

GUNS ON CAMPUS: CONTINUING CONTROVERSY

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INTRODUCTION

After the numerous tragic rampages that have occurred on college and university campuses, some observers have suggested that the tragedies could have been avoided or stopped if even one student had been armed and able to defend himself or herself with a firearm.¹ Others have suggested that if firearms are allowed on college and university campuses, even if such rampages could be prevented, the rate of homicides and violence will rise due to students routinely carrying firearms.² States have historically restricted the exercise of individual gun rights in varying forms. These restrictions have, often times, taken the form of banning firearms on college and university campuses.³ Across America, state legislators have

1. See, e.g., Joyce Lee Malcolm, *McDonald v. City Of Chicago: The Second Amendment Made Clearer, the Fourteenth Amendment Made Murky*, in *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 458 (2011).

2. *Id.* at 457.

3. General firearm regulations take a standard form across the country of prohibiting unlicensed individuals from carrying firearms on college and university campuses. There has been constant debate and a strong movement to allow concealed weapon permit holders to carry on campuses. The states that do allow firearms on campuses adhere to this model. See UTAH CODE ANN. § 76-10.505.5 (West 2011):

(2) A person may not possess any dangerous weapon, firearm, or sawed-off shotgun, as those terms are defined in Section 76-10-501, at a place that the person knows, or has reasonable cause to believe, is on or about school premises as defined in this section.

(3) (a) Possession of a dangerous weapon on or about school premises is a class B misdemeanor. (b) Possession of a firearm or sawed-off shotgun on or about school premises is a class A misdemeanor.

(4) This section does not apply if: (a) the person is authorized to possess a firearm as provided under Section 53-5-704, 53-5-705, 76-10-511, or 76-10-523 [concealed weapon permit laws] or as otherwise authorized by law.

Utah was the first state to allow firearms to be carried on college and university campuses. Its legislation, like other states that allow firearms on campuses, makes it illegal to carry a firearm on campus unless the carrier also possesses a concealed weapon permit. Concealed weapon permits allow individuals to carry firearms in areas where it would otherwise be illegal to do so. For the purposes of this note, it will be assumed that prohibitions against carrying firearms without a concealed weapon permit are valid, and total firearm bans indicate regulatory schemes that do not allow individuals to carry firearms on

annually introduced bills pertaining to the “guns on campus” issue, and 2011 was no exception. In fourteen states, legislators introduced bills to allow licensed individuals to carry concealed weapons on campus.⁴ Additionally, in two states, legislators introduced bills to explicitly forbid individuals from carrying concealed weapons on campus.⁵ All sixteen bills failed.⁶ This note will analyze and discuss various cases and legislation pertaining to the individual right to possess firearms for self-defense and personal security in the college and university campus setting. After considering the current Second Amendment jurisprudence, this Note will discuss potential standards of review applicable to firearm regulations on public, but not private, college and university campuses.⁷

I. STATUS AFTER *HELLER*

college and university campuses, with or without a concealed weapon permit. Arguments for allowing firearms on campuses will be referring to allowing concealed weapon permit holders to carry firearms on college and university campuses. Arguments against allowing firearms on campuses will be referring to prohibitions against concealed weapon permit holders carrying firearms on campuses, in addition to the prohibition against individuals who do not hold a concealed weapon permit. See Appendix A, *infra*, for a brief summary on the current state laws pertaining to firearms on college and university campuses.

4. National Conference of State Legislatures, *Guns on Campus: Overview* (Nov. 13, 2011), <http://www.ncsl.org/issues-research/educ/guns-on-campus-overview.aspx> (twenty-two states explicitly regulate concealed weapons on campus. Those states include: Arkansas, California, Florida, Georgia, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. Additionally, twenty-five states have delegated the decision of whether or not to regulate concealed weapons on campus to the college or university itself. Those states include: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Montana, New Hampshire, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West Virginia). Concealed weapon permits allow citizens to more widely carry firearms throughout society after receiving the permit from the state entity charged with regulating concealed weapons. So, many laws target concealed weapons because other legislation governs the general possession of firearms. Oregon was assumed to have delegated the authority to decide regulation of concealed weapons to colleges and universities themselves, but the Oregon Court of Appeals ruled otherwise. See *infra* section VI.

5. *Id.*

6. *Id.*

7. Public universities are considered a state actor and are subject to the same restraints under the Constitution as the state. Private universities are generally not considered state actors, but instead private institutions, and are not subject to the same restraints as the state. Therefore the constitutional analysis in this Note may not be applicable to private colleges and universities.

In the light of recent and dramatic changes in individual gun rights jurisprudence, states and state institutions face potential challenges to firearm regulations that restrict firearm possession on post-secondary campuses. Before 2008, it was uncertain if the Second Amendment guaranteed United States citizens individual rights to possess firearms or if that right was reserved only to a state-regulated militia.⁸ The United States Supreme Court answered the question in *District of Columbia v. Heller*.⁹ In a 5-4 decision, the Court held that the Second Amendment included an individual right of law-abiding citizens to possess firearms, especially in defense of one's self, homestead, and family.¹⁰ In that case, Dick Heller, a special police officer, brought suit under the Second Amendment to enjoin the District of Columbia from enforcing firearm regulations that effectively banned handguns within the District.¹¹ The District Court for the District of Columbia dismissed Heller's suit. The decision was then appealed to the Court of Appeals for the District of Columbia, which reversed the District Court ruling.¹² Following the reversal, the United States Supreme Court granted certiorari.¹³ The Supreme Court's decision specifically ruled that the District of Columbia's law effectively banning the ownership of handguns was unconstitutional under the Second Amendment.¹⁴

Justice Scalia, speaking for the majority in *Heller*, supported the decision with history. He cited Article VII of the English Bill of Rights, which guaranteed Protestants the right to "have Arms for their defense."¹⁵ He also utilized William Blackstone, who maintained that Englishmen had "natural right[s] of resistance and self-preservation . . . [and] of having and using arms for self-preservation and defense."¹⁶ Next, Justice Scalia analyzed the setting within the states before and after ratification of the Second Amendment to support the Court's decision. The Court found that several states, before and after ratification, "unequivocally protected an individual citizen's right to self-defense [and this was] strong evidence that that is how the founding generation conceived the right."¹⁷ Despite

8. See U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

9. 554 U.S. 570, 635-36 (2008).

10. *Id.* at 575.

11. *Id.* at 570

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 593 (citing Bill of Rights, 1689. 1 W. & M., c. 2, §7 (Eng.)).

16. *Id.* at 664 (quoting 1 William Blackstone, Commentaries 140).

17. Derek P. Langhauser, *Gun Regulation of Campus: Understanding Heller and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 79 (2009).

vigorous dissent and seemingly contradictory precedent,¹⁸ the Court secured the right to keep and bear arms as an individual right of the people. Although the Second Amendment may be read to guarantee only a collective right to possess firearms for the purpose of maintaining a state militia, the Court found that the individual right to keep and bear arms was a central component of the Amendment.¹⁹

In its decision, the Court was careful to add that the right to bear arms was not an absolute right. “It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” Justice Scalia wrote.²⁰ He expounded further on the narrow application of the Court’s ruling, stating “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...”²¹

This explicit narrowing of the opinion left open the possibility of future regulation, and the preservation of some current regulations concerning firearm possession, despite the people’s individual right that the Court had just recognized. Although the Court answered a large question regarding the application of the Second Amendment, there were still many questions lingering.

Heller did not address several key issues for colleges and universities. First, the facts of *Heller* did not raise the incorporation question. Consequently, that question went unaddressed in *Heller*.²² Second, but still related to incorporation, the facts of *Heller* did not raise the question of what restrictions would be valid when public colleges and universities were left, by states, to determine their own position on allowing or banning

18. See *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Miller*, 307 U.S. 174 (1939) (holding that the Second Amendment *did not* limit the federal government from regulating firearms that did not relate to state militias).

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

20. *Id.* at 626.

21. *Id.*

22. See Langhauser, *supra* note 17 (explaining that under the ruling in *Heller*, the individual right to possess firearms was applicable only to the federal government, not the states). While this left state law intact, it also raised concerns of future validity of such state laws. There were several cases in federal court that would raise the incorporation issue, and it was the next logical progression of this individual right in the Bill of Rights. If and when will the Second Amendment be incorporated to the states? What restrictions and limitations on an individual’s right to keep and bear arms under existing state law would endure if incorporation occurred?

weapons on campus.²³ Third, given the facts of *Heller*, the Court did not have an opportunity to define the term “schools” in its dicta when limiting the scope of the opinion.²⁴

II. INCORPORATION OF THE SECOND AMENDMENT: *MCDONALD V. CITY OF CHICAGO*

The Supreme Court, in *McDonald v. City of Chicago*,²⁵ concluded that the Fourteenth Amendment incorporates against the states the Second Amendment right to keep and bear arms.²⁶ The Second Amendment is now binding on the states as a fundamental individual right of the people. Until 2010, the Second Amendment to the United States Constitution applied only to federal legislation and the federal government’s actions.²⁷ This section will outline the reasoning and justifications the Court utilized in incorporating the Second Amendment. Understanding the Supreme Court’s analysis is essential to analyzing and evaluating future laws and firearm regulations.

In June of 2008, Otis McDonald and other Chicago residents who wanted to possess a firearm in their home for self-defense filed suit in federal court against the city of Chicago. They sought a declaration that two handgun bans violated the Second and Fourteenth Amendment.²⁸ The District Court for the Northern District of Illinois dismissed the case, and the Court of Appeals for the Seventh Circuit affirmed the trial court’s dismissal.²⁹ McDonald then filed a petition for certiorari with the United States Supreme Court, and the Court granted review.³⁰ After ruling that the

23. *Id.* (explaining the issues of pre-emption of state laws over college and university procedure and position, and impliedly anticipating potential complications if the Second Amendment then preempted state law).

24. *Id.* The standard interpretation of “schools” is believed to be K-12, not necessarily including post-secondary institutions like colleges and universities. By leaving the term undefined, the Court was not clear at what level such valid exceptions existed. Such consideration is particularly relevant because the ages of most college and university patrons are of majority, but that of K-12 are not.

25. 130 S. Ct. 3020 (2010) (Plurality opinion written by Justice Alito, joined by the Chief Justice and Justices Scalia and Kennedy). Justices Scalia and Thomas each wrote separate concurrences. Justice Stevens wrote a dissent, while Justice Breyer, joined by Justices Ginsburg and Sotomayer, filed a separate dissent.

26. *Id.* at 3050. The Court held that the Second Amendment, as recognized in *Heller*, is incorporated under the Fourteenth Amendment as an individual right to possess firearms for the purpose of self-defense. *Id.*

27. *Id.* at 3022.

28. *Id.* at 3027.

29. *Id.*

30. *Id.* at 3028.

Second Amendment was incorporated against the states,³¹ the Court reversed the decision of the Court of Appeals and remanded the case for further proceedings.³²

McDonald argued that the individual right to keep and bear arms was incorporated into the Fourteenth Amendment on two potential grounds:³³ first, the Privileges and Immunities Clause of the Fourteenth Amendment,³⁴ and second, the Due Process Clause of the Fourteenth Amendment. Chicago and Oak Park (two separate municipalities) argued that the rights protected by the Bill of Rights can be incorporated into the Fourteenth Amendment only “if that right is an indispensable attribute of *any* ‘civilized’ legal system.”³⁵ The plurality rejected the municipalities’ argument as well as McDonald’s first argument (which required overruling the *Slaughter-House Cases*), but it accepted McDonald’s second argument and incorporated the Second Amendment into the Due Process Clause of the Fourteenth Amendment.

The plurality began by noting that the Bill of Rights originally applied only to the federal government.³⁶ The plurality then quickly dismissed the Privileges and Immunities Clause argument, along with any formerly binding precedent.³⁷ It saw no need to reconsider the holding in the *Slaughter-House Cases* because incorporation jurisprudence had evolved under Due Process Clause analysis.³⁸ Also, the Court rejected *Cruikshank*,

31. *McDonald* was a plurality decision. Justice Alito wrote for the plurality, which included the Chief Justice, Justice Kennedy, and Justice Scalia. While Justice Thomas agreed with the plurality that the Second Amendment is a fundamental right, he argued that it should be incorporated through the Privileges and Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause. Justice Stevens dissented, and Justice Breyer dissented separately with Justices Ginsburg and Sotomayer joining Justice Breyer.

32. *McDonald*, 130 S. Ct. at 3020.

33. *Id.* at 3028.

34. *Id.* By depending on the Privileges and Immunities Clause, this argument necessarily asked the Court to reject the narrow interpretation of the clause set forth in the decision of the *Slaughter-House Cases*.

35. *Id.*

36. *Id.* at 3020 (citing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833)).

37. *See* *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Miller*, 307 U.S. 174 (1939). These cases were used to establish that the Second Amendment did *not* limit the federal government from regulating firearms that did not relate to state militias. These cases had been used as authority to reject incorporation of the Second Amendment in the past.

38. *McDonald*, 130 S. Ct. at 3030-31. The author would like to thank Professor Richard Garnett for pointing out that, although the Court has maintained the precedent of the *Slaughter-House Cases*, it has seemingly followed the

Presser, and *Miller* as controlling precedent because those cases were decided before selective incorporation under the Due Process Clause was established.³⁹

Despite the plurality's rejection of the Privileges and Immunities strategy, Justice Thomas argued that the Court should utilize the Privileges and Immunities Clause to incorporate the Second Amendment.⁴⁰ Justice Thomas concurred with the plurality that the Second Amendment guarantees a fundamental right,⁴¹ but disagreed with using the Due Process Clause of the Fourteenth Amendment for incorporation.⁴² Justice Thomas urged the Court to overturn past incorporation precedent on this particular issue.⁴³ He argued that the real work in incorporating fundamental rights is done by the Privileges and Immunities Clause, not the procedural concerns of the Due Process Clause. The plurality did not agree with Justice Thomas and did not overturn its incorporation precedents nor return to the privilege and immunity analysis.⁴⁴

The plurality, instead, turned to the Fourteenth Amendment's Due Process Clause to incorporate the Second Amendment. The plurality proceeded to determine if the Second Amendment satisfied the requirement of selective incorporation under that clause. The determination is based on "whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice."⁴⁵ If the Second Amendment guarantees a fundamental right, then it would be applied to the federal and state governments with equal force.⁴⁶ The Court determined that the Second Amendment does guarantee a fundamental right.

The Chicago and Oak Park statutes at issue in the case were very similar to the statute at issue in *Heller*. Both essentially banned handgun

purposes behind the Privileges and Immunities Clause—as outlined in the *Slaughter-House* dissent—through its Substantive Due Process jurisprudence.

39. *Id.* at 3031. These cases were used to reject incorporation of the Second Amendment in the past.

40. *Id.* at 3058–59 (Thomas, J., concurring); *Incorporation of the Right to Keep and Bear Arms*, 124 HARV. L. REV. 229, 232 (2010) (hereinafter *Incorporation*).

41. *Incorporation*, *supra* note 40, at 232.

42. *Id.*

43. *Id.*

44. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 292.

45. *McDonald*, 130 S. Ct. at 3034. This standard was related to the fundamental principles of our government as well as the history of the American legal tradition, as embodied in the Court's citation of *Snyder v. Massachusetts*, 291 U.S. 97, 105 ("rights that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'").

46. *Id.* at 3035.

ownership within their respective jurisdictions.⁴⁷ On this point, the plurality began with a selective recitation of the reasoning utilized in *Heller*. The plurality reiterated that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”⁴⁸ The plurality added that it is clear that “this right is ‘deeply rooted in this Nation’s history and tradition.’”⁴⁹ After again establishing that the right to keep and bear arms is a fundamental individual right of the people, the plurality transitioned into its analysis of the incorporation doctrine under the Fourteenth Amendment.

In its Fourteenth Amendment analysis, the plurality again returned to history to present evidence for the claim that the Congress that sent the Fourteenth Amendment to the states for ratification intended the Second Amendment to bind the states. Prior to the ratification of the Fourteenth Amendment, but after the Civil War, many freed blacks returned to the South and found that the state legislatures had restricted their rights to own firearms.⁵⁰ Once disarmed, they faced violence and murder from armed gangs of former rebel soldiers.⁵¹ The plurality found that the legislative response to such violence was strong, probative evidence that the Fourteenth Amendment was meant to make the Second Amendment binding upon the states. In this regard, the plurality said:

The most explicit evidence of Congress’ aim appears in §14 of the Freedman’s Bureau Act of 1866, which provided that “the right . . . to have full and equal benefit to all laws and proceedings concerning personal liberty, personal security, and

47. Complaint at 7, *McDonald v. Chicago*, WL 2571757 (N.D. Ill 2008) (08cv03645). (Chicago Municipal Code § 8-20-050 provides: “No registration certificate shall be issued for any of the following types of firearms: ...(c) handguns ...”); Brief for City of Chicago et al. as Amici Curiae Supporting Respondents at 1-2, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (“The Oak Park ordinance prohibits the possession of handguns in the community. Oak Park, Ill., Mun. Code § 27-1-1. Police officers, members of the Armed Forces and National Guard, private security guards and federally licensed firearms collectors are exempt from the ban. *Id.* So also are gun clubs and theatre organizations. *Id.* Rifles and shotguns may be kept and carried on one’s own land or place of business. *Id.* Violations are punishable by a fine of not more than \$1,000 for a first offense and \$2,000 for any subsequent offense, but not imprisonment. *Id.* at § 27-4-1(A). Oak Park does not require registration or licensure of any weapon and does not prohibit possession and use of tasers”).

48. *McDonald*, 130 S. Ct. at 3036 (citing *District of Columbia v. Heller*, 554 U.S. at 598–99) (internal citations omitted)).

49. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

50. *McDonald*, 130 S. Ct. at 3039.

51. *Id.*

the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens . . . ”⁵²

The plurality found that this was an explicit guarantee of the individual right to keep and bear arms. Additionally, the plurality considered the Civil Rights Act of 1866.⁵³ This Act, the plurality pointed out, used nearly the same language as the Freedman’s Bureau Act when explaining that the Act guaranteed the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”⁵⁴ The plurality reasoned that with the use of this identical language, and with the Freedman’s Bureau Act identifying the right to keep and bear arms as a fundamental individual right, it was only logical that the Civil Rights Act would also include the right to bear arms as an individual right.⁵⁵

When that legislation was not as effective as hoped for, the Fourteenth Amendment was added to the Constitution. The Fourteenth Amendment’s Section 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁶

The plurality added that the Fourteenth Amendment was generally understood to provide constitutional protection for the rights included in the Civil Rights Act of 1866.⁵⁷ Through analyzing the text and legislative background of the Act, the plurality concluded that it was meant to guarantee the individual right to keep and bear arms for at least self-defense and defending family and homesteads.⁵⁸

The plurality continued by establishing that the Second Amendment would be incorporated fully and would bind the states in the same manner with which it binds the federal government.⁵⁹ Although binding on the states, like other incorporated constitutional rights, Second Amendment rights are not limitless. The plurality echoed dicta from *Heller* that certain

52. *Id.* at 3040 (citing 14 Stat. 176-177) (emphasis added).

53. 14 Stat. 27.

54. *McDonald*, 130 S. Ct. at 3040 (citing The Civil Rights Act of 1866, 42 U.S.C. § 1982).

55. *McDonald*, 130 S. Ct. at 3040.

56. U.S. CONST. amend. XIV §1.

57. *McDonald*, 130 S. Ct. at 3041.

58. *Id.*

59. *Id.* at 3049.

reasonable firearm regulations would continue to be acceptable after incorporation.⁶⁰ The plurality assured that “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” could continue to be enforced.⁶¹

After the *Heller* and *McDonald* decisions, there remains no doubt about the state of the Second Amendment. The Second Amendment guarantees the individual right to keep and bear arms for legal purposes, and it applies to the states as it does to the federal government. These decisions do, however, leave some questions unanswered. Although the Court said that governments could still place *reasonable* restrictions and limitations on the right to keep and bear arms, the *McDonald* case did not provide an opportunity for the Court to discuss what constitutes a reasonable restriction. Justice Breyer, in his dissent in *McDonald*, raised issues about the Court’s making such determinations. He said that many factors must be considered to determine reasonableness. What types of firearms (for self-defense) are constitutionally protected? How far does the protection extend outside the home (if at all)? What types of restrictions will apply and what procedural concerns are raised?⁶² *McDonald* left these questions unanswered.

Further, the *McDonald* plurality rejected the notion that the judiciary should weigh the conflicting interests and decide, on a case-by-case basis, whether Second Amendment rights should prevail over firearm regulations. Justice Alito, citing the *Heller* majority, stated: “[t]he 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.”⁶³ This leaves the states and courts with a doctrine that acknowledges the possibility of reasonable restrictions on individual gun rights, but that has yet to provide a basis from which to determine reasonableness. Thus, the states may pass laws and courts may

60. *Id.* at 3046.

61. *Id.* at 3047 (citing *Heller*, 554 U.S. at 525–28).

62. *Id.* at 3127 (Breyer, J., dissenting). Justice Breyer argued that there were several practical frailties in the plurality opinion. He argued that there is no consensus that the right to keep and bear arms is fundamental in nature and thus guaranteed by the Fourteenth Amendment’s due process clause, that such a right does nothing to protect minorities or promote equality under the Fourteenth Amendment, that incorporation significantly inhibits state power, and that incorporation will force judges to answer empirical questions regarding matters on which they are not experts. The latter two arguments may indicate some difficulties in applying this case’s holding. There are many state regulations in place, and many state legislatures may resist changing their regulations because they believe them to be reasonable. Thus, despite Justice Alito’s assurances otherwise in the plurality opinion, the determination of what constitutes a reasonable regulation will likely fall to judges reviewing regulations in individual cases.

63. *Id.* at 3050 (citing *Heller*, 554 U.S. at 634).

decide cases in an effort to determine what constitutes a reasonable firearm regulation in the light of an incorporated Second Amendment. If the lower courts are in conflict over the reasonableness of a particular regulation, the Supreme Court may address the issue when such an issue is before it.

III. ISSUES RISING FOR COLLEGES AND UNIVERSITIES FROM THE INCORPORATION OF THE SECOND AMENDMENT

Many issues arise for colleges and universities in the wake of Second Amendment incorporation.⁶⁴ The largest issue, as discussed above, is the definition of reasonableness in the context of firearm regulation on campuses. This is particularly true for colleges and universities that institute their own gun policies. The Court mentioned that firearm bans in sensitive areas, such as schools, may generally be reasonable, but the Court did not define “schools.”⁶⁵ With no clarification if “schools” includes colleges and universities, it is unclear if college and university campuses are “sensitive” enough to validate a firearms ban. Although colleges and universities broadly qualify as a school—an institution of teaching and learning—they can readily be distinguished from K–12 institutions. Most students in colleges and universities are at or above the age of majority. This is critical in terms of gun ownership and possession. Guns, generally, cannot be purchased by individuals under the age of eighteen,⁶⁶ and, in most states, handguns cannot be purchased until the purchaser reaches twenty-one years of age.⁶⁷ Thus firearm bans at schools below the college and university level might do little or nothing that interferes with students’ Second Amendment rights. Bans at the college and university level,

64. The issues identified are analyzed as applying only to public colleges and universities. The state university systems across the United States are considered state actors and therefore are subject to the incorporation of the Second Amendment. Private institutions are not be subject to the demands of the Second Amendment and are seemingly able to continue whatever gun regulations they currently have in place, pending any state or federal legislation to the contrary. Private institutions, like other private actors, generally cannot violate another individual’s Second Amendment rights. Such violations require government action.

65. Although defining “schools” in either *Heller* or *McDonald* would have been dictum, such a definition would have provided guidance and insight to the states and lower courts. As a side mention in both cases, the Court identified that firearm regulations in sensitive areas, like schools, would still likely be acceptable. The Court’s mentioning of schools without providing further explanation leaves numerous possible readings of their sensitive area example.

66. LEGAL COMMUNITY AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE, AND SELECTED LOCAL GUN LAWS, at 81–87 (2008), available at <http://smartgunlaws.org/wp-content/uploads/2008/01/RegGuns.entire.report.pdf>.

67. *Id.*

however, would interfere much more with the Second Amendment rights of students who would otherwise be able to lawfully possess firearms.

Additionally, some colleges and universities do not have the clearly defined perimeters that high schools, middle schools, and elementary schools usually have. Some colleges and universities span across cityscapes and mix with metropolitan areas. The physical layout of some colleges and universities can easily create confusion for individuals trying to determine if they are on campus or off campus at any given point. For example, public roads often run through college campuses. Could a public road be considered a sensitive school area subject to a reasonable regulation, or would the street merely be part of the public landscape where the same regulation would be unreasonable?

The plurality in *McDonald* focused primarily on individual rights to possess firearms for self-defense in the home.⁶⁸ This creates another potential issue for colleges and universities. In many instances, students' day-to-day home⁶⁹ is an on-campus dormitory.⁷⁰ Usually, dorms are apartment-like housing with shared common spaces and bathrooms. Students generally make up the vast majority of residents in the dorms. Does a dorm room constitute a "home" as the Court described it in *McDonald* or is it part of the "school" and a sensitive area? Dorms possess critical characteristics of both. The fundamental purpose of the right to keep and bear arms, as the Court saw it, was to protect one's self, home, and family.⁷¹ Defense of self and home can certainly be at issue for a student in a dorm, particularly considering that many students, as a practical matter, have no other choice of housing while in school but the dorms.⁷² On the other hand, dorms can easily be considered a sensitive

68. *McDonald*, 130 S. Ct. at 3020.

69. "Home" can have many different definitions. For instance, it can mean temporary or relatively permanent residence. For this argument, we will assume that the relatively permanent day-to-day residence of students living on campus is their dorm.

70. The dorm issue also depends on the definition of "school." The broader the scope of "school," the more likely dorms would be considered part of the definition. But it would not be out of line to define "school" as the institution's classroom buildings, offices, and departments created for the direct purpose of education. This would further raise issues of public events, common areas, and extra-curricular activities. It is equally as reasonable to set the definition to include any property the college or university owns and operates related to the purpose of education. Also, with a broader and more inclusive definition of school, there will likely be higher scrutiny over firearm regulation. A broader definition would make firearm regulation more restrictive because it reaches more areas and individuals.

71. *McDonald*, 130 S. Ct. at 3041.

72. Many colleges and universities around the country are mandating that first year students live on campus. See, generally, Gregory Poole, *Mandatory On-Campus Freshmen Housing a Mistake*, THE CRIMSON WHITE, Jan. 19, 2011,

area. Students are gathered in relatively tight quarters for the purpose of receiving a higher education. The presence of firearms in such a setting, arguably, could be disruptive and dangerous. Both arguments carry weight and truth.

Some state legislatures create the laws pertaining to firearm regulations on public campuses, while others leave gun-policy making up to the college or university itself.⁷³ When colleges and universities create their own gun-regulation policies, they may face additional issues and costs in the post-*McDonald* era. The college or university that makes its own policy may face costly litigation over such regulations. Although the potential for litigation may create an incentive for policy makers to ensure that regulations are as reasonable as possible, this incentive may be for naught since there is little by way of a starting point to determine the reasonableness of any given firearm regulation. Colleges and universities do have several factors cutting in favor of finding their firearm regulations reasonable. First, the Court in *McDonald* did generally recognize “schools” (however eventually defined), along with government buildings, as sensitive areas that warrant regulation generally.⁷⁴ This may create a presumption that firearm regulations on college and university campuses are valid. Second, many states currently have firearm regulations concerning college and university campuses.⁷⁵ Such state regulations not only allow firearm regulations on campuses,⁷⁶ but may influence courts as to what types of regulations are reasonable.

<http://cw.ua.edu/2011/01/19/mandatory-on-campus-freshmen-housing-a-mistake/>; Amy Winberry, *Policy Will Require Freshmen to Live on Campus*, THE REFLECTOR, Jan. 19, 2007, <http://www.reflector-online.com/news/policy-will-require-freshment-to-live-on-campus>; Carmen Splane, *SDSU Mandates Dorm Life for Freshmen*, NBC SAN DIEGO, Feb. 10, 2011, <http://www.nbcsandiego.com/news/politics/SDSU-Mandates-Dorm-Life-for-Freshmen-103437864.html>; Arizona State University, *University Housing*, <http://www.asu.edu/housing/> (last visited Apr. 30, 2012); Wichita State University, *Freshmen Live on Campus*, June 28, 2011, <http://webs.wichita.edu/?u=Housing&p=/Freshman/> (last visited Apr. 30, 2012). This creates issues for both the sensitive area arguments and unreasonable regulations arguments as they pertain to dorms. Mandating all first- year students be in the dorms, arguably, makes the area more sensitive. Conversely, such a mandate, coupled with a firearm ban in the dorms, would require gun owning and possessing students to sacrifice some of their Second Amendment rights during their first year of post-secondary studies. This issue may call for special analysis from the courts.

73. See *supra* note 4.

74. *McDonald*, 130 S. Ct. at 3050.

75. See *supra* note 4.

76. See Appendix A, *infra*.

IV. CURRENT STATE LAWS AND PROPOSITIONS REGARDING GUNS ON CAMPUSES

As discussed above, legislators from several states have proposed legislation that would allow guns on college and university campuses.⁷⁷ Several other states have legislation that bans weapons on campuses.⁷⁸ Analysis of state legislation on this issue can provide insight into some of the potential issues that have not been addressed yet by the courts. In this instance, state firearm regulations might be informative tools for the courts in determining what constitutes a reasonable firearm regulation on public campuses.

A. Florida State Law

Florida has addressed the firearms-on-campus issue in two ways. First, Florida explicitly prohibits possession of firearms on college and university campuses.⁷⁹ Florida's statute clearly defines the term "schools" to include colleges and universities throughout the state.⁸⁰ Further, it is significant that Florida includes private and public colleges and universities within its definition. The statute also makes some exceptions according to which individuals may possess firearms within a school area. Generally, the statute does not allow firearms within 1000 feet of a school or school event. The statute excepts individuals who live within 1000 feet of a school and those who visit such residences.⁸¹ Also, the statute excepts possession of firearms in vehicles. Part 2(a)(3) of the statute reads: "[however, a person

77. *Id.*

78. *Id.*

79. FL. STAT. ANN. § 790.115 (West 2011). The law reads:

(2)(a) A person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in § 790.001(13), including a razor blade or box cutter, except as authorized in support of school-sanctioned activities, at a school-sponsored event or on the property of any school, school bus, or school bus stop; however, a person may carry a firearm:

1. In a case to a firearms program, class or function which has been approved in advance by the principal or chief administrative officer of the school as a program or class to which firearms could be carried;
2. In a case to a career center having a firearms training range; or
3. In a vehicle pursuant to § 790.25(5); except that school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges.

For the purposes of this section, "school" means any preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic).

80. *Id.*

81. *Id.* at § 790.25(5).

may possess a firearm:] In a vehicle pursuant to § 790.25(5)⁸²; except that school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges.”⁸³ The vehicle exception seemingly allows individuals picking people up or temporarily being on campus to legally possess a firearm in their vehicle.

Exceptions to firearm bans on campuses are significant because they permit two opposing conclusions. First, if there are valid exceptions, then, as a logical matter, an *absolute* ban does not exist. Such a concession creates opportunities for additional arguments in favor of gun possession on campuses. Reasoning and justification for one exception may easily apply to another proposed exception. Additionally, as time passes with the exceptions in place, and no negative consequences ensue, then justifications for gun regulations on campuses based on danger and violence may weaken. Second, exceptions to outright gun bans allow for individuals to exercise their Second Amendment rights when there is not a significant countervailing interest. This limits the restriction on the right. The less the gun regulation interferes with fundamental individual rights under the Second Amendment, the more likely a court is to accept the regulation as valid.

The second way Florida has addressed firearms on college and university campuses is through its concealed weapon legislation. The relevant statute provides that possession of a concealed weapon permit will not allow its possessor to carry weapons onto campuses.⁸⁴ Florida makes

82. *Id.* The law goes on to state, in relevant part:

Possession in private conveyance: Notwithstanding subsection (2), it is lawful and is not a violation of §790.01 for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in §776.012.

This would allow individuals to keep their firearm in their vehicle while travelling throughout the otherwise restricted school zones. It is important to note that although an exception, this is quite limited in application. Individuals cannot have the firearm on their person, and it must not be immediately accessible.

83. *Id.* at § 790.115.

84. FL. STAT. ANN. § 790.06 (West 2011). Concealed weapon permits allow individuals to carry firearms in such a manner that individuals around them are not aware that the individual is carrying the firearm. They also operate as a tool to

an exception for students to carry weapons, *other than firearms*, openly or concealed, for self defense. In part 12(a)(13) of Section 790.06, Florida prohibits carrying a concealed weapon or firearm in “[a]ny college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile.”⁸⁵ Florida recognizes students’ and faculty’s rights to defend themselves, but still maintains a regulation on firearms. While firearms are not the only feasible form of self-defense, the Supreme Court has recognized Second Amendment rights are fundamental, specifically with respect to self-defense.⁸⁶ It may not be enough that Florida has allowed for another form of self-defense on campus. Also, Florida’s recognition of the right to self-defense may weaken its argument against allowing individuals to carry firearms on college and university campuses.

B. North Carolina Law

In 2011, North Carolina amended its statute to create an absolute ban of any kind of firearm on any educational property or at any school-sponsored extracurricular activity.⁸⁷ The concealed weapon law expands this ban by explicitly stating that a concealed weapon permit does not allow the permit holder to carry a firearm in the areas in which firearms are banned by Section 14-269.2, including educational property.⁸⁸ Educational property is defined by the statute to include any property owned or operated by any school.⁸⁹ School is then defined to include “[a] public or private school, community college, college, or university.”⁹⁰ Although North Carolina,

allow certain individuals to carry firearms in places where firearm possession is otherwise prohibited. Many concealed weapon permit statutes specify areas, like college and university property, where the permit will not allow individuals to avoid regulations restricting firearm possession.

85. *Id.*

86. *McDonald*, 130 S. Ct. at 3036.

87. N.C. GEN. STAT. ANN. § 14-269.2 (West 2011), which reads:

It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school. Unless the conduct is covered under some other provision of law providing greater punishment, any person who willfully discharges a firearm of any kind on educational property is guilty of a Class F felony. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

88. N.C. GEN. STAT. ANN. § 14-415.11 (West 2011) (law originally passed in 1995, but most recently amended in 2011).

89. N.C. GEN. STAT. ANN. § 14-269.2 (West 2011).

90. *Id.*

through various statutes, recognizes an individual right to use a firearm for self defense,⁹¹ that right is completely denied in colleges and universities. North Carolina's statutes are good examples of general gun regulations that completely ban firearms on campuses.

Due to its strong gun bans, North Carolina has seen proposed legislation to soften the ban. The proposed legislation, had it passed, would have allowed for concealed weapon permit holders to keep their firearm in their vehicle while on educational property.⁹² As the law stands, it reduces the penalty for firearm possession on campus from a felony to a misdemeanor for any non-student carrying a firearm on campus or for any individual, student or non-student, to have a firearm in his or her vehicle on educational property.⁹³

The North Carolina statutes, and any statutes that are similar to them, may face the biggest Second Amendment challenges. The broad definitions of "school" and "educational property" used in these statutes make the gun regulation more far-reaching and affect more individuals than narrower alternatives would. An absolute ban is an absolute prohibition on fundamental Second Amendment rights. Such a prohibition raises the question: Does North Carolina have a strong enough interest to justify such a burden on a constitutional right? Such a sweeping ban with far reaching effects is probably not justified.

C. Wisconsin Concealed Weapon Law

Wisconsin's statute controlling the possession of weapons on various types of property, passed in 2011, is unique among state gun regimes. The statute creates a presumption that individuals may carry their firearms, unless otherwise restricted by property owners.⁹⁴ The statute creates an affirmative duty for any individual business or institution to post an

91. *See* N.C. GEN. STAT. ANN. §§ 14-51.2–51.3 (West 2011).

92. N.C. House Bill No. 650 (West 2011).

93. N.C. GEN. STAT. ANN. § 14-269.2 (West 2011).

94. *See* WISC. STAT. ANN. § 943.13(1m)(c)(5) (West 2011), which reads:

Whoever does any of the following is subject to a Class B forfeiture:
Enters or remains in any privately or publicly owned building on the grounds of a university or college, if the university or college has notified the actor not to enter or remain in the building while carrying a firearm or with that type of firearm. This subdivision does not apply to a person who leases residential or business premises in the building or, if the firearm is in a vehicle driven or parked in the parking facility, to any part of the building used as a parking facility.

The presumption that individuals can carry firearms is created by the statute through the clauses that show that the individual violates the statute only if he or she continues to carry a firearm onto property on which the owner (private, business, government, or institutional) has authority to prohibit firearms, has prohibited them, and has given proper notice of that prohibition.

approved sign at all building entrances, stating that firearms are prohibited, if they wish to prevent anyone from carrying a firearm in the building.⁹⁵ Colleges and universities, public or private, throughout Wisconsin can post such signs at the entrances of campus buildings to prevent weapons from being carried into the buildings, but the legislation still permits individuals to carry weapons outside the buildings on campus grounds.⁹⁶ The statute specifically states that sections of the law allowing individual property owners to prohibit firearms throughout their property (including property outside of buildings) do not apply to colleges and universities or institutional property.⁹⁷ The statute also explicitly identified several sensitive areas that would not be affected by the new legislation. Colleges and universities were not identified as sensitive areas.⁹⁸ Additionally, the statute establishes the individual right to keep a firearm in one's vehicle, and forbids colleges and universities from interfering with that right.⁹⁹

95. *Id.* at § 943.13(2)(bm)(2)(am), which reads:

For the purposes of sub. (1m)(c)2., 4., and 5., an owner or occupant of a part of a nonresidential building, the state or a local governmental unit, or a university or a college has notified an individual not to enter or remain in a part of the building while carrying a firearm or with a particular type of firearm if the owner, occupant, state, local governmental unit, university, or college has posted a sign that is located in a prominent place near all of the entrances to the part of the building to which the restriction applies and any individual entering the building can be reasonably expected to see the sign.

96. Allie Grasgreen, *Guns Come to Campus*, INSIDE HIGHER ED., Oct. 3, 2011, http://www.insidehighered.com/news/2011/10/03/concealed_carry_in_oregon_wisconsin_and_mississippi_means_changes_for_college_and_university_campuses#ixzzLiQCjzgAZ.

97. WISC. STAT. ANN. § 943.13(1m)(c)(2) (West 2011), which reads:

[Whoever does any of the following is subject to a Class B forfeiture:] While carrying a firearm, enters or remains in any part of a nonresidential building, grounds of a nonresidential building, or land that the actor does not own or occupy after the owner of the building, grounds, or land, if that part of the building, grounds, or land has not been leased to another person, or the occupant of that part of the building, grounds, or land has notified the actor not to enter or remain in that part of the building, grounds, or land while carrying a firearm or with that type of firearm. This subdivision does not apply to a part of a building, grounds, or land occupied by the state or by a local governmental unit, to a privately or publicly owned building on the grounds of a university or college, or to the grounds of or land owned or occupied by a university or college, or, if the firearm is in a vehicle driven or parked in the parking facility, to any part of a building, grounds, or land used as a parking facility.

98. Grasgreen, *supra* note 95.

99. WISC. STAT. ANN. § 943.13(1m)(c)(5) (West 2011).

Wisconsin's right-to-carry presumption exemplifies a split among the states. There are indications that firearm regulations on campuses may be presumed valid in the face of Second Amendment challenges.¹⁰⁰ Within the classroom, this may be true. Classrooms are for learning and fostering open debates among adherents of opposing ideas. Although arguments for the necessity of self-defense even in the classroom still exist,¹⁰¹ colleges and universities as learning institutions may have significant enough interests in safety in the educational setting to limit the exercise of Second Amendment rights within the classroom. Outside of the classroom, on the other hand, colleges and universities may not have as strong of an argument for regulation. Students and individuals may be more likely to experience threats outside the classroom and may need to defend themselves on campus grounds outside of the classroom. The general public, including its threatening members, can pass through campus grounds. Such potential threats demand that individuals be able to exercise their fundamental rights under the Second Amendment. Additionally, the Wisconsin statute distinguishes colleges and universities from the broad definition of "schools" generally.¹⁰² Thus, the statute supports a definitional difference between elementary/secondary schools and colleges and universities, especially with respect to gun regulation.

V. COLORADO AND OREGON COURT CASES

Although limited in number, there are state court cases pertaining to firearm regulations on college and university campuses. These cases demonstrate how the regulations are reviewed, and they identify some issues that arise when they are challenged. Despite the fact that, outside of the state that decided the case, the decisions will only be persuasive authority, understanding the analyses and issues can provide perspective on how courts may address challenges to guns-on-campus regulation in other states.

A. *Oregon Firearms Educational Foundation v. Board of Higher Education*

100. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 295 (2011).

101. See Malcolm, *supra* note 1 at 459. Malcolm presents the argument that society is safer with a legally armed citizenry to defend themselves. This argument can easily be extended to the proposition that a college or university classroom would be safer if students were able to defend themselves through being armed. The counter argument could also be extended that a classroom full of armed people in more likely to erupt in lethal violence than is a classroom in which no one is armed.

102. WISC. STAT. ANN. § 943.13(1m)(c)(2) (West 2011).

After the U.S. Supreme Court decided *Heller* and *McDonald*, the Oregon Court of Appeals considered the rights of gun owners to carry firearms on state college and university campuses, but the case was decided based on the applicable state law and not on constitutional grounds.¹⁰³ Although not decided on the Second Amendment issues that face colleges and universities, it is still informative as to the type of analysis that may appear in future decisions. Additionally, it further identifies some obstacles that colleges and universities may face when trying to implement their own gun regulation policies independent of the state's regulation efforts.

In 2010, the Oregon Firearms Educational Foundation filed suit against the Oregon Board of Higher Education, seeking to invalidate an administrative rule that sanctioned persons for possessing firearms on state college and university property.¹⁰⁴ Under Oregon law, the Foundation brought its challenge to the administrative rule directly to the court of appeals.¹⁰⁵ The Foundation argued both that the rule sanctioning individuals who carry or possess firearms on campus was preempted by existing state law and that the law violated the Second Amendment.¹⁰⁶ The Oregon Court of Appeals found that the administrative rule was preempted by state law, so the court did not address the Second Amendment issue.¹⁰⁷ Additionally, the Oregon Board of Higher Education did not appeal the case, so no court ever analyzed the Second Amendment issue. Despite this, judicial analysis of the case still provides valuable analysis relating to the state statutes.

First, the Oregon Court of Appeals rejected an argument that Oregon's concealed weapon law explicitly allowed permit holders to carry firearms on college and university campuses.¹⁰⁸ The court said that even if a legislature allows individuals to carry weapons, colleges and universities are not necessarily prevented from restricting the carrying of weapons on their property. This suggests that, outside of additional legislation, colleges and universities in states with statutory and decisional regimes similar to Oregon's may have the power to create gun regulations on campus.

Second, the court decided the case on the basis of an Oregon law that granted sole power to regulate firearms to the Legislative Assembly.¹⁰⁹

103. Oregon Firearms Educ. Found. v. Bd. of Higher Educ., 264 P.3d 160, 162 (Or. Ct. App. 2011).

104. *Id.*

105. OR. REV. STAT. ANN. § 183.400 (West 2011).

106. *Oregon Firearms Educ. Found.*, 264 P.3d at 161.

107. *Id.*

108. *Id.* at 162.

109. *Id.* at 162-63. *See also* OR. REV. STAT. ANN. § 166.170 (West 2011), which reads:

(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer,

With sole power to regulate firearms left to the legislature, the Oregon Board of Higher Education could not legitimately make any valid regulation regarding firearms, the court said. Although this does not speak directly to the individual right to carry on campuses, it does present another issue for colleges and universities. Approximately half the states in the U.S. leave many regulatory decisions to their state colleges and universities.¹¹⁰ State and higher education regulatory agencies are now required to navigate not only Second Amendment rights, but state laws as well when creating gun regulations. It may seem that the colleges and universities can create any firearm regulation they like, but they may still run into serious obstacles as more gun regulation challenges are filed and courts have to interpret more statutory schemes. A violation of either state law or the Second Amendment will invalidate the regulation in question. In this case, even if the regulation had satisfied all state laws, it still may have been found invalid under the Second Amendment.

B. Students for Concealed Carry on Campus v. Regents of the University of Colorado

This case originated in a suit brought by Students for Concealed Carry on Campus challenging the University of Colorado's firearm regulations.¹¹¹ The student group claimed that the regulations violated the Colorado Concealed Carry Act (CCA)¹¹² and the right to bear arms in self-defense under the state constitution.¹¹³ The state trial court dismissed the student

ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.

(2) Except as expressly authorized by state statute, no county, city or other municipality corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void.

110. *See supra* note 4. Oregon was one of the states characterized as deferring such regulation decisions to the colleges and universities. *But see Oregon Firearms Educ. Found.*, 264 P.3d 160 (ruled against the university having such power to create gun regulations).

111. *Students for Concealed Carry on Campus v. Regents of the Univ. of Colorado*, WL 1492308 (Colo. App. 2010).

112. COLO. STAT. ANN. §§ 18-12-201 – 18-12-216 (West 2012)

113. COLO. CONST. art. II, § 13, which states:

“The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto

group's claims against the university, and the student group appealed to the Colorado Court of Appeals.¹¹⁴ The Court of Appeals reversed the trial court and found that the student group had legitimate claims under the Colorado Concealed Carry Act, as well as the Colorado Constitution. The Colorado Supreme Court granted *certiorari*.¹¹⁵ On March 5, 2012, the Colorado Supreme Court affirmed the decision of the Court of Appeals on statutory grounds under the Concealed Carry Act and remanded the case.¹¹⁶ Because the Colorado Supreme Court held that the students stated a claim on statutory grounds, it did not consider the constitutional claim. The Court of Appeals analysis under the state constitution was not overturned and still warrants consideration.

Although the Colorado Court of Appeal's decision was made before *McDonald* was decided, the Colorado Court of Appeals provides insightful analysis on the standard of review applicable to firearm regulations. Again, this is distinguished from potential Second Amendment claims, but review of the state constitutional right could provide insight into how gun regulations may be analyzed under the Second Amendment right.

The Colorado Court of Appeals decided that the plaintiffs stated a claim under the state's Concealed Carry Act and, more importantly to this analysis, had a claim against the Regents under the state constitution article II, section 13, which guarantees the right to bear arms in self-defense.¹¹⁷ The firearm regulation at the University of Colorado was a complete ban.¹¹⁸ The complaint alleged that it was "an *unreasonable* regulation of the right to keep and bear arms."¹¹⁹ The Colorado Court of Appeals outlined the standards of review for regulations affecting individual rights claims.

The Colorado Court of Appeals identified rational basis, strict scrutiny, and reasonable exercise of state police power as potential standards of

legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

114. *Id.*

115. *Regents of Univ. of Colorado v. Students for Concealed Carry on Campus*, WL 4159242 (Colo. 2010).

116. *Regents of Univ. of Colorado v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012).

117. *Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, WL 1492308 at *1.

118. *Id.*

119. *Id.* at *11 (emphasis added). The wording of the complaint makes it particularly relevant to Second Amendment analysis. The U.S. Supreme Court, through Justice Alito, made assurances in *McDonald* that "reasonable regulations" would be tolerated within the Second Amendment. State court decisions regarding what constitutes a reasonable and unreasonable firearm regulation should be informative to the courts hearing future cases of this sort.

review for the firearm regulation.¹²⁰ This may be similar to the review options other courts will utilize when analyzing state firearm regulations (including regulations generated by public colleges and universities, because they are state actors). First, the court rejected rational basis as the proper standard of review.¹²¹ This is the most deferential standard identified by the court. The Colorado Court of Appeals explained that when utilizing rational basis review “the court determines whether the government’s chosen means were rationally related to furthering a legitimate governmental purpose.”¹²² Further, this standard does not require that the regulation be the most strongly related option, nor the least restrictive, only that there is a rational argument that the regulation is related to a legitimate governmental purpose. Under this standard of review, the existence of alternative regulation options that are friendlier to would be gun-carriers have no effect on the legitimacy of the regulation.¹²³ Rational basis carries a presumption of validity and is most appropriately used where a fundamental right is not involved.¹²⁴

The Colorado Court of Appeals identified strict scrutiny as the proper standard of review where a fundamental right is implicated in the regulation. Under this standard, such regulations “will be sustained only if they are narrowly tailored to serve a compelling state interest.”¹²⁵ The court added further that the government must show “[the regulation] is narrowly drawn to achieve that interest in the least restrictive manner possible.”¹²⁶ However, the court did not follow strict scrutiny because Colorado had not defined the right to bear arms as fundamental.¹²⁷

The Colorado Court of Appeals, citing state precedent, decided that state firearm regulations should be reviewed under the same standard for analyzing the reasonable exercise of state police power. The court said that a regulation falls under this standard “if it is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare.”¹²⁸ This standard does not create a validity presumption as with

120. *Id.*

121. *Id.* at 8–9, 11.

122. *Id.* at 9 (citing *Western & S. Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648, 668, 671-72 (1981)).

123. *Id.*

124. *Id.* at 8.

125. *Id.* at 9.

126. *Id.* (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000)).

127. This may suggest that other courts reviewing Second Amendment claims may be more likely to utilize strict scrutiny review because the Court has defined the Second Amendment as a fundamental individual right of the people.

128. *Students for Concealed Carry on Campus*, WL 1492308 at *10 (quoting *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994)).

rational basis review.¹²⁹ This standard weighs the significance of the state interest against the regulation's infringement on the right.¹³⁰ If the regulation reasonably relates to a legitimate state interest and does not excessively impinge upon the right in question, then it is valid. The Colorado Court of Appeals concluded that the students stated the kind of claim that, under the Colorado constitution, requires the reviewing court to determine if the rule in question infringed excessively upon the students' firearms rights.

This case may suggest how other courts will address Second Amendment constitutional issues. According to the Colorado court, regulations affecting a fundamental right require strict scrutiny review. Thus, under the Second Amendment, now incorporated, Colorado may have to reanalyze firearm regulations with respect to the fundamental status of Second Amendment rights.

VI. FEDERAL CASES CONCERNING THE RIGHT TO KEEP AND BEAR ARMS

Several circuits of the U.S. Court of Appeals have handed down rulings pertaining to the appropriate standard of review of firearm regulations since the Second Amendment was made applicable to the states in *Heller*, with conflicting outcomes. There are three prevailing standards of review in the lower courts reviewing gun regulation: strict scrutiny, intermediate scrutiny, and substantial burden.¹³¹ The Supreme Court has not set an explicit standard of review for Second Amendment cases, but, in *Heller*, it did explicitly rule out rational basis review.¹³² To determine the proper review for Second Amendment claims, some courts have considered the standard of review for alleged First Amendment violations and analogized those cases to the Second Amendment case before them.¹³³

First Amendment free-speech regulations are reviewed under varying standards depending on the character and degree of the challenged law's burden on the right.¹³⁴ The more burdensome the regulation is on protected speech, the more demanding the standard of review, and the greater the burden is on the government to establish that the regulation is narrowly

129. *Id.*

130. *Id.*

131. *See generally*, United States v. Skoien, 614 F.3d 638 (2010); United States v. Engstrum, 609 F. Supp. 2d 1227 (2009); Nordyke v. King, 644 F.3d 776 (2011).

132. *Heller*, 554 U.S. 570 (2008).

133. *See generally*, Nordyke v. King, 644 F.3d 776 (2011) (only regulations that substantially burden the right to keep and to bear arms should receive heightened scrutiny under the Second Amendment).

134. *See, e.g.*, United States v. Skoien, 587 F.3d 803, 813 (2009), *vacated* United States v. Skoien, 614 F.3d 638 (2010).

tailored and related to a compelling state interest.¹³⁵ Regulations imposing only slight burdens on speech are reviewed more leniently.¹³⁶ Some scholars have argued for this reasoning to be applied to Second Amendment analysis.¹³⁷ Regulations like the D.C. handgun ban from *Heller*, which severely interfere with Second Amendment rights, must be reviewed with strict scrutiny. Some courts have reasoned that if the regulation does not interfere with Second Amendment rights at their core, then such heightened scrutiny is unwarranted, and that intermediate scrutiny would be appropriate.¹³⁸

Another established First Amendment review policy could be adapted to apply to Second Amendment review. Under First Amendment jurisprudence, laws and regulations that are premised on the content of speech require a higher standard of review (strict scrutiny) than regulations that are content-neutral.¹³⁹ This differentiating standard can be applied to firearm regulations that go to the core of Second Amendment rights versus regulations that do not. The core of Second Amendment rights is still a debatable issue, but minimally the core should consist of the right to self-defense in one's home identified by the Supreme Court in *Heller* and *McDonald*. Thus, minimally, regulations that restrict core rights of self-defense in the home would require strict scrutiny review, but regulations that do not may get intermediate scrutiny.

Federal appellate courts have disagreed on the proper standard of review for Second Amendment cases. Reasoning in the cases has centered on key issues from *Heller* and *McDonald*. In *Heller*, the Supreme Court said that the individual right to keep and bear arms is recognized and guaranteed in the Second Amendment. The Supreme Court also acknowledged, in dicta, that, like other rights, the Second Amendment right is not absolute. The Supreme Court gave two key examples of this distinction in the case. The first example explained that at its core the Second Amendment guarantees an individual right to possess a firearm for self defense in the home.¹⁴⁰ It is vital to understand this example for what it really is. This is an example of illustration not limitation. The Supreme Court's base holding in *Heller* is that the Second Amendment recognizes and guarantees the individual right to keep and bear arms for legal purposes—one of which is self-defense in the home. "Legal purposes" is not limited to just self- and home-defense though; that was just the legal purpose within the facts of the case before the Supreme Court. Many courts have mistakenly taken this example as a

135. WISC. STAT. ANN. § 943.13(1m)(c)(5) (West 2011).

136. Malcom, *supra* note 101.

137. *Id.* at 455.

138. *Id.*; *see also Nordyke*, 644 F.3d at 776.

139. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 933 (3d ed. 2006).

140. *Heller*, 554 U.S. at 570.

limit on the holding and based their review of later regulations on this interpretation.¹⁴¹

The second key example given by the Supreme Court pertained to forms of firearm regulations that may not violate the Second Amendment. Some of those potentially valid firearm regulations are restrictions on felons' Second Amendment rights and regulations keeping firearms out of sensitive areas (like government buildings and schools).¹⁴² Some courts have said that, in identifying unproblematic regulations of these sorts, the Court was setting up categorical exceptions to the Second Amendment.¹⁴³ Other courts find it as an indication that intermediate scrutiny is the proper standard of review.¹⁴⁴ Although both interpretations have some merit, the Supreme Court merely acknowledged that, like other rights, Second Amendment rights are not absolute. Some regulations, with the valid setting and scope, will, therefore, be valid.

A. *United States v. Skoien*

This case originated in Madison, Wisconsin, when Steven Skoien was charged with owning and possessing a handgun in his home in violation of 18 U.S.C.A. § 922(g)(9).¹⁴⁵ Skoien was indicted for possessing a firearm

141. See generally *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2009); *United States v. Anderson*, 599 F.3d 348 (5th Cir. 2009); *United States v. Shultz*, 2009 U.S. Dist. LEXIS 234 (N.D. Ind. 2009); *Nordyke v. King*, 644 F.3d 776 (2011).

142. *Heller*, 554 U.S. at 625.

143. See, e.g., *Skoien*, 614 F.3d at 640. The *en banc* 7th Circuit vacated the panel decision and recognized a categorical exception to Second Amendment rights for convicted criminals. *Id.* at 45. The 7th Circuit linked its decision to Supreme Court's dicta in *Heller* referring to potentially valid firearm regulations pertaining to convicted criminals. *Id.* at 639–40; *Heller*, 554 U.S. at 625–26. This exception, although implemented in many state and federal laws, is not as clear cut as the 7th Circuit made it seem. As discussed earlier, the exceptions laid out by the Supreme Court were not clear categories, but more likely examples of potentially valid legislation subjects. A valid subject in and of itself does not make any or all regulations within that subject automatically valid as the 7th Circuit made it in this case. See also *United States v. Anderson*, 599 F.3d 348, 352 (5th Cir. 2009); *United States v. Shultz*, 2009 U.S. Dist. LEXIS 234 at *3 (N.D. Ind. 2009).

144. *Nordyke*, 644 F.3d 776.

145. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 1674 (2011); see also 18 U.S.C. § 922(g)(9) (2006), which provides, in relevant part:

It shall be unlawful for any person—(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

after being previously convicted for misdemeanor domestic violence. Skoien moved to dismiss the charges on Second Amendment grounds, but the U.S. District Court for the Western District of Wisconsin denied the motion.¹⁴⁶ Skoien pled guilty to the charge and then appealed the denial of his motion.¹⁴⁷

Although this case analyzed Second Amendment rights under federal law, the same standards would also be used to analyze state laws after *McDonald* incorporated the Second Amendment. The *Skoien* appeal was heard by the Seventh Circuit,¹⁴⁸ and then was reheard by the Seventh Circuit *en banc*. The *en banc* opinion vacated the earlier decision,¹⁴⁹ and then affirmed the trial court's ruling on different grounds.¹⁵⁰

Although no longer valid precedent, the panel opinion provides a helpful analytical template for analyzing firearm regulation cases and is worth reviewing. The panel decision established intermediate scrutiny as the proper standard of review for Section 922(g)(9) cases. The panel reasoned that rational basis review was plainly rejected in *Heller*, and that strict scrutiny was inappropriate because strict scrutiny "is obviously incompatible with *Heller's* dicta about 'presumptively lawful' firearms laws."¹⁵¹ Although this latter point is debatable, the panel maintained that "[l]aws that restrict the right to bear arms are subject to meaningful review, but unless they severely burden the core Second Amendment right of armed defense, strict scrutiny is unwarranted."¹⁵²

Further, the panel decision is informative in two areas. First, the opinion leaves open strict scrutiny review for certain firearm regulations. The panel recognized that, minimally, the Supreme Court established that firearm regulations limiting self-defense in the home are subject to strict scrutiny.¹⁵³ Since strict scrutiny was utilized to review one application of firearm regulation to Second Amendment rights, other aspects of Second Amendment rights could also be so fundamental as to require strict scrutiny review of regulations restricting them. The Supreme Court identified the right to possess firearms for legal purposes to be both fundamental and antecedent to the adoption of the Second Amendment.¹⁵⁴ With such a

146. *United States v. Skoien*, 587 F.3d 803, 805 (7th Cir. 2009) *reh'g en banc granted, opinion vacated*, 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010) and *on reh'g en banc*, 614 F.3d 638 (7th Cir. 2010).

147. *Id.*

148. *Id.* at 803.

149. *United States v. Skoien*, 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010) (granting rehearing *en banc*, vacating opinion).

150. *Skoien*, 614 F. 3d at 638.

151. *Id.* at 811 (emphasis in original).

152. *Id.* at 812.

153. The review used in *Heller* was strict scrutiny. *See Heller*, 554 U.S. at 570.

154. *Id.* at 591–92.

classification, the Second Amendment's core scope should expand past self-defense in the home.

Second, the panel decision explains the application of intermediate scrutiny to reviewing regulations regarding firearms. Intermediate scrutiny is different from rational basis review.¹⁵⁵ It is much more demanding of the regulations to which it is applied. Intermediate scrutiny carries no presumption of constitutionality.¹⁵⁶ Under intermediate scrutiny, "[t]he government 'bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit' that the test requires."¹⁵⁷ A "reasonable fit" is required between a compelling governmental interest and the regulatory means chosen to serve that end.¹⁵⁸ More specifically, this standard of review requires that the government regulation's scope (i.e., its interference with Second Amendment rights) be properly proportioned to the compelling interest.¹⁵⁹ Although not as demanding as strict scrutiny, intermediate scrutiny does require a meaningful review of the regulation to ensure it does not excessively suppress the right it affects. In addition, the panel opinion acknowledged that intermediate scrutiny is valid only for regulations that do not severely burden core Second Amendment rights.¹⁶⁰

The Seventh Circuit *en banc* vacated the panel's decision in favor of a more categorical exception, relating back to the Supreme Court's dicta in *Heller* and *McDonald* regarding potentially valid firearm regulations that restrict convicts' firearm rights.¹⁶¹ The *en banc* Seventh Circuit panel reasoned that by mentioning such an exception in the *Heller* and *McDonald* opinions, the Supreme Court created clear categories of existing regulations that were *per se* valid. The *en banc* panel further reasoned that the Supreme Court meant to recognize the continuing validity of such categorical exceptions after the Court incorporated the Second Amendment.¹⁶²

B. *United States v. Engstrum*

Not all federal courts have agreed that intermediate scrutiny is the proper standard of review for Second Amendment regulations. In *United States v. Engstrum*,¹⁶³ Rick Engstrum was indicted under 18 U.S.C. §

155. *Skoien*, 587 F.3d, at 814.

156. *Skoien*, 587 F.3d, at 814.

157. *Id.* (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

158. *Id.*

159. *Id.*

160. *Id.* at 814.

161. *Skoien*, 614 F.3d 638.

162. *Id.*

163. 609 F. Supp.2d 1227 (D. Utah 2009).

922(g)(9) for possession of a firearm following a domestic violence conviction.¹⁶⁴ In response to Engstrum’s motion to dismiss the indictment against him, the United States District Court for the District of Utah maintained that strict scrutiny is the proper standard, but that 18 U.S.C. §922(g)(9) is a valid regulation under such review.¹⁶⁵

The District Court found strict scrutiny to be the proper standard based on two rationales. First, “the *Heller* Court described the right to keep and bear arms as a fundamental right that the Second Amendment was intended to protect.”¹⁶⁶ Second, “the *Heller* Court categorized Second Amendment rights with other fundamental rights which are analyzed under strict scrutiny.”¹⁶⁷ Further, the District Court explained that strict scrutiny required that firearm regulations be narrowly tailored to serve a compelling government interest.¹⁶⁸ This requires the government to show that the regulation goal serves a legitimate government interest, and to show that the regulation is the narrowest means available to achieve that end. According to the Utah District Court, Section 922(g)(9) was focused on a compelling government interest—to prevent domestic violence and injury to potential victims—and not allowing individuals convicted of domestic violence to possess firearms was part of the narrowest approach to achieving that interest.¹⁶⁹

C. *Nordyke v. King* (“*Nordyke V*”)

The Ninth Circuit has introduced yet another standard of review for Second Amendment regulation.¹⁷⁰ In *Nordyke V*, a Ninth Circuit panel declared that a “substantial burden” review was proper in the case before it. The case was originally brought prior to the U.S. Supreme Court’s decision in either *Heller* or *McDonald*. Russell Allen Nordyke, a gun show promoter, originally brought suit in the U.S. District Court for the Northern District of California in 1999 challenging a county ordinance prohibiting the possession of firearms on county property in California.¹⁷¹ Initially, Nordyke claimed that the ordinance violated his First Amendment rights

164. *Id.* at 1228.

165. *Id.* at 1229.

166. *Engstrum*, 609 F. Supp. 2d 1227, 1231.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Nordyke v. King*, 644 F. 3d 776, 780 (9th Cir. 2011), *reh’g granted en banc* 664 F. 3d 774 (9th Cir. 2011). The *en banc* panel ruled that the panel decision shall not represent any precedent and should not be cited by any court in the Ninth Circuit. Although the holding may ultimately be overturned, the panel decision does present another viewpoint and possible interpretation and review. As such, it is worth discussing.

171. *Nordyke*, 644 F. 3d at 780.

and was preempted by state law. Nordyke sought a preliminary injunction to prevent enforcement of the ordinance, but the District Court denied it. Then he filed an interlocutory appeal to the Ninth Circuit. The Ninth Circuit certified to the California Supreme Court the question whether the ordinance was preempted by state law, and the California Supreme Court replied that state law did not preempt the ordinance.¹⁷² The Court of Appeals then rejected the argument that the ordinance burdened the expressive nature of gun possession and added that a Second Amendment challenge would be precluded by Ninth Circuit precedent.¹⁷³ The case was then remanded to allow Nordyke to amend his pleading. Nordyke amended his pleading, but his Second Amendment claim was not allowed by the District Court, and the District Court granted summary judgment on his other claims.¹⁷⁴

Nordyke then appealed the summary judgment and denial of his Second Amendment claim. Before the Ninth Circuit ruled on the appeal, the Supreme Court decided *Heller*. After further briefing to consider the ramification of *Heller*, the Ninth Circuit panel held: “(1) the individual right to keep and to bear arms recognized in *Heller* is incorporated against state and local governments through the Due Process Clause of the Fourteenth Amendment; but (2) the Ordinance constituted a permissible regulation of firearms under the Second Amendment.”¹⁷⁵ In that decision, the panel did not adopt a standard of review for firearm regulations. That case was then reheard *en banc*, but before the *en banc* court could render a decision the Supreme Court decided *McDonald*. The case was then remanded to a Ninth Circuit panel to decide the case in light of the *McDonald* decision.¹⁷⁶ The Ninth Circuit panel then adopted the substantial burden standard of review for firearm regulations, and concluded that, under the facts of this case, a higher standard of review was not necessary for the Second Amendment claim.¹⁷⁷ The Ninth Circuit then decided to vacate the panel decision and rehear the case again *en banc*.

Despite being vacated, the Ninth Circuit panel decision still provides good insight into the arguments and rationale for a different standard of review. The substantial burden standard is seemingly more deferential than intermediate scrutiny. A substantial burden review requires that only firearm regulations that “substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment.”¹⁷⁸ As a preliminary consideration, the court should determine if the regulation

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 782.

176. *Nordyke*, 644 F. 3d at 776.

177. *Id.*

178. *Id.* at 786.

itself creates a substantial burden on the right it regulates. This includes considerations of the scope and effect of the regulation. The court should ask whether the regulation allows sufficient alternative means to exercise the right.¹⁷⁹ If the regulation does not excessively inhibit the ability to exercise the right, then it does not invite heightened scrutiny. For example, in this case, the Ninth Circuit panel decided that a state regulation banning gun possession on county property did not create a substantial burden on gun show operators trying to sell firearms at the county fair. The panel reasoned that since the gun show operators could sell their firearms through other means and at other locations, the restriction did not excessively interfere with their Second Amendment rights.¹⁸⁰ The Ninth Circuit *en banc* panel has not delivered its decision in this case as of publication of this note.

VII. LIKELY REVIEW OF STATE LAWS AND COLLEGE AND UNIVERSITY RESTRICTIONS

There are varying opinions as to the proper standard of review of alleged Second Amendment violations, but most courts agree that different standards are required for different regulations. State laws have changed since the rulings in *Heller* and *McDonald*. More states are allowing more widespread firearm possession, and more challenges to gun regulation are being filed.¹⁸¹ These factors may influence future judicial decisions on college and university firearm regulations. One point is clear, the Supreme Court ruled out rational basis review in *Heller*.¹⁸² In the same case, the Supreme Court also mentioned in dicta that there would be certain, reasonable, valid regulations.

Although the Supreme Court recognized that there would be some valid regulations, the case before it did not present an opportunity for the Court to discuss what regulations would be valid and why. Today, throughout the states, there are many firearm regulations that affect colleges and universities directly and indirectly.¹⁸³ The spectrum runs from absolute firearm bans¹⁸⁴ on college and university campuses, to regulations that

179. *Id.*

180. *Id.*

181. WISC. STAT. ANN. § 943.13(2)(bm)(2)(am) (West 2011) (Wisconsin allows individuals to possess firearms in common grounds outside of buildings and allows individuals to keep firearms in their vehicles); FL. STAT. ANN. § 790.06 (West 2011) (under the concealed weapon permit statute, Florida allows individuals to possess firearms except in fifteen stated locations and individuals can keep their firearms in their vehicles). *See also* Malcolm, *supra* note 1, at 457.

182. *See Heller*, 554 U.S. at 634–35.

183. States have taken different approaches to firearm regulations. *See supra* note 1.

184. *See supra* Part IV.

allow firearms only in certain areas,¹⁸⁵ to regulations that allow firearms to be carried on campuses.¹⁸⁶ Obviously, absolute firearm bans on campuses interfere with individual Second Amendment rights the most. Although, under absolute bans, individuals can carry firearms off campus grounds, many students and faculty spend a majority of their time in any given day on campus. Thus, their Second Amendment rights are severely restricted by absolute bans. Absolute firearm bans impose the greatest restrictions on the greatest number of people. They may reach everyone affiliated with the college or university, as well as other members of the surrounding community. Other regulations do not have so broad an effect. Regulations of that sort do interfere with individual firearm rights, but limited interference, depending on the reason for the interference, may survive proper scrutiny.

A. Strict Scrutiny

The Supreme Court, in *Heller* and *McDonald*, established that the right to possess firearms for legal purposes under the Second Amendment was a fundamental individual right of the people.¹⁸⁷ Further, the Court said the Second Amendment merely codified a recognized pre-existing right.¹⁸⁸ When a right is considered fundamental, as this right is, courts generally review regulations and restrictions to the right under heightened scrutiny.¹⁸⁹ Strict scrutiny is the highest level of scrutiny, requiring the government to show that the regulation is related to a compelling government interest and is the least restrictive means to accomplish that interest.¹⁹⁰

The government faces an uphill battle if firearm regulations are reviewed under strict scrutiny, but some regulations should be reviewed under it. Many colleges and universities (whether through college or university regulations or state regulations) have absolute bans of firearms on campus.¹⁹¹ No firearms are allowed on campus at any time.¹⁹² These

185. *Id.*

186. See WISC. STAT. ANN. § 943.13(2) (West 2011); FL. STAT. ANN. § 790.06 (West 2011); N.C. GEN. STAT. ANN. § 14-269.2 (West 2011). See *supra* Part IV (the assumption that the right to carry firearms on college and university campuses is or can be reasonably limited to concealed weapon permit holders).

187. *McDonald*, 130 S. Ct. 3020, 3041 (2010).

188. See *Skoien*, 587 F.3d at 813.

189. See, e.g., *Engstrum*, 609 F. Supp. 2d at 1228.

190. *Id.* at 1231.

191. See, e.g., FL. STAT. ANN. § 790.115 (West 2011); N.C. GEN. STAT. ANN. § 14-269.2 (West 2011).

192. A typical exception to this absolute ban would be for police forces or specific individuals with special permission to carry firearms on campus. Generally, such exceptions are only for security forces. Other exceptions might exist for drill demonstrations by student organization. Firearms used for drill

types of regulations should face strict scrutiny for several reasons. First, an absolute ban of firearms on college and university campuses severely interferes with fundamental firearm rights for students, faculty, and staff. The interference is still broader considering that a vast majority of the individuals on college and university campuses have reached the age of majority, many students live on campus, and campus parameters are not clear to the general public. Such far reaching restrictions require the most demanding sort of judicial scrutiny.¹⁹³

The absolute ban of firearm possession in college and university dormitories warrants further analysis. Although different from other home dwellings, dormitories are the day-to-day residences for many students in many colleges and universities. Some students are required to live in the dorms for at least their first year of college.¹⁹⁴ In *Heller*, the Supreme Court established that the Second Amendment includes a fundamental right to possess firearms for legal purposes. Chief among legal purposes to possess firearms is self-defense in the home.¹⁹⁵ The D.C. ban on handguns was a per se invalid regulation of firearms and required high scrutiny because it severely interfered with this fundamental legal purpose.¹⁹⁶ The same argument can be made for gun bans in dormitories. Students who live on campus, especially those required to live on campus, maintain the right to possess firearms for self-defense in their home. An absolute weapon ban prohibits students from exercising that right, and should be reviewed with the highest of scrutiny.

B. Intermediate Scrutiny

Absolute firearm bans should face strict scrutiny, but not all regulations reach the level of complete prohibition. Lesser regulations may not require such a critical review. Intermediate scrutiny, similar to strict scrutiny, does not presume that the regulation is valid. The government still carries the burden to show that there is an important interest and the regulation reasonably fits as a means to accomplish that interest.¹⁹⁷ A reasonably fitting regulation does not have to be the most narrowly tailored means to accomplish the government's end, but the government must show that the regulation does not excessively restrict the right it implicates.¹⁹⁸ There must be proportionality between the means used to achieve the compelling

demonstrations are usually permanently incapacitated, meaning they have been rendered incapable of discharging ammunition.

193. See *Skoien*, 587 F.3d at 813.

194. *Supra* note 68.

195. *Id.*

196. See *Heller*, 554 U.S. 570.

197. See *Craig v. Boren*, 429 U.S. 180, 197 (1976); *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Skoien*, 587 F.3d at 813.

198. *Skoien*, 587 F. 3d at 813.

interest and the restriction on the protected right. Here, validity of the regulation depends on the important interest, on the level of interference with the right, and on how reasonably the regulation satisfies the interest.

Analyzing the application of intermediate scrutiny with respect to current state statutes may further clarify. The Florida and Wisconsin state laws discussed earlier do not rise to the level of complete firearm bans.¹⁹⁹ Although Florida's statute is more strict, it allows for another means of personal self-defense on campus and provides an exception for firearms stored in vehicles.²⁰⁰ This allowance might be enough to move review of the statute from strict to intermediate scrutiny. Wisconsin's statute looks less like a complete ban because it mandates that individuals can keep firearms in their vehicles and can carry firearms on the common grounds (outside of buildings) of college and university campuses.²⁰¹

Florida's statute effectively removes firearms from colleges and university campuses, with minimal exception for firearms kept in vehicles (further restricted to individuals not affiliated with the college or university if the college or university exercises its right under the statute to ban its students, teachers, and faculty from storing firearms in their vehicles on campus), but attempts to mitigate the effects of the regulation by allowing students to carry non-lethal weapons.²⁰² The statute is in place to ensure safety for students and create a comfortable and peaceful educational setting. These are important interests. Safety is always a concern. Creating a sound educational setting where students can share and learn openly is also a compelling interest for colleges and universities (and thus the state).²⁰³ In light of these interests, the fundamental rights of the Second Amendment are restricted.

Students, especially those living off-campus, may not be severely inhibited by a regulation similar to Florida's.²⁰⁴ It is not unusual for firearms to be restricted in sensitive areas (as held by the Supreme

199. See *supra* Part IV. North Carolina's statutes were also discussed, but they constitute an absolute ban of firearms on campus and would be analyzed under strict scrutiny.

200. See *supra* notes 82, 84 and accompanying text.

201. See *supra* notes 95–96, 99 and accompanying text.

202. See *supra* note 74.

203. See Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235, 249-53(2011).

204. It may be a very separate issue for students who cannot possess or keep their firearms anywhere other than their residency. Banning possession for these students might directly interfere with the Supreme Court's view of the fundamental legal purpose of possessing a firearm—self-defense in the home—and would be likely struck down in court. To avoid these issues, the following paragraph analyzes Florida's ban only as applied to individuals who come and go on or through campuses.

Court).²⁰⁵ The Florida regulation would seemingly achieve the ends of campus safety²⁰⁶ and elimination of disruptions to sound educational settings. The regulation, due to its explicit exceptions, may be a reasonable fit. Although the regulation appears to be a firearm ban, it is still only a restriction on firearms rights. Certain exceptions exist. Homes which are within the school zone but not affiliated with the college or university are exempt from the firearm restrictions in the regulation.²⁰⁷ Additionally, any person visiting such a home is also exempt.²⁰⁸ Also, the law allows for individuals to keep firearms in their vehicles, while either passing through or parking in school areas.²⁰⁹ This alleviates much of the concern for restrictions on the general public. The final exception allows students and staff to carry non-lethal weapons, as alternatives to firearms, for self-defense.²¹⁰ It is unclear whether such an exception would mitigate the restrictive effects of firearm regulations. Although the regulation does provide for another form of self-defense, a court may find it an unsuitable alternative to fundamental Second Amendment rights. A court may also find it unconstitutional for the state, through regulations, to decide for the people how to exercise their right to keep firearms for self-defense.

Wisconsin has legislated in a different direction. The Wisconsin regulations start with the presumption that concealed weapon permit holders can legally carry their firearms on campus.²¹¹ The statute outlines where and how individual institutions, including colleges and universities, can limit the right to carry firearms into buildings. But the statutes maintain the individual's right to keep firearms locked in his or her vehicle and to carry firearms throughout the institution's grounds outside of buildings.²¹² The statutes are concerned with the same compelling interests as are the Florida statutes, but address those concerns in a less restrictive way. It might, therefore, survive intermediate scrutiny. The Wisconsin statute recognizes and respects fundamental Second Amendment rights. Additionally, the regulation does not unduly interfere with the rights of the general public, who may innocently wander onto the outskirts of college and university campuses. Even in buildings, the law creates a presumption of legal firearm possession until the college or university puts a conspicuous sign at the entrance informing individuals that firearms are prohibited inside the building.²¹³

205. *Heller*, 554 U.S. 570, 625–29 (2008).

206. *See* Malcolm, *supra* note 1, at 458.

207. *See supra* note 79.

208. *Id.*

209. *Id.*

210. *Id.*

211. *See* WISC. STAT. ANN. § 943.13(2)(bm)(2)(am) (West 2011).

212. *Id.*

213. *Id.*

Such minor interference with firearm possession, only triggered when it would directly undermine the important interests of safety and comfortable learning in the educational setting, may survive intermediate scrutiny. Of all the regulations discussed, the Wisconsin statute seems to achieve the goals of the important state interests with the least restriction on Second Amendment rights. It may fall within what the Supreme Court acknowledges as a reasonable regulation on firearm possession in sensitive areas.

VIII. CONCLUSION

There is no judicial ruling directly addressing what constitutes a reasonable regulation of firearm possession on college and university campuses. But there are indications of how such a decision would be made. State statutes show a high likelihood that colleges and universities would be included under the definition of “schools.” A majority of states use such a definition.²¹⁴ That does not mean that college and university regulations would not be analyzed differently from K-12 schools, but it is likely that colleges and universities will be considered more sensitive than other public venues. Although college and university campuses may be considered more sensitive than those other venues, firearm regulations pertaining to colleges and universities should still, at the very least, be reasonable. The Second Amendment codifies *fundamental* individual rights. In turn, those rights require the same sort of respect as other fundamental rights. Thus, outright firearm bans on college and university campuses, due to their distant reach, absolute nature, and scope of effect, warrant the highest level of scrutiny. Other regulations, less restrictive in reach and absoluteness, may warrant only intermediate scrutiny with a lower burden on the government to establish their constitutionality.

Dorm rooms, especially those which are inhabited through college and university mandate, may be the largest issue in the future. When the Supreme Court held that firearm possession for legal purposes is a fundamental right of the people, it specifically spoke to self-defense in the home.²¹⁵ Dorms are, at times, the only home that a student has in the state where he or she attends college. They may have no other option for residency, and they may have no other option for a location in which to keep their firearms for self-defense. They face many of the same potential threats as apartment-dwellers generally. Although still owned and operated by the college or university, the dorm is a hybrid—both home and school. According to case law and current Second Amendment jurisprudence, when firearm regulations directly restrict the fundamental right of self-defense in the home, the firearm regulation should fail.

214. See, e.g., N.C. GEN. STAT. ANN. § 14-269.2 (West 2011); FL. STAT. ANN. § 790.115 (West 2011).

215. See *Heller*, 554 U.S. 570.

Many states are changing their stance on firearm possession on campuses, and the courts may follow suit. Colleges and universities that regulate possession of concealed weapons on campus face challenges from state law preemption,²¹⁶ state constitutions,²¹⁷ and the incorporated status of the Second Amendment. Regulations should specifically target the important government interests, but still allow citizens generally to exercise their individual right to possess firearms for legal purposes. Overbearing firearm regulations and restrictions will likely fail, even under intermediate scrutiny. Colleges and universities have to be aware of such scrutiny, and recognize the scope and effect of firearm regulations on campuses.

APPENDIX A: MORE STATE STATUTORY SCHEMES

More State Statutory Schemes that Completely Ban Firearms on Campuses

• Arkansas:

ARK. CODE ANN. § 5-73-119 (West 2012):

(c)(1) No person in this state shall possess a handgun upon the property of any private institution of higher education or a publicly supported institution of higher education in this state on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ the handgun as a weapon against a person.

ARK. CODE ANN. § 5-73-306 (West):

No license to carry a concealed handgun issued pursuant to this subchapter authorizes any person to carry a concealed handgun into:

(14) Any school, college, community college, or university campus building or event, unless for the purpose of participating in an authorized firearms-related activity

• Massachusetts:

MASS. GEN. LAWS ANN. ch. 269, § 10 (West)

Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

(j) Whoever, not being a law enforcement officer, and notwithstanding any license obtained by him under the

216. See *Oregon Firearms Educ. Found. v. Bd. of Higher Educ.*, 264 P.3d 160 (Or. Ct. App. 2011).

217. See *Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, WL 1492308 (Colo. App. 2010).

provisions of chapter one hundred and forty, carries on his person a firearm as hereinafter defined, loaded or unloaded or other dangerous weapon in any building or on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of such elementary or secondary school, college or university shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. For the purpose of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged by whatever means.

• **New Jersey:**

N.J. STAT. ANN. § 2C:39-5 (West)

Unlawful possession of weapons

e. Firearms or other weapons in educational institutions.

(1) Any person who knowingly has in his possession any firearm in or upon any part of the buildings or grounds of any school, college, university or other educational institution, without the written authorization of the governing officer of the institution, is guilty of a crime of the third degree, irrespective of whether he possesses a valid permit to carry the firearm or a valid firearms purchaser identification card.

• **New Mexico:**

N.M. STAT. ANN. § 30-7-2.4 (West 2012):

A. Unlawful carrying of a firearm on university premises consists of carrying a firearm on university premises except by:

- (1) a peace officer;
- (2) university security personnel;
- (3) a student, instructor or other university-authorized personnel who are engaged in army, navy, marine corps or air force reserve officer training corps programs or a state-authorized hunter safety training program;
- (4) a person conducting or participating in a university-approved program, class or other activity involving the carrying of a firearm; or
- (5) a person older than nineteen years of age on university premises in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property.

B. A university shall conspicuously post notices on university premises that state that it is unlawful to carry a firearm on university premises.

C. As used in this section:

(1) “university” means a baccalaureate degree-granting post-secondary educational institution, a community college, a branch community college, a technical-vocational institute and an area vocational school; and

(2) “university premises” means:

(a) the buildings and grounds of a university, including playing fields and parking areas of a university, in or on which university or university-related activities are conducted; or

(b) any other public buildings or grounds, including playing fields and parking areas that are not university property, in or on which university-related and sanctioned activities are performed.

D. Whoever commits unlawful carrying of a firearm on university premises is guilty of a petty misdemeanor.

N.M. STAT. ANN. § 29-19-8 (West 2012):

B. Nothing in the Concealed Handgun Carry Act shall be construed as allowing a licensee in possession of a valid concealed handgun license to carry a concealed handgun on school premises, as provided in Section 30-7-2.1 NMSA 1978.

• **Oklahoma:**

OKLA. STAT. ANN. tit. 21, § 1277 (West)

Unlawful carry in certain places

D. No person in possession of a valid concealed handgun license issued pursuant to the provisions of the Oklahoma Self-Defense Act shall be authorized to carry the handgun into or upon any college, university, or technology center school property, except as provided in this subsection. For purposes of this subsection, the following property shall not be construed as prohibited for persons having a valid concealed handgun license:

1. Any property set aside for the use or parking of any vehicle, whether attended or unattended, provided the handgun is carried or stored as required by law and the handgun is not removed from the vehicle without the prior consent of the college or university president or technology center school administrator while the vehicle is on any college, university, or technology center school property;

2. Any property authorized for possession or use of handguns by college, university, or technology center school policy; and

3. Any property authorized by the written consent of the college or university president or technology center school administrator, provided the written consent is carried with the handgun and the valid concealed handgun license while on college, university, or technology center school property

State Statutory Schemes that are Similar to the Florida Statute

- **Georgia:**

GA. CODE ANN. § 16-11-127.1 (West)

Weapons on school safety zones, school buildings or grounds or at school functions

(a) As used in this Code section, the term:

(1) “School safety zone” means in or on any real property owned by or leased to any public or private elementary school, secondary school, or school board and used for elementary or secondary education and in or on the campus of any public or private technical school, vocational school, college, university, or institution of postsecondary education.

(b)(1) Except as otherwise provided in subsection (c) of this Code section, 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 or on a bus or other transportation furnished by the school any weapon or explosive compound . . . :

(c) The provisions of this Code section shall not apply to:

(7) A person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10, when such person carries or picks up a student at a school building, school function, or school property or on a bus or other transportation furnished by the school or a person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10 when he or she has any weapon legally kept within a vehicle when such vehicle is parked at such school property or is in transit through a designated school zone;

(8) A weapon possessed by a license holder which is under the possessor's control in a motor vehicle or which is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle which is being used by an adult over 21 years of age to bring to or pick up a student at a school building, school function, or school property or on a bus or other transportation furnished by the school, or when such vehicle is used to transport someone to an activity being conducted on school property which has been authorized by a duly authorized official of the school; provided, however, that this exception shall not apply to a student attending such school

- **Tennessee:**

TENN. CODE ANN. § 39-17-1309 (West 2012)

Carrying or possession of weapons; school buildings and grounds

(b)(1) It is an offense for any person to possess or carry, whether openly or concealed, with the intent to go armed, any firearm, explosive, explosive weapon, bowie knife, hawk bill knife, ice pick, dagger, slingshot, leaded cane, switchblade knife, blackjack, knuckles or any other weapon of like kind, not used solely for instructional or school-sanctioned ceremonial purposes, 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.

(c)(1) It is an offense for any person to possess or carry, whether openly or concealed, any firearm, not used solely for instructional or school-sanctioned ceremonial purposes, 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. It is not an offense under this subsection (c) for a nonstudent adult to possess a firearm, if the firearm is contained within a private vehicle operated by the adult and is not handled by the adult, or by any other person acting with the expressed or implied consent of the adult, while the vehicle is on school property.

State Statutory Schemes that Allow Weapon Possession on Campuses

- **Mississippi:**

MISS. CODE ANN. § 97-37-7(2) (West 2012)

Permits for certain employees; fees; fingerprint checks; renewal; reciprocal agreements for out-of-state law enforcement officers

A person licensed under Section 45-9-101 to carry a concealed pistol, who has voluntarily completed an instructional course in the safe handling and use of firearms offered by an instructor certified by a nationally recognized organization that customarily

offers firearms training, or by any other organization approved by the Department of Public Safety, shall also be authorized to carry weapons in courthouses except in courtrooms during a judicial proceeding, and any location listed in subsection (13) of Section 45-9-101, except any place of nuisance as defined in Section 95-3-1, any police, sheriff or highway patrol station or any detention facility, prison or jail. The department shall promulgate rules and regulations allowing concealed pistol permit holders to obtain an endorsement on their permit indicating that they have completed the aforementioned course and have the authority to carry in these locations. This section shall in no way interfere with the right of a trial judge to restrict the carrying of firearms in the courtroom.

MISS. CODE. ANN. § 45-9-101(13) (West 2012):

. . . any junior college, community college, college or university facility unless for the purpose of participating in any authorized firearms-related activity . . .

• **Louisiana:**

14 LA. REV. STAT. ANN. § 95.2 (West 2012)

Carrying a firearm or dangerous weapon by a student or nonstudent on school property, at school-sponsored functions or firearm-free zone

A. Carrying a firearm, or dangerous weapon as defined in R.S. 14:2, by a student or nonstudent on school property, at a school sponsored function, or in a firearm-free zone is unlawful and shall be defined as possession of any firearm or dangerous weapon, on one's person, at any time while on a school campus, on school transportation, or at any school sponsored function in a specific designated area including but not limited to athletic competitions, dances, parties, or any extracurricular activities, or within one thousand feet of any school campus.

C. The provisions of this Section shall not apply to:

- (1) A federal, state, or local law enforcement officer in the performance of his official duties.
- (2) A school official or employee acting during the normal course of his employment or a student acting under the direction of such school official or employee.
- (3) Any person having the written permission of the principal.
- (4) The possession of a firearm occurring within one thousand feet of school property and entirely on private property, or entirely within a private residence, or in accordance with a concealed handgun permit issued pursuant to R.S. 40:1379.1 or R.S. 40:1379.3.

- (5) Any constitutionally protected activity which cannot be regulated by the state, such as a firearm contained entirely within a motor vehicle.
- (6) Any student carrying a firearm to or from a class, in which he is duly enrolled, that requires the use of the firearm in the class.
- (7) A student enrolled or participating in an activity requiring the use of a firearm including but not limited to any ROTC function under the authorization of a university.
- (8) A student who possesses a firearm in his dormitory room or while going to or from his vehicle or any other person with permission of the administration.

