Excise Taxes on a Fundamental Right: Do Excise Taxes on Firearms Survive in a Post-*Heller* World?

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"*And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.*"

- Justice Antonin Scalia

Introduction

Before the Supreme Court's decision in *District of Columbia v. Heller*, it had been nearly 70 years since the Court had issued a major decision concerning the scope of the Second Amendment.[1] Prior to *Heller*, lower courts looked to *United States v. Miller* for guidance as to how to enforce the right that the Second Amendment protected.[2] In the decades between *Miller* and *Heller*, most lower courts adopted a view that the Second Amendment did not protect a private right to keep and bear arms.[3]

In *Heller*, the Court rejected the trend of the lower courts and held that the Second Amendment protected a pre-existing individual right to own a firearm, and that the central purpose of this right was self-defense.[4] Following the *Heller* decision, the Court incorporated

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1 District of Columbia v. Heller, 554 U.S. 570 (2008); United States v. Miller, 307 U.S. 174 (1939).

2 *Heller*, 554 U.S. at 621.

3 *See, e.g.*, Cases v. United States, 131 F.2d 916 (1st Cir. 1942) (upholding the Federal Firearms Act); United States v. Tot, 131 F.2d 261 (3d Cir. 1942) ("Weapon bearing was never treated as anything like an absolute right by the common law.").

4 *Heller*, 554 U.S. at 592, 599.

the Second Amendment against the states in *McDonald v. City of Chicago.*[5]

The Court's decision in *Heller* cleared the way for new challenges to regulations on firearms, and since the Court's decision, lower courts have tried to determine just how far the individual protection outlined in *Heller* extends. As Second Amendment challenges to existing regulations on firearms continue to become more prevalent, post-*Heller* courts should use a familiar "tiers of scrutiny" approach, modeling First Amendment jurisprudence. This Article will show how this approach works in hypothetical Second Amendment challenges to two taxes on guns, the Transfer Tax (26 U.S.C. § 5811) and the Pittman-Robertson Tax (26 U.S.C. § 4181), and will suggest that a more deferential scrutiny may be the only way the taxes are able to withstand a constitutional challenge. Part I provides an overview of the history of Second Amendment interpretation by the courts. Part II provides an overview of Congress' taxing power and the taxes imposed on firearms. Part III examines the impact of *Heller* on the constitutionality of taxes on firearms, and compares these taxes to taxes imposed on the practice of First Amendment rights.

I. THE SECOND AMENDMENT AND ITS INTERPRETATION

The right to bear arms is rooted in English common law and the English Bill of Rights.[6] The extent of the right protected in English history is debated;[7] however, most commentators agree that regardless of the exact extent of the right in England, these "English law traditions" were "passed on to the American colonies," and it is these traditions that informed early America's views on the right to bear arms.[8]

Before and after the ratification of the Constitution and the Bill of Rights, states had constitutional provisions and statutes that impacted the extent of a person's right to bear arms. Some of the state constitutional provisions helped to inform the drafting of the Second Amendment.[9] After the Second Amendment was passed,

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[5] McDonald v. Chicago, 561 U.S. 742 (2010).

[6] Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have you seen your Militia Lately?*, 15 U. DAYTON L. REV. 5, 7-8, 14 (1989).

[7] *Id.* at 5-14.

[8] *Id.* at 14.

[9] *See id.* at 18-24 (discussing the historical context of the drafting of the Constitution, noting that 12 of the state constitutions had something like a bill of rights, that four states' constitutions

state statutes were routinely upheld against Second Amendment challenges.[10] Courts largely found that the right protected by the Second Amendment was a protection against infringement by the federal government.[11]

The enactment of the National Firearms Act of 1934 was one of the federal government's first major attempts to regulate firearms, and its constitutionality was challenged in *United States v. Miller* and *Sonzinsky v. United States*.[12]

A. Miller *and the Cases that Followed*

In *Miller*, Jack Miller and Frank Layton were charged with violating the National Firearms Act.[13] It was alleged that they transported, in interstate commerce, a double-barreled, sawed-off shotgun without having registered the shotgun.[14] The defendants challenged the National Firearms Act as violating the Second Amendment.[15] The district court determined the National Firearms Act did infringe on the Second Amendment, and the court dismissed the indictment.[16] The Supreme Court reversed, however, and held that the National Firearms Act, as applied to an individual indicted for transporting an unregistered sawed-off shotgun in interstate commerce, did not violate the Second Amendment.[17] The Court stated, "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time 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."[18]

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contained language about the "right to bear arms," and that many of the others contained provisions about the "militia being the proper defense for a free state.").

10 *See, e.g.*, Presser v. Illinois, 116 U.S. 252, 264-66 (1886).

11 *See, e.g.*, *id.* at 265.

12 The federal government did have a statute that prohibited concealable firearms from being shipped through the mail, 18 U.S.C. § 1715 (2012); United States v. Miller, 307 U.S. 174 (1939); Sonzinsky v. United States, 300 U.S. 506 (1937).

13 United States v. Miller, 307 U.S. 174, 175 (1939).

14 *Id.*

15 *Id.* at 176.

16 *Id*. at 177.

17 *Id.* at 183.

18 *Id.* at 178.

Miller was decided on demurrer, and Miller and Layton did not appear for the appeal.[19] Therefore, there was no opportunity to present evidence that the weapon had "some reasonable relationship to the preservation or efficiency of a well regulated militia."

Regardless of the procedural stage at which *Miller* was decided, courts after *Miller* consistently upheld federal statutes regulating firearms against Second Amendment challenges "unless the statutes [were] shown to interfere with the maintenance of an organized state militia."[20] For example, the Third Circuit Court of Appeals in *United States v. Tot*, concluded that restricting the right to "bear arms" of those who have been shown to be "aggressors toward society" was constitutional because there was no "broader right to bear arms under the common law."[21] The court held that the law restricting gun ownership did not interfere with the maintenance of a well-regulated militia.[22]

Additionally, no lower court understood *Miller* to stand for the proposition that the Second Amendment protected any weapon with a potential military use.[23] Courts consistently held that *Miller* did not reach the question of whether or not military weapons could be regulated, as reaching that question was unnecessary to decide the case.[24] In *Cases v. United States,* the First Circuit Court of Appeals upheld the Federal Firearms Act.[25] The Federal Firearms Act did not allow the transfer or receipt of a firearm through interstate commerce by "fugitives or persons convicted of a crime of violence."[26] The court rejected the argument that, because the weapon in question, a Colt revolver, was a weapon suitable for military use, prohibiting the defendant from receiving or transferring it violated the defendant's Second Amendment rights.[27] Instead of focusing on the weapon, the court looked to who possessed the weapon, and determined that the

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19 *See* Kevin D. Szczepanski, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFF. L. REV. 197, 226 (1996)*; see also* Robert A. Levy, *Second Amendment Haze,* WASH. TIMES (June 17, 2008), http://www.cato.org/publications/commentary/second-amendment-haze.

20 Ehrman & Henigan, *supra* note 6, at 45.

21 United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942).

22 *Id.* at 266-67; *see also* Ehrman & Henigan, *supra* note 6, at 45.

23 Ehrman & Henigan, *supra* note 6, at 42-43.

24 *See, e.g.*, United States v. Warin, 530 F.2d 103 (6th Cir. 1976).

25 Cases v. United States, 131 F.2d 916 (1st Cir. 1992); 15 U.S.C. §§ 901-10 (1938) (repealed and replaced by the Gun Control Act of 1968).

26 15 U.S.C. §§ 901-10 (1938); *see also* Ehrman & Henigan, *supra* note 6, at 43.

27 Ehrman & Henigan, *supra* note 6, at 43.

law was not unconstitutional because its "possession by the [individual] did not contribute to the maintenance of a militia."[28] It was against this background that the Supreme Court moved toward its decision in *Heller.*

B. *The Supreme Court Interprets the Second Amendment in* District of Columbia v. Heller

In 2008, after nearly seven decades of lower court decisions, the Supreme Court settled the question of whether the right protected by the Second Amendment is a collective right connected to militia service, or an individual right not connected to militia service.[29] The Court held that the Second Amendment protects a pre-existing individual right to possess a firearm outside of military service.[30] Specifically, the Court held that an individual has a right to possess a firearm for self-defense, stating that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation."[31]

In *Heller,* the Court held that the District of Columbia's handgun licensing statute was unconstitutional.[32] This statute prohibited carrying unregistered handguns, and made the registration of handguns illegal.[33] Dick Heller was a District of Columbia special police officer who was authorized to carry a gun as part of his job, but he also applied for a registration certificate for a handgun he wished to keep at home.[34] The District of Columbia denied Mr. Heller's request, and he filed a lawsuit to enjoin the city from enforcing the ban on the registration of handguns.[35] He requested the Court enjoin, "the licensing requirement insofar as it prohibit[ed] the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibit[ed] the use of 'functional firearms within the home.'"[36]

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28 *Id*. at 42-43 (citing Cases v. United States, 131 F.2d 916, 923 (1st Cir. 1942)).

29 District of Columbia v. Heller, 554 U.S. 570, 591 (2008).

30 *Id.*

31 *Id.* at 592.

32 *See id.* at 635.

33 *Id.* at 574-75.

34 *Id*. at 575.

35 District of Columbia v. Heller, 554 U.S. 570, 575-76 (2008).

36 *Id.*

The Court, in overturning the District's registration ban, first looked to the meaning of the Second Amendment and read it to have a prefatory clause and an operative clause.[37] A prefatory clause is one that announces the purpose of the text that will follow in the operative clause.[38] An operative clause represents the demand of the text.[39] The prefatory clause in the Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State."[40] This clause gives a purpose to the operative clause, "the right of the people to keep and bear arms."[41]

The Court determined the phrase "to keep arms" meant to hold or have in an "individual's power or possession" and "to bear" meant to carry.[42] Considering both of these terms in the context of the time that the amendment was drafted, the Court determined that this phrase would have been commonly used to mean to carry a weapon outside of a militia.[43] Further, the Court did not find the argument persuasive that, just because the phrase may have been used in a few instances as limited to a militia, the phrase was limited to being used only in that way.[44] Considering all the textual elements present in the operative clause, the Court determined the clause should be interpreted to give an individual a right "to possess and carry weapons in case of [a] confrontation."[45]

Next, the Court looked at how the prefatory and operative clause functioned together.[46] The Court found it reasonable that the prefatory clause describing a well-regulated militia would fit with an operative clause creating an individual right to bear arms because of the historical context of the amendment.[47] The founding fathers were concerned with protecting an individual's right to bear arms because

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37 *Id.* at 577.

38 *Id*.

39 *Id.*

40 *Id.* at 595; *see also* U.S. CONST. amend. II.

41 District of Columbia v. Heller, 554 U.S. 570, 577 (2008) (quoting J. TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW § 585 (1867)); *see* U.S. CONST. amend. II.

42 *Heller*, 554 U.S. at 582, 584.

43 *Id*. at 584.

44 *Id.* at 588.

45 *Id.* at 592.

46 District of Columbia v. Heller, 554 U.S. 570, 598 (2008).

47 *Id.*

"tyrants" had eliminated the militia by "taking away people's arms," not by disbanding the militia itself.[48]

The Court looked to this historical support as well as analogous state statutes to support its reading of the amendment.[49] The Court looked to state constitutions that were ratified before or after the time of the Second Amendment, and found that they supported the notion that, at the time, Americans viewed the Second Amendment as protecting an individual right.[50] Additionally, the Court looked to other sources from the time, including writings by St. George Tucker, Joseph Story, and Thomas Cooley, among others, who all interpreted the Second Amendment as protecting an individual right.[51] The Court concluded that its reading was reasonable based on the historical intent of the amendment to prevent the elimination of a well-armed militia, and the Court concluded that other Supreme Court precedents did not preclude this reading.[52]

One of the dissents offered historical evidence to counter each of the majority's points.[53] The dissent criticized the majority's use of nineteenth-century evidence as analogous to using post-enactment legislative history.[54] The dissent concluded from its survey of histori-

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[48] *Id.*

[49] The Court noted that:

> [m]any colonial statutes required individual arms bearing for public-safety reasons—such as the 1770 Georgia law that 'for the security and *defence of this province* from internal dangers and insurrections' required those men who qualified for militia duty individually 'to carry fire arms' 'to places of public worship.'

Id. at 598-604 (quoting 19 COLONIAL RECORDS OF THE STATE OF GEORGIA 137-39 (A. Candler ed. 1911 (pt. 1)) (emphasis added by the Court). The court also cited both federalists and anti-federalists in support of the statement, "The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution." *Id.* at 598.

[50] *Id.* at 600-04 (reviewing the constitutions and bills of rights of Pennsylvania, Vermont, North Carolina, Massachusetts, Kentucky, Ohio, Indiana, Missouri, Mississippi, Connecticut, Alabama, Tennessee, and Maine, the court stated, "[O]f the nine state constitutional protections for the right to bear arms enacted immediately after 1789 [that] at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right."); *see also* Andrew R. Gould, *The Hidden Second Amendment Framework within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1546-47 (2009).

[51] District of Columbia v. Heller, 554 U.S. 570, 606-17 (2008).

[52] *Id.* at 625.

[53] *Id.* at 651-662 (Stevens, J., dissenting); *see also* Andrew R. Gould, *The Hidden Second Amendment Framework within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1548 (2009).

[54] *Heller*, 554 U.S. at 662; *see also* Andrew R. Gould, *The Hidden Second Amendment Framework within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1547 (2009).

cal evidence that the phrase "to keep and bear arms" had the meaning to possess arms if needed for military purposes and to use them in conjunction with military activities."[55] In addition, Mr. Heller challenged the constitutionality of the requirement that the handgun be kept inoperable at all times, through a trigger lock or disassembled.[56] The Court agreed.[57] Because this part of the statute made it impossible for a person to use the handgun for its constitutional purpose—self-defense—it was a limitation on the right that was too restrictive to be constitutional.[58]

The Court did not use an "interest-balancing" approach in *Heller*, finding that when a right is enumerated in the Constitution, a balancing approach is not warranted.[59] When a right has been specifically enumerated in the Constitution, a consideration of the extent to which that right exists is out of bounds of all three branches of government.[60] When considering the right to bear arms, the Court explained that there was no need for a balancing approach on a case-by-case basis because the right, explicitly enumerated in the Second Amendment, was really "worth insisting upon."[61] The Court emphasized that a right that has been guaranteed by the text of the Constitution but subject to a future judge's assessment of its usefulness is really not guaranteed at all.[62] The Court compared the Second Amendment to the First Amendment in this context, stating each amendment contains a guaranteed right ratified by the people.[63] These rights may include exceptions, for things such as libel and obscenity in the context of the First Amendment, and felons owning firearms in the case of the Second Amendment; exceptions, however, do not make a textually enumerated amendment that has been ratified by the people subject to "interest-balancing" by the Court.[64] Because the right to bear arms

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[55] *Heller*, 554 U.S. at 644.

[56] *Id.* at 630.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 634.

[60] *Id.* ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.")

[61] *Heller*, 554 U.S. at 634.

[62] *Id.* at 634.

[63] *Id.* at 634-35.

[64] *Id*. at 635.

was specifically enumerated in the Second Amendment, it was not within the Court's authority to determine the extent to which it could be exercised.[65]

The Court did note, however, that although the amendment guarantees the right to bear arms, the right is not unlimited.[66] Like other rights guaranteed by the Constitution, this right can be limited by statute or regulations that do not inhibit one's ability to access the right.[67] In *Heller*, the statute effectively amounted to an entire ban on a class of weapons regularly used for self-defense.[68] Therefore, it was a restriction on the right to bear arms that was overly burdensome.[69] The District of Columbia's regulation at issue in *Heller* banned the use of handguns, which are the "most preferred firearm in the nation."[70] Because of the severity of the regulation, the Court held that this regulation would fail "constitutional muster" under any form of heightened scrutiny.[71] The Court did not have to articulate the exact scope of the right or the outer limits of the right because of the nature of the regulation at issue in the case.[72] The Court simply stated that certain longstanding regulations, such as those against the mentally ill and felons, could still stand under the reasoning of *Heller*.[73] This has left lower courts will little guidance on how exactly to handle firearm regulations.

C. *Lower Court Decisions Since* Heller

In *Heller*, the Supreme Court did not offer clear guidance to the lower courts on how to determine the scope of the right protected by the Second Amendment. Consequently, lower courts have been left to interpret *Heller* and develop their own frameworks, keeping in

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65 *Id.* at 634 (responding to Justice Breyer's call for a balancing test in dissent).

66 *Id.* at 626. The Court declines to go into an extensive history about the prohibitions on this right, but notes that it has never been an unlimited right.

67 District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

68 *See id.* at 634 (citing D.C. Code § 7-2507.06)

69 *Id*. at 634-35.

70 *Id*. at 628-29.

71 *Id*. at 628-29 & n.27.

72 *See id.* at 626-27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

73 District of Columbia v. Heller, 554 U.S. 370, 626 (2008).

mind the bounds of *Heller*. Because the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right, courts have generally concluded that determining the scope of the right should start with a "historical inquiry."[74] However, when a historical analysis leaves the question presented in the case unresolved, a majority of lower courts have applied the common tiers of scrutiny approach.[75] This approach has created a two-tier inquiry for regulations impacting the Second Amendment right. First, courts will look to see if the law imposes a burden on conduct that "was understood to be within the scope of the right at the time of ratification."[76] If so, a court moves to the second part of the analysis, applying the appropriate level of scrutiny.[77] If the conduct being regulated is determined to be within the core right protected by the Second Amendment, a court applies strict scrutiny, and if not, the court applies intermediate scrutiny.[78]

Because *Heller* approved some long-standing regulations on the Second Amendment right, such as prohibiting felons from owning weapons, some of the first challenges after *Heller* focused on restrictions of firearm ownership by those who had been convicted of misdemeanor crimes of domestic violence.[79] In *United States v. Chester* and *United States v. Skoien*, federal circuit courts decided that some form of heightened scrutiny should apply to the challenge to 18 U.S.C. § 922(g)(9), which prohibited each defendant from owning a firearm.[80] The Seventh Circuit adopted intermediate scrutiny in *Skoien*, stating that the United States conceded that the statute in question was "valid only if substantially related to an important gov-

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[74] *See id.*; *see also* United States v. Chester, 628 F.3d 673, 678 (4th Cir. 2010).

[75] *See, e.g.*, *Chester*, 628 F.3d at 680 ("In view of the fact that *Heller* ultimately found the District's gun regulations invalid 'under any standard of scrutiny,' it appears to us that the Court would apply some form of heightened constitutional scrutiny if a historical evaluation did not end the matter."). Judge Kavanaugh, in his dissent in *Heller II*, stated that a more true reading of *Heller* was to use the Constitution's text and analogies to history and tradition to assess firearm regulations. However, a court has not adopted his reasoning thus far. *See* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[76] *Chester*, 628 F.3d at 680.

[77] *Id.*

[78] *See id.* at 682-83.

[79] *See* United States v. Chester, 628 F.3d 673 (4th Cir. 2010); *see also* United States v. Skoien, 614 F.3d 638, 639 (7th Cir. 2010) (en banc).

[80] 18 U.S.C. § 922(g)(9) prohibits anyone convicted of a misdemeanor crime of domestic violence from transporting any firearm in interstate or foreign commerce. *See also Chester*, 628 F.3d at 683; *Skoien*, 614 F.3d at 641-42.

ernmental objective."[81] Because of this concession, the court did not "get more deeply into the 'levels of scrutiny' quagmire," determining that logic and data supported a substantial relationship between § 922 and an important governmental objective.[82]

The Fourth Circuit also adopted an intermediate scrutiny test in *Chester*.[83] The court determined that the fundamental right protected by the Second Amendment was "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense."[84] Because Chester was not a law-abiding citizen, the conduct being regulated did not go to the fundamental protection of the Second Amendment.[85] Therefore, the regulation was only subject to intermediate scrutiny, not strict scrutiny.[86]

Although *Chester* and *Skoien* appeared to adopt intermediate scrutiny, the Seventh Circuit in *Ezell v. City of Chicago* appeared to be willing to adopt something closer to strict scrutiny.[87] In *Ezell*, the regulation at issue required individuals in the city of Chicago to undergo one hour of training at a gun range to be able to lawfully own a gun, but the regulation banned all gun ranges from the city.[88] In determining how to evaluate regulations infringing on the Second Amendment, the court created an approach, following the doctrine of the First Amendment, that would require "a severe burden on the core Second Amendment right of armed self-defense" to be justified by "an extremely strong public-interest justification and a close fit between the government's means and its end."[89] Regulations on the

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[81] *See Skoien*, 614 F.3d at 641-42.

[82] *Id*. at 642.

[83] *See Chester*, 628 F.3d at 682-83.

[84] *Id.* at 683 (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

[85] Chester, a resident of West Virginia, was convicted of domestic assault and battery in 2005, a misdemeanor offense there. *Id.* at 676-77. In response to the following incident, he was charged with possession of a firearm after committing a misdemeanor offense of domestic violence in violation of federal law, specifically 18 U.S.C. § 922(g)(9) (2012):

> In October 2007, officers from the Kanawha County, West Virginia, Sheriff's Department responded to a 911 call reporting a domestic disturbance at Chester's residence. Chester's wife reported to the officers that Chester grabbed her throat and threatened to kill her after she caught him receiving the services of a prostitute on their property. In a subsequent search of the home, officers recovered a 12-gauge shotgun in the kitchen pantry and a 9mm handgun in the bedroom. Chester admitted both firearms belonged to him.

Id.

[86] *Id.*

[87] Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011).

[88] *Id*. at 689-90.

[89] *Id.* at 708.

Second Amendment that fall "closer to the margin of the Second Amendment right" could be justified more easily.[90]

Post-*Heller* courts have dealt not only with regulations of those convicted of certain crimes being banned from owning firearms, but also have considered certain restrictions on conceal and carry permits[91] and certain restrictions on the carrying of firearms outside the home,[92] among others.[93] In each instance, courts have assessed whether a historical inquiry can answer the question at hand, and if not they apply some form of heightened scrutiny.

II. THE HISTORY OF THE TAXING POWER AND TAXES ON FIREARMS

A. *The Taxing Power*

Although interpretation of the Second Amendment has been controversial, and the specific contours of the right protected by the Amendment continue to change, a power of the federal government that has been somewhat less controversial is the taxing power. Article I, Section 8 of the Constitution gives Congress the "Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and General Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States."[94] Although this power is granted by the Constitution, and the language allows for a broad interpretation, courts have placed limits on this power.[95]

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[90] *Id*.

[91] *See* Peruta v. Cty. of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014) (holding the need to show good cause to get a conceal and carry permit infringed the Second Amendment); *but see* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 83-84 (2d Cir. 2012) (holding a showing of "proper cause" to get a permit to carry a firearm did not infringe on the Second Amendment).

[92] Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (striking down Illinois statutes which prohibited carrying a firearm in public).

[93] *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 689-90 (7th Cir. 2011) (holding that a city's conditioning the right to possess firearms on gun range training while simultaneously forbidding gun range training everywhere in the city violates the Second Amendment).

[94] U.S. CONST. art. I, § 8, cl. 1.

[95] *See* Mystica M. Alexander & Timothy Gagnon, *The Roberts Court: Using the Taxing Power to Shape Individual Behavior*, 23 U. FLA. J.L. & PUB. POL'Y 345, 347 (2012).

Congress often uses the taxing power to regulate, and to circumvent limits otherwise placed on federal power.[96] Taxes often do not directly infringe on individual rights, but instead change the cost-benefit analysis that an individual will use when deciding whether or not to purchase a good.[97] Examples of this type of regulation exist when Congress imposes taxes on tobacco products.[98] These regulations also exist in the form of giving tax deductions, not just imposing taxes. For example, the home mortgage tax deduction and deductions for charitable donations all encourage rather than discourage certain behaviors.[99]

The Supreme Court initially upheld a federal excise tax in 1796, when it considered a tax levied on carriages, which at the time were considered a luxury vehicle.[100] Since that time, the excise tax has been most favored when shaping policy.[101] An excise tax is typically a tax on a specific good.[102] These taxes are used to raise revenue and to potentially discourage an individual from purchasing certain types of products.[103]

A recent, controversial decision involving Congress' power to tax is *National Federation of Independent Business v. Sebelius.*[104] This case characterized the penalty imposed for a failure to purchase health insurance as a tax rather than a penalty.[105] The Court's opinion emphasized that although this tax does impact individual behavior, an individual still has a choice, stating the "imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."[106]

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96 *See, e.g.*, NFIB v. Sebelius, 132 S. Ct 2566, 2643 (2012) (Scalia, J., dissenting); Asha Rangappa, *The Cost of Freedom: Using the Tax Power to Limit Personal Arsenals*, 32 YALE L. & POL'Y REV. INTER ALIA 17, 19 (2013).

97 *See* Asha Rangappa, *The Cost of Freedom: Using the Tax Power to Limit Personal Arsenals*, 32 YALE L. & POL'Y REV. INTER ALIA 17, 19 (2013).

98 *Id.* at 19 (citing 26 U.S.C. § 32 (2012)).

99 *Id.*

100 Hylton v. United States, 3 U.S. 171, 172-73 (1796).

101 *See* Rangappa, *supra* note 97, at 19.

102 *Excise Tax*, INTERNAL REVENUE SERVICE (Oct. 12, 2015), http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Excise-Tax (last visited Feb. 15, 2014).

103 Rangappa, *supra* note 97, at 19.

104 NFIB v. Sebelius, 132 S. Ct 2566 (2012).

105 *Id*. at 2600.

106 *Id*.

Congress' power to tax is not unlimited. Congress cannot impose a tax that is so burdensome that it would be considered a penalty.[107] The line between a tax and a penalty can be hard to define, and courts have given Congress increasing deference in this area.[108] However, if a law passed by Congress is not "naturally and reasonably adapted to the collection of the tax," then a court may find it to be a penalty.[109]

B. *Taxes Imposed by the National Firearms Act and Other Federal Statutes*

Firearms are subject to at least two kinds of federal taxes.[110] The first is a tax imposed by 26 U.S.C. § 4181. This is an excise tax that imposes a 10% handgun tax and an 11% long gun tax on gun manufacturers.[111] The second is imposed by the National Firearms Act, and is a $200 tax on the transfer of certain types of firearms, including fully automatic firearms, short-barreled shotguns, and rifles.[112] If a tax has been paid on the firearm under § 5811, the firearm will not be subject to tax again under § 4181. The 10% and 11% excise taxes have not been challenged in court. However, the constitutionality of the tax imposed on certain firearms by the National Firearms Act[113] was challenged in *Sonzinsky v. United States*.[114]

In *Sonzinsky*, the Supreme Court upheld the taxes imposed by the statute on "dealing in firearms" as constitutional, finding that Congress has the power to "select subjects of taxation, choosing some and omitting others."[115] The petitioner, who had been convicted of dealing in firearms without paying the tax, challenged the tax, claiming that it was not a tax, but a penalty aimed at suppressing the traffic of certain types of firearms.[116] The petitioner argued that the combination of the taxes on dealers, manufacturers, and importers, as well as the tax on each "transfer of a firearm," had the cumulative effect of

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107 *See* Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922).

108 *Id.*

109 *Id*. at 43.

110 Firearms are also often subject to state laws and fees. *See* David T. Hardy, District of Columbia v. Heller *and* McDonald v. City of Chicago: *The Present as Interface of the Past and Future,* 3 NE. U. L.J. 199, 221 (2011).

111 26 U.S.C. § 4181 (2012).

112 26 U.S.C. § 5811 (2012).

113 26 U.S.C. §§ 1132-1132q (1934).

114 Sonzinsky v. United States, 300 U.S. 506 (1937).

115 *Id.* at 512.

116 *Id.*

being prohibitive in practice, and illustrated that the purpose of the law was to regulate, not to tax.[117]

However, the Court reasoned that it was beyond the "competency of the court" to inquire into the motive of Congress when it was acting to exercise a power granted to it by the Constitution.[118] The Court stated that, "A tax is not any less a tax because it has a regulatory effect,"[119] and a tax is not any less of a tax because it burdens the item being taxed.[120] The tax imposed by the National Firearms Act did generate revenue, and the Court was unwilling to speculate into the motives of Congress.[121] Therefore, the taxes were constitutional.[122]

III. ANALYSIS

As with most taxes, the excise taxes on firearms are presumably, at least in part, passed to the consumer.[123] These taxes have not been challenged on Second Amendment grounds since the Court's decision in *Heller*.[124] Although *Heller* did tentatively approve some longstanding regulations on firearms, such as restrictions on conceal and carry and restrictions on a felon's ability to own guns, one may assume that after *Heller*'s interpretation of the Second Amendment as protecting a pre-exiting, individual right to own a firearm, excise taxes would receive at least some form of heightened judicial scrutiny. As Second Amendment challenges to taxes on firearms begin to arise, post-*Heller* courts should use a familiar "tiers of scrutiny" approach, modeling First Amendment jurisprudence. This approach can be used to predict outcomes of Second Amendment challenges to two taxes on guns, the Transfer Tax (26 U.S.C. § 5811) and the Pittman-Robertson Tax (26 U.S.C. § 4181), and suggests that a more deferential type of scrutiny may be the only way the taxes are able to withstand a constitutional challenge.

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117 *Id.* at 512-13.

118 *Id*. at 513-14.

119 *Id* (citing United States v. Doremus, 29 U.S. 86, 93-94 (1919)).

120 Sonzinsky v. United States, 300 U.S. 506, 513 (1937).

121 *Id*. at 514.

122 *Id.*

123 *See* Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After* Heller: *Threats and Sideshows from a Social Welfare Perspective,* 56 UCLA L. REV. 1041, 1084-86 (2009) ("At least part of this [federal] tax [on firearms] is surely passed along to consumers.").

124 *See* Cook, Ludwig & Samaha, *supra* note 123, at 1084-86.

A. *Why* Heller *Changes the Analysis: A Fundamental Right*

The Court's decision in *Heller* suggested, but did not explicitly state, that the Second Amendment right to bear arms was a fundamental right.[125] When the Court decided to incorporate the Amendment against the states in *McDonald v. City of Chicago*, the Court did find that the Second Amendment protects a right that is "fundamental to our scheme of ordered liberty."[126] Finding that this right is fundamental gives direction to courts as to what level of scrutiny to apply, as the Supreme Court generally applies strict scrutiny in reviewing restrictions on fundamental rights.[127] However, this implied direction that strict scrutiny should be applied is undercut by *Heller*'s own inclusion of "presumptively lawful regulatory measures[.]"[128]

In *Heller*, the Supreme Court interpreted the Second Amendment to protect an individual's right to bear arms for the purpose of self-defense.[129] The Court did not specify how closely this right could be regulated, but instead stated that several longstanding regulations of the right would not be overturned by this decision.[130] Since *Heller*, lower courts have been grappling with how to determine when a regulation places too heavy of a burden on an individual's constitutionally protected right, and the excise taxes on firearms could be subject to similar challenges.[131]

B. *A Challenge to Taxes that Burden the First Amendment Right of Freedom of the Press*

No case has challenged the excise taxes on firearms under the Second Amendment since the Court's decision in *Heller*.[132] However, similar taxes were challenged and struck down as overly burdensome on the exercise of First Amendment rights. Although legislatures are

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125 District of Columbia v. Heller, 554 U.S. 570, 592-93 (2008) ("By the time of the founding, the right to have arms had become fundamental for English subjects.").

126 McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

127 Gould, *supra* note 50, at 1547.

128 *Heller*, 544 U.S. at 627 n.26; *see also* Gould, *supra* note 50, at 1566.

129 *Heller*, 544 U.S. at 591.

130 *Id.* 626-27.

131 *See, e.g.*, United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Skoien, 614 F.3d 638, 640-41 (7th Cir. 2010) (en banc).

132 *See* Rangappa, *supra* note 97, at 20.

generally given deference when it comes to the taxing power, the Court struck down the taxes imposed by Minnesota on the supplies necessary to publish a newspaper as a violation of the First Amendment.

In *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, the Supreme Court struck down a tax levied by the state of Minnesota on the cost of paper and ink.[133] The Court found the tax to be a burden on the freedom of the press, and therefore a violation of the First Amendment.[134] Until 1971, a newspaper company, the Minneapolis Star and Tribune, had been exempt from the use and sales taxes imposed by the Minnesota statute.[135] In 1971, the legislature amended the statute to impose a tax on the cost of paper and ink used in the publication of the paper.[136] This amended statute included an exemption for the first $100,000 worth of ink and paper.[137] Because of this exemption, only 11 publishers, "producing 14 of the 388 paid circulation newspapers in the state," paid taxes under the amended statute.[138] The Star Tribune was one of the 11, and in 1974, the first year in which tax liability was incurred, it paid approximately two-thirds of its revenue in taxes.[139] The Star Tribune challenged this tax as a violation of the First and Fourteenth Amendments.[140]

The Court struck down this tax, not because state and federal governments have no power to tax or impose economic regulations on newspapers, but because Minnesota was not applying a general tax to newspapers.[141] Instead, it was applying a special tax only to certain newspapers.[142] Minnesota argued that this tax was part of its general tax scheme, and therefore was constitutional.[143] The Court, however, held that the law was facially invalid because it singled out certain publications for special treatment.[144] The Court determined that this

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133 Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983).

134 *Id.*

135 *Id*. at 577

136 *Id.*

137 *Id*. at 578.

138 *Id.*.

139 Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 578 (1983).

140 *Id*. at 579.

141 *Id*. at 581.

142 *Id.*

143 *Id*.

144 *Id.* at 581.

tax did not serve the same function as an ordinary "use tax," which would operate as a complement to a sales tax, because the newspapers at issue in the case were not subject to a sales tax.[145] And under Minnesota's tax structure, where an item is exempt from the sales tax, "there is no complementary function for the use tax to serve."[146]

This "use tax" created a special tax that just applied to the press.[147] Because the press was singled out for special treatment, the Court applied a balancing test to determine "whether the First Amendment permit[ed] special taxation."[148] For the tax to stand, the Court looked at whether the burden on the First Amendment "was necessary to achieve an overriding governmental interest."[149] If a regulation singles out the press for different treatment than other businesses, as the tax on ink and paper did, the state would have a heavier burden of justification.[150]

Minnesota claimed its main interest in imposing this tax was to raise revenue.[151] This interest, however, was not enough for the Court to allow for special treatment of the press.[152] The Court stated that although raising revenue is a critical interest for any government, there are other ways the State can raise revenues, such as imposing a tax on businesses generally.[153] Minnesota also claimed that this tax should be upheld because it was just a substitute for a sales tax.[154] Minnesota, however, did not offer any explanation as to why it imposed this specific use tax instead of a more general sales tax.

The tax also violated the First Amendment because it singled out not only the press, but also a small group of newspapers.[155] There were no exemptions in other tax statutes comparable to the $100,000 exemption under the statute at issue.[156] Consequently, the Court did not find that Minnesota met its heavy burden to prove that this tax

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145 Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 581-82 (1983).

146 *Id.*

147 *Id*.

148 *Id*.

149 *Id*. (citing United States v. Lee 455 U.S. 252, 257 (1982)).

150 *Id.* at 583.

151 Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983).

152 *Id*.

153 *Id.*

154 *Id*. at 587.

155 *Id*. at 591.

156 *See id*. at 591-93.

was "necessary to achieve an overriding governmental interest," and therefore, the tax violated the First Amendment.[157]

C. *Could a Tax on Firearms be Treated the Same as the Tax on Ink and Paper?*

Because the decision in *Heller* was narrow, giving lower courts little direction as to how to analyze firearm regulations, most courts have adopted an analysis that is similar to the familiar tiers of scrutiny analysis of First Amendment regulations.[158] Accordingly, a court faced with the question of whether or not the taxes on firearms violate the Second Amendment, may look to First Amendment jurisprudence for guidance.

If a court were to take the First Amendment approach from *Minneapolis Star and Tribune Company*, the court would apply a balancing test to determine if the excise tax on firearms could be justified as "necessary to achieve an overriding governmental interest."[159] As evidenced by the outcome in *Minneapolis Star and Tribune Company*, a justification that this tax will produce revenue will not be sufficient to justify the burden of the tax on the exercise of a fundamental protected right.[160]

According to the legislative history of the National Firearms Act, the purpose of the transfer tax was to curtail the use of weapons that were considered to be more dangerous than others.[161] This law was enacted at a time when the public seemed to be consumed with the violence surrounding the prohibition of liquor.[162] For that reason, the tax only applies to certain enumerated types of firearms.[163] In order for this tax to be constitutional under the reasoning of *Minneapolis*

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157 *See* Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 593 (1983).

158 *See, e.g.*, United States v. Chester, 628 F.3d 673, 674 (4th Cir. 2010); United States v. Skoien, 614 F.3d 638, 639-40 (7th Cir. 2010) (en banc).

159 *Minneapolis Star and Tribune Co.*, 460 U.S. at 582 (citing United States v. Lee, 455 U.S. 252, 257 (1982)).

160 *Id.* at 586.

161 Stephen Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms,* 62 TENN. L. REV. 597, 602 (1995) (citing 66 CONG. REC. 725, 732 (1924)).

162 *See id.* at 602 (citing *Firearms: Hearing on H.R. 2569, H.R. 6606, H.R. 6607, and H.R. 11325, before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 71st Cong., 2d Sess. 1-3, 7 (1930)).

163 *See id.*

Star and Tribune Company, the government would have to show that the tax is necessary to protect public safety, and that public safety is an "overriding governmental interest."[164] Promoting public safety is undoubtedly within the government's interest, so the burden on the government would be to show that imposing this tax is a necessary way of promoting this interest. Considering that this tax only applies to certain types of firearms, the government may find it easier to justify than a broad based tax. However, the government would still have to provide evidence that the firearms singled out under this tax pose a greater threat to public safety, and therefore regulating them is necessary to protect public safety. Under this balancing approach, it is difficult to see where a court would draw the line, and the resulting decision would largely depend on the deference afforded the government's evidence.

The taxes imposed by § 4181 are earmarked for the Department of Interior and given to the states to fund wildlife habitat restoration, hunter safety training, and maintenance of shooting ranges, among other things.[165] Therefore, the purpose of this law is to raise revenue to fund those programs, and the Court in *Minneapolis Star and Tribune Company* rejected raising revenue as an "overriding governmental interest."[166] This tax is different than that at issue in *Minneapolis Star and Tribune Company*, in that this is a general tax, not a tax that just singles out certain groups of gun owners. The government, therefore, would have an easier time justifying this tax than the tax in *Minneapolis Star and Tribune Company*, which singled out certain newspapers.[167] The government, however, would still have to produce evidence that the restriction on commonly owned guns is necessary to achieve an "overriding governmental interest," and that this interest is distinct from the issue of raising revenue that was previously rejected by the Supreme Court.[168] Taking the approach that the Court did in *Minneapolis Star and Tribune Company*, a lower court would have to

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164 *See id.*

165 U.S. FISH & WILDLIFE SERVICE, *Federal Aid Division — The Pittman-Robertson Federal Aid in Wildlife Restoration Act*, http://www.fws.gov/southeast/federalaid/pittmanrobertson.html (last updated Jan. 21, 2010).

166 Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983).

167 *Id*. at 581.

168 *See id.* at 582-83 ("A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest.") (citing United States v. Lee, 455 U.S. 252 (1982)).

use its judgment to determine whether funding these state programs is a sufficiently important governmental interest, and weigh that interest against the burden this tax imposes on gun purchasers. It is difficult to know how much importance a court would place on funding this program, particularly at the expense of burdening a fundamental right.

D. Heller *Rejected a Balancing Test: Applying the Tiers of Scrutiny*

Given the difficulties and the amount of judicial discretion required to apply a balancing test, a court would not have to apply the balancing test of *Minneapolis Star and Tribune Company* when evaluating the taxes imposed on firearms. In fact, in *Heller*, the majority rejected using a balancing test to evaluate restrictions on the Second Amendment.[169] Lower courts have applied the familiar tiers of scrutiny approach when analyzing regulations that impact the Second Amendment, and this is the approach Justice Rehnquist took in his dissent in *Minneapolis Star and Tribune Company*.[170]

In his dissent, Rehnquist asserted that the "differential treatment" balancing test that the majority proposes is unprecedented and unwarranted, and he contends that differential treatment should not be the basis for the most "stringent constitutional review[.]"[171] Instead, he did not find that the taxes at issue infringe on any First Amendment rights, and he recommended that the tax be subject to only a rational basis review.[172] Because "a presumptively rational legislature" enacted the tax, it was "arm[ed] with a presumption of rationality."[173] Therefore, he would uphold the tax.[174]

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169 *Heller*, 554 U.S. at 634. Critics of the tiers of scrutiny approach claim that the tiers of scrutiny are also a balancing test, and *Heller* therefore rejected it. However, lower courts have taken guidance from the *Heller* opinion that this right is like the rights protected by the First Amendment, and therefore a similar analysis may be appropriate. For criticism of the tiers of scrutiny approach *see, e.g.*, Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

170 *Minneapolis Star and Tribune Co.*, 460 U.S. at 597 (Rehnquist, J., dissenting). The majority rejects the tiers of scrutiny approach since it sees this problem arising directly under the First Amendment, stating, "The appropriate method of analysis thus is to balance the burden implicit in singling out the press against the interest asserted by the State." *Id.* at 585 n.7 (majority opinion). The tiers of scrutiny do balance the government's interests against the interests of individuals, so arguably this was even rejected by the Supreme Court in *Heller.* However, the *Heller* majority did not reject all balancing tests, only the test put forward by Justice Breyer in his dissent. *Heller*, 554 U.S. at 634-35.

171 *Minneapolis Star and Tribune Co.*, 460 U.S. at 598.

172 *Id*. at 600.

173 *Id*. at 599 (citing Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955)).

Under the dissent's approach in *Minneapolis Star and Tribune Company*, in considering the taxes at issue and the Second Amendment, the Court should apply the familiar tiers of scrutiny approach. In *Heller*, the Court rejected the rational basis approach for the Second Amendment.[175] Therefore, the statutes at issue would have to be subject to at least intermediate scrutiny.[176] This would shift the burden to the government to prove that the imposition created by the tax furthers an important governmental interest in a way that is substantially related to that interest.[177]

Because *Heller* defined the right to keep and bear arms for the purpose of self-defense as a fundamental right, precedent would seem to suggest that a strict scrutiny analysis would be appropriate.[178] However, given the approval of some longstanding regulations in *Heller*, courts have looked at whether it is proper to apply intermediate scrutiny. To settle the puzzle created by *Heller*, courts have applied a two-part analysis and looked to whether or not the regulation at issue burdens a core part of the protected right. If the regulation imposes a substantial burden on the core right, which is the right of a person to bear arms for self-defense, a court applies strict scrutiny.[179] If however, the regulation does not impact the core of the right, a court applies intermediate scrutiny.[180]

In the context of the taxes currently imposed on firearms, the first determination a court would have to make is whether or not this tax burdens a right protected by the Second Amendment.[181] Any of the taxes currently imposed by § 4181 or § 5811 could interfere with an individual's ability to purchase a firearm. Therefore, the Second Amendment is implicated due to the interference of these laws with the ability to keep and bear arms. After determining that the Second

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174 *Id*. at 600, 604.

175 District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008).

176 *See, e.g.*, United States v. Chester, 628 F.3d 673 (4th Cir. 2010).

177 *Id*. at 683 (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480-81 (1989)).

178 Gould, *supra* note 50, at 1566 (stating that strict scrutiny is often applied when evaluating restrictions on fundamental rights). It is not the case that strict scrutiny will always be applied to fundamental rights, intermediate scrutiny is applied in the context of the First Amendment.

179 United States v. Marzzarella, 614 F.3d 85, 100-01 (3d Cir. 2010) (upholding, under intermediate scrutiny, statute prohibiting possession of a handgun with an obliterated serial number).

180 Gould, *supra* note 50, at 1566 (stating that strict scrutiny is often applied when evaluating restrictions on fundamental rights).

181 *See, e.g.*, United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

Amendment is implicated, a court would proceed to the next step, deciding which level of scrutiny to apply.[182]

1. The Transfer Tax - 26 U.S.C. § 5811

A court faced with determining the constitutionality of the taxes currently imposed on firearms would have to address each tax individually. The court would have to determine whether each tax implicates a core part of the Second Amendment.[183] If the court found that the core right of possessing arms for the purpose of self-defense was not implicated, it would apply intermediate scrutiny. Courts have found that non-novel registration and licensing requirements do not impact the core of the Second Amendment, so one could take a similar approach to a tax that is already absorbed in the price of the firearm.[184] Because the tax imposed by 26 U.S.C. § 5811 applies to certain firearms, which are not the categories of firearms that are most often used for protection of the home,[185] a court would likely assess this statute under intermediate scrutiny. A court that applies intermediate scrutiny will determine whether the law in question furthers an important governmental interest in a way that is substantially related to that interest.[186] The law does not have to be the least restrictive means of achieving the government's interest so long as the burden is not more than necessary.[187]

The tax imposed under § 5811 is not imposed on a select group of people as was the tax in *Minneapolis Star and Tribune Company*, and that weighs in favor of upholding the tax. The tax under § 5811 is imposed on a certain category of firearms.[188] This also weighs in the government's favor as the firearms subjected to this tax are not the most commonly owned,[189] and therefore do not place a burden on

182 *See, e.g.*, *id*.

183 *See id*.

184 Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1245 (D.C. Cir. 2011). Excise taxes are not a tax paid directly by the consumer, instead they are included in the price of the good and paid by the retailer. *See Excise Taxes*, TAX POLICY CENTER, http://www.taxpolicycenter.org/taxtopics/encyclopedia/Excise-Taxes.cfm, (last visited Feb. 27, 2016).

185 Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 175 (1995).

186 *See* United States v. Chester, 628 F.3d 673, 690 (4th Cir. 2010).

187 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

188 26 U.S.C. § 5845 (2012).

189 *See* Kleck & Gertz, *supra* note 185, at 184.

armed self-defense. An individual could simply purchase another firearm.

The government would argue that this law advances an important governmental interest. The important governmental interest furthered by the tax in § 5811 is public safety. Whereas the court in *Minneapolis Star and Tribune Company* rejected raising revenue as an important governmental interest, the *Heller* Court appears to approve of public safety as being an important governmental interest, if not a compelling one.[190] Therefore, whether or not this tax can stand will turn on whether the law is substantially related to furthering the governmental interest of public safety.

To show that the tax is substantially related to furthering the government's interest, the government will need to submit empirical evidence that restricting these firearms lowers crime and furthers the interest of public safety.[191] It is difficult to obtain reliable statistics on gun ownership and use, but there is evidence that indicates that the weapons regulated by the National Firearms Act do tend to be more dangerous and more often used in crime.[192] Because taxes do prevent people from purchasing products, the government could meet its burden if it is able to show that less of these firearms have been purchased since the tax was imposed.[193]

There are several reasons that the excise tax imposed on the transfer of certain categories of firearms is more likely to be upheld than the tax in *Minneapolis Star and Tribune Company*. First, public safety is arguably a more important governmental interest than raising revenue, and the motivation for the tax imposed by § 5811 was to curtail the use of these more dangerous firearms.[194] Second, the tax does not directly infringe on the right guaranteed by *Heller*. Because this tax implicates a smaller group of firearms, and not those firearms most often used for self-defense, a court is likely to be more deferential than it was in *Minneapolis Star and Tribune Company.* Assuming the government's empirical evidence about the use of these firearms in criminal conduct is reliable, this tax could withstand a challenge under intermediate scrutiny.

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190 Gould, *supra* note 50, at 1571-72.

191 *See* Gould, *supra* note 50, at 1572-73.

192 *See* Kleck & Gertz, *supra* note 185, at 153-55.

193 The $200 at the time this law was passed was much more severe than the $200 is today. So the tax may have been a major deterrent initially, but may be less of one now.

194 *See* Halbrook, *supra* note 161, at 602.

The transfer tax imposed by § 5811 would withstand a post-*Heller* challenge, as it would only be subjected to intermediate scrutiny because it does not implicate the core of the Second Amendment protected by *Heller*. Even the Court in *Heller* recognized that the type of firearm at issue could impact the constitutional analysis.[195] Justice Scalia recognizes that, although, there is an individual right to have a firearm protected by the Second Amendment, the Second Amendment does not protect all firearms equally, stating "the Second Amendment confers an individual right to keep and bear arms (though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia')."[196]

2. The Pittman-Robertson Tax - 26 U.S.C. § 4181

The tax imposed by § 4181 is commonly referred to as the Pittman-Robertson Tax, named for the co-sponsors of the bill that created the tax.[197] The excise tax on gun manufacturers imposed by § 4181 on all firearms, including handguns, is more likely than the transfer tax to impact the core of the right and will therefore be protected by a higher level of scrutiny. A court could find that the excise tax imposed under § 4181 "severely limits the possession of a firearm"[198] or "imposes a substantial burden on the core right of self-defense."[199] The court may then find that reaching a tiers of scrutiny analysis is not required. Instead, a court may find an analogy to viewpoint discrimination to be more persuasive.

Viewpoint discrimination is the term used by the courts to identify laws or regulations that favor or disfavor one or more opinions.[200] Regulations that manifest viewpoint discrimination receive the highest form of scrutiny under the First Amendment because viewpoint dis-

195 District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

196 *Id.* at 622 (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).

197 *See* 16 U.S.C.A. § 669b (1937); U.S. FISH & WILDLIFE SERVICE, *Federal Aid Division — The Pittman-Robertson Federal Aid in Wildlife Restoration Act*, http://www.fws.gov/southeast/federalaid/pittmanrobertson.html (last updated Jan. 21, 2010).

198 United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (Strict scrutiny is inapplicable because "[t]he burden imposed by the law [at issue] does not severely limit the possession of firearms.").

199 *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (holding strict scrutiny inapplicable to a regulation that does not impose "a substantial burden upon the core right of self-defense.").

200 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

crimination threatens the central reason for protecting speech.[201] A court is more likely to uphold a subject matter regulation of speech than a viewpoint regulation because a subject matter regulation does not raise "the same concerns of government censorship and the distortion of public discourse presented by viewpoint regulations."[202]

As with the distinction between viewpoint discrimination under the First Amendment and subject matter discrimination, a distinction can be drawn among regulations on firearms that regulate the core right protected by the Second Amendment and those that do not. Because the tax imposed by § 4181 regulates handguns, this tax is a tax that goes to the core protection offered by the Second Amendment. Therefore, a court should treat it the same as viewpoint discrimination and subject it to the highest form of scrutiny.

If, however, a court chose to utilize a tiers of scrutiny level of analysis, strict scrutiny would apply. Starting at the beginning of the inquiry using the two-tier approach, a court would first have to find that the Second Amendment is implicated by the tax.[203] Once the court determines that the Amendment is implicated, they could find that an excise tax goes to the core of that right. This is similar to how imposing a higher level of tax on certain guns that are commonly used for self-defense imposes a burden on those wishing to purchase a gun.[204] Once a court is able to make this determination, it would apply strict scrutiny.[205] For a law to stand under strict scrutiny, it must be "narrowly tailored to serve a compelling state interest."[206] Under a strict scrutiny analysis, a court presumes that the law is not valid, and the government "bears the burden of rebutting that presumption."[207]

A tax that raises the cost of firearms is a substantial burden if it results in higher costs of armed self-defense, and a regulation that imposes a substantial burden on a fundamental right is presumptively unconstitutional.[208] A tax on handguns does just that. It increases the cost of handguns, and therefore, the government must put forward a

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201 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992); *see also id.* at 422 (Stevens, J., concurring) ("Core political speech occupies the highest, most protected position[.]").

202 *Id.* at 434 (Stevens, J., concurring).

203 *See, e.g.*, United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

204 *See* Kleck & Gertz, *supra* note 185, at 184.

205 United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010).

206 *Id*. at 99 (quoting FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 465 (2007)).

207 *Id*. (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000)).

208 *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1542-44 (2009).

compelling justification for the tax. The funds generated by this tax are earmarked, given to the Secretary of Interior and then distributed to the states.[209] The states can then use these funds to manage animals and their habitats as well as maintain hunter safety programs and shooting ranges.[210] Does being earmarked, given to states, and used for hunter safety make the governmental interest in imposing this tax any more compelling?

Minneapolis Star and Tribune Company rejected raising general revenue as a compelling governmental interest, claiming that the state had other ways to raise revenues that did not infringe on a constitutional right.[211] The taxes imposed on firearms may fall outside of the scope of the Court's decision in *Minneapolis Star and Tribune Company*, and therefore be more likely to promote a compelling governmental interest because they are specifically earmarked for a purpose.[212] These taxes do not go into the general revenue fund, but instead are arguably used for "purposes that expand the exercise of arms-bearing rights."[213] One of the goals of using the revenue in this way was to create better hunting experiences through habitat management, and to increase safety, thereby increasing the number of firearms to be purchased for hunting.[214]

However, even if these funds are arguably used in a way that promotes a more compelling interest than just generally raising revenue, it is still difficult to see how the tax can withstand constitutional scrutiny. Stephen Gilles and Nelson Lund rejected a similar cost shifting idea in the context of mandatory insurance for gun owners.[215] They claim that mandatory gun insurance disguised as a tax would violate the Second Amendment.[216] Gilles and Lund argue "forc[ing] law-

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209 U.S. FISH & WILDLIFE SERVICE, *Federal Aid Division — The Pittman-Robertson Federal Aid in Wildlife Restoration Act*, http://www.fws.gov/southeast/federalaid/pittmanrobertson.html (last updated Jan. 21, 2010).

210 *Id.*

211 *See* Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983).

212 Hardy, *supra* note 110, at 221.

213 Hardy, *supra* note 110, at 221.

214 U.S. FISH & WILDLIFE SERVICE, *Federal Aid Division — The Pittman-Robertson Federal Aid in Wildlife Restoration Act*, http://www.fws.gov/southeast/federalaid/pittmanrobertson.html (last updated Jan. 21, 2010).

215 Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 18, 20 (2013).

216 *Id.* at 20.

abiding firearm owners to bear the costs of wrongs committed by those who own and use firearms illegally would blatantly violate the Second Amendment."[217] Although the taxes at issue under § 4181 are not transferring the costs of legal gun use to those who use guns illegally, the taxes instead are transferring the costs of maintaining hunter safety programs and the like from the states to those who wish to purchase a handgun for self-defense. Thus, even if these taxes fall outside the revenue-raising justification that was rejected in *Minneapolis Star and Tribune Company*, it is difficult to see what compelling interest could make them constitutional.

If the government is able to convince the court that funding these programs is a sufficiently compelling interest because of the use of the funds, it will still have to overcome the burden of showing that this is the least restrictive way of advancing this compelling interest. Considering that the tax imposed by § 4181 is a tax on all guns not otherwise taxed under the National Firearms Act, the tax is not narrowly tailored to further the government's interest of raising revenue to maintain habitats or hunter safety programs. The government could impose other fees on licenses or hunting tags to affect these interests in a more narrowly tailored way. In fact, under this program, taxes are collected on fishing poles, bows and arrows, and other similar goods.[218] The government will have to justify why, despite the other taxes imposed by this law, the tax on firearms is necessary. Therefore, even if the government could show that this excise tax does serve a compelling governmental interest, it is hard to see how a tax on all firearms is narrowly tailored to advance that interest.

3. Applying a More Deferential Type of Strict Scrutiny

Heller tentatively approved longstanding regulations on the right to bear arms,[219] and this is often an argument against being able to apply any form of strict scrutiny. However, because the right to bear arms is a fundamental right, something more than intermediate scrutiny should apply.[220] The potential middle ground is a form of more

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217 *Id.*

218 *See* 16 U.S.C.A. § 669b (1937); *see also* U.S. FISH & WILDLIFE SERVICE, *Federal Aid Division—The Pittman-Robertson Federal Aid in Wildlife Restoration Act*, http://www.fws.gov/southeast/federalaid/pittmanrobertson.html (last visited Dec. 14, 2014).

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

220 *See* McDonald v. Chicago, 561 U.S. 742, 744 (2010) (determining that Second Amendment protects a right that is "fundamental to our scheme of ordered liberty.").

deferential strict scrutiny.[221] Although the Court has recently been critical of lower courts not applying strict scrutiny in its true form,[222] the regulations deemed constitutional in *Heller* indicate that the Court may be more willing to be deferential to the government when it comes to justifying regulations on firearms.[223] Deferential strict scrutiny would not be "fatal in fact," but instead would allow "some leeway in terms of satisfying strict scrutiny."[224]

In practice, this would mean that the court would be deferential to the government's justifications for what constitutes a compelling interest.[225] Public safety appeared to be the compelling interest that *Heller* accepted as protected by longstanding governmental regulation.[226] This compelling interest is applicable in the context of the tax applied by § 5811. The interest of Congress was to regulate these specific firearms, as these firearms were more closely tied to the heavy amount of crime occurring at the time.[227] Therefore, this tax would satisfy the deferential form of compelling interest.

The tax imposed by § 4181 does not satisfy the compelling interest of public safety, but the funds collected from this tax are used by states for hunting safety programs, maintenance of shooting ranges and a variety of other uses that benefit hunters, fishermen, and endangered animals. Under a deferential application of compelling interest, this justification could meet the compelling interest threshold.

Assuming the government will be able to meet the burden of the compelling interest prong under a deferential strict scrutiny analysis, whether or not the taxes can stand will be determined based on whether they are narrowly tailored. A more deferential approach to narrowly tailoring will not require empirical evidence, unless a court is skeptical of whether the law is actually necessary to further the com-

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221 Gould, *supra* note 50, at 1571-72. This would be similar to the approach the court took in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), and *Johnson v. California*, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting).

222 *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419-20 (2013).

223 Gould, *supra* note 50, at 1571.

224 Gould, *supra* note 50, at 1570-71.

225 Gould, *supra* note 50, at 1572.

226 *Id.* (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1459 (2009)).

227 *See* Halbrook, *supra* note 161, at 602.

pelling interest.[228] Because the Court did not require empirical evidence in *Heller*, it could take the same approach in the future, unless it had a reason to doubt that the law in question did further a compelling governmental interest.[229]

As applied to each taxing regulation, § 5811 is related to public safety, so a court would require no additional evidence. The government will have a more difficult time showing that the § 4181 tax is narrowly tailored to further a compelling interest as it applies more broadly to more classes of firearms and is not justified by a public safety interest. The government could put forward an argument that because the purpose of the tax is to fund the state programs for hunters and fisherman, this tax is at least as related to that interest as the other longstanding regulations approved of in *Heller* are to public safety.[230] However, this argument is less convincing than the public safety argument, and a court is more likely to require empirical evidence to justify that this law is narrowly tailored to further a compelling interest.

CONCLUSION

It is true that under *Heller*, a court could consider the taxes on firearms as longstanding regulations. If so, it is more likely that the taxes would not be struck down because *Heller* approved of longstanding regulations.[231] However, this presumption can be rebutted "by showing [that] the regulation does have more than a de minimis effect upon [this] right."[232] The taxes imposed by § 4181 and § 5811 could infringe directly on a lawful individual's right to bear arms just as the tax on ink and paper directly infringed on the exercise of the freedom of the press. Therefore, a plaintiff can make a case that a

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228 Gould, *supra* note 50, at 1572 (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1459 (2009)).

229 Gould, *supra* note 50, at 1572 (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1459 (2009)).

230 *See* District of Columbia v. Heller, 554 U.S. 570, 619-26 (2008) (discussing longstanding regulations).

231 *See id.* at 626-27 (approving of longstanding regulations but not giving blanket approval to all longstanding regulations).

232 Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1253 (D.C. Cir. 2011) (alteration in original).

court should take the same skeptical approach that it did when evaluating the taxes implicating the First Amendment to the taxes imposed by § 4181 and § 5811.[233]

A court could also find that these taxes do not impose a substantial burden on the right to bear arms protected by the Second Amendment. Whereas the tax imposed on the newspaper company in *Minneapolis Star and Tribune Company* forced the company to pay two-thirds of its yearly profits in taxes,[234] the taxes imposed by § 4181 and § 5811 have a less substantial impact on the price of guns. Eugene Volokh, however, contends that poor people's self-defense deserves just as much protection as those who can afford "technologically sophisticated new devices or high new taxes."[235] Therefore, if a court is sensitive to any cost increase on an individual's ability to be able to exercise a fundamental right, then any burden imposed by increasing the cost of any firearm will be substantial enough to warrant a skeptical look from judges or justices.

It is difficult to see how either of the taxes imposed by § 4181 or § 5811 could withstand a challenge after *Heller* if a court applied a true strict scrutiny analysis. Very few regulations on any constitutional right are able to withstand strict scrutiny.[236] However, if a court applied a more deferential version of strict scrutiny or intermediate scrutiny, a case can be made for both taxes to withstand the challenge. The tax imposed by § 5811 could withstand this challenge because the government has an important interest related to public safety in deterring crime, and this tax is only imposed on a small category of firearms that are not most commonly used for self-defense. Although less convincing of a case, the tax under § 4181 could withstand the challenge because the government's interest in funding the programs associated with the Pittman-Robertson Tax is at a minimum an important interest, and under a deferential strict scrutiny analysis it could rise to the level of a compelling interest.

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233 *See* Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 575 (1983).

234 *Id.* at 578.

235 *See* Volokh, *supra* note 208, at 1542.

236 *But see, e.g.*, Korematsu v. United States, 323 U.S. 214, 216-24 (1944).