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Constitutional Law - the Second Amendment with a Rational Bite: Looking for a Heightened Standard of Review - Chief of Police of City of Worcester v. Holden, 26 N.E.3D 715 (Mass. 2015)

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**CONSTITUTIONAL LAW—THE SECOND
AMENDMENT WITH A RATIONAL BITE:
LOOKING FOR A HEIGHTENED STANDARD OF
REVIEW—CHIEF OF POLICE OF CITY OF
WORCESTER V. HOLDEN, 26 N.E.3D 715(MASS.
2015).**

The Second Amendment bestows upon citizens the right to keep and bear arms.¹ Federal and state law both seek to prevent dangerous persons from obtaining firearms and have allowed reasonable restrictions on the Second Amendment to achieve that result.² In *Chief of Police of City of Worcester v. Holden*,³ the Massachusetts Supreme Judicial Court upheld the revocation and denial of a firearms license.⁴ The Massachusetts Supreme Judicial Court found the Massachusetts state law passed the rational basis test and therefore was constitutionally sound.⁵

¹ U.S. CONST. amend. II; see *District of Columbia v. Heller*, 554 U.S. 570, 625-28 (2008) (explaining scope of Second Amendment). “Tracing the Second Amendment’s origins from the colonial period to America’s founding, the Court emphasized the historical prominence of the right to keep and bear arms, explaining that the Founding Fathers considered it among the few rights important enough to write down in the Constitution.” Kyle Hatt, *Gun-Shy Originalism: The Second Amendment’s Original Purpose in District of Columbia v. Heller*, 44 SUFFOLK U. L. REV. 505, 520-21 (2011) (discussing Second Amendment historical context with standard of review).

² See *Heller*, 554 U.S. at 625-36 (upholding individual right to possess handgun); *Chardin v. Police Comm’r of Boston*, 989 N.E.2d 392, 398-404 (Mass. 2013) (reaffirming right to bear arms); *Ruggiero v. Police Comm’r of Boston*, 464 N.E.2d 104, 105-08 (Mass. App. Ct. 1984). “No right is absolute, and the extent to which legislation can permissibly burden a right is largely determined by the doctrinal-rules, tests, and other devices the Court adopts to ‘implement’ the right.” Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 684-85 (2007) (discussing allowable limitations on citizens’ rights); Hatt, *supra* note 1, at 520-21 (discussing Second Amendment applicable standard of review).

³ 26 N.E.3d 715 (Mass. 2015)

⁴ See *id.* at 723 (Mass. 2015) (holding denial and revocation fall outside Second Amendment thus applying rational basis test).

⁵ See *id.* at 722-28 (applying rational basis test); see also *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329, 332-34 (Mass. 1989) (applying rational basis when a fundamental interest is not involved); *Chardin*, 989 N.E.2d at 398-404 (explaining law that falls outside scope of Second Amendment does not require heightened scrutiny); *Fine v. Contributory Ret. Appeal Bd.*, 518 N.E.2d 1151, 1152-53 (Mass. 1986) (“[S]tatutes which do not involve either a suspect group or a fundamental right only need be supported by a conceivable, rational basis.”); Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 492 (2011) (“Under the Court’s current due process adjudication mechanism, rights are either classified as ‘fundamental,’ in which case laws infringing upon them are subject to strict scrutiny, a test which

On September 10, 2005, police responded to a domestic violence incident in Shrewsbury, Massachusetts involving Raymond Holden.⁶ Police recorded a signed statement from Holden's wife detailing the domestic violence incident.⁷ Holden was arraigned on September 12, 2005 in Westborough District Court on assault and battery charges stemming from the September 10 police incident report.⁸ The Chief of Police of the city of Worcester ("Chief") suspended Holden's firearms license because he was deemed not to be a "suitable person" based on the pending charges.⁹ Holden sought judicial review of his suspended firearms license and filed a complaint with the Worcester District court on December 6, 2005.¹⁰ The court restored Holden's firearm license; ruling that the suspension, pursuant to G.L. c. 140, § 131 (f), was "arbitrary and capricious in that the withholding of the license [was] not predicated upon any factual determination by [the licensing authority]."¹¹

On January 30, 2006, the Chief reinstated the suspended license; however, he immediately revoked the license after reinstatement.¹² On

is almost always 'fatal in fact' for the infringing law, or they are not classified as fundamental, and are subject to a rational basis test that almost always upholds the infringing law."'). *But see* Wollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (applying intermediate scrutiny against law regulating handgun permit).

⁶ *Holden*, 26 N.E.3d at 719. Holden's daughter called the Shrewsbury police department reporting that her father had beaten her mother (Holden's wife) and thrown her out of his vehicle in front of the daughter's house in Shrewsbury, Massachusetts. *Id.* at 719-20.

⁷ *Id.* at 719. The statement detailed that a verbal altercation occurred earlier in the evening between Holden and his wife. *Id.* After the altercation, Holden agreed to drop his wife off at the daughter's house but when they arrived he physically assaulted his wife. *Id.* at 719-20. While still in the vehicle, Holden struck his wife in the face and then exited the vehicle, approached the passenger side and forcibly removed his wife from the vehicle. *Id.* Holden threw his wife on the pavement and then left the scene in the vehicle. *Id.* The wife suffered a swollen lip, a scratch over her right eye, and scrapes and bruises on her left arm. *Id.*

⁸ *Id.* at 720 (detailing court proceedings against Holden).

⁹ *Id.* Holden had a business in Worcester which necessitated having a firearm. Brief for Respondent/Appellant at *9-10, Chief of Police of City of Worcester v. Holden, 26 N.E.3d 715 (Mass. 2015) (No. SJC-11682), 2011 WL 12519649. Officer Michael Sacco was assigned to the firearms license investigative unit, where he discovered the wife's criminal complaint against Holden for domestic assault and battery. *Id.* Officer Sacco sent a notice of suspension of Holden's firearms license on September 14, 2005 based on the Worcester Police Chief's judgment that Holden was unsuitable to carry a firearm within the meaning of the statute. *Id.* Officer Sacco relied on a police report prepared by Shrewsbury Police Officer Stephen Rice at the time of the incident. *Id.* Holden's wife withdrew her criminal complaint two weeks later and within two weeks the charges were dismissed at the request of the wife. *Id.*

¹⁰ Brief for Respondent/Appellant at *9-10, Chief of Police of City of Worcester v. Holden, 26 N.E.3d 715 (Mass. 2015) (No. SJC-11682), 2011 WL 12519649 at *9-10; *see Holden*, 26 N.E.3d at 720 (explaining Holden's actions, judicial finding on the complaint).

¹¹ *Holden*, 26 N.E.3d at 720.

¹² *Id.* The new revocation was based on the police incident report, instead of solely basing it on Holden's arraignment. *Id.*

March 1, 2006, Holden again sought judicial review with the Worcester District Court to restore his firearms license.¹³ The Worcester District Court determined the Chief relied on the same evidence as the initial firearms revocation and ordered Holden's license to be reinstated.¹⁴ The Chief filed a complaint for certiorari with the Massachusetts Superior Court, which remanded the case to the District Court because it erred in not conducting an evidentiary hearing.¹⁵ The case lay dormant for two years until September 21, 2010, when Holden's firearms license expired.¹⁶ Holden applied for a new license, which the Chief denied on October 18, 2010, again because he was still not considered a "suitable person."¹⁷

On January 6, 2011, Holden filed a complaint for judicial review of the Chief's denial to hold a firearms license.¹⁸ The District Court found the Chief had reasonable grounds to suspend and revoke Holden's license in both 2005 and 2006.¹⁹ The court, however, vacated the denial of Holden's November 18, 2010 application for a new firearms license after determining that the Chief did not have reasonable grounds to deny the license application.²⁰ On December 6, 2011, the Chief filed a complaint of certiorari with the Superior Court.²¹ The Superior Court determined the use of past incidents is acceptable criteria in determining the suitability of candidates seeking a firearms license.²² Additionally, the court determined that the "core of the Second Amendment, the right of an individual to keep and bear arms in the home, was not implicated in [Holden's] case."²³

"[T]hose who challenge the constitutionality of a statute that does not burden a suspect group or a fundamental interest carry 'a heavy burden in seeking to overcome the statute's presumption of constitutionality.'"²⁴

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* Holden appealed but it was dismissed in order to allow the district court to hold an evidentiary hearing. *Id.*

¹⁶ *Holden*, 26 N.E.3d at 720-21.

¹⁷ *Id.* The police chief again relied upon cited details from police reports generated from the initial assault and battery incident in 2005. *Id.*

¹⁸ *Id.* at 721. The court held a full evidentiary hearing on February seventh and ninth of 2011. *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 721.

²¹ *Holden*, 26 N.E.3d at 721.

²² *Id.* at 721, 728-29.

²³ *Id.* at 721.

²⁴ *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329, 332 (Mass. 1989), *cert. denied*, 493 U.S. 1056 (1990). A set standard of review helps give clarity and predictability to constitutional challenges. Ivan E. Bodensteiner, *Scope of the Second Amendment Right – Post-Heller Standard of Review*, 41 U. TOL. L. REV. 43, 56 (2009) (discussing Second Amendment issues in *Heller*). "Absent a showing that a statute burdens a suspect group or fundamental

The rational basis test under the Federal Constitution looks to “‘whether [a] statute bears a reasonable relation to a permissible legislative objective’ . . . and, under the . . . State Constitution [is] whether the statute ‘bears real and substantial relation to public health, safety, morals, or some other phase of the general welfare.’”²⁵ The Supreme Court acknowledged the need to allow states to use suitable person determinations when restricting citizen’s Second Amendment rights, stating “whatever else it leaves to future evaluation, it surely elevates above all other interests the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home.”²⁶ The Second Amendment is a fundamental right and was written into the United States Constitution because the framers believed it was important.²⁷

There is no set standard of review to determine if a law restricting a citizen’s Second Amendment right is unconstitutional.²⁸ A majority of

interest, it will be upheld as long as it is rationally related to the furtherance of a legitimate State interest.” *Dickerson v. Attorney Gen.*, 488 N.E.2d 757, 759 (Mass. 1986). The statute needs only to “be supported by a conceivable, rational basis.” *Fine v. Contributory Ret. Appeal Bd.*, 518 N.E.2d 1151, 1152-53 (Mass. 1988).

²⁵ See *New England Med. Ctr., Inc.*, 541 N.E.2d at 333 (explaining rational basis). “There is no magic formula for determining which ‘value’ should be assigned to a particular governmental interest.” Bodensteiner, *supra* note 23, at 56 (describing rational basis and its results). A statute, in order to pass rational basis, needs only to “be supported by a conceivable, rational basis.” *Fine*, 518 N.E.2d at 1152-53. “The heart of the rational basis standard is that the court should not interfere if the purpose of the legislation is reasonably related to some valid governmental purpose.” Jackson, *supra* note 5, at 537-38 (describing purpose and scope of rational basis test). “[W]here the right infringed on is not a ‘fundamental’ right, we have stated that the question under the due process clause of the Federal Constitution is ‘whether the statute bears a reasonable relation to a permissible legislative objective.’” *English*, 541 N.E.2d at 334 (quoting *Pinnick v. Cleary*, 271 N.E.2d 592 (Mass. 1971)).

²⁶ See *Heller*, 554 U.S. at 635 (2008) (emphasis added) (explaining application of Second Amendment). Rights are not absolute and are able to be reasonably restrained. See Winkler, *supra* note 2, at 684-85 (examining how rights are permissibly restrained). Despite needing reasonable restrictions, the Second Amendment was considered extremely important during the drafting of the constitution, similar to other fundamental rights. See Hatt, *supra* note 1, at 520-21 (discussing Second Amendment historical context, standard of review). Reasonable restrictions on the Second Amendment, such as age limits and prohibiting firearms on school or government grounds, are permissible. See Andrew Peace, *A Snowball’s Chance in Heller: Why DeCastro’s Substantial Burden Standard is Unlikely to Survive*, 54 B.C. L. E-SUPPLEMENT 175, 178-80 (2013), <http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/14> (detailing traditional standard of review for Second Amendment in context of *Heller*).

²⁷ See *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010) (“[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”). There is not a single method for determining value afforded to a particular governmental interest. Bodensteiner, *supra* note 23, at 56-57. Enumerated rights, such as the second amendment, require a higher burden of review. Jackson, *supra* note 4, at 526-30.

²⁸ See *Heller*, 554 U.S. at 634-35 (discussing standard of review). “While it is clear that the Court did not spell out every facet of the individual right, the Court undoubtedly employed some level of heightened review.” Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of*

courts have applied intermediate scrutiny to laws regulating firearms in public.²⁹ Intermediate scrutiny was applied in those cases because regulating authorities did not totally prohibit carrying firearms in public.³⁰

Review Under Heller, 29 N. ILL. U. L. REV. 605, 616, 617 (2009) (discussing standard of review implicated under *Heller*). Justice Scalia stated:

[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. 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.

Heller, 554 U.S. at 2817-18; see also *Heller*, 554 U.S. at 628 n.27 (describing rational basis as inappropriate for Second Amendment review); *United States v. Marzzarella*, 614 F.3d 85, 95-96 (3d Cir. 2010) (rejecting rational basis for higher level of review); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 800-03 (1987) (discussing problems with rational basis plus and intermediate scrutiny). *Heller* demanded a higher level of scrutiny than rational basis be used but the Supreme Court did not set a standard of review to analyze infringements on the Second Amendment. Allen Rostron, *The Continuing Battle Over The Second Amendment*, 78 ALB. L. REV. 819, 824-26 (2015) (describing Supreme Court’s two pronged approach to analyzing Second Amendment challenges). Courts generally must choose between intermediate scrutiny or strict scrutiny to solve Second Amendment challenges. *Id.* Law does not need to be the least restrictive means to accomplish a government interest. *Id.* Rational basis has been rejected as a standard of review for Second Amendment issues by the Supreme Court. Peace, *supra* note 25, at 179-80 (describing court rejection of rational basis review). The Second Amendment is subject to reasonable restrictions placed on it by state governments meant to achieve a desired goal such as public safety. *Id.* at 178-80.

²⁹ See *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1317 (M.D. Ga. 2011) (following intermediate scrutiny applied to Second Amendment); see also *Heller*, 698 F. Supp. 2d at 186 (applying intermediate scrutiny for Second Amendment challenge). The Supreme Court undoubtedly meant for the Second Amendment to have a form of heightened review.” See Racine, *supra* note 28, at 616, 617 (discussing standard of review implicated under *Heller*).

³⁰ See cases cited *supra* note 29 (reviewing cases applying intermediate scrutiny). The Second Amendment right extends beyond the home:

The Second Amendment was passed in part to guarantee individuals the right to arm themselves to defend against tyrannical governments. The Framers of the Second Amendment surely did not imagine citizens defending against a tyrannical government strictly from the confines of their home—unless the battlefield was confined solely to a citizen’s front yard, that citizen would necessarily need to carry their weapon outside of the home.

Megan Ruebsamen, Note, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 77 (2013) (describing arguments for historically allowing citizens to carry firearms beyond home). Citizens are clearly afforded Second Amendment rights beyond the home:

Keeping and bearing a handgun for self-defense in the home has been increasingly recognized as the “core” of the Second Amendment.³¹ The right to carry a firearm in public is generally not considered at the core of the Second Amendment.³²

The purpose of MASS. GEN. LAWS ch. 140, § 131, is to “limit access to deadly weapons by irresponsible persons.”³³ It was created as a first line of defense to prevent firearms from entering the possession of “evil-doers” and dangerous people by determining if a person is suitable to carry a firearm.³⁴ The statute has been amended but the “suitable person” standard still confers upon a licensing authority “‘considerable latitude’ or broad discretion in making a licensing decision.”³⁵ States may infringe on a citizen’s Second Amendment right to carry firearms outside the home by showing a law is merely rational to reach an end, thereby passing the

[I]t should be clear that the Second Amendment affords some level of protection outside the home, albeit at a level less than acute. However, simply because the protection would not be where the right is “most acute” does not necessarily mean that the right would be protected at a reduced level.

See *Racine*, *supra* note 28, at 639 (discussing standard of review for firearm possession outside of home). Carrying guns outside of the home has been analyzed for the most part under intermediate scrutiny. See *Rostron*, *supra* note 28, at 838-43 (describing courts different applications of intermediate scrutiny to possessing firearms outside of home). Courts vary in restricting the carrying of firearms both openly and concealed outside of the household. *Id.* (describing circuit splits over restrictions carrying firearms outside of home).

³¹ See *Hightower v. City of Boston*, 693 F.3d 61, 71-73 (1st Cir. 2012) (describing ideals of Second Amendment). The Second Amendment applies to both state and federal firearm regulations. *Id.* “Courts have consistently recognized that *Heller* established that the possession of operative firearms for use in defense of the home constitutes the ‘core’ of the Second Amendment.” *Id.* at 72. Carrying a firearm outside of the home constitutes a separate interest compared to a law abiding citizen owning and operating a firearm within their home. *Id.* at 70-74.

³² See *Woollard*, 712 F.3d at 876 (describing Second Amendment rights exist outside of home, along with applicable level of scrutiny). The Second Amendment was partly enacted to not only to allow citizens to defend themselves, but also to help prevent a tyrannical government. See *Ruebsamen*, *supra* note 29, at 77 (describing arguments for historically allowing citizens to carry firearms beyond home). The Second Amendment right does not end at a law abiding citizen’s doorstep, but continues beyond the home. See *Racine*, *supra* note 28, at 639-40 (discussing standard of review for firearm possession outside of home).

³³ See *Ruggiero v. Police Comm’r of Boston*, 464 N.E.2d 104, 106 (Mass. App. Ct. 1984) (discussing interpretation of statute).

³⁴ See *id.* at 106-07 (describing purpose of statute). Reasonable restrictions of fundamental rights, including suitable person standards, are allowed. *Winkler*, *supra* note 2, at 684-85. No right is limitless and is subject to restrictions whether it is a fundamental or non-fundamental right. *Id.*

³⁵ See *Chardin v. Police Comm’r of Boston*, 989 N.E.2d 392, 395 (Mass. 2013) (allowing for broad discretion when granting licenses).

rational basis test.³⁶

In *Chief of Police of City of Worcester v. Holden*, 26 N.E.3d 715 (Mass. 2015), the Massachusetts Supreme Judicial Court upheld the removal of a fundamental right, holding the validity of MASS. GEN. LAWS CH. 140, § 131 because it passed the rational basis standard.³⁷ The court found that the law, which allowed the revocation and rejection of firearms licenses based on the “suitable person” standard, was permissible under rational basis.³⁸ Under the rational basis test a law must only be reasonable to reach a desired end.³⁹ The court found the Massachusetts law did not violate the Second Amendment by overly burdening it, but it was a reasonable and rational means to reach the desired goal of preventing dangerous weapons from entering the hands of unsuitable persons.⁴⁰

The court erred in not applying a heightened level of scrutiny to the appellant’s firearms license revocation.⁴¹ Naturally, rights bestowed upon

³⁶ See Jackson, *supra* note 5, at 493 (“The rational basis test as it currently stands is too weak. By allowing any plausible reason for the legislation to suffice, whether or not it was a true reason for the legislation, and by asking only whether lawmakers could have thought that it was reasonably related to the subject it purported to advance, the Court has essentially made the rational basis test the equivalent to no test at all.”). Courts have generally chosen between intermediate scrutiny or strict scrutiny when addressing challenges to laws infringing on Second Amendment rights. Rostron, *supra* note 28, at 824-26.

³⁷ See *Chief of Police of City of Worcester v. Holden*, 26 N.E.3d 715, 722-24 (Mass. 2015) (discussing court’s reasoning).

³⁸ See *id.* (“Because a *prohibition* against carrying concealed weapons is presumptively lawful, it follows that licensing the carrying of such weapons, a less restrictive measure, also must be presumptively lawful. ‘Presumptively lawful’ prohibitions and regulations do not burden conduct protected by the Second Amendment. As such, they fall outside the scope of the Second Amendment and are not subject to heightened scrutiny. For these reasons, we conclude that the denial of a Class A license to carry a concealed firearm, or the revocation or suspension of a Class A license, falls outside the Second Amendment and is subject *only* to rational basis analysis, as a matter of substantive due process.”); see also *Commonwealth v. McGowan*, 982 N.E.2d 495, 502-04 (Mass. 2013) (describing laws keeping away firearms from unauthorized individuals for health, safety and welfare of society).

³⁹ See *Holden*, 26 N.E.3d at 723-24 (explaining rational basis test); see also *English*, 541 N.E.2d at 332 (quoting *Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing*, 398 N.E.2d 368, 371 (Mass. 1979) (discussing statute’s presumption of constitutionality). See *English*, 541 N.E.2d at 332 (“[T]hose who challenge the constitutionality of a statute that does not burden a suspect group or a fundamental interest ‘carry a heavy burden in seeking to overcome the statute’s presumption of constitutionality.’” (quoting *Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing*, 398 N.E.2d 471 (Mass. 1979))).

⁴⁰ See *Holden*, 26 N.E.3d at 722-25 (applying rational basis).

⁴¹ See *McDonald v. City of Chicago, III.*, 561 U.S. 742, 778-79 (2010); Jackson, *supra* note 5, at 493 (“The rational basis test as it currently stands is too weak [T]he Court has essentially made the rational basis test the equivalent to no test at all.”); Bodensteiner, *supra* note 24, at 56 (describing difficulty of determining governmental interest); Jackson, *supra* note 5, at 493 (describing when strict scrutiny applies compared to rational basis to rights). “While it is clear that the Court did not spell out every facet of the individual right, the Court undoubtedly

citizens by the United States Constitution are not limitless and are not protected from reasonable restrictions.⁴² However, when a State seeks to burden a fundamental right they should be held to a heightened standard.⁴³ Fundamental rights, such as the First Amendment, are held to higher level of scrutiny than the rational basis test.⁴⁴

employed some level of heightened review.” See *Racine*, *supra* note 28, at 616, 617 (discussing standard of review implicated under *Heller*). Rational basis is inappropriate for reviewing a law infringing on the Second Amendment, a heightened level of review is more appropriate. See *Heller*, 554 U.S. at 627-28 n.27 (explaining rational basis inappropriate for Second Amendment review). *Heller* demanded a higher level of scrutiny than rational basis to be used but the Supreme Court did not set a standard of scrutiny to analyze infringements on the second amendment. See *Rostron*, *supra* note 28, at 824-26 (describing Supreme Court’s approach to analyzing Second Amendment challenges). Courts generally must choose between intermediate scrutiny or strict scrutiny to solve Second Amendment challenges. See *id.* (same). Law does not need to be the least restrictive means to accomplish a government interest. *Id.* Rational basis has been rejected as a standard of review for Second Amendment issues by the Supreme Court. See *Peace*, *supra* note 26, at 179-80 (describing court rejection of rational basis review). Reasonable restrictions on the Second Amendment are permissible. *Id.*

⁴² See *Heller*, 554 U.S. at 626-27 (discussing limitations on fundamental rights). Whether a fundamental right is in question or a non-fundamental right, no right is limitless and is subject to reasonable restrictions. See *Winkler*, *supra* note 2, at 684-87 (outlining restrictions on rights).

⁴³ See *English*, 541 N.E.2d at 332-33 (discussing levels of scrutiny). A set standard of review helps to give clarity and predictability to constitutional challenges. *Bodensteiner*, *supra* note 24, at 56. “[L]iberty demands an actual rational link between the means and the ends.” *Jackson*, *supra* note 5, at 543; see *Heller* 554 U.S. at 628 n.27 (explaining rational basis inappropriate for Second Amendment review); *Pettinga*, *supra* note 28, at 800-03 (discussing differences between rational basis plus and intermediate scrutiny). *Heller* demanded a higher level of scrutiny than rational basis but the Supreme Court did not set a standard of scrutiny to analyze infringements on the Second Amendment. *Rostron*, *supra* note 28, at 824-26. Courts generally must choose between intermediate scrutiny or strict scrutiny to solve Second Amendment challenges. *Id.* The law does not need to be the least restrictive means to accomplish a government interest. *Id.* Rational basis has been rejected as a standard of review for Second Amendment issues by the Supreme Court. *Peace*, *supra* note 26, at 179-80 (describing court rejection of rational basis review). Reasonable restrictions on the Second Amendment such as age limits, prohibition on carrying firearms on school or government grounds are permissible. See *id.* (listing permissible restrictions); see also *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1317 (M.D. Ga. 2011) (following intermediate scrutiny applied to Second Amendment); *Heller* 698 F. Supp. 2d at 186 (applying intermediate scrutiny for Second Amendment challenge). Carrying guns outside of the home has been analyzed for the most part under intermediate scrutiny. See *Rostron*, *supra* note 27, at 838-43 (describing courts different applications of intermediate scrutiny to possessing firearms outside of home). Courts have been varied in restricting carrying firearms both openly and concealed outside of the household. See *id.* (describing circuit splits over restrictions carrying firearms outside home).

⁴⁴ See *Jackson*, *supra* note 5, at 492-93 (arguing for strengthened rational basis test). In order to survive a strict scrutiny test:

[T]he government bears the heavy burden of satisfying two elements: one relating to the government’s ends and the other to its means. As to its ends, the government must show a compelling interest in drawing a suspect classification or infringing on a fundamental right. As to its means, the government must prove that it adopted narrowly tailored means to achieve that compelling interest. A government action

In *Heller*, the Court failed to place a single standard of review for future courts to if laws restricting Second Amendment rights are constitutional.⁴⁵ The Court alluded that there must be a higher level of scrutiny to restrict or remove citizen's Second Amendment rights.⁴⁶ A rational basis Plus test for laws restricting citizen's rights to carry firearms outside of the home both serves the proper meaning of the Second Amendment while maintaining states interests in preventing unsuitable persons from gaining access to firearms.⁴⁷ Rational basis Plus will allow states leeway to create reasonable laws restricting the Second Amendment but force them to tailor laws to a means directly meant to achieve that purpose.⁴⁸ Rational basis Plus further meets the minimum standard

subject to strict scrutiny is unconstitutional if it fails either element of this test.

Ozan O. Varol, *Strict in Theory, But Accommodating in Fact?*, 75 MO. L. REV. 1243, 1245-46 (2010).

⁴⁵ See *Heller*, 554 U.S. at 628 n.27 (discussing level of review). A set standard of review helps to give clarity and predictability to constitutional challenges. See Bodensteiner, *supra* note 24, at 56. "While it is clear that the Court did not spell out every facet of the individual right, the Court undoubtedly employed some level of heightened review." Racine, *supra* note 28, at 616, 617 (discussing standard of review implicated under *Heller*); see also *Heller*, 554 U.S. at 628 n.27 (describing rational basis as inappropriate for Second Amendment review); Pettinga, *supra* note 28, at 800-03 (discussing problems with rational basis plus and intermediate scrutiny). *Heller* demanded a higher level of scrutiny than rational basis to be used but the Supreme Court did not set a standard of scrutiny to analyze infringements on the Second Amendment. Rostron, *supra* note 27, at 824-26 (describing Supreme Court's two pronged approach to analyzing Second Amendment challenges). Courts generally must choose between intermediate scrutiny or strict scrutiny to solve Second Amendment challenges. *Id.* Law does not need to be the least restrictive means to accomplish a government interest. *Id.* Rational basis has been rejected by the Supreme Court as a standard of review for Second Amendment issues. See Peace, *supra* note 25, at 179-80 (describing court rejection of rational basis review). Reasonable restrictions on the Second Amendment such as age limits, prohibition on carrying firearms on school or government grounds are permissible. See *id.* (listing permissible restrictions). "[R]ational basis, the lowest level of review, would be inappropriate for 'a specific, enumerated right' such as the right to keep and bear arms." Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1154-56 (2011); see also Varol, *supra* note 44, at 1243 (discussing level of scrutiny).

⁴⁶ *Heller*, 554 U.S. at 634-35. Not establishing a set standard of review for Second Amendment challenges produces immense confusion for citizen's rights. Bodensteiner, *supra* note 24, at 56.

⁴⁷ See *English*, 541 N.E.2d at 332-33 (describing purpose of rational plus test). A set standard of review helps to give clarity and predictability to constitutional challenges. See Bodensteiner, *supra* note 24, at 56 (explaining standards of review).

⁴⁸ See *Alamo Rent a Car, Inc. v. Ryan*, 643 N.E.2d 1345, 1349 (Ill. App. Ct. 1994) (describing rational basis plus). The rational basis Plus standard "requires the court to determine not only whether there is a reasonable relationship between the challenged legislation and the governmental interest, but also whether the means employed by the regulation substantially relates to the stated purpose for the regulation." *Id.* "It is well settled that when a statute does not affect a fundamental right or involve a suspect or quasi-suspect classification, the appropriate standard for review under the equal protection . . . is the traditional rational basis test." *Id.* "The

proscribed in *Heller*, a level of scrutiny higher than that of just rational basis.⁴⁹ Allowing a fundamental right to be indefinitely restricted without a heightened level of review is untenable.⁵⁰

Despite the Supreme Court's failure to establish a standard of review for laws restricting Second Amendment rights in *Heller*, it is clear the Court demanded some form of heightened review. Adopting a rational basis Plus standard of review for restrictions on citizen's Second Amendment rights to carry firearms outside of the home is in line with the Court's reasoning. If Massachusetts continues to review its laws restricting the Second Amendment through the rational basis test it surely will continue to face promising constitutional challenges. Adopting the rational basis Plus standard will help Massachusetts avoid a level of review to low but still allow strong and reasonable firearms restrictions. It would further help to secure citizen's Second Amendment rights through more narrowly

rational basis test requires that there be a reasonable relationship between the challenged legislation and a conceivable and perhaps unarticulated governmental interest." *Id.* The court should determine "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *English*, 541 N.E.2d at 332 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)). Rational basis Plus helps protect constitutional rights:

A strengthened rational basis test, however, would require that the legislation at issue actually be reasonably related to its legislative purpose, and that the purpose be valid. Such a test would allow courts to better protect rights, while at the same time retain the benefits of a tiered scrutiny as it currently exists. By allowing courts to inquire into the purpose behind the legislation and to look at the link between the ends and the means, courts will no longer have to try to find some way around the test in hard cases, and the doctrine will become more consistent and legitimate.

Jackson, *supra* note 5, at 493.

⁴⁹ See Jackson, *supra* note 5, at 542-43 (describing standard dictated in *Heller*). "Under a strengthened rational basis analysis under the Due Process Clause, however, courts would be empowered, as the Supreme Court did in *Cleburne*, to look at the purposes behind the governmental action." *Id.* at 542. The burden would still remain with the citizen to challenge a state law restricting the Second Amendment:

[T]he burden is still on the party challenging the statute to demonstrate that the statute is not rationally related to a valid legislative purpose, either because the purpose itself is not within the power of the government, or because the connection between the statute and the purpose is tenuous. The government is still entitled to a presumption of constitutionality, and facts supporting the [statute] are presumed, until rebutted by the challenging party.

Id. at 542-43.

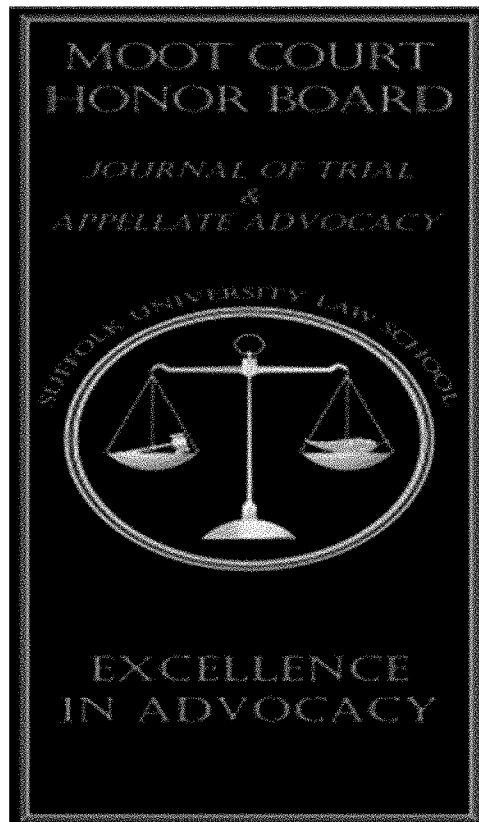
⁵⁰ See *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted that the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty"). Enumerated rights, such as the Second Amendment, require a higher burden of review. See Jackson, *supra* note 5, at 526-30 (describing which rights require a higher level of scrutiny).

tailored laws. The Second Amendment will continue to be hotly debated until the Supreme Court establishes a proper level of review but until that time Massachusetts should adopt the rational basis plus test.

Michael F. Grimes

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