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WHERE DO WE GO FROM HERE? HANDGUN REGULATION IN A POST-*HELLER* WORLD

Lindsey Craven *

INTRODUCTION

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.¹

Debate over the meaning of these twenty-seven words has run rampant for centuries. The conflict has revolved around the basic meaning of the Second Amendment: does it protect an individual's right to own a gun, or does it merely extend as far as was necessary to maintain the state militias in 1791?²

In June 2008 the Supreme Court directly addressed the individual versus collective right question in *District of Columbia v. Heller*.³ The case involved gun laws in Washington, D.C. that made it a crime to carry any unregistered firearm, but prohibited the registration of handguns.⁴ The D.C. laws also required all lawfully owned firearms in the home to be unloaded and disassembled.⁵ The plaintiff, Dick Heller, a special police officer at the Federal Judicial Center, was "authorized to carry a handgun while on duty," but was denied a permit to have his handgun in his home.⁶ He challenged the laws as an unconstitutional restraint on his Second Amendment right to keep and bear arms.⁷ Speaking to the actual meaning of the Second Amendment for the first time in history,⁸ the Court ruled that "[t]here 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."⁹

* J.D., William & Mary School of Law, 2010; B.A., Portland State University, 2007. Thank you to my parents, sister, and friends for reading prior drafts and putting up with my endless gun law talk. Your support is priceless.

¹ U.S. CONST. amend. II.

² See Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of The Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 174–76 (2008) (discussing the individual and collective right models).

³ 554 U.S. ___, 128 S. Ct. 2783, 2799 (2008).

⁴ *Id.* at 2788 (citing D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)).

⁵ *Id.* (citing D.C. CODE § 7-2507.02 (2001)).

⁶ *Id.*

⁷ *Id.*

⁸ Clark Neily, *District of Columbia v. Heller: The Second Amendment is Back, Baby*, 2008 CATO SUP. CT. REV. 127, 127.

⁹ *Heller*, 128 S. Ct. at 2799.

This seemingly clear determination, however, left open many questions about the extent of this newly-recognized individual right.¹⁰ Federal, state, and local laws regulating gun ownership abound in this country.¹¹ While the Court proclaimed that the *Heller* decision does nothing to undermine regulations prohibiting “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,”¹² the establishment of an individual right to own a gun opens the door for gun rights advocates to challenge the constitutionality of state regulations that limit that right.

This Note will examine a few areas of state firearm laws that are likely to be addressed in the cases following *Heller*. Part I of this Note will briefly discuss the nature of the right established by *Heller* and the likelihood that the Court will incorporate the Second Amendment, applying it to the states. It will argue that under Court precedent, the Second Amendment qualifies as a fundamental right that should apply to the states as well as the federal government. Part II will argue that the acknowledgment of an individual right to gun ownership, and the language used in *Heller*, indicate the Court’s intent to adopt a standard of strict scrutiny when evaluating future challenges to gun regulations. Part III will examine the areas of gun regulation that are most vulnerable to constitutional challenges under strict scrutiny, including discretionary permitting systems for the concealed carrying of weapons, and laws that designate public colleges and universities as gun-free zones.

I. INCORPORATION

While the Court’s decision in *Heller* recognized an individual right to bear arms,¹³ the scope of the case limited the Court’s opinion to the Second Amendment’s applicability to action by the federal government.¹⁴ Because Washington, D.C. is under federal jurisdiction, the Court was not ruling on state action.¹⁵ In 1937, in *Palko v. Connecticut*,¹⁶ the Court blazed a new trail in constitutional law by establishing that, under certain circumstances, the rights protected under the Bill of Rights would also apply to the states.¹⁷ However, without this “incorporation,” the text of the Bill of

¹⁰ Klukowski, *supra* note 2, at 167 (“[S]cores of questions arise from this groundbreaking proposition, such as the legality of gun prohibitions and confiscations, which firearms are protected, what level of scrutiny applies, whether the right is fundamental, and whether the right is incorporated.”); Neily, *supra* note 8, at 127.

¹¹ See, e.g., NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION, COMPENDIUM OF STATE LAWS GOVERNING FIREARMS (2007), available at <http://www.nraila.org/media/PDFs/Compendium.pdf> (“[There are] over 20,000 ‘gun control’ laws on the books in America . . .”).

¹² *Heller*, 128 S. Ct. at 2816–17.

¹³ *Id.* at 2799.

¹⁴ *Id.* at 2813 n.23.

¹⁵ Christopher Keleher, *District of Columbia v. Heller: The Death Knell For Illinois Handgun Bans?*, 96 ILL. B.J. 402, 405 (2008).

¹⁶ 302 U.S. 319 (1937).

¹⁷ Dorothy J. Hernaez, Note, *Parker v. District of Columbia: Understanding the Broader*

Rights limits its protection to actions by the federal government.¹⁸ The Court has never taken explicit steps to incorporate the Second Amendment against the states.¹⁹ In fact, past Supreme Court cases have explicitly limited the Second Amendment's reach to the federal government.²⁰ In light of the Court's recognition of an individual right to bear arms, a clarified position on incorporation is a necessary next step in Second Amendment jurisprudence.²¹ The Court will address this issue in the October 2009 Term: On September 30, 2009, the Court granted certiorari in *McDonald v. City of Chicago*, agreeing to answer the question of "[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses."²² This section will argue that the standards for selective incorporation under the Due Process Clause, set forth in *Duncan v. Louisiana*,²³ and the language of *Heller* indicate that the Second Amendment will be incorporated in the near future.²⁴

Implications for the Future of Gun Control, 6 GEO. J.L. & PUB. POL'Y 693, 720 (2008) (discussing incorporation of provisions of the Bill of Rights that "'are implicit in the concept of ordered liberty' or 'so rooted in the traditions and conscience of our people to be ranked as fundamental'" (citing *Palko*, 302 U.S. at 319, 324–26)).

¹⁸ *Id.* at 719 ("It is a well-established principle of constitutional law that the Bill of Rights, by itself, does not protect the citizens of the United States from actions of state and local governments.").

¹⁹ See Cameron Desmond, Comment, *From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1050 (2008); Hernaez, *supra* note 17, at 718; Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 49 (1996).

²⁰ *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

²¹ Hernaez, *supra* note 17, at 718.

²² Petition for Writ of Certiorari, *McDonald v. City of Chicago*, 2009 WL 1640363 (2009) (No. 08-1521); *NRA v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. City of Chicago*, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521).

²³ 391 U.S. 145 (1968).

²⁴ The question presented in *McDonald* gives the Court the ability to rule on incorporation under the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment. Incorporation through the Privileges or Immunities Clause would require the Court to overturn its long-standing precedent, set in the *Slaughter-House Cases*, that the clause does not incorporate the Bill of Rights. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873). While many scholars question the continuing merits of *Slaughter-House*, see, e.g., Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297–98 n.247 (1995), the likelihood of the Court overturning such a landmark case and using the Privileges or Immunities Clause as the vehicle for incorporation is unknown. Incorporation through the Due Process Clause is a much easier case for the Second Amendment. The majority of this paper will address the *impact* of incorporation, not the method of achieving incorporation, a topic that has been addressed by many eminent scholars. See, e.g., Michael Anthony Lawrence, *Second Amendment Incorporation*

In 1968, the Supreme Court clarified its position on the Fourteenth Amendment's power to apply federally-guaranteed rights to the states.²⁵ The standard for incorporation became whether a right was "fundamental—whether, that is, [it] . . . is necessary to an Anglo-American regime of ordered liberty."²⁶ In *Duncan*, the analysis the Court utilized to determine whether the right (in that case, the right to trial by jury)²⁷ was fundamental included looking at (A) the history of the right; (B) the existence of the right in the states; (C) popular support for the right; and (D) the purpose served by the right.²⁸ Because the right to trial by jury had a deeply-rooted history in the United States and preceding legal systems, existed in all states, had great public support, and served the purpose of preventing governmental oppression, the Court concluded that the right to trial by jury was fundamental.²⁹ The language and structure of the Court's opinion in *Heller* suggest that the Court considers the right to bear arms to be fundamental according to the *Duncan* test, and thus will rule in favor of incorporation.³⁰

A. History of the Right

In *Duncan*, the Court traced the history of the right to trial by jury back to its English counterparts, recognizing the fundamental nature of the right in the history and tradition of the English way of life.³¹ Similarly, the *Heller* majority opinion paid significant attention to the historical background of the right to bear arms. The Second Amendment, the Court argued, was predated by the English Bill of Rights, which contained a guarantee that Protestants would be allowed to keep arms for their defense.³² Because of the prior oppression of dissenters by the Stuart Kings Charles II and James II, and later of the colonists by George III, the Court determined that the right to keep and bear arms for individual self-defense had become a "fundamental" right for English subjects by the time the Second Amendment was codified.³³ The historical recognition of the right as fundamental supports arguments in favor of incorporation.

through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses, 72 MO. L. REV. 1 (2007); Lund, *supra* note 19, at 46–55; Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 215–17 (2008).

²⁵ *Duncan*, 391 U.S. at 148–50 & n.14. For a general discussion of the development of the selective incorporation doctrine, see Lawrence, *supra* note 24, at 50–56.

²⁶ *Duncan*, 391 U.S. at 149–50 n.14.

²⁷ *Id.* at 149.

²⁸ *Id.* at 151–58; see also Hernaez, *supra* note 17, at 721 (quoting David A. Lieber, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 CRIM. L. & CRIMINOLOGY 1079, 1103 (2005)).

²⁹ *Duncan*, 391 U.S. at 151–58.

³⁰ *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783 *passim* (2008).

³¹ *Duncan*, 391 U.S. at 151–53.

³² *Heller*, 128 S. Ct. at 2798.

³³ *Id.* at 2798–99.

B. Existence of the Right in the States

During its examination of the meaning of the text of the Second Amendment, the Court in *Heller* touched on the existence of state constitution counterparts to the Second Amendment.³⁴ Four states adopted similar provisions between independence and the ratification of the Bill of Rights, and another nine ratified their own state provisions between 1789 and 1820.³⁵ The Court used the contemporary language and interpretations of state provisions regarding arms to establish the meaning of the Federal Second Amendment as guaranteeing an individual right, and not just a collective right.³⁶

When the Court considers incorporation, it will also look at current treatment of the right to keep and bear arms in the states. Forty-four states have a clause in their constitutions guaranteeing the right to keep and bear arms.³⁷ Forty-two of those clauses contain explicit language extending the right to the individual.³⁸ These provisions will undoubtedly support a finding of state approval of an individual right to bear arms, as did the fact, in *Duncan*, that every state guaranteed the right to trial by jury.³⁹

C. Popular Support for the Right

The *Heller* majority opinion was heavily rooted in history and the original meaning of the Second Amendment. The majority interpretation of the amendment was based on the eighteenth century meanings of the words used in the text, and was “guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’”⁴⁰ By looking at the commonly understood meaning of the words “the people,”⁴¹ “arms,”⁴² “keep arms,”⁴³ and “bear arms,”⁴⁴ at the time of

³⁴ *Id.* at 2802–04.

³⁵ *Id.* at 2802, 2803.

³⁶ *Id.* 2802 (“Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment.”).

³⁷ Nat’l Rifle Ass’n Inst. for Legislative Action, *Guarantees Of The Right To Arms In State Constitutions*, <http://www.nrila.org/Issues/FactSheets/Read.aspx?ID=63> (last visited Feb. 17, 2010).

³⁸ Desmond, *supra* note 19, at 1059.

³⁹ *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968).

⁴⁰ *Heller*, 128 S. Ct. at 2788 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

⁴¹ *Id.* at 2790–91.

⁴² *Id.* at 2791 (“The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined ‘arms’ as ‘weapons of offence, or armour of defence.’ . . . Timothy Cunningham’s important 1771 legal dictionary defined ‘arms’ as ‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.’” (internal citations omitted)).

⁴³ *Id.* at 2792 (“The phrase ‘keep arms’ was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to ‘keep Arms’ as an individual right unconnected with militia service.”).

⁴⁴ *Id.* at 2793 (“From our review of founding-era sources . . . ‘bear arms’ was unambiguously used to refer to the carrying of weapons outside of an organized militia.”).

ratification, the Court concluded that “[the Second Amendment] guarantee[s] the individual right to possess and carry weapons in case of confrontation.”⁴⁵

The *Heller* majority opinion also examined the treatment of the Second Amendment after ratification.⁴⁶ The Court recounted the post-enactment commentary of contemporaries of the drafters,⁴⁷ pre-Civil War case law,⁴⁸ and post-Civil War legislation⁴⁹ and commentary,⁵⁰ to “determine the public understanding” of the text, and concluded that “virtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do.”⁵¹

When the Court decides whether to incorporate the Second Amendment, it will likely consider current popular support for the individual right to bear arms, in addition to historical support for the right.⁵² Before *Heller* was decided, seventy-three percent of the American populace believed that they had the individual right to own firearms unconnected to service in a militia.⁵³ This belief has been confirmed by *Heller*, at least on the federal level. In a 2008 poll conducted by Gallup, forty-two percent of Americans reported owning a gun in their homes.⁵⁴ There is overwhelming evidence of the popular support for an individual construction of the right to bear arms, which will favor incorporation.

D. Purpose Served by the Right

The final element the Court will examine to determine whether the individual right to bear arms is fundamental under the *Duncan* test will be the purpose served by the right. The majority in *Heller* focused a great deal on the intent of the framers when drafting the Second Amendment.⁵⁵ While acknowledging that the prefatory clause⁵⁶ plays a role in announcing the purpose of the amendment, the Court concluded that the prefatory clause does not limit the meaning of the amendment as a whole.⁵⁷ Indeed, the Court suggested that while the preservation of the militia was

⁴⁵ *Id.* at 2797.

⁴⁶ *Id.* at 2804–12.

⁴⁷ *Id.* at 2805–07.

⁴⁸ *Id.* at 2807–09.

⁴⁹ *Id.* at 2809–11.

⁵⁰ *Id.* at 2811–12.

⁵¹ *Id.* at 2805 (emphasis omitted).

⁵² Hernaez, *supra* note 17, at 723–24.

⁵³ See Joan Biskupic, *Do You Have a Legal Right to Own a Gun?*, USA TODAY, Feb. 27, 2008, at A1; see also Matthew Bennett, *Misfire: How the Debate over Gun Rights Ignores Reality*, 1 ALB. GOV'T L. REV. 482, 486–87 (2008).

⁵⁴ GALLUP, INC., *Do You Have a Gun in Your Home?*, in GUNS (Oct. 3–5, 2008), <http://www.gallup.com/poll/1645/Guns.aspx>.

⁵⁵ *Heller*, 128 S. Ct. at 2801–02.

⁵⁶ U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State . . .”).

⁵⁷ *Heller*, 128 S. Ct. at 2789.

the purpose for which the amendment was *codified*, “most [Americans] undoubtedly thought [the right] even more important for self-defense and hunting. . . . [Self-defense] was the *central component* of the right itself.”⁵⁸ The Court was explicit in its determination that the purpose of the Second Amendment is directly related to individual self-defense: “the inherent right of self-defense has been central to the Second Amendment right.”⁵⁹

Other purposes served by the Second Amendment, and invoked by courts and scholars, include prevention of governmental tyranny, recreation and hunting, and Lockean notions of personal autonomy.⁶⁰ These are all factors the Court will consider when deciding whether the purposes served by the right are important enough to render the right to bear arms fundamental.

E. Conclusion on Incorporation

While the Court did not address incorporation or *Duncan*, all the elements of the *Duncan* test were present in the *Heller* opinion. Even apart from *Heller*, the necessary aspects of a fundamental right are present in the Second Amendment.⁶¹ This suggests that the Court will find that the right to keep and bear arms is a fundamental right, and will incorporate the Second Amendment in *McDonald*. The remainder of this Note will address additional issues that will arise after incorporation.

II. STANDARD OF REVIEW

Though the Court recognized the individual right to keep and bear arms, the Court did not set a standard of review for gun regulations in the *Heller* opinion, leaving the question open for future litigation.⁶² The extent of the protection guaranteed by the

⁵⁸ *Id.* at 2801.

⁵⁹ *Id.* at 2817; *see also id.* at 2797 (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”).

⁶⁰ *See generally* Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477 (2004); Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131 (2008).

⁶¹ *See* Klukowski, *supra* note 2, at 190 (“[U]nder the existing rules on incorporation, it should certainly be incorporated if it also secures an individual right to self-preservation.” (internal citations omitted)); Lawrence, *supra* note 24, at 58 (“Applying the Court’s standard—*i.e.*, whether the right protected ‘is fundamental—whether, that is, [it] is necessary to an Anglo-American regime of ordered liberty’—the inescapable conclusion . . . is that the Second Amendment does indeed satisfy this test.” (emphasis omitted)); Lund, *supra* note 19, at 55 (“The right protected by the Second Amendment meets the Court’s test of what is ‘fundamental’ far more easily than other rights that have already been incorporated.”).

⁶² *Heller*, 128 S. Ct. at 2821; *see also* Neily, *supra* note 8, at 128; Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2035 (2008).

Second Amendment will largely be determined based on the standard of review the Court chooses to apply to regulations that limit the right to bear arms.⁶³ Though the application of standards of review is difficult to separate into distinct categories, the traditional options for review include rational basis, strict scrutiny, and intermediate review.⁶⁴ This section will briefly discuss each standard and its application to Second Amendment cases. It will then argue that *Heller* indicates a move toward strict scrutiny.

A. *The Three Standards*

Rational basis review “requires a court to uphold regulation so long as it bears a ‘rational relationship’ to a ‘legitimate governmental purpose.’”⁶⁵ Under this standard, courts begin with a “presumption of constitutionality of the government’s regulations.”⁶⁶ The plaintiff bears the burden of proving that the law is unconstitutional.⁶⁷ As long as the government can show a rational link between the objective and the law, the court will allow the law to stand.⁶⁸ In the past, rational basis review has been utilized when the right at stake is not a fundamental right or when the law does not designate a suspect classification.⁶⁹

Strict scrutiny is the other end of the spectrum and requires “reviewing with care each . . . law to determine whether it is ‘narrowly tailored to achieve a compelling governmental interest.’”⁷⁰ Strict scrutiny applies only to the most fundamental of rights,⁷¹

⁶³ See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 685 (2007).

⁶⁴ See Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 161 (1984).

⁶⁵ *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

⁶⁶ Hernaez, *supra* note 17, at 714.

⁶⁷ *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) (“State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”).

⁶⁸ *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

⁶⁹ *Id.* (“Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.”); see also *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

⁷⁰ *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting) (quoting *Abrams v. Johnson*, 521 U.S. 74, 82 (1997)); see also Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 425 (2009).

⁷¹ Klukowski, *supra* note 2, at 186 (“[T]he general rule for laws burdening fundamental rights is strict scrutiny.”).

and laws restricting those fundamental rights carry a presumption of unlawfulness.⁷² Under strict scrutiny, the state must prove that the restriction is “narrowly tailored” to meet this compelling purpose,⁷³ a much loftier challenge than the burden of rational basis.⁷⁴ Analysis of the “fit” between the regulation and the purpose includes assuring that the law is not overly inclusive, that it is the least restrictive means for achieving the stated goal, that it actually achieves the stated purpose, and that it leaves open alternative ways of exercising the restricted right.⁷⁵

Under intermediate scrutiny, a law will be upheld if it is substantially related to an important governmental purpose.⁷⁶ The burden is on the government to prove the substantial relationship.⁷⁷ Intermediate review, as its name indicates, is not as deferential as rational basis review, but is not as exacting as strict scrutiny. It has traditionally been applied in equal protection cases when the class involved was not a suspect class, but shared “some of the characteristics of a suspect classification.”⁷⁸ A version of intermediate review has also been applied in evaluating time, place, and manner restrictions on speech,⁷⁹ in commercial speech cases,⁸⁰ and in privileges and immunities cases.⁸¹

⁷² See Shaman, *supra* note 64, at 162; Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597, 599 (2006) (“Strict scrutiny, with its presumption of unconstitutionality, is a standard of review traditionally used in areas where courts deem any burdensome legislation to be ‘immediately suspect.’” (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944))).

⁷³ See Tushnet, *supra* note 70, at 425.

⁷⁴ See Winkler, *supra* note 63, at 727.

⁷⁵ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring) (“[A] governmental practice or statute which restricts ‘fundamental rights’ . . . is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”); Desmond, *supra* note 19, at 1069–70; Mark Tushnet, *The Future of the Second Amendment*, 1 ALB. GOV’T L. REV. 354, 359 (2008) (“[A] ‘fundamental’ right [can] be limited only for ‘compelling’ reasons, and even then only by regulations that are pretty much guaranteed to accomplish real reductions in crime, violence, or gun violence.”); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 (2006) (“Narrow tailoring requires that the law capture within its reach no more activity (or less) than is necessary to advance those compelling ends. An alternative phrasing is that the law must be the ‘least restrictive alternative’ available to pursue those ends. This inquiry into ‘fit’ between the ends and the means enables courts to test the sincerity of the government’s claimed objective.”).

⁷⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[The law] must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

⁷⁷ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁷⁸ Shaman, *supra* note 64, at 163.

⁷⁹ See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

⁸⁰ See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

⁸¹ See, e.g., *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985); *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208 (1984).

B. Application of Each Standard to Gun Laws

If a court were to apply rational basis review to the right to bear arms, the governmental interest in public safety would serve as the legitimate state interest.⁸² The government would not be required to prove that the challenged regulation actually had the intended impact of making society safer; it would merely have to show a rational relationship between the regulation and safety.⁸³ All gun regulations could rationally be related to the general safety of society, and thus would be presumptively lawful. Plaintiffs challenging such laws would bear the burden of overcoming this presumption.

The same safety purpose that is “legitimate” under rational basis review would have to be “compelling” to survive under strict scrutiny.⁸⁴ Governments most likely would be able to classify the general safety of society as a compelling interest.⁸⁵ However, the government would also bear the burden of proving the tight fit between the regulation and the compelling purpose.⁸⁶ There is a lack of definitive statistics concerning the impact of gun regulations,⁸⁷ which means the government would have a difficult time producing the kind of proof necessary to justify placing restrictions on a fundamental right.

Intermediate scrutiny has been the dominant standard invoked in gun regulation cases and has taken the form of a “reasonable regulation” standard.⁸⁸ A court looks at the purpose behind enacting the law and compares it with the extent to which the regulation burdens the individual right.⁸⁹ If the law is a reasonable way of regulating the right and does not amount to an elimination of the right entirely, it is constitutional.⁹⁰ This standard of review has proven to be an easy one for governments to meet when it comes to gun regulations: of the hundreds of gun control laws passed in the fifty states, only six have been invalidated since World War II.⁹¹

⁸² Desmond, *supra* note 19, at 1066–67 (2008).

⁸³ See *supra* note 68 and accompanying text.

⁸⁴ Winkler, *supra* note 63, at 727.

⁸⁵ Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1132 (2000) (“Surely [public safety] is a compelling interest. What could be of much higher priority?”).

⁸⁶ Winkler, *supra* note 63, at 801.

⁸⁷ Todd Barnett, *Gun “Control” Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 MO. L. REV. 155, 189 (1998); Green, *supra* note 60, at 138. For a discussion of the lack of clarity on the impact of requiring permits for carrying concealed weapons, see *infra* notes 139–41 and accompanying text. See also *infra* Part III for application of strict scrutiny to certain specific gun regulations.

⁸⁸ See Desmond, *supra* note 19, at 1054–55; Amanda C. Dupree, Comment, *A Shot Heard ‘Round the District: The District of Columbia Circuit Puts a Bullet in the Collective Right Theory of the Second Amendment*, 16 AM. U.J. GENDER SOC. POL’Y & L. 413, 417 (2008); Winkler, *supra* note 63, at 712.

⁸⁹ Desmond, *supra* note 19, at 1056.

⁹⁰ Winkler, *supra* note 63, at 717.

⁹¹ *Id.* at 718 (“Under the reasonable regulation standard, courts uphold all but the most arbitrary and excessive laws.”).

C. Heller's Effect on Standard of Review

Though reasonable regulation has been the standard for evaluating gun laws in the states and at the federal level in the past,⁹² the Court's decision in *Heller* called into question this longstanding standard of review. In his dissent, Justice Breyer criticized the majority for failing to set a standard of review for the Second Amendment.⁹³ Indeed, the majority acknowledged that an explicit standard of review does not exist and is not established by the opinion.⁹⁴ However, the opinion gives clues to what standard the Court will adopt in the future.

The most explicit attention the Court paid to a standard of review was to reject rational basis as an option:

Obviously, [rational basis] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.⁹⁵

Of the three opinions, Justice Breyer's dissent was the only one to explicitly suggest a standard of review, concluding that an "interest-balancing" standard would be the most appropriate.⁹⁶ Justice Breyer discussed *Heller*'s proposition that the Court adopt strict scrutiny, and came to the conclusion that it would be impossible.⁹⁷ In evaluating the government's interest in public safety under a strict scrutiny standard, courts would always find the interest to be compelling, and would then have to evaluate the propriety of limiting a fundamental right for the sake of a compelling interest.⁹⁸ As the analysis would always result in an "interest-balancing inquiry," Justice Breyer argued that the Court should simply establish an interest-balancing standard of review.⁹⁹ This interest-balancing inquiry would consist of a comparison of the

⁹² *Id.* at 690–91.

⁹³ *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2868 (2008) (Breyer, J., dissenting).

⁹⁴ *Id.* at 2821 (majority opinion) ("Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field").

⁹⁵ *Id.* at 2817–18 n.27.

⁹⁶ *Id.* at 2852 (Breyer, J., dissenting).

⁹⁷ *Id.* at 2851.

⁹⁸ *Id.* at 2851–52.

⁹⁹ *Id.* at 2852; *see also* Winkler, *supra* note 63, at 726 ("[W]hile [strict scrutiny] might

extent to which the right was burdened with the purpose of the specific regulation.¹⁰⁰ This test, though given a different name, bears a remarkable similarity to the reasonable regulation standard that has been utilized by the states for decades.¹⁰¹

The majority, however, denied that Justice Breyer's analysis was appropriate in Second Amendment cases.¹⁰² The Court stated,

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.¹⁰³

It continued that the right "to use arms in defense of hearth and home" is elevated above all other interests.¹⁰⁴ This language indicates that the Court, when given the chance, will establish a strict scrutiny standard of review.

Even if the majority had not explicitly refuted Justice Breyer's interest-balancing test and had not addressed the standard of review question at all, the Court's implication that the Second Amendment is a fundamental right under the *Duncan* test¹⁰⁵ would suggest a strict standard of review. In his brief to the Court, Heller argued in favor of strict scrutiny on the grounds that the Second Amendment guarantees the most fundamental of rights: "enabling the preservation of one's life and guaranteeing . . . liberty."¹⁰⁶ The brief also makes note that "fundamental rights are those 'explicitly or implicitly guaranteed by the Constitution.'"¹⁰⁷ Heller's argument was affirmed by the Court through its implication that the Second Amendment is a fundamental right, rooted in the even more inherent right to self-defense.¹⁰⁸ The Court also compared

require the narrowing of some gun control laws, heightened review may ultimately devolve into a reasonable regulation-like standard still deferential to legislatures.").

¹⁰⁰ *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting).

¹⁰¹ *See* Desmond, *supra* note 19, at 1056 ("Under a reasonable regulation standard, a court will strike down a law only to the extent that the burden on the individual right is unreasonable in light of the legislature's purpose for enacting the law. The test 'focuses on the balance of the interests at stake' . . ." (quoting *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007))); Hernaez, *supra* note 17, at 712 ("In determining what is reasonable . . . government interest should be weighed against the individual interest in bearing arms . . ."); Winkler, *supra* note 63, at 717 ("Courts applying the reasonable regulation standard go through the formal motions of identifying the underlying governmental objectives and weighing those goals against the burden on the individual.").

¹⁰² *Heller*, 128 S. Ct. at 2821.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See supra* Part I.

¹⁰⁶ Brief for the Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), at 57.

¹⁰⁷ *Id.* at 55–56 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973)).

¹⁰⁸ *Heller*, 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."); *id.* at 2801 ("[S]elf-defense . . . was the *central*

the specific enumeration of the right to bear arms to “freedom of speech, the guarantee against double jeopardy, [and] the right to counsel,”¹⁰⁹ implying that the Second Amendment should be afforded the same level of scrutiny as other specifically enumerated rights.

Proponents of gun control point to the Court’s statement that *Heller* did not call into question any gun regulations except for D.C.’s¹¹⁰ as evidence that the Court had no intention of overturning certain specific gun regulations.¹¹¹ This language, however, only states that nothing in *this specific opinion* should be taken to call those regulations into question. The constitutionality of regulations restricting the purchasing of firearms, restricting the concealed carrying of weapons, and establishing gun-free zones was not an issue in *Heller*. Any statement about regulations other than the challenged D.C. laws, whether affirming or nullifying them, is dicta and is not controlling precedent. Furthermore, the Court specifically stated that it was not addressing the application of the Second Amendment in every situation.¹¹²

Gun control advocates also place emphasis on the Court’s statement in footnote twenty-six that laws restricting gun ownership by felons, the creation of gun-free zones, and laws imposing qualifications for ownership are “presumptively lawful,”¹¹³ as evidence that the Court intends to adopt a lower level of scrutiny.¹¹⁴ Because strict scrutiny starts from the position that any infringement on a fundamental right is presumptively *unlawful*,¹¹⁵ advocates argue that the Court could not have intended to apply strict scrutiny to such regulations.¹¹⁶ This phrase does indeed make the Court’s position on a standard of review unclear. However, until a law is overturned by the courts, it will remain in effect and remain presumptively lawful. The footnote is non-binding dicta and carries little weight when placed next to the numerous occasions

component of the right itself.”); id. at 2817 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”).

¹⁰⁹ *Id.* at 2817–18 n.27.

¹¹⁰ *Id.* at 2816–17 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

¹¹¹ *The Heller Decision: What Does it Mean for Gun Control?*, LEGAL ACTION (Legal Action Project of the Brady Center to Prevent Gun Violence, Washington, D.C.), Fall, 2008, at 3 [hereinafter Brady Center Newsletter].

¹¹² *Heller*, 128 S. Ct. at 2821 (“Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field”).

¹¹³ *Id.* at 2817 n.26.

¹¹⁴ See Reynolds & Denning, *supra* note 62, at 2039–40; Brady Center Newsletter, *supra* note 111.

¹¹⁵ See *supra* note 72 and accompanying text.

¹¹⁶ See Brady Center Newsletter, *supra* note 111.

in which the Court indicates its inclination to adopt strict scrutiny as the overarching standard of review.¹¹⁷

D. Conclusion on Standard of Review

Whether applying strict scrutiny to gun regulations is a wise course of action is a policy question and is beyond the scope of this Note. Scholars have argued for and against strict scrutiny, and have debated the likelihood that the Court will ever apply strict scrutiny to regulations limiting rights conferred by the Second Amendment.¹¹⁸ One factor in this ongoing policy discussion, however, must be the impact that applying strict scrutiny would have on gun regulations. The remainder of this Note will examine some categories of firearm regulations that would be most vulnerable under strict scrutiny.

III. IMPACT OF STRICT SCRUTINY

If the Court does establish strict scrutiny as the standard of review for Second Amendment cases, the resulting analysis of gun regulations will be much more exacting than it has been in the past. States will be required to demonstrate the tight fit between limitations on the right to bear arms and the compelling governmental purpose of safety.¹¹⁹ As mentioned previously, strict scrutiny consists of assuring that a regulation is narrowly tailored: it must not be overly inclusive, it must be the least restrictive means of achieving the compelling governmental purpose, it must leave open other avenues for exercising the right, and it must actually achieve the compelling purpose.¹²⁰ If the Court adopts a truly strict version of strict scrutiny, there are several areas of regulation that will be subject to challenges on Second Amendment grounds. These include discretionary “may issue” laws regulating the carrying of concealed weapons, and the creation of gun-free zones on public college campuses.

A. “May Issue” Concealed-Carry Laws

The right to carry a concealed weapon varies significantly from state to state. Illinois and Wisconsin, for example, do not allow anyone to carry a concealed firearm

¹¹⁷ Brannon P. Denning & Glenn H. Reynolds, *Five Takes on the District of Columbia v. Heller*, 69 OHIO ST. L.J. 671, 675–76 (2008).

¹¹⁸ For arguments in favor of strict scrutiny, see generally Brief for the Respondent, *supra* note 106; Lund, *supra* note 19; Massey, *supra* note 85. For arguments against strict scrutiny, see Desmond, *supra* note 19; Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLAL. REV. 1425, 1428–30 (2009); Winkler, *supra* note 63.

¹¹⁹ See *supra* notes 70–75 and accompanying text.

¹²⁰ See *id.*

in public, with the exception of peace officers.¹²¹ On the opposite end of the spectrum, Alaska and Vermont do not even require an individual to have a permit to carry a concealed weapon.¹²² The rest of the states fall somewhere in between.¹²³ Thirty-one states have what have come to be known as “shall issue” laws: as long as a citizen meets the minimum requirements set forth in the statute, the relevant state agency *must* issue the individual a permit to carry a concealed weapon.¹²⁴ While requirements vary, they tend to include a minimum age, a background check to guarantee an individual is not precluded from owning firearms,¹²⁵ payment of a licensing fee, a firearms safety class, and fingerprinting.¹²⁶

The remaining eight states have discretionary “may issue” concealed-carry laws.¹²⁷ The discretion in the application of these laws comes in the form of the state agent’s evaluation of the applicant’s need for the concealed weapon.¹²⁸ For example, in California applicants must show that “good cause exists for the issuance.”¹²⁹ The statute does not define what “good cause” is.¹³⁰ Even upon proof of good cause, however, the statute only says the county sheriff *may* issue the permit.¹³¹ In the wake of *Heller*, Second Amendment incorporation, and under a strict scrutiny analysis, these eight states could be forced to remove the subjective elements of their concealed weapon laws.¹³²

¹²¹ See 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4) (West 2009) (“A person commits the offense of unlawful use of weapons when he knowingly: . . . [c]arries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm”); WIS. STAT. ANN. § 941.23 (West 2009) (“Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.”).

¹²² NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION, *supra* note 11. Alaska has a permit system to establish reciprocity with other states. *Id.*

¹²³ See Students for Concealed Carry on Campus, <http://www.concealedcampus.org/state-by-state.php> (last visited Feb. 17, 2010).

¹²⁴ Ryan S. Andrus, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity*, 42 ARIZ. L. REV. 129, 130–32 (2000) (reviewing state “shall issue” laws as of 2000).

¹²⁵ Preclusion from firearm ownership can come from being a convicted felon, an illegal alien, or having mental illness, among other things. See *id.* at 131.

¹²⁶ *Id.*; see also Nat’l Rifle Ass’n Inst. for Legislative Action, *Federal and State Firearm Laws*, <http://www.nraila.org/GunLaws> (last visited Feb. 17, 2010).

¹²⁷ See CAL. PENAL CODE § 12050 (West 2009); DEL. CODE ANN. tit. 11, § 1441 (2009); HAW. REV. STAT. § 134-9 (2008); MD. CODE ANN., PUB. SAFETY § 5-306 (West 2009); MASS. GEN. LAWS ANN. ch. 140, § 131 (West 2009); N.J. STAT. ANN. § 2C:58-4 (West 2009); N.Y. PENAL LAW § 400.00 (Consol. 2009); R.I. GEN. LAWS § 11-47-11 (2009).

¹²⁸ Andrus, *supra* note 124, at 135.

¹²⁹ CAL. PENAL CODE § 12050.

¹³⁰ *Id.* (containing no definition of “good cause”).

¹³¹ *Id.*

¹³² Neily, *supra* note 8, at 159.

In analyzing the constitutionality of these laws, courts would have to begin with the purpose of the permit system, with the states being required to prove that their statutes were rooted in a compelling governmental purpose.¹³³ The rationale for the discretionary laws is rooted in public safety, which, as addressed above, will always be designated a compelling governmental interest.¹³⁴ Specifically, the discretionary permit process is based on the state's desire to limit the number of private citizens carrying concealed weapons in public, and to only allow private citizens to carry concealed arms in limited situations.¹³⁵ By limiting the permit process, the state limits the number of firearms in public, reduces the chance of theft, misuse, or accidents with firearms, and thus makes society and individuals safer.¹³⁶ The states, therefore, will have little difficulty convincing the courts that the first prong of a strict scrutiny analysis is satisfied.

The "narrowly tailored" requirement of the strict scrutiny analysis is where the "may issue" laws will fail. The laws do not indicate what "good cause" is for issuing permits, leaving the determination up to the individual actors within the state licensing agencies.¹³⁷ For a law to be narrowly tailored, it must include guidelines indicating under what circumstances the exceptions apply.¹³⁸ Without specific guidelines as to what actually makes an individual qualified to get a permit, the law cannot be considered narrowly tailored to achieve the stated purpose. "The arbitrariness inherent in allowing states to define good cause is one of the chief deficiencies of the Discretionary system."¹³⁹

In fact, discretionary "may issue" laws allow for and have resulted in discriminatory implementation.¹⁴⁰ For example, in New York, while influential and famous individuals are awarded concealed-carry permits, taxi drivers, crime victims, and

¹³³ See *supra* notes 70–75 and accompanying text (discussing strict scrutiny analysis).

¹³⁴ See *supra* note 85 and accompanying text (arguing that safety will always be a compelling purpose).

¹³⁵ See Andrus, *supra* note 124, at 135; Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 681 (1995).

¹³⁶ See Steven W. Kranz, Comment, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 HAMLINE L. REV. 637, 662 (2006).

¹³⁷ Andrus, *supra* note 124, at 135.

¹³⁸ Massey, *supra* note 85, at 1129 ("[Licensing] [s]chemes that vest uncontrolled discretion in government officials to grant or deny such permits should be presumptively invalid. Licensing laws that cabin official discretion by directing issuance of 'concealed carry' permits only to those persons who have demonstrated some special or exceptional need for personal armed self-defense should also be treated as presumptively invalid. Such laws materially infringe the individual right to armed self-defense because they disable ordinary citizens from exercising their own judgment concerning the necessity of preparations for armed self-defense.").

¹³⁹ Andrus, *supra* note 124, at 136.

¹⁴⁰ Cramer & Kopel, *supra* note 135, at 682–86 (relaying incidents of discriminatory permitting of weapons even upon a showing of fear for one's life).

ordinary citizens are routinely denied the opportunity to carry a concealed weapon.¹⁴¹ The “may issue” laws also result in wide variations of permit issuance within states.¹⁴²

Under strict scrutiny, the state would also have the burden of proving that the discretionary permitting system actually achieved the stated goal of increasing public safety, and that it was the least restrictive way of implementing that policy decision.¹⁴³ This would be a difficult task, given that the statistics on concealed-carry laws are inconclusive.¹⁴⁴ Proponents of gun control offer empirical studies concerning crime rates and the prevalence of handguns, and conclude that more people owning guns results in more violence.¹⁴⁵ Proponents of the right to carry concealed weapons claim that when people are allowed to carry concealed, criminals are deterred from crime because they never know when others around them are armed.¹⁴⁶ Without conclusive evidence that fewer guns in public actually makes society safer, the government will have a hard time proving that there is a legitimate means-ends fit between the goal and the method of implementation.

In addition, even if the government can prove that fewer guns will result in a safer society, it will still have to prove that the discretionary permitting system is the least restrictive means of achieving the goal of public safety. The “may issue” laws, as they stand, state that there are certain circumstances under which an individual *could* be granted a permit to carry a concealed weapon.¹⁴⁷ The state agent, however, still has the ability to deny a permit, even when an individual has a good reason for wanting one.¹⁴⁸ The “*may issue*” language itself allows the agent to deny a permit, even when

¹⁴¹ *Id.* at 684–85.

¹⁴² *See id.* at 712–13. For more statistics on permit issuance in California, see OFFICE OF THE ATTORNEY GEN. OF CAL., BUREAU OF FIREARMS, CARRY CONCEALED WEAPON LICENSES REPORT 1987–2007, available at <http://ag.ca.gov/firearms/forms/pdf/ccwissuances2007.pdf>.

¹⁴³ *See supra* notes 70–75 and accompanying text.

¹⁴⁴ *See* Barnet, *supra* note 87, at 189; *see also* John J. Donohue, *The Impact of Concealed-Carry Laws*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 287, 325 (Jens Ludwig & Philip J. Cook eds., 2003) (“With data problems making it unclear whether the county or state data are more reliable, with the lack of good instruments available to directly address the problems of endogeneity and the lack of good controls available to capture the criminogenic influence of crack, it is hard to make strong claims about the likely impact of passing a shall-issue law.”); Desmond, *supra* note 19, at 1060 (“The difficulty, however, lies in the latter part of the test—that the regulation be ‘narrowly tailored’ to meet the compelling interest. This often requires a showing that there were no less restrictive means, a difficult task given the lack of evidence that specific gun control measures actually reduce violence and/or accidents.”).

¹⁴⁵ *See* EARL E. MCDOWELL, *AMERICA’S GREAT GUN GAME* 103–22 (2007).

¹⁴⁶ *See generally* John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997) (arguing from empirical data that having the right to carry concealed deters crime).

¹⁴⁷ *See supra* note 127 (statutes within).

¹⁴⁸ CAL. PENAL CODE § 12050 (West 2009) (“The sheriff of a county, upon proof that the person applying [meets all the criteria,] . . . *may issue* to that person a license to carry [a concealed weapon].” (emphasis added)).

the individual meets the criteria established by the legislature, which is much more restrictive than adhering to clearly defined criteria.¹⁴⁹

Furthermore, these laws are vague in their requirements of “good cause,” and in their allowance for subjective implementation. The Supreme Court has addressed the problem of vague statutes in the past, and has struck down laws as “void-for-vagueness.”¹⁵⁰ While the doctrine originally addressed certain notice aspects of criminal statutes,¹⁵¹ the Court has also written about the dangers of vague laws in the form of discriminatory implementation:

[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.¹⁵²

“May issue” laws are inherently arbitrary as they vest all discretion in issuing licenses with the local law enforcement and do not provide any guidelines as to the standards for receiving a permit, yet they allow for a permit to be denied on the whim of the local official. The Court has indicated that some vagueness will be permitted in certain areas of the law,¹⁵³ but that “the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”¹⁵⁴ As the Court has held that the individual right to keep and bear arms is constitutionally protected, gun regulations will be subjected to a more stringent vagueness test.

¹⁴⁹ Neily, *supra* note 8, at 159 (“Arbitrary, unreviewable government discretion over the enjoyment of a right has always been anathema in American constitutional law . . .”).

¹⁵⁰ Jeffrey Merle Evans, Recent Development, *Void-For-Vagueness—Judicial Response to Allegedly Vague Statutes—State v. Zuanich*, 92 Wn. 2d 61, 593 P.2d 1314 (1979), 56 WASH. L. REV. 131, 132–35 & nn.11–14 (1980).

¹⁵¹ Sarah Sparks, Case Note, *Deteriorated vs. Deteriorating: The Void-For-Vagueness Doctrine and Blight Takings* Norwood v. Horney, 75 U. CIN. L. REV. 1769, 1771–72 (2007).

¹⁵² Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

¹⁵³ *Id.* at 498–99 (“The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”).

¹⁵⁴ *Id.* at 499.

Discretionary “may issue” concealed-carry laws are aimed at achieving a compelling governmental interest, but are not narrowly tailored to achieve that interest. The problem with “may issue” laws is in their discretionary application that subjectively denies some citizens the opportunity to exercise their right to bear arms. Therefore, under a standard of strict scrutiny, “may issue” laws will be deemed unconstitutional in the wake of *Heller* and Second Amendment incorporation.¹⁵⁵

B. Guns on College Campuses

Across the country, states prohibit individuals from bringing firearms onto public college and university campuses.¹⁵⁶ In the wake of the tragedy at Virginia Polytechnic Institute and State University (Virginia Tech) in April of 2007,¹⁵⁷ the right of students and teachers to have weapons on campus has become a central issue in state legislatures.¹⁵⁸ So far, public opinion and legislatures are not willing to open institutions of higher education to firearms: as of this writing, only Utah has passed a measure to remove the gun-free designation from public colleges and universities.¹⁵⁹ Fifteen states allow each school to decide for itself whether to allow firearms or not, but few schools have taken advantage of the choice and almost all schools remain gun-free.¹⁶⁰

¹⁵⁵ This is not to say that the states currently utilizing “may issue” laws must allow anyone to carry a concealed weapon. The states could adopt policies akin to those of Wisconsin and Illinois, completely prohibiting concealed carry, or they could adopt shall-issue laws with specific requirements as long as the subjective elements were removed. The constitutionality of completely prohibiting concealed carry has not been addressed by the Court as of this writing.

¹⁵⁶ Students for Concealed Carry on Campus, <http://www.concealedcampus.org/state-by-state.php> (last visited Feb. 17, 2010) (“There are 24 states that expressly prohibit concealed carry on college campuses by persons with a valid concealed handgun license/permit.”); *see, e.g.*, GA. CODE ANN. § 16-11-127.1(b) (West 2009) (“Except as otherwise provided . . . it shall be unlawful for any person to carry to or to possess or have under such person’s control while within a school safety zone or at a school building, school function, or school property . . . any weapon”); MISS. CODE ANN. § 45-9-101(13) (West 2009) (“No license issued pursuant to this section shall authorize any person to carry a stun gun, concealed pistol or revolver into . . . any elementary or secondary school facility; any junior college, community college, college or university facility unless for the purpose of participating in any authorized firearms-related activity”); TENN. CODE ANN. § 39-17-1309(b)(1) (West 2009) (“It is an offense for any person to possess or carry, whether openly or concealed . . . any firearm . . . in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field or any other property owned, used or operated by any board of education, school, college or university board of trustees, regents or directors for the administration of any public or private educational institution.”).

¹⁵⁷ John M. Broder, *Suspect is Killed: ‘Horror and Disbelief’ at Virginia Tech-Separate Attacks*, N.Y. TIMES, Apr. 17, 2007, at A1.

¹⁵⁸ Joshua Molina, *Utah Students Hide Guns, Head to Class*, CNN.COM, Feb. 21, 2008, <http://www.cnn.com/2008/US/02/20/cnnu.guns/index.html>; *see also* Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 550 (2008).

¹⁵⁹ *See* Molina, *supra* note 158.

¹⁶⁰ Students for Concealed Carry on Campus, *supra* note 123. As of this writing, three states have legislation pending in their state legislatures that addresses concealed weapons on

College campuses are their own species of gun-free zone: entry to the campus is normally not restricted, making the gun-free status difficult to enforce.¹⁶¹ Most of the students on college campuses (as opposed to, say, elementary or secondary schools) are of legal age to own firearms.¹⁶² Finally, many students live on campus in addition to attending classes and working there.¹⁶³ The campus is their home, which makes broad gun prohibitions more burdensome.¹⁶⁴ This section will analyze two different aspects of the gun-free requirements of most public institutions of higher education in light of these unique characteristics: the prohibition against carrying concealed weapons on campus, and the prohibition against keeping a firearm in a dorm room. If school policies completely prohibiting firearms are challenged in courts and analyzed under a strict scrutiny standard, they will likely be overturned, removing the gun-free designation.¹⁶⁵

1. Carrying Concealed Handguns on Campus

Even before the shootings at Virginia Tech, carrying guns on college campuses was a hot-button issue.¹⁶⁶ In the wake of the shooting, a new national organization was formed called Students for Concealed Carry on Campus (SCCC), with the purpose of advocating the right of college students and professors, who already have concealed-carry permits, to bring concealed weapons onto campus and into the classroom (informally called “campus carry”).¹⁶⁷ The organization and other proponents of campus carry argue that it is ridiculous that students who are of legal age and have the right to carry concealed weapons everywhere else must surrender their arms once

campus. *Id.* at <http://www.concealedcampus.org/pendinglegislation.php> (last visited Feb. 17, 2010).

¹⁶¹ Rostron, *supra* note 158, at 558.

¹⁶² See LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS 81–87 (2008).

¹⁶³ According to the most recent U.S. Census data, 2,064,130 students live in college dormitories. See UNITED STATES CENSUS BUREAU, CENSUS 2000 PHC-T-26 TABLE 1. POPULATION IN GROUP QUARTERS BY TYPE, SEX AND AGE, FOR THE UNITED STATES: 2000 (Nov. 10, 2003), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t26/tables/tab01.pdf>.

¹⁶⁴ Desmond, *supra* note 19, at 1068.

¹⁶⁵ This section does not argue that all gun-free zones will be nullified. Areas that have restricted access and limited entry points that allow for monitoring of the gun-free status of the area, such as airports or the U.S. Capital, will likely be upheld. *See id.* This section will only address the special characteristics of *public* college campuses that make their gun-free zone status questionable under strict scrutiny. The right of *private* schools to make their campuses gun-free is much broader and implicates many more areas of law, including private property rights and takings law.

¹⁶⁶ Rostron, *supra* note 158, at 549.

¹⁶⁷ See Students for Concealed Carry on Campus, *supra* note 123 (navigate to the “About Us” link).

they arrive on campus.¹⁶⁸ In states where concealed carrying is allowed, eliminating that right on college campuses will not survive strict scrutiny.

Like almost all firearm restrictions, prohibiting guns on campus is a safety precaution, a compelling interest that the courts certainly would recognize. Before the shooting at Virginia Tech, the school's board of governors reaffirmed its gun ban, declaring that it "w[ould] help parents, students, faculty and visitors feel safe on . . . campus."¹⁶⁹ In addition, schools have an interest and a duty to provide an atmosphere conducive to learning.¹⁷⁰ The presence of handguns, some argue, interferes with that learning environment by creating an atmosphere of uncertainty and increasing the likelihood of violence and accidents.¹⁷¹

Accepting the creation of a safe and open learning environment as a compelling governmental purpose, a court hearing a challenge to a campus carry prohibition would turn to the "fit" requirement of strict scrutiny. It would have to consider whether the creation of gun-free zones actually achieves this purpose and whether the law was narrowly tailored to it. The government's first hurdle would be to prove that preventing students and faculty from carrying concealed weapons actually made campus a safer place. The same problems of acquiring statistical proof that accompanied concealed-carry permits in general would apply: statistical analysis of concealed-carry laws is extremely inconclusive.¹⁷² With only eleven schools currently allowing concealed carrying, there is little data to draw upon.¹⁷³ Without statistical proof, the state most likely would not be able to meet the burden of proving that the ban actually made campus safer.¹⁷⁴

The bans are also arbitrarily over-inclusive. Everyone is prevented from carrying concealed weapons, including those students and faculty who already have a permit from the state allowing them to carry concealed weapons everywhere else.¹⁷⁵ These individuals would have met the state's requirements for concealed carrying, including, in most states, being of the minimum age, taking a safety class, and submitting to a background check.¹⁷⁶ One could go from being a licensed law-abiding citizen on one

¹⁶⁸ See *id.*, at www.concealedcampus.org/common_arguments.php.

¹⁶⁹ Rostron, *supra* note 158, at 550 (citing Greg Esposito, *Gun Bill Gets Shot Down by Panel*, ROANOKE TIMES, Jan. 31, 2006, at A1 (internal citations omitted)).

¹⁷⁰ Desmond, *supra* note 19, at 1066–67.

¹⁷¹ See BRADY CENTER TO PREVENT GUN VIOLENCE, NO GUN LEFT BEHIND: THE GUN LOBBY'S CAMPAIGN TO PUSH GUNS INTO COLLEGES AND SCHOOLS 13, 17 (2007).

¹⁷² See *supra* notes 139–41 and accompanying text.

¹⁷³ See Students for Concealed Carry on Campus, *supra* note 123 (navigate to the "About Us" link).

¹⁷⁴ There are those that argue that arming students and faculty actually makes campus safer, giving licensed gun owners the opportunity to deter crime and protect themselves and others in the case of an emergency. See Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1438–39 (2009).

¹⁷⁵ Students for Concealed Carry on Campus, *supra* note 123, at http://www.concealedcampus.org/common_arguments.php (last visited Feb. 17, 2010).

¹⁷⁶ See *supra* note 126 and accompanying text.

city block to breaking gun laws on the next by crossing onto school property. This arbitrary change in status would cut against the state under a strict scrutiny analysis. Failing the “fit” requirement of strict scrutiny, prohibitions against campus carrying face legitimate challenges in the future.

Some scholars and gun control advocates have drawn a parallel between gun regulations and First Amendment time, place, and manner restrictions.¹⁷⁷ They argue that because the fundamental right to free speech is subject to reasonable, narrowly tailored restrictions, so too can firearm ownership be subject to similar regulations.¹⁷⁸ Applying free speech time, place, and manner analysis to gun-free zones requires a showing of a legitimate governmental purpose, narrow tailoring of the law, and maintaining alternate avenues of exercising the right.¹⁷⁹

As already addressed, the compelling interest prong will be easily met, but narrow tailoring will be unlikely. Also influencing the element of narrow tailoring in the parallel to free speech restrictions are considerations of the location of the gun-free zone, its size, and the government’s ability to enforce the gun-free status.¹⁸⁰ On college campuses, depending on the school, the zone could be quite extensive, covering an individual’s work, school, recreation, and home.¹⁸¹ With college campuses often being open to the public, the ability to control the flow of weapons onto campus would be virtually impossible, making the prohibition less likely to achieve the stated purpose.¹⁸² These factors, in addition to the above discussion of narrow tailoring under strict scrutiny, lead to the conclusion that gun-free zones are not narrowly tailored to achieve the compelling governmental purpose.

The third factor of reasonable time, place, and manner restrictions, namely, alternate avenues for exercising the right, also fails in the context of guns on campus. The analysis of alternative means of exercising the right “depends on the extent to which people have a choice (and the means) to avoid the gun-free zone and exercise their right elsewhere.”¹⁸³ While a campus gun-free zone is not as restrictive as an entire city ban, such as Washington, D.C.’s, many students spend the majority of their time on campus and would have little opportunity for exercising their right elsewhere. In addition, as all but a few campuses prohibit firearms, students do not have many

¹⁷⁷ Desmond, *supra* note 19, at 1065 (“A buffer-zone restricting where one may exercise his or her right to free speech is analogous to a gun-free zone restricting where one may exercise his or her right to keep and bear arms under the Second Amendment.”).

¹⁷⁸ Barnett, *supra* note 87, at 156–57.

¹⁷⁹ Desmond, *supra* note 19, at 1066 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

¹⁸⁰ *Id.* at 1068.

¹⁸¹ The impact of the size of the gun-free zone will be addressed further in the next section.

¹⁸² Desmond, *supra* note 19, at 1068 (“A controlled environment where the entrances and exits can be effectively monitored—such as an elementary school or airport terminal—is more likely to withstand a constitutional challenge than a gun-free zone covering an expansive area where leakage is more difficult to detect and prevent.”).

¹⁸³ *Id.* at 1070.

options for choosing to attend a school where firearms are allowed, unless they live in Utah.¹⁸⁴ If firearms are prohibited on campus, there are very few alternative ways to exercise the right to keep and bear arms. Given this analysis, laws prohibiting campus carry will fail the reasonable time, place, and manner test of First Amendment free speech restrictions, and will not survive strict scrutiny.

2. Firearms in Dorms and Protecting Hearth and Home

Laws that make college campuses completely gun-free zones also outlaw firearms in dormitories.¹⁸⁵ In addition to the safety concerns that are at play in allowing students to carry concealed weapons on campus, colleges and gun control advocates argue that college students are an at-risk group, thus, the school has a compelling interest in limiting students' gun ownership on campus.¹⁸⁶ Dangers of alcohol abuse, theft, and suicide are all factors when a large number of young people are living together.¹⁸⁷ These dangers are exacerbated by the presence of firearms.¹⁸⁸ All of these factors, combined with the general understanding that safety is a compelling interest for the state in regulating firearms, would satisfy the compelling interest of the state in limiting gun ownership in dorms.

This rationale for limiting gun ownership on campus, however, would not withstand strict scrutiny's "fit" requirement. The prohibitions are not narrowly tailored to achieve the stated purpose. The state establishes the standards required for gun ownership, including minimum age requirements, background checks, and safety classes.¹⁸⁹ The college student who legally owns a gun has already met the state's requirements for gun ownership. Taking away the right to own arms in the home purely because the individual chooses to pursue higher education and live on campus is arbitrary and greatly over-inclusive. The same student living off campus would be a legal gun owner.

While the extent of the right to bear arms has not been fully defined, the Supreme Court was very clear in *Heller* that certain limitations are categorically unconstitutional,

¹⁸⁴ See *supra* notes 159–60 and accompanying text.

¹⁸⁵ Some statutes explicitly prohibit guns in dorms. See, e.g., MICH. COMP. LAWS ANN. § 28.425o(1) (West 2009) (“[A]n individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under section 12a(f), shall not carry a concealed pistol on the premises of any of the following: . . . (h) A dormitory or classroom of a community college, college, or university.”). Other statutes generally outlaw guns in all school buildings without specifying dorms. See, e.g., NEB. REV. STAT. § 69-2441(1)(a) (2008) (“A permit holder may carry a concealed handgun anywhere in Nebraska, except any: . . . building, grounds, vehicle, or sponsored activity or athletic event of any public, private, denominational, or parochial . . . school, . . . a community college, or a public or private college, junior college, or university . . .”).

¹⁸⁶ BRADY CENTER TO PREVENT GUN VIOLENCE, *supra* note 171, at 6–9.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., Andrus, *supra* note 124, at 131.

“includ[ing] the absolute prohibition of handguns held and used for self-defense *in the home*.”¹⁹⁰ A law that keeps an individual from exercising their right to self-defense in the home is not going to withstand strict scrutiny.

One of the tests for determining whether a law is constitutional is looking to see if it allows for alternative methods of exercising the right being threatened.¹⁹¹ In *Heller*, the Court acknowledged that outlawing handguns did not remove all possibilities for self-defense, but the D.C. handgun ban was held unconstitutional because it removed the most common method of self-defense, rendering many people without viable alternatives: “Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”¹⁹² By prohibiting gun ownership on campus, colleges have effectively removed any opportunity for students to own guns in their homes. Removing the option for having a firearm in the home eliminates the right of college students who live on campus to exercise their right to keep and bear arms in the same way that residents of Washington, D.C. were prevented from exercising their right. This indicates that banning gun ownership on campus is an unconstitutional restraint on the right to bear arms.

Outlawing guns in dorms also creates a conflict between enforcement of gun laws and the right to self-defense. Policies of self-defense guarantee the right to use force if certain requirements are met, such as imminence, necessity, and proportionality.¹⁹³ Laws prohibiting handguns in dorm rooms prevent a student from keeping a handgun in his dorm for defense in legitimately threatening situations. If such a situation arose, the student could expose himself to discipline from the school or possible criminal sanctions for violating gun policy. In such an extreme situation, which law takes priority? The student has a right to defend himself, but not to own the gun that he uses in his defense? In a post-*Heller*, post-incorporation case involving gun bans in dorms, courts would examine the fit between the gun law and other essential rights like self-defense. If the ban rendered the right to self-defense with a firearm non-existent, courts would find it necessary to eliminate the ban.

¹⁹⁰ District of Columbia v. *Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2822 (2008) (emphasis added).

¹⁹¹ *Id.* at 2818 (“A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.” (quoting *State v. Reid*, 1 Ala. 612, 616–17 (1840))); see also Desmond, *supra* note 19, at 1062 (“[I]f a compelling interest overrides a right in nearly every circumstance in which the right may be exercised, one might as well say that there is no right. Thus, a complete firearm ban or total disarmament, for example, would be unconstitutional because it essentially nullifies the right protected.” (internal citations omitted)).

¹⁹² *Heller*, 128 S. Ct. at 2818.

¹⁹³ William Meyerhofer, *Statutory Restrictions on Weapons Possession: Must the Right to Self-Defense Fall Victim?*, 1996 ANN. SURV. AM. L. 219, 221.

CONCLUSION

Whether one believes that fewer restrictions on firearms will make the country a safer or a more dangerous place, it is clear that significant changes in the gun debate are upon us, and firearms regulation is entering a new era. The only issue authoritatively settled by *Heller* was the individual/collective rights debate.¹⁹⁴ The Court must still decide whether the Second Amendment applies to the states and what standard of review should apply to future Second Amendment challenges. By finding an individual right to bear arms, the Court has opened the door to strict scrutiny of federal and state regulations of handguns, thus allowing for gun regulations across the country to be challenged and possibly overturned.

¹⁹⁴ *Heller*, 128 S. Ct. at 2821-22; see also Green, *supra* note 60, at 132; Keleher, *supra* note 15, at 427.