for analyzing such claims.") (citation omitted). It should be noted that a number of commentators incorrectly refer to the two-step test as intermediate scrutiny, but in actuality, they are referring to the hybrid two-step test. *See, e.g.*, Bolin & Denzin, *supra* note 22, at 683 (stating that the majority of courts that have announced a standard of review for challenged gun regulations have adopted the "kind of intermediate scrutiny described in Section II.A." However, the type of scrutiny discussed in that section of the article was the two-step test); Rosenthal & Malcolm, *supra* note 88, at 440 n.13 ("At the appellate level, there has been something of a trend toward a form of intermediate scrutiny requiring that the challenged regulation be substantially related to an important governmental objective." These authors then list a string of cases that all employed the two-step test.).

[119] *See infra* Section III.B.

[120] Bagni, *supra* note 23, at 1514, 1539; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1402 (1981).

[121] Bagni, *supra* note 23, at 1549.

[122] *Id.* at 1538–39.

The circle model was offered as a "more satisfactory approach . . . for resolving the conflict between religious liberty and the quest for human equality" by providing a more workable method for resolving this conflict.[123] Bagni starts with the premise that the government generally cannot regulate core activities and relationships in a church—those that are "purely spiritual or integral facets of the actual practice of the religion."[124] "Emanating from this core are a series of activities and relationships with increasing indicia of secularity"[125] to which decreasing levels of scrutiny apply. This concept is best illustrated by a circle model, with an epicenter consisting of the purely spiritual aspects of a church, and three concentric circles revolving around the epicenter.[126]

The epicenter is comprised of the "relationship between a church and its clergy and modes of worship and ritual," as well as membership policies of a church, religious education programs, and church-operated schools that "teach secular subjects with a decidedly religious orientation."[127] The first concentric circle emanating from the epicenter includes church-sponsored community activities, such as adoption agencies, homes for the elderly, hospitals, and schools dominated by secular courses in which religiosity is "present but not pervasive."[128] This circle also includes relationships between the church and "support employees with some religious or quasi-religious functions."[129] The second circle contains a church's secular business activities and relationships between secular employees, such as clerks or janitors, who perform purely nonspiritual functions.[130] The third, and outermost, circle is comprised of the "totally secular world."[131]

The spiritual epicenter of a church, or the core, can rarely be regulated by the government because this would infringe on the church's autonomy and thus would be subject to the highest form of

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123 *Id.* at 1539.
124 *Id.*
125 *Id.*; Laycock, *supra* note 120, at 1409.
126 Bagni, *supra* note 23, at 1539; Laycock, *supra* note 120, at 1402–03.
127 Bagni, *supra* note 23, at 1539.
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*

scrutiny—strict scrutiny.[132] The only type of regulation that might be justified in the epicenter is the need to assure the physical safety of church members, nonmembers, or of the community.[133] A church must be afforded the right to discriminate in relation to activities falling within its spiritual epicenter, such as selecting its congregants, because the free exercise of religion guarantees this right.[134] Moreover, the members of any specific religious sect must be allowed to freely model their internal structure because the existence of their religion depends on this.[135]

As one moves further away from the core, the fewer religious rights the church has and the less scrutiny should be applied.[136] When a church's activities fall outside the epicenter, the church is subject to regulation proportionate to the circle within which that activity falls—it may still be afforded some First Amendment protection, but these claims must be examined while simultaneously considering general societal interests against discrimination.[137] Thus, activities and relationships falling outside the epicenter may be regulated "to differing degrees by the state."[138]

The application of the epicenter analysis in evaluating activities that do not fall within the spiritual epicenter can be illustrated by examining church-related schools that engage in discriminatory practices.[139] Under this analysis, the "best way to evaluate a religious school's discriminatory admissions policy is to ask to what extent enrollment in the school is distinguishable from membership

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132 *Id.*

133 *Id.*

134 *Id.* at 1540–41 ("A church may choose to exclude persons for purely secular reasons; such a decision is simply outside the purview of civil government. In this sense, the right to control membership is absolute.").

135 *Id.* at 1540.

136 *Id.* at 1539–40 ("Once, however, the church acts outside this epicenter and moves closer to the purely secular world, it subjects itself to secular regulation proportionate to the degree of secularity of its activities and relationships."); Laycock, *supra* note 120, at 1409.

137 Bagni, *supra* note 23, at 1540.

138 *Id.* at 1549.

139 *Id.* at 1541. As previously explained, schools fall in the epicenter if they "teach secular subjects with a decidedly religious orientation" or in the first circle if they are "dominated by secular courses" and "religious orientation is present but not pervasive." *Id.* at 1539.

in a church," and thus not a purely spiritual activity.[140] In examining this issue, a court must first inquire whether the organization—here, the school— is, in fact, religious, and then ask "whether the religious mission permeates the educational process."[141] If the court decides that the school is a religious school whose main purpose is to teach classes in a religious context, then the school's admissions policy cannot be regulated in accordance with the free exercise of religion.[142] However, if the school is found to not be predominantly religious and discriminates in accepting students, the school's claim of exemption from regulation cannot be honored because this falls in the quasi-secular circle.[143] The practice must be weighed against the governmental interest in equality,[144] thus subjecting it to intermediate scrutiny.

The benefit of the circle model is that case-by-case balancing is not required, "for implicit in [the epicenter] approach is that the facts and circumstances of each case dictate a result for *that* case."[145] This is because there are certain rules and guidelines about what each circle includes, so this model clearly lays out where a specific activity falls, without needing to painstakingly figure out what type of scrutiny to apply to any given activity.[146] As a result, this model provides an excellent basis for evaluating Second Amendment regulations because the circle model by its very nature provides comprehensive guidance and a much more workable method of analysis than models currently used.[147]

B. *The Circle Model and the Second Amendment—Why It Works*

The circle model would be the best model to use to evaluate gun regulations because it provides flexibility and ease of use, while at the same time providing structure and guidance for a predictable re-

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140 *Id.*
141 *Id.* at 1542–43.
142 *Id.* at 1543.
143 *Id.* at 1543–44.
144 *Id.* at 1544.
145 *Id.*
146 *Id.*
147 *See id.*

sult. It is logical to apply the circle model because this model provides the nuance of Justice Breyer's interest-balancing approach,[148] but addresses the weakness of his approach, *i.e.* that it is vague and free-wheeling,[149] by providing clearer guidance. Justice Breyer's interest-balancing approach "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."[150] This inquiry is similar to the circle model, which requires a comparable balancing approach, but is framed differently because it does not provide any real guidance to the judiciary in making such decisions.[151] The Supreme Court rejected the interest-balancing approach because it was too free-wheeling[152] due to the fact that it would have required the judiciary to rule on a case-by-case basis "whether a constitutional right is actually worth insisting upon."[153] The circle model corrects this problem because this model does not require case-by-case balancing.[154] Justice Breyer had the right idea, but it simply needed more structure, and the circle model assuages the Supreme Court's concerns[155] by providing much more guidance, structure, and predictability, while at the same time allowing for flexibility and nuance.[156]

The circle model also builds on the idea behind the lower courts' use of the two-part test, and commentators' sliding-scale model, which require courts to choose a level of scrutiny "based on how close the burdened right comes to the core of the Second Amendment's guarantee and how severely the challenged [regulation] burdens that right."[157] According to the two-part test, regulations affecting the core Second Amendment right of armed self-defense in the

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148 District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).

149 *Id.* at 634 (majority opinion).

150 *Id.* at 689–90 (Breyer, J., dissenting).

151 *See id.*

152 *Id.* at 634 (majority opinion).

153 Habib, *supra* note 51, at 1367.

154 Bagni, *supra* note 23, at 1544 ("[F]or implicit in [the epicenter] approach is that the facts and circumstances of each case dictate a result for *that* case.").

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

156 Bagni, *supra* note 23, at 1544.

157 Pratt, *supra* note 22, at 558–59.

home should be evaluated using strict scrutiny.[158] But laws that do not affect the core right should be evaluated using intermediate scrutiny.[159]

The circle model builds on these models as it, too, is comprised of the belief that the core right requires strict scrutiny and falls at the epicenter of the model.[160] As one moves further away from the epicenter, regulations are easier to justify.[161] They require less scrutiny the further away from the core they fall on the model.[162]

However, unlike the two-part test and the sliding-scale model, the circle model provides a more comprehensive guide. The two-part test and the sliding-scale model, which for all intents and purposes are the same thing,[163] are incomplete because under these models "a restrictive regulation will vary between strict and intermediate scrutiny, based on the impact the regulation has on the core of the right."[164] These models fail to include rational basis to evaluate any challenged regulations.[165] Rational basis should be applied to certain regulations,[166] and thus the two-part test and sliding-scale model completely disregard this level of scrutiny.[167] The proposed circle model builds on the two-part test and sliding-scale model and brings these models to their logical end, thus providing much more guidance in determining whether a specific Second Amendment challenge is constitutional.

It should be noted that First Amendment jurisprudence has previously been used to elaborate upon and make sense of Second Amendment jurisprudence.[168] The two-step test first adopted by the

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158 Moran, *supra* note 61, at 177; Habib, *supra* note 110, at 13.

159 Habib, *supra* note 110, at 13.

160 Bagni, *supra* note 23, at 1539.

161 *Id.* at 1539–40.

162 *Id.*

163 *See supra* note 114 and accompanying text.

164 Habib, *supra* note 110, at 13; Moran, *supra* note 61, at 177.

165 *Id.*

166 *See infra* Section III.C.2.

167 Habib, *supra* note 110, at 13.

168 *See* Bolin & Denzin, *supra* note 22, at 681*; see also* United States v. Marzzarella, 614 F.3d 85, 96–97 (3d Cir. 2010) ("[T]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different.") (citation omitted); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) ("[W]e agree

Third Circuit in *United States v. Marzzarella*[169] was "modeled after the approach in First Amendment cases."[170] The court in *Marzzarella* stated that it would look to First Amendment doctrine to inform its analysis of the Second Amendment.[171] Additionally, many commentators have drawn comparisons between First Amendment and Second Amendment jurisprudence.[172] Thus, because First Amendment law has a history of guiding Second Amendment law,[173] it makes sense to use another First Amendment model, the circle model used in the context of church autonomy and freedom of religion, to evaluate Second Amendment regulations.

C. *Applying the Circle Model—Determining What Level of Scrutiny to Apply*

The application of the circle model is fairly straightforward. The circle model in the Second Amendment context is comprised of an epicenter with two concentric circles revolving around it.[174] The core right of bearing arms in the home for self-defense is at the epicenter of this model and regulations that affect this core right trigger the highest level of scrutiny—strict scrutiny.[175] As one moves further away from the center, the less scrutiny need be applied.[176] Any

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with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.").

169 614 F.3d at 89.

170 Bolin & Denzin, *supra* note 22, at 681.

171 614 F.3d at 89 n.4.

172 In explaining why certain gun regulations trigger strict scrutiny and others trigger intermediate scrutiny, commentators have drawn comparisons between the Second Amendment and First Amendment. Certain types of speech regulations, such as content-based restrictions, are presumptively invalid and require strict scrutiny, and other types of speech, such as content-neutral speech, can be regulated and are subject to intermediate scrutiny. There is still other speech that is not protected by the First Amendment. This is a useful analogy for determining what level of scrutiny to apply to gun restrictions. Kiehl, *supra* note 72, at 1165; James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 864 (2014); Brian C. Whitman, Comment, *In Defense of Self-Defense: Heller's Second Amendment in Sensitive Places*, 81 MISS. L.J. 1987, 2016 (2012).

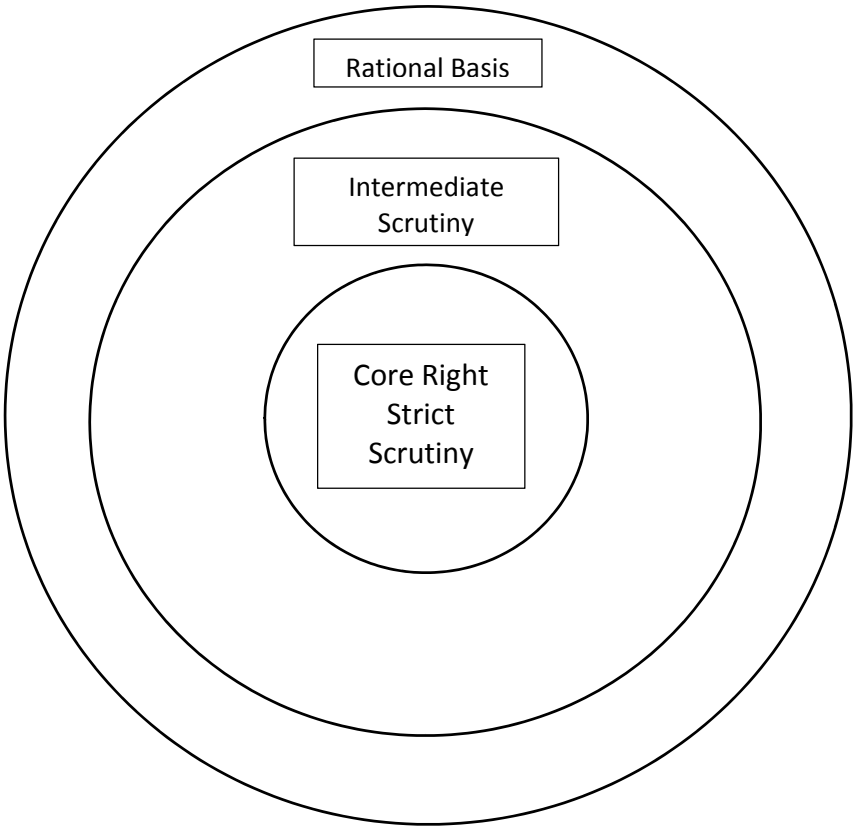
173 *See* sources cited *supra* note 168.

174 *See* Bagni, *supra* note 23, at 1539; Laycock, *supra* note 120, at 1402.

175 *See* Bagni, *supra* note 23, at 1539.

176 *See id.* at 1539–40.

regulations falling in the first circle emanating from the epicenter trigger intermediate scrutiny and any regulations falling in the second circle trigger rational basis.[177] This model provides a much more workable method for determining what level of scrutiny to apply to a specific regulation.[178] The circle model provides nuance and structure, with fairly predictable results, while still allowing for flexibility.[179] Here is a diagram of the circle model and the appropriate level of scrutiny that would be applied in each circle:



Below, the Author will explain how she foresees the circle model being applied to challenged gun regulations affecting specific

177 *See id.*
178 *See id.* at 1544.
179 *See supra* Section III.B.

individuals: law-abiding citizens, both with and without mental illness, and felons. However, even if readers do not necessarily agree with the application of the model, namely the following breakdown of where these specific individuals fall within the circle model, the Author believes readers can agree that the circle model approach is still applicable.[180]

Individuals without mental illness fall in the core of the model, requiring regulations affecting these individuals to be analyzed using strict scrutiny. One circle removed from the core, requiring intermediate scrutiny, is where individuals with mental illnesses fall. And two circles removed from the core, triggering a mere rational basis review, is where felons fall.

1. LAW-ABIDING CITIZENS

For purposes of understanding gun regulations, law-abiding citizens should be broken down into both those with and without mental illness. Below, following the discussion of why law-abiding citizens without mental illness fall in the core of the model, the Author will explain why regulations targeting the mentally ill fall in the first circle removed from the core, triggering a different level of scrutiny.

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[180] The circle model is still open to interpretation and this Comment by no means intends to limit how it can specifically be applied to various gun regulations affecting specific individuals. Readers can choose where in the circle model they believe these individuals fall, and this may not necessarily align with where I have placed these individuals. However, I believe that the reasoning behind using the circle model, *i.e.* the approach itself, still holds true and makes this the most sound model to evaluate challenged gun regulations.

i. Individuals without Mental Illness

The *Heller* Court emphasized that the Second Amendment only applies to law-abiding citizens,[181] so individuals without mental illness certainly fall in the core of the protection.[182] Perhaps the hardest line to draw in the application of this model is how to differentiate when regulations targeting individuals without mental illness fall in the epicenter or the first circle emanating from the center. Generally, individuals without mental illness will fall in the core of the circle and regulations that restrict such an individual's right to bear arms in the home will be examined using strict scrutiny.[183]

However, not all regulations that are aimed at individuals without mental illness will restrict the fundamental right to bear arms in the home for self-defense.[184] Such regulations should instead trigger intermediate scrutiny. Although this Comment focuses on the "who" factor, a more comprehensive understanding of this idea can only be attained if the "who" factor is looked at in combination with the "what, where, and how" factors, *i.e.* what kind of weapon, where the weapon is used, and how it is used. The circle model dictates that it is only if all factors—"who, what, where, and how"—fall in the core that strict scrutiny applies. For example, if a gun regulation targets an individual without mental illness's ability to use a handgun in his home, this certainly triggers strict scrutiny. But if one of those factors is changed, *i.e.* the regulation targets the use of guns outside of the home, or the use of a semi-automatic gun or a rifle, then intermediate scrutiny applies. A law restricting an individual without mental illness's ability to bear arms in specific places outside of the

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[181] District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."); *see* Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: "Historical Guideposts" and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON J. CONST. L & POL'Y 7, 27 (2010); Habib, *supra* note 51, at 1369–70, 1373.

[182] *See infra* Section III.C.1.ii for a discussion of why those with mental illness do not fall in the core of the circle model despite being law-abiding citizens.

[183] *See* Bagni, *supra* note 23, at 1539.

[184] *Heller*, 554 U.S. at 581.

home should not be looked at using strict scrutiny, but rather intermediate scrutiny.[185]

Thus, as far as the "who" is concerned, for general ease of use, individuals without mental illness should fall in the core of the circle model, and trigger strict scrutiny. But one must be aware that if other factors do not also fall in the core, then regulations affecting such individuals might not require strict scrutiny. Thus, in certain circumstances, laws that regulate these individuals may fall in the first circle—triggering intermediate scrutiny. This placement, however, is based on many other things, such as the "what, where, and how" factors.[186]

ii. Individuals with Mental Illness

The mentally ill[187] fall in the first circle emanating from the epicenter of the circle model. To comprehend this breakdown, one must understand why some mentally ill individuals are different than those who are not mentally ill, why felons are different than individuals with mental illness, and thus why regulations targeting the mentally ill trigger a higher standard of review than those targeting felons.

Individuals with mental illness are generally not any more dangerous than law-abiding citizens in the general public, but there are some mentally ill individuals who may be more likely to commit

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[185] It should be noted that in certain situations it is difficult to determine in which circle to place individuals without mental illness. This is because these scenarios usually involve not only the "who" aspect, but require one to consider the "what, where, and how" aspects simultaneously.

[186] These factors, however, are not the focus of this Comment, so for general application, individuals without mental illness should fall in the core.

[187] It is extremely difficult to define who is mentally ill because most of the country could fall into this category. Perhaps the easiest way to determine if someone is mentally ill for the purpose of evaluating gun regulations is according to the federal standard "banning gun possession only after someone is involuntarily committed to a psychiatric facility or designated as mentally ill or incompetent after a court proceeding or other formal legal process." Michael Luo & Mike McIntire, *When the Right to Bear Arms Includes the Mentally* Ill, N.Y. TIMES (Dec. 21, 2013), http://www.nytimes.com/2013/12/22/us/when-the-right-to-bear-arms-includes-the-mentally-ill.html?_r=0. However, few individuals with mental health issues reach this point. *Id.* Some classic examples of afflictions of those who are considered mentally ill are schizophrenia, depression, paranoia, and bipolar disorder. *Id.*

violence.[188] "Past violent tendencies, noncompliance with medication, and substance abuse are factors" indicating that a mentally ill person is more prone to violence.[189] "The correlation between sociopathic behavior"—a pattern of manipulating, exploiting, or violating the rights of others—"and criminal behavior is strong."[190] For general ease of use of this model, all individuals with mental illness fall in the first circle emanating from the core, and challenged regulations that target these individuals should be examined using intermediate scrutiny[191] because the government has an important interest in regulating gun ownership among these types of individuals.[192]

Additionally, the mentally ill are different than felons because despite the fact that some mentally ill individuals are more likely to commit violence,[193] "there is a clear distinction between those who are 'mentally ill' and those who are dangerous."[194] Unlike felons, just because someone is classified as mentally ill does not mean he is no longer a law-abiding citizen.[195] And "only about 3–5% of all violent acts are attributable to people with a serious mental illness."[196] Thus, the mentally ill are still afforded some of the protections of the Second Amendment.[197]

By placing the mentally ill in the first circle emanating from the core and applying intermediate scrutiny to gun regulations affecting these individuals, courts will be able to reconcile[198] the Second

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188 Steven W. Dulan, *State of Madness: Mental Health and Gun Regulations*, 31 T. M. COOLEY L. REV. 1, 9 (2014).

189 *Id.* at 9–10.

190 *Id.* at 10.

191 One commentator suggests applying intermediate scrutiny to regulations targeting the mentally ill. *Id.* at 13–14 (The author explains that courts should look to First Amendment jurisprudence and the articulation and application of intermediate scrutiny in order to examine regulations targeting the mentally ill. "While simply grouping all people with mental illness together and denying Second Amendment rights arguably should not pass even rational-basis review, more narrowly tailored and clearly articulated standards could possibly balance the respective interests at play.").

192 Habib, *supra* note 51, at 1366.

193 *See supra* notes 188–89 and accompanying text.

194 Dulan, *supra* note 188, at 2.

195 *Id.* at 9.

196 *Id.*

197 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

198 Dulan, *supra* note 188, at 10–11.

Amendment's protection afforded to law-abiding citizens,[199] such as the mentally ill, while simultaneously acknowledging that regulations targeting the mentally ill are presumptively lawful.[200] Thus, the mentally ill have a right to bear arms; however, it is not an absolute right because there is an important governmental interest in public safety that is also considered.[201]

2. FELONS

As the Supreme Court explained, only law-abiding citizens are protected by the Second Amendment right to bear arms.[202] And "[o]nly law-abiding individuals obey firearm bans and disarm themselves in fear of criminal sanctions."[203] The ban on possession of firearms by all felons was enacted in 1961.[204] Regulations that affect felons are presumptively lawful as the Court explained in *Heller*.[205] But rather than applying a heightened level of scrutiny (*i.e.* intermediate scrutiny) to regulations affecting such individuals as most lower courts and commentators would advocate,[206] a rational basis standard of review is more fitting.

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199 *Heller*, 554 U.S. at 635.

200 *Id.* at 626–27.

201 *Id.*; *see* Dulan, *supra* note 188, at 13.

202 *Heller*, 554 U.S. at 635 (The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."); Charles, *supra* note 181, at 27 ("[T]he *Heller* majority made it clear that the right only extends to 'law-abiding, responsible citizens to use arms in defense of hearth and home.'") (citation omitted); Habib, *supra* note 51, at 1369–70, 1373 ("Likewise, it seems that the central privileges of the right to bear arms are available most acutely to 'law-abiding, responsible citizens.'") (citation omitted).

203 Whitman, *supra* note 172, at 1988.

204 United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (noting that Pub. L. No. 87–342, 75 Stat. 757 (1961) extended "the disqualification [of arms ownership] to all persons convicted of any 'crime punishable by imprisonment for a term exceeding one year', the current federal definition of a 'felony'").

205 554 U.S. at 626–27.

206 Moran, *supra* note 61, at 174 (stating that most lower courts have applied intermediate scrutiny when reviewing Second Amendment challenges); Rosenthal & Malcolm, *supra* note 88, at 440 n.13 (explaining that at the appellate level, most courts have settled on intermediate scrutiny as the proper standard of review for challenged gun regulations); Habib, *supra* note 51, at 1374 ("[W]hen regulatory schemes seek to regulate or restrict the exercise of the right to bear arms by

In light of the fact that the Second Amendment protection only applies to law-abiding citizens,[207] regulations that affect felons should be reviewed under the least restrictive form of scrutiny—rational basis—despite the fact that the Court in *Heller* rejected the use of this standard of review.[208] The Court in *Heller* rejected this level of scrutiny because it would make all regulations constitutional.[209] However, the Court only rejected rational basis review in relation to law-abiding citizens, because the Second Amendment only protects the rights of law-abiding citizens.[210]

It is not unheard of for felons to have limited rights—it has long been accepted that those who have a criminal capacity and willingness to harm others should forfeit their fundamental right to vote.[211] As a result, it would not be unprecedented for felons to also forfeit their right to bear arms.

Thus, felons fall completely outside the protection of the Second Amendment,[212] and as per the circle model,[213] felons fall in the outermost sphere, so regulations affecting them are the farthest removed from the core right of the Second Amendment. These types of regulations have the least effect on the core right to bear arms and should be reviewed under the least restrictive rational basis standard of review.[214]

Regulations that affect different types of felons should all be viewed under a rational basis review because all of these individuals fall outside of the Second Amendment's protections as they are not law-abiding.[215] The Author will delve more deeply into regulations

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citizens who are not law-abiding and responsible, such regulations will be reviewed with a level of scrutiny below strict scrutiny, but above rational-basis.").

[207] Charles, *supra* note 181, at 27.

[208] Whitman, *supra* note 172, at 2015 (*Heller* "declare[d] that rational basis should not be employed" as a level of scrutiny for gun regulations.).

[209] 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

[210] Charles, *supra* note 181, at 27.

[211] Dulan, *supra* note 188, at 11.

[212] *See supra* note 202.

[213] *See* Bagni, *supra* note 23, at 1539.

[214] *See id.* at 1539–40.

[215] *See supra* note 202 and accompanying text. It should also be noted that regulations targeting juveniles would fall in the outermost sphere as well and

affecting a specific type of felon: the domestic violence misdemeanant.

In 1996, Congress added the Lautenberg Amendment[216] to the 1996 Gun Control Act.[217] This Amendment makes it illegal for any person convicted of a felony or misdemeanor crime of domestic violence to own or possess a gun.[218] The reasoning behind 18 U.S.C. § 922(g)(9) is "that people who have been convicted of violence once—toward a spouse, child, or domestic partner, no less—are likely to use violence again."[219] Guns clearly exacerbate the problem of domestic violence.[220] In 2012, 93% of women were killed by a male they knew, 62% of these homicides were committed by an intimate partner, and the most common weapon used was a gun.[221] According to a study in the *Journal of Trauma*, "[m]ore than twice as many women are killed with a gun used by their husbands or intimate acquaintances than are murdered by strangers using guns, knives, or any other means."[222] In a survey of battered women,

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trigger rational basis review. This is because of the "existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns." United States v. Rene E., 583 F.3d 8, 12 (1st Cir. 2009); *see* Charles, *supra* note 181, at 18. Juveniles differ from adults in terms of "maturity, judgment and self-control" and thus the government has an extremely strong interest in regulating juvenile gun ownership. Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of District of Columbia v. Heller and McDonald v. City of Chicago*, 19 VA. J. SOC. POL'Y & L. 1, 53 (2011).

216 18 U.S.C. § 922(g)(9).

217 Sarah Lorraine Solon, *Domestic Violence*, 10 GEO. J. GENDER & L. 369, 388 (2009).

218 *Id.*

219 United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010).

220 Josh Sugarmann, *For Women, Gun Violence Often Linked to Domestic Violence*, HUFFINGTON POST (Dec. 1, 2014, 5:59 AM), http://www.huffingtonpost.com/josh-sugarmann/for-women-gun-violence-of_b_5913752.html ("Reducing gun violence against women goes hand in hand with reducing domestic violence."); Dylan Matthews, *11 Facts About Gun Violence in the United States: Guns Contribute to Domestic Violence*, VOX (Dec. 10, 2015, 11:53 AM), http://www.vox.com/cards/gun-violence-facts/guns-domestic-violence-united-states-risk (noting that women have a much greater risk of dying by homicide due to domestic violence if they have access to a gun in their home).

221 Sugarmann, *supra* note 220.

222 Evan Defilippis, *Having a Gun in the House Doesn't Make a Woman Safer*, CITYLAB (Feb. 24, 2014), http://www.citylab.com/politics/2014/02/having-gun-house-doesnt-make-woman-safer/8474/.

71.4% of respondents reported that their intimate partners had used guns these women had in their homes against them, usually threatening to kill these women.[223]

The court in *Skoien* applied intermediate scrutiny to gun regulations affecting domestic violence offenders.[224] The court explained that domestic abusers often commit acts against relatives that are charged as misdemeanors when a similar act against a stranger would be a felony, firearms are deadly in domestic abuse, and domestic offenders are likely to offend again and remain dangerous.[225]

However, rational basis should be applied to domestic violence offenders because these individuals are not law-abiding citizens and therefore the Second Amendment does not apply to them.[226] Additionally, the Author has singled out domestic violence offenders because they pose a particularly high threat to society and have high recidivism rates.[227] The rate of re-offense by perpetrators of domestic violence is 30% to 40%.[228] More importantly, there are few treatment methods that have reduced the recidivism rate of domestic violence offenders.[229] Domestic violence offenders are particularly problematic; according to a 2007 study of more than 300,000 ex-convicts, "offenders with domestic violence charges were the most

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[223] *Id.* ("Indeed, gun threats in the home *against* women by their intimate partners appear to be more common across the United States than self-defense uses of guns by women.").

[224] 614 F.3d at 642.

[225] *Id.* at 643–44.

[226] Charles, *supra* note 181, at 27.

[227] *Skoien*, 614 F.3d at 644; Jean Reynolds, *Domestic Violence—Again and Again*, L. ENFORCEMENT TODAY (Nov. 14, 2013), http://www.lawenforcementtoday.com/domestic-violence%E2%80%94again-and-again/.

[228] Reynolds, *supra* note 227.

[229] Robert M. Sartin, et al., *Domestic Violence Treatment Response and Recidivism: A Review and Implications for the Study of Family* Violence, 11 AGGRESSION AND VIOLENT BEHAVIOR 425, 426 (2006) ("A recent meta-analysis of 22 studies evaluating treatment efficacy found treatment for domestic violence perpetrators to have only a small effect on post-treatment recidivism . . . .").

likely of any other group studied to commit another violent felony."[230] These offenders use their families as a training ground for committing other violent felonies.[231]

Additionally, commentators have suggested that restricting the bearing of arms of domestic violence misdemeanants would have been accepted by the Founding Fathers at the time of ratification of the Second Amendment because of the Founders' emphasis on law-abiding citizens, implying that a low standard of scrutiny would likely have been deemed acceptable by the Founders.[232]

CONCLUSION

The Supreme Court established an individual right to bear arms in the home for self-defense in *District of Columbia v. Heller* and later extended this right to the states through the Due Process Clause of the Fourteenth Amendment in *McDonald v. City of Chicago*. However, because the Supreme Court failed to express what level of scrutiny should be applied to challenged gun regulations in either of these landmark cases, post-*Heller* and *McDonald* lower courts have been left in a state of utter confusion. These courts have applied various levels of scrutiny ranging from strict to intermediate to an undue burden standard and some have applied a two-step hybrid test utilizing strict and intermediate scrutiny. While most courts have settled on applying the hybrid two-step test, this approach is not best suited to analyzing challenged gun regulations.

First Amendment doctrine has been used to inform Second Amendment analysis regarding why certain regulations trigger strict scrutiny and others trigger intermediate scrutiny. Thus, further drawing on First Amendment jurisprudence and the circle model used in the context of church autonomy, this Comment suggests that the circle model should be applied in analyzing Second Amendment

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230 Jennifer Mascia, *Domestic Abusers Often Graduate to Other Violent Crimes. They Also Often Get to Have Guns.*, THE TRACE (Dec. 1, 2015), http://www.thetrace.org/2015/12/domestic-abuse-gun-ownership-planned-parenthood-shooting/ ("Domestic violence felons experienced a recidivism rate for violent felonies of 19 percent, compared to 13.7 percent for offenders with felony assault convictions . . . .").

231 *Id.*

232 Charles, *supra* note 181, at 38–39 ("[I]t is most certain that such a restriction would be deemed constitutionally permissible under the requisite low to intermediate scrutiny standard of review.").

regulations. According to this model, there is an epicenter with two concentric circles revolving around it. The core right of bearing arms in the home for self-defense is at the epicenter of this model, and regulations that affect this core right trigger the highest level of scrutiny—strict scrutiny. Any regulations falling in the first circle emanating from the epicenter trigger intermediate scrutiny and any regulations falling in the second circle trigger rational basis. This model provides a much more workable method of determining what level of scrutiny to apply to a specific regulation. Additionally, the circle model provides nuance and structure, while still allowing for flexibility.

The circle model builds upon the idea behind Justice Breyer's interest-balancing approach as well as the hybrid two-part test and the sliding-scale model. The circle model brings these other models to their logical conclusions. While the logic behind Justice Breyer's interest-balancing approach is similar to the idea behind the circle model, the circle model provides much more guidance than the interest-balancing approach by providing predictable results as well as structure. Thus, regulations need not be analyzed according to the free-wheeling interests of the judiciary, as the circle model provides a comprehensive guide for where specific regulations will fall.

Moreover, compared to the two-part test and the sliding-scale model, the circle model more accurately takes into account the understanding that the Second Amendment does not apply to felons, but only to law-abiding citizens. Because felons are not protected by the Second Amendment, regulations affecting them only need to be analyzed using the lowest level of scrutiny. Thus, contrary to the two-part test and the sliding-scale model, which apply intermediate scrutiny to regulations affecting felons, the circle model suggests that felons fall in the outermost circle surrounding the core, applying rational basis review to regulations affecting them.

Law-abiding citizens that do not have a mental illness fall within the epicenter of the circle, individuals with mental illness fall in the first circle emanating from the epicenter, and felons fall in the outermost circle emanating from the epicenter. While some may disagree with the application of the circle model and the placement of specific individuals within the model, the approach itself is still applicable. Individuals who disagree may place specific individuals where they see fit in the circle model. This model provides a much

more comprehensive guide than the other models currently used to analyze Second Amendment challenges.