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Navigating the Second Amendment Crossfire: The Third Circuit Triggers Working Methodology in United States v. Marzzarella and United States v. Barton

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NAVIGATING THE SECOND AMENDMENT CROSSFIRE: THE THIRD CIRCUIT TRIGGERS WORKING METHODOLOGY IN *UNITED STATES v. MARZZARELLA* AND *UNITED STATES v. BARTON*

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I. OPENING SHOTS

When Michael Marzzarella received a call on an afternoon in April of 2006, he thought it was just another eager customer looking to purchase a stolen firearm.[1] Unbeknownst to Mr. Marzzarella, the caller inquiring about a pistol was actually a confidential informant ("CI") working with the police.[2] The CI had caught wind of Marzzarella's business in "trafficking stolen handguns" and had informed the police that Marzzarella carried a stolen semi-automatic pistol with the serial number ground off.[3]

Unfortunately for Mr. Marzzarella, he agreed on a sale.[4] The following day he met the CI and an undercover state trooper, who bought the pistol for two hundred dollars.[5] Perhaps he wanted to build a rapport with his new customer, because when the trooper purchased a handgun from him the next month, Marzzarella helpfully informed him that the serial number could be easily "ground off."[6] This business came to an end when Marzzarella was indicted and convicted for possessing an unmarked firearm in violation of 18 U.S.C. § 922(k).[7] Marzzarella challenged his conviction, asserting that the statute violated his Second Amendment rights and was therefore unconstitutional.[8]

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1. *See* Brief for the United States at 5, United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010) (No. 09-3185), 2009 WL 5635544 (describing call where informant "inquire[d] about the availability for sale of" stolen firearm).

2. *See id.* (describing CI's call to Marzzarella); *see also* United States v. Marzzarella, 595 F. Supp. 2d 596, 597 (W.D. Pa. 2009) (describing facts of case).

3. *See* Brief for the United States, *supra* note 1, at 5 (stating informant's findings). Marzzarella would pick up the stolen firearms from his associate "Gat Man" before selling them from his home. *See id.* (explaining trafficking business).

4. *See id.* (describing sale arrangement).

5. *See id.* (noting sale of "fully functional" firearm).

6. *See id.* (reciting Marzzarella's instruction to trooper "that the firearm's serial number could be ground off so that it, too, would be obliterated").

7. *See id.* (describing arrest and conviction). The relevant part of the statute reads: "It shall be unlawful for any person knowingly to transport, ship, or receive . . . any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered . . . ." 18 U.S.C. § 922(k) (2006).

8. *See* United States v. Marzzarella, 595 F. Supp. 2d 596, 597–98 (W.D. Pa. 2009) (discussing Second Amendment claim). For a discussion of the case on appeal, see *infra* notes 83–99 and accompanying text.

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The Second Amendment reads: "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."[9] For almost a century, this provision was understood as protecting a collective right, as opposed to an individual right, to keep and bear arms.[10] In *District of Columbia v. Heller*,[11] the Supreme Court fundamentally altered this interpretation, holding that the Second Amendment protects an individual right.[12]

Heller ignited a wave of litigation as more and more defendants, like Marzzarella, claimed their convictions violated their individual right under the Second Amendment.[13] The lower courts were caught unprepared—*Heller* did not outline the scope of this new individual right, nor did it articulate the standard of review to be applied to Second Amendment challenges.[14] Courts had the crucial task of protecting this new individual right, as well as shielding against risks of gun violence and threats to public safety, all without a set legal framework.[15] Faced with a new and unsettled area of law, courts diverged in their approaches and applications of *Heller*.[16]

This Casebrief analyzes the Third Circuit's approach to Second Amendment challenges in the aftermath of *Heller*.[17] Part II surveys the Supreme Court's early Second Amendment case law and the lower courts'

9. U.S. CONST. amend. II.

10. *See, e.g.*, Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 12 (2010) (describing collective right theory that was "broadly accepted for nearly a century"). The Framers wanted to ensure that Congress did not "assert too much power over the several states" through the army. *Id.*; *see also* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4–5 (2000) (discussing widely accepted collective right view in lower courts after *Miller*). Under this theory, the Second Amendment's purpose was to create a militia to protect against the nation's standing army. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 487–88 (2004) (noting Second Amendment allowed "states to preserve their well regulated militias against the threat of disarmament by the federal government").

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

12. *See id.* at 595 (ruling Second Amendment protects individual right).

13. *See, e.g.*, *Marzzarella*, 595 F. Supp. 2d at 596, 598 (noting after *Heller*, "numerous defendants prosecuted under the federal firearms laws" challenged convictions under Second Amendment). For a further discussion of the litigation following *Heller*, see *infra* notes 59–80 and accompanying text.

14. For a discussion of *Heller*'s lack of guidance in these two areas, see *infra* notes 59–65, 195, and accompanying text.

15. For a discussion of the risks of gun violence, see *infra* notes 82, 153, and accompanying text.

16. For a discussion of these divergent approaches, see *infra* notes 61–81 and accompanying text.

17. For a discussion of the Third Circuit's approach to Second Amendment challenges, see *infra* notes 83–105 and accompanying text.

applications of that precedent.[18] Part III discusses the *Heller* decision and the lower courts' varying interpretations.[19] Part IV discusses the Third Circuit's recent decisions in *United States v. Marzzarella*[20] and *United States v. Barton*,[21] examining the framework they establish for analyzing Second Amendment challenges.[22] Part V analyzes the impact of both cases on the Third Circuit's Second Amendment jurisprudence, focusing on potential strategies for practitioners.[23] Part VI examines how the Third Circuit's approach has provided guidance to its sister circuits.[24] Additionally, Part VI emphasizes the significance of the Third Circuit's approach in an unsettled area of law.[25]

II. THE LEGAL BATTLEGROUND

A. *Pre-Heller: The Miller Misfire*

Before *Heller*, the Supreme Court addressed the Second Amendment in a handful of cases, none of which involved an extensive analysis of its meaning.[26] The Court made its only major statement about the Second Amendment's scope in 1939 with *United States v. Miller*.[27] There, the Court

18. For a discussion of Supreme Court's Second Amendment jurisprudence before *Heller*, see *infra* notes 26–29 and accompanying text. For lower courts' interpretations, see *infra* notes 30–46 and accompanying text.

19. For a discussion of the *Heller* decision, see *infra* notes 47–55 and accompanying text. For the effect on the lower courts, see *infra* notes 59–82 and accompanying text.

20. 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

21. 633 F.3d 168 (3d Cir. 2011).

22. For a discussion of the Third Circuit's Second Amendment framework, see *infra* notes 83–105 and accompanying text.

23. For a discussion of the Third Circuit's impact on practitioners, see *infra* notes 108–83 and accompanying text. Second Amendment challenges are not limited to criminal defendants, but because *Marzzarella* and *Barton* both dealt with criminal convictions, that is how this Casebrief's analysis is framed. Most of the practitioner strategies can be employed outside the criminal context as new Second Amendment issues arise. *See, e.g.*, *Right to Carry/Discretionary Licensing*, COMM2A, http://comm2a.org/discretionary-licensing-right-to-carry (last visited Feb. 12, 2012) (describing recent challenges to gun permit laws).

24. For a discussion of Third Circuit guidance to other circuits, see *infra* notes 186–96 and accompanying text.

25. For conclusions about the impact of the Third Circuit's approach, see *infra* notes 184–85, 196, and accompanying text.

26. *See* Benforado, *supra* note 10, at 12 (noting only three instances before *Heller* that Supreme Court examined Second Amendment); Sarah Perkins, Note, District of Columbia v. Heller*: The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1062 (2010) ("The Second Amendment has rarely surfaced in litigation before the Supreme Court.").

27. 307 U.S. 174 (1939). *See also* Kenneth A. Klukowski, Note, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. C.R. L.J. 167, 170 (2008) ("The Supreme Court has only made one significant statement about the meaning of the Second Amendment."). The Court upheld a federal law prohibiting the transport of short-barreled shotguns across state lines against the defendant's Second Amendment challenge. *See Miller*, 307 U.S. at 178 (finding regulation constitutional).

reasoned that the Second Amendment's purpose was to foster an effective militia.[28] Finding no evidence that short-barreled shotguns had any "reasonable relationship to the preservation or efficiency of a well regulated militia," the Supreme Court ruled that a ban on those weapons did not implicate the Second Amendment.[29]

B. *The Collective Right Theory: Bulletproof Reasoning, or Missing the Target?*

Following *Miller*, the lower courts interpreted the Second Amendment as only protecting a collective right.[30] Firearm regulation challenges usually turned on whether the weapon's use had "a reasonable relationship" to militia service.[31] *Miller* was met with some criticism, though, because the opinion narrowly focused on the specific facts of the case and provided little insight into the meaning of the Second Amendment.[32] Because the collective view controlled in most cases, courts did not discuss the scope of the Second Amendment right, or apply a standard of re-

28. *See Miller*, 307 U.S. at 178 (stating "obvious purpose" of Second Amendment was "to assure the continuation and render possible the effectiveness of [the militia]").

29. *See id.* ("In the absence of any evidence tending to show that possession or use of [short-barreled shotguns] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

30. *See, e.g.*, Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 366 (2000) (noting under collective view, "the Second Amendment affects citizens only in connection with . . . a government-organized and regulated militia").

31. *See, e.g.*, Quilici v. Vill. of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (noting Second Amendment right "inextricably connected to the preservation of a militia"); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (ruling Second Amendment protects collective right); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (holding Second Amendment only applies to State's right to arm militia).

32. *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir. 2002) (characterizing *Miller* as "cryptic"), *abrogated by* United States v. Vongxay, 594 F.3d 1111 (2010); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) (noting *Miller* was "not entirely illuminating"), *abrogated by* United States v. Skoien, 587 F.3d 803 (2009); Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942) (characterizing *Miller* as "already outdated" and not "attempting to formulate a general rule applicable to all cases"); Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1543 (2009) (noting *Miller* "failed to rule specifically whether this right was individual or collective" but focused on facts at hand).

view.[33] There were cases, however, that discussed limitations to the Second Amendment unrelated to the collective view.[34]

First, the lower courts recognized that there was no absolute right to bear arms.[35] The Third Circuit addressed this limitation in *United States v. Rybar*.[36] There, the court upheld a statute that prohibited the transfer or possession of machine guns against the defendant's Second Amendment challenge.[37] The Third Circuit had "neither the license nor the inclination" to decide if *Miller* was wrong, but instead emphasized that there was "no absolute right to firearms" under the Second Amendment.[38]

Next, the lower courts were consistent in their favorable treatment of felon dispossession statutes.[39] The Third Circuit discussed the Second Amendment in the context of a felon's challenge in *United States v.*

33. *See, e.g.*, Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 108 (1997) (noting "little need" for scrutiny standard under collective view, but under individual view "there would be many cases to review because almost all gun control laws could be challenged . . . ."); Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407, 1445–46 (1992) (describing how lower courts "closed the door on constitutional scrutiny of individual possession of firearms" after *Miller*).

34. For a discussion of these limitations, see *infra* notes 35–43 and accompanying text.

35. *See, e.g.*, United States v. Price, 328 F.3d 958, 961 (7th Cir. 2003) (declining to "wade into [the] Second Amendment quagmire" of analysis because "rights under the amendment can be restricted"); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984) (noting right to possess firearm is not fundamental); United States v. Warin, 530 F.2d 103, 107 (6th Cir. 1976) (finding Second Amendment "does not constitute an absolute barrier to . . . regulation of firearms"); United States v. Swinton, 521 F.2d 1255, 1259 (10th Cir. 1975) (holding no absolute right to firearms); Cody v. United States, 460 F.2d 34, 36–37 (8th Cir. 1972) ("[I]t has been settled that the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms.").

36. 103 F.3d 273 (3d Cir. 1996).

37. *See id.* at 276, 286 (upholding conviction under 18 U.S.C. § 922(o)(1), making it "unlawful for any person to transfer or possess a machinegun").

38. *See id.* at 286 ("[T]his court has on several occasions emphasized that the Second Amendment furnishes no absolute right to firearms."). In a later case, the Third Circuit upheld a statute prohibiting possession of a machine gun. *See* United States v. Willaman, 437 F.3d 354, 356–57 (3d Cir. 2006) (upholding statute). The court glossed over the Second Amendment challenge stating: "We will not linger on this point inasmuch as a number of our cases" emphasize there is "no absolute right to firearms" under the Second Amendment. *See id.* (drawing on rationale of past decisions).

39. *See, e.g.*, United States v. Three Winchester 30–30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290 n.5 (7th Cir. 1974) (finding no merit in claim that felon dispossession statute violated Second Amendment right); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (upholding constitutionality of felon dispossession statute); Cody v. United States, 460 F.2d 34, 36–37 (8th Cir. 1972) (concluding that felon dispossession statute did not violate Second Amendment); United States v. Cole, 276 F. Supp. 2d 146, 150 (D.D.C. 2003) (finding no authority to support claim that "a statute prohibiting felons from possessing firearms violates the Second Amendment").

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Graves.[40] The defendant objected to his conviction for making false statements on a gun registration form.[41] He did not assert the Second Amendment as a defense, but the Third Circuit briefly discussed the nature of the right anyway.[42] The court acknowledged that "any regulation may" violate the Second Amendment, but in applying the collective right theory, other courts "consistently have found no conflict between federal gun laws and the Second Amendment."[43]

Only if there was an individual right protected by the Second Amendment would the need for an in-depth analysis arise.[44] The notion of an individual right faced heavy debate and commentary, and from the second half of the twentieth century onward, an increasing number of publications reflected a departure from the collective view to the individual right view.[45] The criticisms of *Miller*, discussions of an individual right by lower courts, and the increasingly sharp cry from scholarly works all called for

40. 554 F.2d 65 (3d Cir. 1977).

41. *See id.* at 67 (noting Graves wrote "he had not been convicted of a [felony]" even though he had been). Graves was convicted under 18 U.S.C. § 922(a)(6) for "knowingly" making false statement "in connection with the acquisition of firearms." *See id.* (describing defendant's conviction).

42. *See id.* at 66 n.2 (discussing whether Second Amendment right would be violated).

43. *Id.* ("Arguably, any regulation of firearms may be violative of [the Second Amendment]."). Had Graves raised the Second Amendment, *Miller* would have controlled the analysis. *See id.* (noting adherence to collective right theory); *see also* United States v. Tot, 28 F. Supp. 900, 901, 903 (D.N.J. 1939) (holding Second Amendment not implicated by federal act making it "unlawful for any person who has been convicted of a crime of violence . . . to receive any firearm or ammunition" (quoting 15 U.S.C. § 902(f) (1934))).

44. *See, e.g.*, United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996) (finding Second Amendment not implicated because gun dealer had not shown any "connection with militia-related activity"). The Third Circuit's analysis did not extend much further than what the collective right theory would allow. *See* Eckert v. Pennsylvania, 331 F. Supp. 1361, 1362 (E.D. Pa. 1971) (holding no Second Amendment right unless firearm "bears a reasonable relationship to the preservation or efficiency of a well-regulated militia"), *aff'd*, 474 F.2d 1339 (3d Cir. 1973). Some circuits addressed the possibility of an individual right but applied the collective right theory. *See* United States v. Price, 328 F.3d 958, 961 (7th Cir. 2003) (noting possibility of individual right); *Cole*, 276 F. Supp. 2d at 150 (addressing merit to defendant's argument that Second Amendment protects individual right). The Fifth Circuit was the first to recognize an individual Second Amendment right. *See* United States v. Emerson, 270 F.3d 203, 218 (5th Cir. 2001) (holding Second Amendment protects individual right).

45. *See, e.g.*, Perkins, *supra* note 26, at 1063 (describing scholarly debate on "nature of the right protected by the Second Amendment during the twentieth century"); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461 (1995) (noting "explosion of scholarship" on Second Amendment from increased attention to gun control debates); Spitzer, *supra* note 30, at 367–68 (providing detailed discussion about how individualist view flourished in scholarship).

the Supreme Court to revisit the true meaning of the Second Amendment.[46]

III. AN INDIVIDUAL SECOND AMENDMENT RIGHT: NO LONGER OUT OF RANGE

A. *The Supreme Court Pulls the Trigger*

After nearly seventy years of silence, the Supreme Court directly addressed the right guaranteed by the Second Amendment in 2008 with *Heller*. Dick Heller was a D.C. police officer with authorization to carry a handgun on duty, but could not register to keep a handgun in his home.[47] Heller's request to keep a gun at home was denied because D.C. law prohibited the registration of handguns, and no one was permitted to carry a handgun without a license.[48] In addition, lawfully owned firearms were required to be kept "unloaded or disassembled" in the home.[49] Heller challenged all three provisions on Second Amendment grounds, claiming a right to use "functional firearms" for self-defense in the home.[50]

In a landmark decision, the Supreme Court held that the Second Amendment protected an individual right to keep and bear arms.[51] The D.C. statutes violated that right because they made it impossible for citizens to use firearms for the "core lawful purpose of self-defense."[52] The Court stressed, however, that this right was not without its limits.[53] Writing for the majority, Justice Scalia listed several "presumptively lawful" reg-

46. *See, e.g.*, Wagner, *supra* note 33, at 1458–59 (arguing that Supreme Court "should take the next opportunity . . . to reverse the long line of cases denying any individual right to keep and bear arms").

47. *See* District of Columbia v. Heller, 554 U.S. 570, 575 (2008) (reviewing facts of case).

48. *See id.* at 574–75 (describing D.C. CODE § 7-2502.02(a)(4) (2001) (prohibiting handgun registration) and section 22-4504 (prohibiting unlicensed carrying)).

49. *See id.* at 575 (describing section 7-2507.02, which requires firearms be kept "unloaded and disassembled or bound by a trigger lock or similar device" if kept at home).

50. *See* Parker v. District of Columbia, 478 F.3d 370, 374 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008) (asserting right to possess firearms "readily accessible to be used effectively when necessary" for self-defense). The District Court dismissed the complaint, but the appellate court reversed, holding the city's laws violated the Second Amendment's individual right. *See Heller*, 554 U.S. at 576 (noting procedural history).

51. *See Heller*, 554 U.S. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

52. *See id.* at 629–30 (noting "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid"). The requirement that all firearms in the home "be rendered and kept inoperable" made it impossible to use them for self-defense. *Id.* at 630 (explaining why statutes were unconstitutional).

53. *See id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

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ulations that could survive a constitutional challenge.[54] This "nonexhaustive" list was subject to intense criticism, but it formed the basis for adjudication by the lower courts faced with this new individual right.[55]

The Supreme Court reaffirmed *Heller* in *McDonald v. City of Chicago*.[56] A plurality of the Court ruled that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment to the States.[57] In the wake of *Heller* and *McDonald*, lower courts were bombarded with firearm regulation challenges, now that the Second Amendment protected an individual right to bear arms.[58]

B. *Lower Courts Stare Down the Barrel of Uncertainty*

Heller jolted the lower courts out of the collective right theory and into a new area of law riddled with uncertainty and litigation.[59] The decision left important questions unanswered, causing widespread confusion amongst the lower courts.[60] Specifically, *Heller* did not outline the scope of the new Second Amendment right, nor did it provide the standard of review courts should apply to Second Amendment challenges.[61]

54. *See id.* at 626–27 n.26 (naming "presumptively lawful" measures). The Court listed: "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27(same).

55. *See id.* at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."); Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 444–45 (2011) (criticizing list as being "inconsistent with the Court's originalist analysis"). For a discussion of *Heller*'s list in subsequent litigation, see *infra* notes 62–72 and accompanying text.

56. 130 S. Ct. 3020 (2010). Chicago residents were precluded from keeping firearms in their homes for self-defense. *See id.* at 3026 (describing ordinance that said, "?[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.'" (alteration in original) (quoting Chicago, Ill., Municipal Code § 8–20–040(a) (2009))). The code also "prohibit[ed] registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City." *Id.* (describing section 8–20–050(c) of ordinance).

57. *See id.* at 3036–37 (holding right to bear arms is "deeply rooted in this Nation's history and tradition" and thus is incorporated by Due Process Clause (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

58. For a discussion of the ensuing litigation, see *infra* notes 59, 186–91 and accompanying text.

59. *See, e.g.*, Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1141 (2011) (noting "[h]undreds of challenges to gun regulations" after *Heller*); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1565 (2009) (describing "avalanche of challenges" as defendants "saw *Heller* as a get out of jail free card").

60. *See, e.g.*, Gould, *supra* note 32, at 1549 ("*Heller* has simultaneously clarified and clouded the constitutional mystery surrounding the Second Amendment.").

61. *See* Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. CAL. L.

In determining whether a regulation fell inside the Second Amendment's scope, the lower courts focused on *Heller*'s list of "presumptively lawful" measures.[62] The Supreme Court provided little guidance on how to interpret and apply this list.[63] *Heller* "hit[ ] the reset button," leaving the lower courts to call the shots on what is protected and what is not.[64] Faced with a widely unsettled area of law, the circuits split in their interpretations of *Heller* and developed different methods of analysis.[65]

One important divide comes from the Supreme Court's failure to explain why certain regulations were deemed "presumptively lawful."[66] The lower courts have articulated two rationales for this classification. First, regulations are "presumptively lawful" because they regulate conduct outside the scope of Second Amendment protection.[67] Second, these measures are "presumptively lawful" because they pass any level of scru-

REV. 547, 593 (2009) (stating *Heller* "provided closure as to one issue" but left open issues of Second Amendment's scope and standard of review); Gould, *supra* note 32, at 1537 (noting after *Heller*, lower courts were "deluged with Second Amendment claims," but had "little explicit guidance" from Supreme Court "as to how to rule on these challenges").

62. *See Civil Rights: The* Heller *Case*, 4 N.Y.U. J.L. & LIBERTY 293, 309–10 (2009) ("*Heller* has led to a considerable wave of litigation in the lower federal courts," which rely on this "laundry list" of exceptions to uphold regulations); David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315, 317 (2011) (describing how after *Heller*, lower courts "quickly turned to determining the parameters of the right which they had previously thought nonexistent").

63. *See* District of Columbia v. Heller, 554 U.S. 570, 679 (2008) (Stevens, J., dissenting) (stating majority left "for future cases the formidable task of defining the scope of permissible regulations"); Cass Sunstein, *America's 21st Century Gun Right*, BOS. GLOBE (June 26, 2008), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/06/26/americas_21st_century_gun_right/ (noting courts "will now see many years of efforts to decide the scope" of Second Amendment).

64. Anna Stolley Persky, *An Unsteady Finger on Gun Control Laws: Despite 2nd Amendment Cases, Firearms Codes Are Moving Targets*, 96 A.B.A. J. 14 (2010) (discussing *Heller*'s minimal guidance regarding scope); *see, e.g.*, Adam Winkler, Heller*'s Fallout: The Court's Decision Raises More Legal Questions than It Answers*, NAT'L J. ONLINE (July 17, 2008), http://www.nationaljournal.com/njonline/heller-s-fallout-20080717 (stating *Heller* provided "a few sentences that seem to suggest . . . what might be allowed and what might not be allowed").

65. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010) ("But *Heller* did not purport to fully define all the contours of the Second Amendment, and accordingly, much of the scope of the right remains unsettled." (citation omitted)).

66. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413 (2009) (noting lack of explanation makes it "difficult to discern the principles or values behind *Heller*'s carve-outs").

67. *See Marzzarella*, 614 F.3d at 91 (finding "presumptively lawful" means statutes that "regulate conduct outside the scope of the Second Amendment"); *see, e.g.*, United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) (adopting *Marzzarella*'s reading of "presumptively lawful").

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tiny.[68] Despite this discrepancy, the circuits have been consistent in upholding "presumptively lawful" regulations.[69] This is true even though some circuits disagree on whether *Heller*'s list is dicta or binding.[70] The true problem is that this muddy understanding of "presumptively lawful" will directly impact the way courts approach Second Amendment challenges.[71] When a court faces an issue not addressed by *Heller*, or another circuit, an unclear understanding of what "presumptively lawful" means could lead to divided results.[72]

Heller's failure to set a standard of review left the lower courts in further disarray.[73] The Supreme Court seemed to reject rational basis, leaving intermediate scrutiny and strict scrutiny available.[74] The majority of circuits have applied intermediate scrutiny, but the rationales for doing so differ.[75] Some find *Heller*'s list of exclusions to be incompatible with strict

68. *See* Gould, *supra* note 32, at 1560 (arguing measures are "presumptively lawful" because they pass all levels of scrutiny).

69. *See* Kiehl, *supra* note 59, at 1142 (noting how lower courts consistently uphold gun regulations against challenges regardless of approach used). For a further description of the lower courts' treatment of "presumptively lawful" regulations, see *infra* notes 189, 191, and accompanying text.

70. *Compare* United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (characterizing list as dicta), *and* United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009) (same), *with* United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (ruling language is not dicta), *and* United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) (same). Courts characterizing *Heller*'s list as dicta still rely on it to uphold firearm regulations. *See* United States v. Barton, 633 F.3d 168, 171 (3d Cir. 2011) (listing courts that rely on *Heller*'s "dicta"). The Third Circuit characterizes the list as binding. *See id.* at 171 (ruling *Heller*'s list not dicta).

71. *See, e.g.*, *Barton*, 633 F.3d at 172 (rejecting facial challenge under presumption that "felon dispossession statutes regulate" unprotected conduct); *Marzzarella*, 614 F.3d at 89 (stating threshold question is whether conduct is protected under Second Amendment).

72. *See Marzzarella*, 614 F.3d at 91 (discussing two potential meanings of "presumptively lawful"). The court recognized the importance of understanding what "presumptively lawful" means. *See id.* at 90–92 (discussing meaning of "presumptively lawful" even though possessing unmarked firearms not within list).

73. *See, e.g.*, Lindsay Goldberg, Note, District of Columbia v. Heller*: Failing to Establish a Standard for the Future*, 68 MD. L. REV. 889, 899 (2009) (describing impact of *Heller*'s silence on standard of review); Jeffrey M. Shaman, *After* Heller*: What Now for the Second Amendment?*, 50 SANTA CLARA L. REV. 1095, 1104 (2010) (noting *Heller* rejected minimal scrutiny, but "declined to choose between strict and intermediate scrutiny").

74. *See* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) ("If all that was required . . . was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."); Robert A. Levy, District of Columbia v. Heller, *What's Next?*, CATO UNBOUND (July 14, 2008), http://www.cato-unbound.org/2008/07/14/robert-a-levy/district-of-columbia-v-heller-whats-next/ (noting Court "categorically rejected 'rational basis,'" and "will adopt some version of intermediate or heightened scrutiny").

75. *See* Kiehl, *supra* note 59, at 1145 ("The majority of courts . . . have employed intermediate scrutiny, which is emerging as a clear favorite . . . for Second Amendment challenges."); Rosenthal & Malcolm, *supra* note 55, at 466 n.13 (noting "trend toward a form of intermediate scrutiny requiring that the challenged

scrutiny.[76] One approach gaining momentum applies intermediate scrutiny where the challenged statute regulates conduct not directly within "the core of the Second Amendment right," and does not "severely limit" lawful firearm possession.[77] Courts that have used this approach usually analogize it to the First Amendment's tiered scrutiny framework.[78] The courts applying strict scrutiny reason that the Second Amendment protects a fundamental right, thus warranting the highest level of scrutiny.[79]

Regardless of the approach used, the lower courts have consistently upheld firearm regulations.[80] The problem is, however, that an unclear rationale for the appropriate standard could produce differing results when a novel issue arises.[81] The Second Amendment context makes this risk more significant because courts must be vigilant against the inherent danger of weak gun control, but protective of an individual's fundamental rights.[82]

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regulation be substantially related to an important governmental objective"). For a further discussion of the lower courts applying intermediate scrutiny, see *infra* notes 171–73 and accompanying text.

76. *See* United States v. Skoien, 587 F.3d 803, 811 (7th Cir. 2009) ("We do not see how the listed laws could be 'presumptively' constitutional if they were subject to strict scrutiny"); Heller v. District of Columbia, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (noting "strict scrutiny . . . would not square with" *Heller*'s list), *aff'd in part* 670 F.3d 1244 (D.C. Cir. 2011).

77. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011) (explaining that level of scrutiny "will depend on how close the law comes to the core of the Second Amendment right, and the severity of the law's burden on the right"); *Marzzarella*, 614 F.3d at 97 (choosing intermediate scrutiny because statute "should merit a less stringent standard than the one that would have been applied to" statutes in *Heller*).

78. For a discussion of courts analogizing to First Amendment scrutiny, see *infra* notes 159, 165–68, 193–94 and accompanying text.

79. For a further discussion of strict scrutiny, see *infra* notes 160–62 and accompanying text.

80. *See, e.g.*, Kiehl, *supra* note 59, at 1146 ("[E]ven under this highest level of scrutiny, the courts have upheld the challenged regulation in every instance.").

81. *See* Levy, *supra* note 74 (resolving "what weapons and persons can be regulated and what restrictions are permissible" are questions that "will depend . . . on the standard of review").

82. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (acknowledging "problem of handgun violence" and that law enforcement need "a variety of tools for combating that problem"). The Court ruled however: "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Id.* (balancing public safety concerns with fundamental rights); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (noting city enacted handgun bans to protect against violence, but "City's handgun murder rate has actually increased since the ban was enacted"). The Court also described several residents that "have been the targets of threats and violence." *See id.* at 3026–27 (discussing why residents want handguns for protection); United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011) (noting application of strict scrutiny "would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to 'prevent[ ] armed mayhem' in public places"

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IV. THE THIRD CIRCUIT OPENS FIRE

In *United States v. Marzzarella*, the Third Circuit ruled on an issue that was not explicitly included in *Heller*'s list of "presumptively lawful" measures.[83] The defendant challenged his felony conviction for possessing an unmarked firearm under 18 U.S.C. § 922(k).[84] In its opinion, the Third Circuit set out its two prong test: (1) "[W]hether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee[,]" and (2) if yes, whether the law survives "some form of means-end scrutiny."[85]

Under the first prong, the court asked "whether the possession of an unmarked firearm in the home is protected by the right to bear arms."[86] Answering this question required "a textual and historical inquiry" into the Second Amendment's original meaning.[87] Applying *Heller*, the Third Circuit reasoned that the "historical tradition" of Second Amendment protection included only those weapons "commonly owned by law-abiding citizens" at that time.[88] Drawing on this historical approach, the defendant argued that unmarked firearms were categorically protected under the Second Amendment, because "firearms in common use" at the time of its ratification did not have serial numbers.[89] The court rejected this argument, noting that this type of "historically fact-bound approach" should not be used to ultimately define what weapons the Second Amendment protects.[90] Serial numbers on firearms did not exist when the Second

(alteration in original) (quoting United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010))).

83. *See* United States v. Marzzarella 614 F.3d 85, 91–92 (3d Cir. 2010) (citing *Heller*, 554 U.S. at 626–27) (discussing list).

84. *See id.* at 88 (describing defendant's Second Amendment argument). For a discussion of the facts of the case, see *supra* notes 1–8 and accompanying text.

85. *Id.* at 89 (outlining two-prong test).

86. *Id.* (explaining approach under first prong).

87. *See* David Kopel, Ezell*'s Doctrinal Rules for the Second Amendment*, THE VOLOKH CONSPIRACY (July 8, 2011, 2:08 AM), http://volokh.com/2011/07/08/ezell/ (citing Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011)) (discussing Second Amendment's historical meaning under *Marzzarella*'s first prong); *Marzzarella*, 614 F.3d at 89–90 ("Because '[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them,' the Court interpreted the text in light of its meaning at the time of ratification." (alteration in original) (citation omitted) (quoting *Heller*, 554 U.S. at 634–35)).

88. *See Marzzarella*, 614 F.3d at 90 ("'*Miller* stands only for the proposition that the Second Amendment right . . . extends only to certain types of weapons—those commonly owned by law abiding citizens.'" (citation omitted) (quoting *Heller*, 554 U.S. at 623)).

89. *See id.* at 93 (discussing Marzzarella's argument that unmarked firearms are "categorically protected").

90. *See id.* ("*Heller* cautions against using such a historically fact-bound approach when defining the types of weapons within the scope of the right."). The Second Amendment does not extend to "only those arms in existence in the 18th century." *Id.* at 93 (quoting *Heller*, 554 U.S. at 582) (discussing error in defendant's argument).

Amendment was ratified, and thus do not receive categorical protection because they were not "within the contemplation of the pre-existing right."[91]

The defendant also argued that the statute was unconstitutional because it infringed on his right of self-defense.[92] The court did not reject this argument outright, but discussed the limits imposed on the right to bear arms for self-defense.[93] The court noted that unmarked firearms could fall within *Heller*'s classification of "dangerous and unusual weapons," and thus be beyond the Second Amendment right.[94] Ultimately, the court found it unclear whether the Second Amendment right included "possession of unmarked firearms in the home," but proceeded to the second prong of the test as if it did.[95]

Under the second prong, the Third Circuit engaged in a detailed discussion of the appropriate level of scrutiny.[96] The court rejected a rational basis standard, stating *Heller* required "some form of heightened scrutiny."[97] Acknowledging the uncertainty revolving around this issue, the court ultimately settled on intermediate scrutiny.[98] The court ruled that law enforcement's ability to trace serial numbers was a "substantial or important interest," and the statute "fit[ ] reasonably with that interest."[99]

The Third Circuit faced an issue explicitly targeted by *Heller*'s list in *United States v. Barton*. There, the defendant challenged his conviction for

91. *Id.* at 94 (rejecting categorical protection for class of weapons with characteristics that "citizens had no concept of" when Second Amendment was ratified).

92. *See id.* (describing defendant's self-defense argument). The court focused on the fact that the handgun's functionality was not compromised, and thus any "burden on Marzzarella's ability to defend himself" was minimal. *See id.* (declaring "[w]ith or without a serial number, a pistol is still a pistol").

93. *See id.* ("[I]t cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances.").

94. *See id.* at 95 (finding it "arguably possible" that *Heller*'s "exception for dangerous and unusual weapons" extends to unmarked firearms).

95. *See id.* ("[W]e cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms."). The court concluded the statute "would pass constitutional muster even if it burden[ed] protected conduct. . . ." *Id.* (finding it unnecessary to decide if defendant's Second Amendment right was infringed).

96. *See id.* (evaluating statute "under the appropriate standard of constitutional scrutiny").

97. *See id.* at 96 (noting *Heller* did not rule on standard of review, but "the fact that the [handgun] ban was struck down . . . indicates some form of heightened scrutiny must have applied").

98. *See id.* at 97 (noting "[w]hile it is not free from doubt," intermediate scrutiny should apply). The court did not decide which form of intermediate scrutiny. *See id.* at 98 ("Although these standards differ in precise terminology, they essentially share the same substantive requirements."). The court concluded the different types of intermediate scrutiny "all require the asserted governmental end to be more than just legitimate . . . ." *Id.* (noting government interest must be either "significant," "substantial," or "important.").

99. *See id.* at 98–99 (ruling statute "passes muster" under intermediate scrutiny).

being a felon in possession of firearms.[100] The Third Circuit held the statute fell within *Heller*'s "categorical exceptions," and thus could not be facially unconstitutional.[101] The court noted however, that a "presumptively lawful" regulation could still be invalidated if it was unconstitutional "as applied" to a specific individual.[102]

The Third Circuit stated that to prevail on an "as-applied" challenged, "Barton must present facts about himself and his background that distinguish his circumstances from those persons historically barred from Second Amendment protections."[103] In addition, the court looked to the "traditional justifications" of the statute to determine if the policies behind it supported a "permanent disability" on the defendant's Second Amendment rights.[104] Because Barton did not provide evidence to show why he fell outside the statute's scope, the Third Circuit upheld the dismissal of his as-applied challenge and his conviction.[105]

100. *See* United States v. Barton, 633 F.3d 168, 170 (3d Cir. 2011). (describing defendant's claim that statute violated Second Amendment right). Barton had sold a revolver to a police informant, after which the police searched his home. *See id.* (reviewing facts of case). The police found an assortment of weapons, and Barton was arrested because he had a prior felony conviction. *See id.* (finding "seven pistols, five rifles, three shotguns, and various types of ammunition" at Barton's residence). Barton was convicted under section 922(g)(1) which reads: "It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition . . . ." 18 U.S.C. § 922(g)(1) (2006).

101. *See Barton*, 633 F.3d at 172 (rejecting facial challenge "because *Heller* requires that we 'presume,' under most circumstances, that felon dispossession statutes regulate conduct which is unprotected by the Second Amendment . . . ."). The court stated "certain 'longstanding prohibitions on the possession of firearms' are 'presumptively lawful.'" *See id.* at 171 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)). For a further discussion of these "presumptively lawful" measures, see *supra* notes 54–55, 66–72, and accompanying text.

102. *Barton*, 633 F.3d at 173 (finding defendant's "as-applied challenge" not foreclosed by "presumptive validity of felon gun dispossession statutes"). The court reasoned that *Heller*'s categorization of felon dispossession statutes as "presumptively lawful" implied that this "presumption may be rebutted." *See id.* (discussing "as-applied" inquiry).

103. *Id.* at 174 (ruling defendant must show factual basis for "as-applied" challenge).

104. *See id.* at 173 ("[T]o evaluate Barton's as-applied challenge, we look to the historical pedigree of 18 U.S.C. § 922(g) to determine whether the traditional justifications underlying the statute support a finding of permanent disability in this case."). The court found the statute was meant to keep firearms away from people who would be a risk to society, and briefly discussed the legal foundation for the statute. *See id.* at 173–74 (noting intent behind section 922(g) was "to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society" (quoting Scarborough v. United States, 431 U.S. 563, 572 (1977))).

105. *See id.* at 174 (ruling Barton "failed to demonstrate that his circumstances place him outside the intended scope of" statute).

V. STRATEGIES FOR PRACTITIONERS DRAWING ON THE THIRD CIRCUIT'S FIRE POWER

The Third Circuit's analyses in *Marzzarella* and *Barton* illustrate the well-rounded approach lower courts take when evaluating challenges under the Second Amendment.[106] When a court is faced with a firearm regulation challenge, the first divide will be whether the regulation falls under *Heller*'s "presumptively lawful" list and the second divide will be what level of scrutiny should be applied.[107]

A. *Analyzing the Barrage of "Presumptively Lawful" Regulations*

Generally, courts summarily dismiss defense arguments that a regulation is "facially invalid"—requiring a showing that there is "no set of circumstances" where it could be valid—because that standard is difficult to satisfy.[108] With such a high burden, only "extreme and arbitrary and irrational laws" would fit that description.[109] Instead, the defense should focus on distinguishing its case from *Heller*'s "presumptively lawful" measures, because that would provide a good starting point to argue the regulation restricts protected conduct.[110]

In refuting that argument, the State should argue that the regulation is "presumptively lawful."[111] If the regulation falls within *Heller*'s categories, the State would have a strong basis for arguing it is constitutional.[112] In *Barton*, the defendant's situation was explicitly within *Heller*'s list, and thus the Third Circuit began its analysis with a presumption in favor of the constitutionality of that regulation.[113] *Barton* also shows, however, that a "presumptively lawful" regulation will not automatically be found valid.[114]

106. For a discussion of this well-rounded approach, see *supra* notes 86–105, *infra* notes 180–81 and accompanying text.

107. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (outlining two-prong test).

108. *See Barton*, 633 F.3d at 172 (describing defendant's burden under "facial challenge").

109. *See Civil Rights: The* Heller *Case*, *supra* note 62, at 312 (describing statute in *Heller* as example because it "ban[ned], effectively, all self-defense with firearms . . . .").

110. *See* Brief for Appellant at 9, United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010) (No. 09-3185), 2009 WL 3866720 (arguing defendant Marzzarella was within Second Amendment's protective scope because he "was not a felon nor was he insane" and "[t]he type of firearm [he] possessed" was protected).

111. *See* Brief for the United States at 11, United States v. Barton, 633 F.3d 168 (3d Cir. 2011) (No. 09-2211), 2010 WL 2962436 (showing that felon dispossession statute is within *Heller*'s list).

112. *See Barton*, 633 F.3d at 172 (noting "*Heller* requires that we 'presume,' under most circumstances," that those statutes listed "regulate conduct which is unprotected by the Second Amendment").

113. *See id.* (citing *Heller* and *McDonald* for proposition that "The Supreme Court has twice stated that felon gun dispossession statutes are 'presumptively lawful'").

114. *See id.* at 173 (noting *Heller*'s characterization of "*presumptively* lawful" implies presumption may be rebutted) (emphasis added).

B. *Targeting the "As-Applied" Challenge*

Defense attorneys should seize on *Barton* and stress that the Third Circuit does not view *Heller*'s "presumptively lawful" list in a vacuum, but analyzes the nature of that list in detail.[115] Although under most circumstances, "presumptively lawful" statutes "regulate conduct which is unprotected by the Second Amendment," attorneys should stress that they can be unconstitutional "as applied" to a specific person.[116] To make an effective "as-applied" argument, defense attorneys must satisfy *Barton*'s requirements.[117]

Under *Barton*'s "as-applied" framework, the Third Circuit first examines the regulation's history to determine if the prohibition on the defendant's rights furthers that regulation's policies.[118] Defense attorneys should argue that this history does not justify the infringement on the defendant's Second Amendment right.[119] They must keep in mind that the Third Circuit requires a "factual basis" for an "as-applied" challenge.[120] Thus, the defense must provide evidence to distinguish the defendant from persons traditionally outside the scope of Second Amendment protection.[121] A defendant "convicted of a minor, non-violent crime" could stress they are "no more dangerous than a typical law

115. *See* Brief of Appellant at 21–22, *Barton*, 633 F.3d 168 (No. 09-2211), 2010 WL 2504123 (arguing list "cannot be . . . the beginning and end of the analysis"). The Third Circuit agreed and engaged in a well-rounded analysis even after finding *Heller*'s list included prohibitions on felons. *See Barton*, 633 F.3d at 170–71, 74 (analyzing list and "as-applied" challenge).

116. *See Barton*, 633 F.3d at 173 (rejecting facial challenge but examines statute "as applied"); *see e.g.*, Stephen P. Halbrook, *Post-*Heller *Decisions*, in FIREARMS LAW DESKBOOK § 1:4 (2011) (describing how felon can raise "as-applied" challenge to rebut presumption of validity).

117. *See Barton*, 633 F.3d at 174 (discussing "as-applied" challenge).

118. *See id.* at 173–74 (examining "historical pedigree" of section 922(g) to determine if underlying policies supported infringement on defendant's right). For a further discussion of *Barton's* "historical pedigree" analysis, see *supra* notes 103–05 and accompanying text.

119. *See Barton*, 633 F.3d at 173–74 (examining historical support for felon dispossession statutes). Some authorities have questioned this support. *See* United States v. McCane, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring) (stating "more recent authorities have *not* found evidence of longstanding dispossession laws[,]" but argue "such laws did not exist and have questioned the sources relied upon by the earlier authorities"); *Civil Rights: The* Heller *Case*, *supra* note 62, at 308 (stating gun regulations "are modern inventions," and "do not reflect long-standing unbroken traditions").

120. *See Barton*, 633 F.3d at 174 (stating defendant must have "a factual basis" for his challenge).

121. *See, e.g.*, United States v. Brown, 436 F. App'x 725, 726 (8th Cir. 2011) (rejecting "as-applied challenge" because defendant did not present "'facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections'" (quoting *Barton*, 633 F.3d at 174)).

abiding citizen," or a defendant with a "decades old" conviction could show they no longer pose a "threat to society."[122]

On the other side, the State should attack the defense's "as-applied" challenge.[123] Here, the State should examine the regulation's "historical pedigree," to show that the impact on the defendant's Second Amendment rights is justified by congressional intent to keep the public safe.[124] They can also highlight the fact that there is no absolute right to firearms.[125] If the defendant does not have a "lawful purpose" for the conduct involving the firearm, that conduct will not be protected.[126] This is especially true if the State can demonstrate that the particular weapon has value "primarily for persons seeking to use them for illicit purposes."[127]

In *Marzzarella* and *Barton*, the Third Circuit addressed the "core lawful purpose of self-defense."[128] Defense attorneys should analogize to *Heller* and argue that the challenged regulation "makes it impossible" for law-abiding citizens to exercise their "inherent right of self-defense."[129] This

122. *Barton*, 633 F.3d at 174 (discussing ways defendants can distinguish their situations); Julie McGrain, *Court Rejects Second Amendment Challenges to 18 U.S.C. § 922(g)(1)*, THIRD CIRCUIT BLOG (Mar. 7, 2011), http://circuit3.blogspot.com/2011/03/court-rejects-second-amendment.html (discussing potential defendants that could make successful as applied challenges).

123. *See* Brief for the United States, *supra* note 111 at 19 ("Barton not only fails to develop the ["as-applied"] argument . . . he fails to distinguish his case from a run-of-the-mill prosecution under § 922(g)(1).").

124. *See* Brief for the United States, *supra* note 1, at 29 n.18 (noting Congress sought "to regulate . . . firearms sales and transfers to assist law enforcement . . . in combating crime" (citing DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS 25 (2000)), *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/Following_the_Gun%202000.pdf)). In pursuing these objectives, "serial numbers arose, and later, firearms tracing." *Id.* (discussing important purpose tracing serves).

125. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (stating Second Amendment does not create "'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose'" (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008))); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding Heller could register handgun "[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights").

126. *See Heller*, 554 U.S. at 625 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."); *See, e.g.*, Brief for the United States, *supra* note 111, at 16 ("[T]he Second Amendment's history and purpose support the proposition that felons are categorically excluded from the Amendment's protections.").

127. *See* United States v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010) (finding no "lawful purpose served by obliterating a serial number"); *see, e.g.*, *Second Amendment Handgun Obliterated Serial Number 18 U.S.C. 922(k)*, PA. LAW WEEKLY, Aug. 10, 2010 ("There was no compelling reason why a law-abiding citizen would prefer an unmarked firearm.").

128. *See Marzzarella*, 614 F.3d at 94 (describing defendant's self-defense argument); *Barton*, 633 F.3d at 174–75 (same).

129. *See Heller*, 554 U.S. at 629–30 (showing that statutes impermissibly infringe on "inherent right of self-defense"). This right is "central to the Second Amendment." *Id.* at 640 (discussing self-defense).

will be particularly effective if the statute significantly hinders the defendant's ability to use a weapon in the home.[130] Defense attorneys must keep in mind, however, that keeping a firearm in the home is not sufficient to establish a "lawful purpose" of self-defense.[131]

Moreover, most firearm regulations will not be as strict as the statute in *Heller*.[132] The State could emphasize that point to show that the challenged regulation is much narrower in its scope.[133] Additionally, the Third Circuit has stated that the right of self-defense is limited when it is regulated by a "presumptively lawful" statute, so it is extremely important for defense attorneys to distinguish the defendant's situation from those in *Heller*'s list.[134] After making their arguments under *Barton*'s framework, practitioners should move to the two-prong test of *Marzzarella*.[135]

C. *Combating a Novel Issue with Two Prongs of Ammunition*

The two-prong test articulated in *Marzzarella* provides guidance to courts and practitioners facing a novel Second Amendment issue.[136] When confronted with regulations not explicitly within *Heller*'s "presumptively lawful" list, courts find it more challenging to apply *Heller* and have

130. *See id.* at 628 (stating regulation "extends . . . to the home, where the need for defense of self, family, and property is most acute"); *see, e.g.*, Brief of Appellant, *supra* note 115 at 15 (arguing right of self-defense "sounds with particular strength when exercised in the home").

131. *See* United States v. Huet, 665 F.3d 588, 601 (3d Cir. 2012) (upholding conviction of aiding and abetting felon's possession of firearm). The Third Circuit stated that the defendant had a "right to keep [the weapon] in her home," but the Second Amendment "did not give her the right to facilitate [her boyfriend's] possession of the weapon." *See id.* at 602 (ruling statute does not infringe on protected conduct even if defendant possessed firearm for self-defense) (citation omitted)).

132. *See Heller*, 554 U.S. at 629 ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban.").

133. *See* United States v. Marzzarella, 595 F. Supp. 2d 596, 599 (W.D. Pa. 2009) (noting statutes in *Heller* were "far broader in scope"). The burden imposed by section 922(k) was "practically negligible" compared to the handgun ban in *Heller*. *See id.* (distinguishing regulations); *see, e.g.*, Keith Donoghue, *Upholding § 922(k) Ban on Unmarked Firearms, Court Charts Course for Second Amendment Challenges*, THIRD CIRCUIT BLOG (July 29, 2010), http://circuit3.blogspot.com/2010/07/upholding-922k-ban-on-unmarked-firearms.html (noting "decisive factor" was that statute "'restricts possession of weapons which have been made less susceptible to tracing . . . not "any otherwise lawful firearm.'" (quoting *Marzzarella*, 614 F.3d at 101))).

134. *See Marzzarella*, 614 F.3d at 94 ("[I]t cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances."); *see also* United States v. Barton, 633 F.3d 168, 174–75 (3d Cir. 2011) (noting that even if person has firearm for self-defense, "'a felony conviction disqualifies an individual from asserting'" that right (quoting *Marzzarella*, 614 F.3d at 92)).

135. For a discussion of practitioner arguments under *Marzzarella*'s test, see *infra* notes 140–83 and accompanying text.

136. *See Marzzarella*, 614 F.3d at 95 (outlining two prong approach).

recognized the need to proceed with caution.[137] This difficulty was particularly evident in *Marzzarella*, where the Third Circuit "assumed" the defendant's conduct was protected so it could apply the second prong.[138] Practitioners on both sides should address each prong of *Marzzarella* because the Third Circuit's tendency is to move through both prongs regardless of the result under the first.[139]

1. *The First Prong: Looking Through the Second Amendment's Scope*

Under the first prong, the Third Circuit inquires whether the challenged regulation infringes on conduct within the Second Amendment's protection.[140] The defense would argue that the regulation hinders protected conduct.[141] If the conduct is unprotected, the court's analysis ends there and the regulation is upheld.[142] The defense should show the defendant is "categorically different" from people historically understood to be outside the Second Amendment's protective scope.[143] Here, the defense can emphasize that *Heller*'s list did not explicitly cover the defendant's situation.[144] The Third Circuit has been cautious when asked to characterize regulations as "presumptively lawful" when they were not

137. *See* Gould, *supra* note 32, at 1550 (noting courts can "easily dispose of challenges" falling under *Heller*'s list, "[b]ut when the factual scenarios stray from those listed in *Heller*, the lower federal courts fall into disarray"); Kiehl, *supra* note 59, at 1149 ("While lower courts have fairly easily disposed of challenges to gun laws specifically mentioned in *Heller*'s laundry list of presumptively lawful regulations, they have struggled more with regulations not included in the *Heller* list or covered by its historical test."). The Third Circuit has discussed the difficulty in dealing with this area of law. *See Marzzarella*, 614 F.3d at 101 (noting that "Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned by *Heller*"); *see also Barton*, 633 F.3d at 172 n.4 (noting difficulty in applying *Heller* to novel problem).

138. *See Marzzarella*, 614 F.3d at 95 (applying second prong despite uncertainty of result under first prong).

139. *See, e.g.*, Piszczatoski v. Filko, 840 F. Supp. 2d 813, 831 (D.N.J. 2012) (ruling statute fell outside Second Amendment right, but addressed "under *Marzzarella*'s second prong, whether the challenged provisions would survive the appropriate level of scrutiny" due to unsettled nature of law). For a further discussion of *Marzzarella*'s application of both prongs, see *supra* notes 88–99 and accompanying text.

140. *See Marzzarella*, 614 F.3d at 89 ("First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.").

141. *See* Brief for Appellant, *supra* note 110, at 9 (arguing Marzzarella's conduct "lies squarely within the scope of the Second Amendment's right to possess firearms in the home").

142. *See* United States v. Huet, 665 F.3d 588, 602 (3d Cir. 2012) (finding aiding and abetting felon to possess weapon was "beyond the scope of Second Amendment protection," and thus "inquiry under *Marzzarella* [was] complete").

143. *See* United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011) (quoting United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010)) (finding that felons were "categorically different" from others in terms of Second Amendment right).

144. For further discussion of this argument, see *infra* notes 145–47 and accompanying text.

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listed by *Heller*.[145] To stress that the defendant's conduct is protected, the defense should assert some "lawful purpose" for the firearm.[146] To bolster this argument, the defense can distinguish the type of weapon from those "dangerous and usual weapons" unprotected by the Second Amendment.[147]

The State should argue that the regulated conduct is outside the scope of Second Amendment protection.[148] Here, the State ought to reiterate that *Heller*'s "presumptively lawful" list was not exhaustive.[149] The Third Circuit is particularly vigilant when analyzing regulations not explicitly within *Heller*'s list, so the State must demonstrate why the regulation should be put within that list of exclusions.[150] This can be done by showing the regulation is "longstanding"—as were the statutes in *Heller*.[151] The State could also draw focus to the regulation's policies and analogize them to policies underlying "presumptively lawful" statutes.[152] Here, practition-

145. *See Marzzarella*, 614 F.3d at 93 ("[P]rudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*."); *see also Huet*, 665 F.3d at 602 (stating courts "must tread carefully when deciding whether to find conduct not explicitly identified by the *Heller* Court as subject to 'presumptively lawful' restrictions as unprotected by the Second Amendment." (citing *Marzzarella*, 614 F.3d at 101)).

146. *See Marzzarella*, 614 F.3d at 95 ("'[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes'" (alteration in original) (quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008))).

147. *See id.* ("[A] handgun with an obliterated serial number seems distinct from a weapon like a short-barreled shotgun."). The *Marzzarella* court found no "lawful purpose" in having unmarked firearms, but distinguished those from "dangerous and unusual weapons" listed by *Heller*. *See id.* (finding unmarked firearm "no more damaging than a marked firearm").

148. *See id.* at 89 ("Our threshold inquiry, then, is whether 922(k) regulates conduct that falls within the Scope of the Second Amendment.").

149. *See id.* at 92–93 (stating *Heller*'s list "is not exhaustive," and thus "additional classes of restrictions" could exist). The Third Circuit noted that there is no set approach "for identifying these additional restrictions," but found *Heller* did not say the "pre-ratification presence is the only avenue to a categorical exception." *See id.* at 93 (discussing other potential exclusions).

150. *See id.* ("[P]rudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*.").

151. *See* Piszczatoski v. Filko, 840 F. Supp. 2d 813, 828–31 (D.N.J. 2012) (ruling handgun permit law "presumptively lawful"). The district court stated: "To the extent that New Jersey's Handgun Permit Law may implicate some narrow right to carry a firearm outside the home, the challenged provisions would not necessarily burden any protected conduct." *Id.* at 829 The court classified the law as a "'longstanding' licensing provision of the kind that *Heller* identified as presumptively lawful.'" *Id.* (quoting *Heller*, 554 U.S. at 626–27 n.26). The Third Circuit characterized these "longstanding regulations" as "exceptions . . . so that the regulated conduct falls outside the scope of the Second Amendment." *Id.* (citing *Barton,* 633 F.3d at 172).

152. *See Marzzarella*, 614 F.3d at 93 (describing how statute prohibiting "possession by substance abusers" would be valid "because it presumably serves the same purpose as restrictions on possession by felons"). Regulations preventing possession by "dangerous" people have a good basis for being "presumptively law-

ers can highlight the need for law enforcement officials to have the means to protect the public against gun violence.[153]

The State should further assert that, even if the defendant's conduct is protected, the Second Amendment does not foster an absolute right to firearms.[154] Practitioners can bolster this argument by analogizing to the "categorical exceptions" in First Amendment jurisprudence, which deny protection to certain types of speech.[155] Here, it is important that practitioners stress the recognized exclusions and limitations to the Second Amendment right, because courts will likely carve out more exclusions as this area of law develops.[156]

2. *The Second Prong: Triggering the Appropriate Level of Scrutiny*

Marzzarella's second prong sets out a framework to determine the appropriate level of scrutiny.[157] This is particularly useful to courts and practitioners because there is no set standard of review in this area of law.[158] *Marzzarella* drew from First Amendment tiered scrutiny: the least stringent

ful." *See, e.g.*, United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) (noting "§ 922(g)(3) has the same historical pedigree as other portions of § 922(g)"); United States v. Cheeseman, 600 F.3d 270, 280 (3d Cir. 2010) (stating intent behind section 922(g)(3) was "to keep firearms out of the possession of drug abusers, a dangerous class of individuals").

153. *See, e.g.*, Appellee's Brief at 55, Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036), 2010 WL 5108973 ("[E]ven if there is nothing to fear when the truly law-abiding possess guns with obliterated serial numbers, the government may prohibit such possession to 'serve[ ] a law enforcement interest in enabling the tracing of weapons.'" (alteration in original) (quoting *Marzzarella*, 614 F.3d at 98)).

154. For a further discussion of this argument, see *supra* notes 35, 38, 125–26, and accompanying text.

155. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (comparing "categorical limits on the possession of firearms" with categorical limits found in First Amendment); Anderson, *supra* note 61, at 563 ("Categorical exclusions are most commonly used in First Amendment" case law, but they "play a role in Second Amendment jurisprudence.").

156. *See, e.g.*, *Skoien*, 614 F.3d at 641 ("Categorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others."); *see generally* Blocher, *supra* note 66, at 377 (providing in-depth analysis of *Heller*'s "categorical" approach and implications for Second Amendment doctrine).

157. *See, e.g.*, Donoghue, *supra* note 133 (stating under second prong, "the court must next determine whether the law survives the appropriate 'form of means-end scrutiny'" (quoting *Marzzarella*, 614 F.3d at 89)).

158. *See, e.g.*, Perkins, *supra* note 26, at 1074 ("Of the several unanswered questions left in the wake of *Heller*, the level of scrutiny has the most potential to transform American gun regulations."); Persky, *supra* note 64, at 16 (noting that because Supreme Court "failed to articulate a clear standard of review, lower courts have had to wing it"); Rosenthal & Malcolm, *supra* note 55, at 438 (calling level of scrutiny "the most important piece of plumbing that will need to be installed").

is rational basis, followed by intermediate scrutiny, and strict scrutiny is the most burdensome.[159]

The defense should urge the court to apply strict scrutiny so the regulation is subjected to the harshest test.[160] The trend amongst the circuits is to apply intermediate scrutiny, but the Third Circuit has explicitly acknowledged that certain situations could warrant the highest standard.[161] For example, strict scrutiny could be triggered by regulations that directly implicate a "law abiding citizen's" right of self-defense.[162] Self-defense is a "fundamental right," but defense attorneys must be mindful that not all fundamental rights receive strict scrutiny.[163] More importantly, defense attorneys must show the defendant is "law abiding," which is similar to demonstrating a "lawful purpose."[164]

It would be beneficial for defense attorneys to draw on First Amendment cases where "content based" restrictions on speech failed under strict scrutiny.[165] These restrictions could provide useful parallels where a firearm regulation bans an entire class of weapons, or a class of people from having weapons.[166] In that situation, the defense ought to highlight

159. For an overview of standards of review see Anderson, *supra* note 61, at 557–63 (discussing rational basis, intermediate scrutiny, and strict scrutiny).

160. *See* Brief of Appellant, *supra* note 115, at 20 (arguing *Heller* requires more than rational basis). Heller also rejected a "freestanding 'interest balancing' approach," leaving intermediate and strict scrutiny. *See id.* at 22 (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)). The defense stated intermediate scrutiny was inappropriate and argued for strict scrutiny. *See id.* (arguing for highest standard).

161. *See* United States v. Marzzarella, 614 F.3d 85, 96 (3d Cir. 2010) ("Whether or not strict scrutiny may apply to particular Second Amendment challenges, it is not the case that it must be applied to all Second Amendment challenges."); *see, e.g.*, Donoghue, *supra* note 133 (noting *Marzzarella* "further suggest[ed] that at least some gun laws may be subject to strict scrutiny").

162. *See, e.g.*, United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) ("[A]ny law that would burden the 'fundamental' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny."); Piszczatoski v. Filko, 840 F. Supp. 2d 813, 834 (D.N.J. 2012) (noting strict scrutiny "is triggered by the core of the right"); Perkins, *supra* note 26, at 1079 (arguing for strict scrutiny where "a particular gun regulation directly interferes with the fundamental right of self-defense protected by the Second Amendment"). Most firearm regulations do not directly infringe on the "core" right to self-defense like *Heller*. *See id.* (noting strict scrutiny inappropriate "to evaluate . . . vast majority of gun regulations").

163. *See* Heller v. District of Columbia, 670 F.3d 1244, 1256 (D.C. Cir. 2011) ("[I]t does not logically follow[ ] that strict scrutiny is called for whenever a fundamental right is at stake."); *Marzzarella*, 614 F.3d at 96 ("Strict scrutiny does not apply automatically" to "enumerated right").

164. For further discussion of the "lawful purpose" requirement, see *supra* notes 126–27, 146–47 and accompanying text.

165. *See, e.g.*, Brief for the Appellant, *supra* note 110, at 24–28 (discussing content based restrictions); Anderson, *supra* note 61, at 563 ("[S]trict scrutiny . . . provides the default rule for assessing content based regulations of speech").

166. *See* Brief for Appellant, *supra* note 110, at 24 (arguing that "ban on the possession of any firearm without a serial number in the privacy of a citizen's home is the equivalent of content-based regulation").

that the fourth, seventh, ninth, and tenth circuits have explicitly drawn on *Marzzarella*'s First Amendment analysis.[167] Furthermore, the Supreme Court drew parallels to First Amendment precedent, suggesting approval of this approach in a widely unsettled area of law.[168]

The State should urge the court to reject strict scrutiny and adopt a lower standard.[169] It can make an argument for a rational basis standard, but that is unlikely to be accepted.[170] There is a much stronger argument for intermediate scrutiny because the Third Circuit applied that standard.[171] Practitioners could emphasize that the majority of other circuits apply intermediate scrutiny.[172] Furthermore, they could draw focus to courts that have explicitly drawn on the Third Circuit's approach under that standard.[173] The State should keep in mind that in such an unsettled

167. *See, e.g.*, Nordyke v. King, 644 F.3d 776, 786–87 (9th Cir. 2011) (asking whether restrictions leaves "law-abiding citizens with reasonable alternative means" for obtaining firearms (citing *Marzzarella*, 614 F.3d at 95)), *aff'd in part en banc*, 681 F.3d 1041 (9th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 706–07 (7th Cir. 2011) (noting other circuits have "begun to adapt First Amendment doctrine to the Second Amendment context" including Third Circuit); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) (joining other circuits that look at First Amendment "as a guide in developing a standard of review"); United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010) (discussing *Marzzarella*'s First Amendment analogies); United States v. Laurent, No. 11-322, 2011 WL 6004606, at *19 (E.D.N.Y. Dec. 2, 2011) (drawing on First Amendment "to define what constitutes a substantial burden" and standard of review (citing *Marzzarella*, 614 F.3d at 96)).

168. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("Of course the right [to bear arms] was not unlimited, just as the First Amendment's right of free speech was not."). The Court stated "[j]ust as the First Amendment protects modern forms of communications . . . the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582 (citation omitted).

169. *See* Brief for the United States, *supra* note 1, at 20 (arguing against strict scrutiny).

170. For a further discussion of the rejection of rational basis, see *supra* note 74 and accompanying text.

171. *See Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny).

172. *See, e.g.*, United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012) (applying intermediate scrutiny to statute prohibiting persons subject to domestic violence protection order from possessing firearms); *Nordyke*, 644 F.3d at 793 (upholding ordinance banning guns on country property under intermediate scrutiny); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (ruling statute prohibiting gun possession by "domestic violence misdemeanants" had "substantial relationship" to "important governmental interest"); United States v. Yancey, 621 F.3d 681, 687 (7th Cir. 2010) (finding statute prohibiting drug users from possessing firearms passed intermediate scrutiny).

173. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 703–04 (7th Cir. 2011) (stating *Marzzarella*'s two prong approach "has been followed by the Third, Fourth, and Tenth Circuits"); United States v. Portillo-Munoz, 643 F.3d 437, 443 n.4 (5th Cir. 2011) (noting "sliding scale test" in *Marzzarella* to determine appropriate standard); United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) (drawing on *Marzzarella* in deciding on intermediate scrutiny), *cert. denied*, 10-11212, 2011 WL 2516854 (2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) ("[A] two-part approach to Second Amendment claims seems appropriate under *Heller*, as explained by the Third Circuit"); United States v. Reese, 627 F.3d 792,

area of law, the lower courts will likely draw from others that share the same reasoning.[174]

Additionally, the State can show why the right to self-defense is not implicated, and that the regulation would not pose a "substantial burden" on that right.[175] Practitioners should also distinguish the regulation from "content based" restrictions on speech.[176] This can be done by stressing the regulation's narrow scope, and distinguishing it from the all-encompassing statutes struck down by *Heller*.[177] A narrow regulation that does not pose a severe burden on the defendant's rights will warrant intermediate rather than strict scrutiny.[178]

Regardless of the standard a court applies, practitioners on both sides should be aware of their case's expected result under all three standards.[179] The Third Circuit's tendency is to apply strict scrutiny after already applying intermediate scrutiny.[180] This reflects a need to cover all the bases when dealing with an undeveloped area of law.[181] Furthermore, practitioners must keep in mind there is no consensus on the type of inter-

800–01 (10th Cir. 2010) (applying intermediate scrutiny under *Marzzarella*), *cert. denied*, 131 S. Ct. 2476 (2011); Heller v. District of Columbia, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (finding intermediate scrutiny "the more appropriate standard"); Peterson v. LaCabe, 783 F. Supp. 2d 1167, 1176–77 (D. Colo. 2011) (noting Tenth Circuit adopted two prong approach articulated by Third Circuit).

174. *See, e.g.*, United States v. Barton, 633 F.3d 168, 171 (3d Cir. 2011) ("We agree with the Second and Ninth Circuits that *Heller*'s list . . . is not dicta."); *Marzzarella*, 614 F.3d at 95 (drawing on other circuits' examples of "dangerous and unusual weapons"); Brief for the United States, *supra* note 111, at 11 (listing cases from all circuits upholding felon dispossession statutes).

175. *See Heller*, 670 F.3d at 1257 (stating level of scrutiny "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right" (quoting *Chester*, 628 F.3d at 682)). Thus, "a regulation that imposes a substantial burden upon the core right of self-defense . . . must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." *Id.* (applying tiered scrutiny framework to Second Amendment).

176. *See* Brief for the United States, *supra* note 1, at 24 (distinguishing statute banning unmarked weapons from content based restriction).

177. *See Marzzarella*, 614 F.3d at 97 (stating section 922(k) "does not come close to [the] level of infringement" in *Heller*, which warrantied strict scrutiny).

178. *See, e.g.*, Kiehl, *supra* note 59, at 1164 (noting where "core right" is not infringed, regulations "should receive a . . . lower level of review—intermediate scrutiny"); Kopel, *supra* note 87 (noting "rigor" of scrutiny depends on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right").

179. *See, e.g.*, Anderson, *supra* note 61, at 556 (providing overview of various standards of scrutiny).

180. *See Marzzarella*, 614 F.3d at 98–99 (applying strict scrutiny after statute passed intermediate scrutiny). The Third Circuit found a "compelling interest" in obtaining information about firearms, which was "narrowly tailored" to that interest. *See id.* at 99–100 (finding regulation "narrowly tailored" because it did not "burden more possession than necessary").

181. *See, e.g.*, Piszczatoski v. Filko, 840 F. Supp. 2d 813, 831 (D.N.J. 2012) (finding statute outside Second Amendment's scope, but addressed whether it would survive scrutiny due to unsettled nature of law).

mediate scrutiny to apply.[182] In practice, the various forms mean essentially the same thing, but it would be useful to have a general understanding of each of them.[183]

VI. LOCK & LOAD

The fact that the Supreme Court denied certiorari to *Marzzarella* and other circuits sharing the Third Circuit's reasoning may signal approval of this reasonable approach to this area of law.[184] Second Amendment jurisprudence is still unclear—*Heller* purposefully left certain questions unanswered.[185] Lower courts facing a whirlwind of litigation have little guidance, and thus must draw from the reasoning of other courts.[186]

The Third Circuit cases have impacted the Second Amendment terrain.[187] *Marzzarella*'s scrutiny analysis and *Barton*'s "as-applied" framework show that the concept of an individual right has affected the approach to Second Amendment challenges.[188] There is a growing trend amongst the

182. *See Marzzarella*, 614 F.3d at 98 (noting different forms of intermediate scrutiny).

183. For a further discussion of intermediate scrutiny's various forms, see *supra* note 98 and accompanying text.

184. For examples of a denial of certiorari, see *supra* notes 167, 174, and accompanying text.

185. For a further discussion of the uncertainty generated by *Heller*, see *supra* notes 59–65 and accompanying text.

186. *See* THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS 6.18.922A-6.18.924B (2009) (Firearm Offenses), *available at* http://www.ca3.uscourts.gov/criminaljury/Nov2010/Final%20Chap%206%20Firearm%20Offenses.pdf (providing instructions for various firearm offenses with notes of relevant decisions from different circuits). *Marzzarella* is described at 6.18.922K entitled "Possession of Firearm With Serial Number Removed, Obliterated, or Altered (18 U.S.C. § 922(k))." *See id.* at 34–35 (discussing *Marzzarella*).

187. *See* Shannon P. Duffy, *In the Wake of "*Heller*," 3rd Circuit OKs Ban on Unnumbered Guns*, LEGAL INTELLIGENCER (July 30, 2010), http://www.law.com/jsp/article.jsp?id=1202464062676&In_Wake_of_Heller_3rd_Circuit_OKs_Ban_on_Unnumbered_Guns [hereinafter Duffy, *In the Wake of* Heller] (describing *Marzzarella* as "an important Second Amendment decision that charts a course for evaluating the validity of gun laws"); *Third Circuit Rejects Second Amendment Attack on Federal Crime of Possessing Gun with Obliterated Serial Number*, SENT'G L. & POL'Y (July 29, 2010), http://sentencing.typepad.com/sentencing_law_and_policy/2010/07/third-circuit-rejects-second-amendment-attack-on-federal-crime-of-possessing-gun-with-obliterated-se.html ("[T]he Third Circuit's work in *Marzzarella* is a must-read for anyone following the development of Second Amendment jurisprudence."). Commentators even recognized *Marzzarella*'s significance before it was decided. *See* Shannon P. Duffy, *Erie Case to Test Limits of Gun Possession Rights*, LEGAL INTELLIGENCER (Feb. 23, 2010), http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202444116070&Erie_Case_to_Test_Limits_of_Gun_Possession_Rights (stating *Marzzarella* "promises to test the limits" of *Heller*).

188. *See* Brannon P. Denning & Glenn H. Reynolds, Heller*, High Water(Mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1264 (2009) (stating that when analyzing felon dispossession challenges, "some federal courts are finding that the characterization of . . . an individual right affects their analysis"). Courts are bound by *Heller*, but this idea of an individual Second Amendment right has "plainly entered into the courts' consciousness and reason-

circuits and district courts to engage in deeper inquiries, even where the case falls into *Heller*'s "presumptively lawful" list.[189] This gives practitioners more opportunities, but has not been enough to remove the defendant from the line of fire.[190] Felon dispossession statutes, like the one at issue in *Barton*, have been upheld after in-depth analyses.[191] Additionally, *Barton*'s analysis of the Second Amendment's scope sets up a useful frame-

ing process" in a new way. *Id.* at 1265 (noting "lower courts are taking cognizance of the *Heller* decision in a way that did not happen" with earlier precedent).

189. *See, e.g.*, United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) ("[T]he government does not get a free pass simply because Congress has established a 'categorical ban'; it still must prove that the ban is constitutional . . . ."), *cert. denied*, 131 S. Ct. 805 (2010). The *presumption* of validity means "there must exist the possibility that the ban could be unconstitutional." *See id.* (emphasis added) (discussing "as-applied" framework); United States v. Pruess, 416 F. App'x 274, 275 (4th Cir. 2011) (remanding case because district court failed to "conduct an analysis of a challenged regulation in light of *Heller*"); United States v. Ayotte, No. 11-00156, 2012 WL 112639, at *9 (D. Me. Jan. 11, 2012) (addressing defendant's "as applied" challenge); United States v. Laurent, No. 11-322, 2011 WL 6004606, at *19–22 (E.D.N.Y. Dec. 2, 2011) (providing detailed overview of steps in analysis under Second Amendment); United States v. Hauck, No. 11-130, 2011 WL 5117614, at *4 (M.D. Pa. Oct. 26, 2011) (addressing "as applied" challenges).

190. *See* Denning & Reynolds, *supra* note 188, at 1264 (finding individual rights notion has affected lower courts' analyses, but "not always sufficiently to get the accused off the hook"); *see, e.g.*, United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011) (ruling defendant did not make "as-applied" challenge by asserting "no prior convictions for any violent felony"). The Third Circuit recently upheld an indictment for aiding and abetting a felon's possession of a firearm where the defendant legally possessed a rifle in the home she shared with her felon boyfriend. *See* United States v. Huet, 665 F.3d 588, 601 (3d Cir. 2012) (noting indictment "d[id] not allege that Huet's possession . . . violated the law," but Huet "aided and abetted" felon's possession). The court noted the problem of misusing felon dispossession statutes "to subject law-abiding cohabitants to liability simply for possessing a weapon in the home," but ruled there was not enough evidence to show the State overreached its bounds. *See id.* (stating Huet's claims about "circumstances of her possession" not developed enough).

191. *See* United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011) (upholding statutes); *Torres-Rosario*, 658 F.3d at 113 ("All of the circuits to face the issue post *Heller* have rejected blanket challenges to felon in possession laws."); United States v. Joos, 638 F.3d 581, 586 (8th Cir. 2011) (ruling felon gun dispossession statute did not violate Second Amendment or Commerce Clause); *Williams*, 616 F.3d at 692–94 (upholding felon dispossession statute under intermediate scrutiny), *cert. denied*, 131 S. Ct. 805 (2010); United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (noting "criminal prohibitions on felons" do not violate Second Amendment right), *cert. denied*, 131 S. Ct. 158 (2010); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) (noting *Heller* established that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment"), *cert. denied*, 130 S. Ct. 3399 (2010); United States v. Vongxay, 594 F.3d 1111, 1117 (9th Cir. 2010) (stating that "even given the Second Amendment's individual right to bear arms, felons' Second Amendment rights can be reasonably restricted"), *cert. denied*, 131 S. Ct. 294 (2010); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009) (relying on *Heller*'s list in upholding felon's conviction for possessing firearm); United States v. Khami, 362 F. App'x 501, 508 (6th Cir. 2010) (relying on *Heller*'s exclusion in upholding conviction under felon dispossession statute), *cert. denied*, 130 S. Ct. 3345 (2010); United States v. Stuckey, 317 Fed. App'x. 48, 50 (2d Cir. 2009) (relying on Heller's list in

work.[192] *Marzzarella*'s breakdown of First Amendment scrutiny is useful for courts and practitioners faced with novel issues.[193] One commentator called *Marzzarella* "illustrative" of how lower courts are interpreting *Heller* as Second Amendment jurisprudence becomes more developed.[194] The *Heller* decision upended nearly seventy years of Second Amendment interpretation, leaving the area of law muddled with uncertainty.[195] The Third Circuit's approach can help forge a path for practitioners to follow as the lower courts continue to adjudicate "in the shadow of Heller."[196]

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upholding convictions); United States v. Brunson, 292 F. App'x 259, 261 (4th Cir. 2008) (per curiam) (relying on *Heller*'s list in upholding felon's conviction).

192. *See, e.g.*, Persky, *supra* note 64, at 14 (criticizing *Heller*'s failure to "provide a concrete framework to help lower courts determine the constitutionality of challenged gun control laws").

193. *See* Duffy, *In the Wake of* Heller, *supra* note 187 (stating "most important lesson" from *Marzzarella* is to look to "extensive jurisprudence on First Amendment claims for guidance"); *Third Circuit Rejects Second Amendment Attack*, *supra* note 187 ("*Marzzarella* . . . proceeds deliberately and . . . cover[s] more Second Amendment ground than any other opinion I can recall from the last two years.").

194. *See* Shaman, *supra* note 73, at 1106 (stating *Marzzarella* is "illustrative of how the lower federal courts have construed *Heller*").

195. *See* Winkler, *supra* note 64 (calling *Heller*'s lack of future guidance "one of [its] great failings").

196. Denning & Reynolds, *supra* note 188, at 1265.