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From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones

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The biggest Second Amendment court battle in history is about to begin—one that will have a huge impact on you, your children and every . . . American gun owner for generations to come.[1]

I. INTRODUCTION

On April 17, 2007, twenty-three year-old Seung-Hui Cho shot and killed thirty-two people and himself on the campus of Virginia Polytechnic University ("Virginia Tech") in Blacksburg, Virginia.[2] This massacre—the deadliest school shooting in American history[3]—stunned the nation and reignited the gun control debate.[4] Gun control proponents blamed easy access to guns and called for more regulations,[5] while gun rights proponents equated fewer guns with fewer opportunities for self-defense.[6] This latter group began a campaign to allow guns on college campuses, questioning the constitutionality of such "gun-free zones."[7]

In June 2008, a little over a year after the Virginia Tech tragedy, another historic event occurred. In *District of Columbia v. Heller*, the United States Supreme Court held that the Second Amendment protects an individual right to bear arms.[8] In doing so, the Court struck down a gun control law as a violation of the Second Amendment for the first time in the nation's history.[9]

Taken together, these two events raise questions regarding the future of gun control legislation, specifically, the effects of an individual rights interpretation of the Second Amendment on state and federal legislatures' ability to create gun-free zones on school campuses and elsewhere.[10] Until recently, most of the debate surrounding the Second Amendment has focused on whether it protects an

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1. John Gibeaut, *A Shot at the Second Amendment: If the U.S. Supreme Court Rules on a Right to Bear Arms, the Decision May Be in Spite of the Powerful NRA Gun Lobby—Not Because of It*, A.B.A. J., Nov. 2007, at 50, 50 (quoting NRA lobbyist Wayne LaPierre).

2. John M. Broder, *Massacre in Virginia: 32 Shot Dead in Virginia; Worst U.S. Gun Rampage*, N.Y. TIMES, Apr. 17, 2007, at A1.

3. *Id.*

4. *See, e.g.*, Christopher Lockwood & Dave Kopel, *Is Gun Control Back? Did It Ever Go Away?*, L.A. TIMES, April 23, 2007, *available at* http://www.latimes.com/news/opinion/la-op-dustup23apr23,0,4242688.story (on file with the *McGeorge Law Review*) (debating the state of gun control in the wake of the Virginia Tech shootings).

5. *Id.*

6. *See, e.g.*, ConcealedCampus.com, Students for Concealed Carry on Campus, http://www.concealedcampus.org/about.htm. (last visited July 5, 2008) [hereinafter Students for Concealed Carry] (on file with the *McGeorge Law Review*) ("In the wake of recent school shootings, such as the massacre at Virginia Tech, SCCC [Students for Concealed Carry on Campus] contends it is now abundantly clear that 'gun free zones' serve to disarm only those law-abiding citizens who might be able to mitigate such tragedies.").

7. Kati Whitaker, *Americans Call for Gun Freedom*, BBC NEWS, July 4, 2007, http://news.bbc.co.uk/2/hi/programmes/crossing_continents/6266558.stm (on file with the *McGeorge Law Review*).

8. District of Columbia v. Heller, 128 S. Ct. 2783, 2821-22 (2008); *see also* Adam Liptak, *A Liberal Case for the Individual Right to Own Guns Helps Sway the Federal Judiciary*, N.Y. TIMES, May 7, 2007, at A18 ("Only a few decades ago, the decision would have been unimaginable.").

9. Liptak, *supra* note 8.

10. See *infra* Part V.A for a definition of "gun-free zones" as used in this Comment.

individual right to keep and bear arms independent of state militias or whether it merely protects "a collective right of states to maintain militias free from federal interference."[11] A gap remains in the scholarship and case law regarding the implications of an individual rights interpretation.[12]

Although the Supreme Court and two federal appellate courts have held that the Second Amendment protects an individual right to bear arms,[13] none have articulated a workable standard of review for implementing that right.[14] This Comment proposes an analytical framework for doing so.[15] Courts should apply a deferential reasonableness balancing test to most gun regulations.[16] A complete ban on all guns may be unconstitutional under this standard, but many local bans, in the form of gun-free zones, may withstand constitutional scrutiny by analogy to First Amendment "time, place, and manner" restrictions.[17]

Part II of this Comment gives an overview of the background and arguments on both sides of the individual/collective rights dichotomy. It also briefly discusses the Second Amendment's applicability to the states through the doctrine of incorporation. Given the Court's recent adoption of the individual rights interpretation, Part III analyzes the purpose and nature of that right. Part IV discusses the possible standards of review that may apply under the individual rights interpretation and concludes that a deferential "reasonableness" standard is appropriate. Part V proposes an analytical framework for applying the individual right to bear arms to gun-free zones.

II. BACKGROUND: INTERPRETING THE SECOND AMENDMENT

The Second Amendment provides: "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."[18]

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11. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 684 (2007); *see also* Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1095 n.1 (2000) (outlining a "partial bibliography" of Second Amendment commentary).

12. *See* Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 907-08 (2004) (reviewing DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003)) ("A final area that could use more attention is the plumbing. What exactly will the doctrine look like? What kinds of regulation will be unconstitutional? Which guns? Which people? Which situations? This is lawyerly detail, well below the level of most of the debate thus far, but it is detail that may be important one day.").

13. *See Heller*, 128 S. Ct. at 2821-22; United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001); Parker v. District of Columbia, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

14. *See infra* Part IV.A.

15. *See infra* Part V.

16. *See infra* Part IV-V.

17. *See infra* Part V.B.

18. U.S. CONST. amend. II.

Most of the debate surrounding the Second Amendment has focused on whether it protects an individual right to "keep and bear arms" independent of state militias or whether it merely protects a collective right of the states to maintain militias "free from federal interference."[19] There has also been some debate as to whether the Second Amendment, if found to protect an individual right, would or should be incorporated to apply to the states through the Fourteenth Amendment.[20] A basic overview of the competing arguments is outlined below.[21]

A. *The Individual/Collective Rights Dichotomy*

1. *Textual and Originalism Considerations*

Proponents from both sides of the interpretive debate contest the historical meaning of several words and phrases within the Second Amendment, specifically: "militia,"[22] "keep and bear,"[23] "arms,"[24] "well regulated,"[25] "the people,"[26] and "free state."[27] Even the placement and purpose of the commas has garnered special attention.[28] Most of the debate, however, has focused on the purpose of the Amendment's preamble (or "prefatory clause") as a whole: "A well regulated militia, being necessary to the security of a free state."[29]

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19. Winkler, *supra* note 11, at 684; *see also* Massey, *supra* note 11, at 1095 n.1 (outlining a "partial bibliography" of Second Amendment commentary).

20. *See infra* Part II.B.

21. For an in-depth analysis of the competing arguments, see the majority and dissenting opinions in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

22. Individual rights proponents claim that the term "militia" as used in the eighteenth century, is synonymous with "the body of the people." MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 10-14 (2007); Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 646-47 (1989).

23. *See* TUSHNET, *supra* note 22, at 7-8 (stating that the words "keep" and "bear," when used together, "referred to weapons in connection with military uses" but when used separately "might refer to hunting or other activities").

24. *See* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 317-18 (2000) ("Even if we assume that the individual right interpretation of the Second Amendment best reflects the original understanding, we still must face the question of what 'arms' it protects today.").

25. Some individual rights proponents claim that the term "well-regulated" means "'well-trained and equipped,'" while collective rights proponents claim that it refers to "'government prohibitions and restrictions.'" Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 662 (2002).

26. *Id.* at 661; TUSHNET, *supra* note 22, at 5-7.

27. *See, e.g.*, Eugene Volokh, *"Necessary to the Security of a Free State"*, 83 NOTRE DAME L. REV. 1, 6 (2007) ("[T]he phrase 'a free State' was not understood as having to do with states' rights as such. Rather, it referred to preserving the liberty of the new country that the Constitution was establishing.").

28. *See, e.g.*, Adam Freedman, *Clause and Effect*, N.Y. TIMES, Dec. 16, 2007, at 4.10 (characterizing the Second Amendment debate as a "long-simmering comma war").

29. U.S. CONST. Amend. II.

Individual rights proponents claim that the preamble serves merely as an explanatory phrase, not a restriction on the right to "keep and bear arms."[30] They emphasize instead the latter portion of the Second Amendment[31] ("the right of the people to keep and bear Arms, shall not be infringed") and claim that the prefatory language identifies the goal of the Second Amendment, narrower than the right itself.[32] Under the most expansive version of this view, individuals have a broad right to possess arms not just for service in a state militia but for purposes of self-defense and even hunting and recreational ventures.[33]

Collective rights proponents place greater emphasis on the preamble and claim that it serves as a limitation on the right to "keep and bear arms."[34] According to this view, the Second Amendment simply safeguards federalism by preventing overreaching by the national government.[35] Some collective rights proponents believe that, at most, the Second Amendment protects a *civic* right.[36] Proponents of this view acknowledge that the Second Amendment may protect an individual right to keep and bear arms, but only in connection with one's service in a state militia for the purpose of preventing government tyranny.[37]

The textual and historical arguments on both sides of the individual/ collective rights dichotomy "are in reasonably close balance."[38] "[E]ach side can develop sophisticated arguments as to the meaning of the Constitution's text, supported by apt quotations from relevant framers,"[39] but ultimately, how one interprets the Second Amendment aligns with how one views guns and gun control.[40] Proponents of gun control favor the collective rights interpretation, an interpretation that would permit virtually all gun regulations.[41] Proponents of gun

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30. TUSHNET, *supra* note 22, at 8-10.

31. Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 479 (2004).

32. Brief for United States as Amicus Curiae at 7, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter *United States Amicus Brief*].

33. *See* TUSHNET, *supra* note 22, at 4 (delineating three separate individual rights models; (1) the "pure" individual rights model (2) the "citizen-militia" individual rights model, and (3) the "citizen-related" individual rights model).

34. Chemerinsky, *supra* note 31, at 479; TUSHNET, *supra* note 22, at 8-10; Levinson, *supra* note 22, at 644.

35. Cass R. Sunstein, *The Most Mysterious Right*, NEW REPUBLIC, Nov. 19, 2007, at 42, 42, *available at* http://www.tnr.com/story_print.html?id=e8997807-107b-461f-90d2-51a3ef91b508 (on file with the *McGeorge Law Review*) (reviewing MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS (2007)).

36. Cornell, *supra* note 25, at 679.

37. Sunstein, *supra* note 35, at 42, 44.

38. TUSHNET, *supra* note 22, at xvi (concluding that the collective rights view is stronger when looking beyond purely original understanding and taking into consideration "all other components that go into good legal arguments," specifically tradition and precedent).

39. Chemerinsky, *supra* note 31, at 485.

40. *See* Dorf, *supra* note 24, at 293 ("But under any plausible approach to legal interpretation, an individual interpreter's policy views will have some positive correlation with her interpretive views."); Chemerinsky, *supra* note 31, at 480 ("Discussion rarely, if ever, changes anyone's mind.").

41. *See* Levinson, *supra* note 22, at 644 ("The consequence of [a collective rights] reading is obvious:

rights favor the individual rights interpretation, a view that, depending on the applicable standard of review, may limit particularly restrictive gun regulations.[42] As many scholars have acknowledged, there is "no definitive answer," and intellectual honesty requires acknowledging as much.[43]

Unsurprisingly, the Supreme Court split right down partisan lines; the conservative judges supported the individual rights interpretation, while the more liberal judges supported the collective rights interpretation.[44]

2. *Second Amendment Doctrine*

"[C]ontrary to conventional wisdom, constitutional doctrine typically trumps constitutional text—at least absent arguments of sufficient strength to overcome the principle of stare decisis."[45]

Nearly seventy years have passed since *United States v. Miller*,[46] the Supreme Court's leading decision on the Second Amendment prior to *Heller*.[47] In *Miller*, the Court upheld a federal law banning the possession of sawed-off shotguns.[48] The Court concluded that such firearms were not "arms" within the meaning of the Second Amendment because there was no "evidence tending to show that" their use or possession had "some reasonable relationship to the preservation or efficiency of a well-regulated militia."[49]

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the national government has the power to regulate to the point of prohibition private ownership of guns, since that has, by stipulation, nothing to do with preserving state militias.").

42. *See* Dorf, *supra* note 24, at 345 ("If a court were to find that, notwithstanding the threat to public safety, the Second Amendment protects an individual right to firearm possession, it is highly unlikely that the same court would go on to find a compelling interest that would justify strong gun control measures.").

43. TUSHNET, *supra* note 22, at xv-xvi; *see* Sunstein, *supra* note 35, at 42 ("Honest textualists will have to agree that the Second Amendment is ambiguous, and that it could plausibly be interpreted in different ways."); Levinson, *supra* note 22, at 643-44 ("No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions."). *But see* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 20 (1996) (stating that interpreting the Second Amendment to protect an individual right to bear arms "is simply not a hard or close question"); Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMMENT. 701, 708 (2000) (reviewing STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) ("At least as an intellectual matter, the debate about the states' rights versus individual right interpretations seems now over.").

44. *See* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (Justices Alito, Kennedy, Roberts, and Thomas joined Scalia's majority opinion, while justices Breyer, Ginsburg, Souter, and Stevens dissented.).

45. Dorf, *supra* note 24, at 295.

46. 307 U.S. 174 (1939).

47. *See* Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (stating that the Supreme Court has never decided whether the Second Amendment protects an individual or a collective right and that *Miller* is the Supreme Court's leading Second Amendment case).

48. United States v. Miller, 307 U.S. 174, 178 (1939).

49. *Id.*

Until recently, most courts read *Miller* as supporting the collective rights interpretation.[50] But a shift in the legal academy toward the individual rights interpretation,[51] followed by two controversial Federal Circuit opinions supporting that view,[52] muddied the waters, raising significant questions as to the correct interpretation of the Second Amendment.[53] *Parker v. District of Columbia*[54] (renamed upon appeal to the Supreme Court as *District of Columbia v. Heller*)[55] provided the Supreme Court with the opportunity to settle the contentious interpretive issue.

In *Parker v. District of Columbia*, the D.C. Circuit court struck down a gun control law as a violation of the Second Amendment for the first time in the nation's history.[56] In finding that the Second Amendment protects an individual right, a divided panel held that the District's gun control laws,[57] some of the strictest in the nation, violated the Constitution.[58] Specifically, the court held unconstitutional the District's prohibition on owning handguns,[59] its prohibition on carrying guns in one's home,[60] and its requirement that guns in the home be disassembled or secured with a trigger lock.[61] The court at length discussed the language, punctuation, and history of the Amendment,[62] ultimately concluding that "[d]espite the importance of the Second Amendment's civic purpose [ensuring citizens could keep arms when called for militia duty] . . . the activities it protects are not limited to militia service, nor is an individual's enjoyment of

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50. *See, e.g.*, Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996) ("Consulting the text and history of the amendment, the Court [in *Miller*] found that the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia."); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than an individual, right. . . . The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'").

51. Increasingly, influential legal scholars have critiqued the collective rights theory and believe that the purpose of the Second Amendment is to protect an individual's right to possess arms for self-defense and not just for service in a state militia. Winkler, *supra* note 11, at 684; Liptak, *supra* note 8.

52. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001); *Parker*, 478 F.3d 370.

53. *See generally* Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (showing that both the majority and dissent cited *Miller* to support their propositions).

54. *Id.*

55. Because the D.C. Circuit Court in *Parker* found that the lead plaintiff, Shelly Parker, lacked standing, the case name changed to *District of Columbia v. Heller* upon appeal to the Supreme Court. *Parker*, 478 F.3d at 374-76.

56. Liptak, *supra* note 8.

57. The terms "gun-control" and "regulation" are used in this Comment to refer to laws affecting guns, gun ownership, or gun use short of complete bans.

58. *Parker*, 478 F.3d at 395.

59. *Id.* at 373; *see also* D.C. CODE § 7-2502.02(a)(4) (2001) (stating an exception for retired D.C. police officers).

60. D.C. CODE § 22-4504 (2001); *Parker*, 478 F.3d at 373.

61. D.C. CODE § 7-2507.02 (2001); *Parker*, 478 F.3d at 373.

62. *Parker*, 478 F.3d at 378-91.

the right contingent upon his or her continued or intermittent enrollment in the militia."[63]

The Supreme Court granted certiorari, heard oral argument in March 2008, and published its opinion in the summer of 2008.[64] The Court could have avoided the complex interpretive questions altogether by deciding the case on narrow grounds.[65] Several questions regarding the plaintiff's standing[66] and whether the Second Amendment even applies to the District of Columbia remained.[67] The Court also could have held that the District's laws were constitutional under either an individual rights or collective rights interpretation,[68] thus evading the ultimate question as to what the Second Amendment means. Although the Supreme Court did ultimately address the difficult interpretive issue, it left many questions unanswered. Notably, it did not decide whether the Second Amendment applies to state action.[69]

B. Incorporation

Although the specific protections in the Bill of Rights are limitations on the federal government alone, most have been incorporated through the Due Process Clause of the Fourteenth Amendment to restrict state action as well.[70] The Second Amendment remains one of the few provisions in the Bill of Rights that has yet to be incorporated,[71] largely because, until recently, it had never been held to protect an individual right.[72]

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63. *Id.* at 395.

64. Posting of Lyle Denniston to SCOTUSblog, http://scotusblog.com/wp/uncategorized/commentary-the-government-and-gun-rights/#more-6184 (Nov. 21, 2007, 10:37 EST) [hereinafter Denniston Posting] on file with the *McGeorge Law Review*). The Court phrased the issue as follows: "Whether the following provisions—secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?" *Id.*

65. *See* Matthew Barakat, *D.C.: Second Amendment Does Not Apply Here*, FOX NEWS, Jan. 4, 2008, http://www.foxnews.com/wires/2008Jan04/0,4670,GunBanAttorney,00.html (on file with the *McGeorge Law Review*) (noting that the court could have based its decision on the "peculiar status of the District of Columbia as a federal enclave" and thus not have a "direct impact on the national gun-control issue").

66. Denniston Posting, *supra* note 64; *see also Parker*, 478 F.3d at 402 n.2 (Henderson, J., dissenting) (stating that the plaintiff only had standing to challenge one of the District's laws).

67. *See Parker*, 478 F.3d at 402 (Henderson, J., dissenting) (arguing that the District of Columbia is not a state within the meaning of the Second Amendment).

68. Chemerinsky, *supra* note 31, at 484-85.

69. *See* Heller v. District of Columbia, 128 S. Ct. 2783, 2813 n.23 (2008).

70. *Parker*, 478 F.3d at 391 n.13.

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

72. *See* Brief for Major American Cities et al. as Amicus Curiae Supporting Petitioners, at 13-14, District of Columbia v. Heller, No. 07-290 (Jan. 2008) ("The Second Amendment cannot properly be applied against the States and their subdivisions because the Amendment was intended to prevent an undue concentration of power in the federal government relative to the States. To apply it to limit state authority would be inconsistent with its purpose.").

In *United States v. Cruikshank*[73] and *Presser v. Illinois*,[74] the Supreme Court expressly held that the Second Amendment does not apply to the states.[75] However, these cases were decided in the pre-incorporation era, a time when courts viewed the protections of Bill of Rights as constraints on the federal government alone.[76] Some commentators believe that "there would be no analytical difficulty" in applying the Second Amendment's individual right to the states along with most other provisions in the Bill of Rights.[77] Although the incorporation issue was not before the Supreme Court in *Heller*, it almost certainly will be in the near future.[78]

III. THE SCOPE AND PURPOSE OF THE INDIVIDUAL RIGHT TO BEAR ARMS

The framework for implementing the individual right to bear arms depends, in part, on the nature and scope of the right and how it is defined.[79] The broader and more fundamental the right, the less likely a gun regulation will pass constitutional muster.[80]

A. Three Versions of the Individual Right

In *Out of Range: Why the Constitution Can't End the Battle Over Guns*, constitutional scholar Mark Tushnet describes three different versions of the individual right: the "pure" individual right, the "citizen-related" individual right, and the "citizen-militia" individual right.[81] The validity of a gun control law will likely depend on the version used. In considering whether a law is constitutional,

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73. 92 U.S. 542.

74. 116 U.S. 252.

75. *Cruikshank*, 92 U.S. at 553; *Presser*, 116 U.S. at 265.

76. *See* Barron v. City of Balt., 32 U.S. 243 (1833) (holding that the Bill of Rights does not apply to the states).

77. Dorf, *supra* note 24, at 296. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment Freedom of Speech); Cantwell v. Connecticut., 310 U.S. 296, 303 (1940) (incorporating the First Amendment Free Exercise Clause); Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) (incorporating the First Amendment Establishment Clause); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating the Eighth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the Fifth Amendment provision against self-incrimination); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment trial by jury).

78. In fact, shortly after the Supreme Court's historic opininion in *Heller*, a lawsuit was filed challenging the constitutionality of a Chicago city ordinance banning the registration of handguns. Robert Longley, D.C. v. Heller *Leaves Big Second Amendment Question: Can it Be Enforced Against State Gun Laws?*, June 28, 2008, http://usgovinfo.about.com/od/guncontrol/a/hellerinstates.htm (on file with the *McGeorge Law Review*).

79. *See infra* Parts III, V.

80. *See* TUSHNET, *supra* note 22, at 4 (describing how different interpretations of the Second Amendment could affect the constitutionality of gun control regulations).

81. *Id.* at 4; *see also* Massey, *supra* note 11, at 1135 (discussing the "several versions" of the individual right).

a "pure" individual right will have different implications than the more limited "citizen-related" and "citizen-militia" versions of the individual right.[82]

According to Tushnet, the "pure" individual right to bear arms is "just like all the other rights in the Bill of Rights—held by each of us as an individual, to be exercised for whatever reasons" (including hunting, recreation, and self-defense).[83] This view, one which most gun rights proponents favor, would lead to "great suspicion" of most gun regulations.[84]

The "citizen-militia" individual right, focuses instead on the right to bear arms for the sole purpose of resisting an oppressive government.[85] This version of the individual right, favored by many gun control proponents, could render the Second Amendment virtually "obsolete," because today, "it is not realistic to think of an armed citizenry defending us against an oppressive government."[86]

The middle-ground, what Tushnet calls the "citizen-related" individual right, is narrower than the "pure" individual right in that it recognizes that the purpose of the Second Amendment is to protect states against a tyrannical federal government.[87] But unlike the "citizen-militia" view, it "doesn't limit the scope of the individual right."[88] The focus here is on both the right to resist an oppressive government *and* the right of self-preservation in the event of government failure (i.e., to "protect us against criminals who would deprive us of our life, liberty, or property").[89]

Tushnet provides textual and historical support for all three versions, ultimately concluding that "[t]he best individual-rights interpretation connects the individual right to the operation of the citizen-militia" but explains, rather than limits, that right.[90]

B. A Defense-Oriented Individual Right

Determining the scope of the individual right also requires an analysis of its purpose. Some have argued it is merely a private property right, analogous to that which is protected under the Fifth Amendment.[91] For example, constitutional scholars Erwin Chemerinsky and Adam Winkler contend that "[a]ny individual right to keep and bear arms unrelated to militia service would be essentially a

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82. *See* TUSHNET, *supra* note 22, at 4 (describing how different interpretations of the Second Amendment could affect the constitutionality of gun-control regulations).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 29.

87. *Id.* at 4, 38.

88. *Id.* at 38.

89. *Id.* at 4, 18.

90. *Id.* at 25-26.

91. Brief for Law Professors Erwin Chemerinsky and Adam Winkler as Amici Curiae Supporting Petitioner at 28, District of Columbia v. Heller,128 S. Ct. 2783 (2008) (No. 07-290).

property right" and courts should therefore apply the reasonable regulations standard that is applied to other property rights under the Fifth Amendment.[92] This Comment shows that the better interpretation is one that considers the purpose of the Second Amendment, a purpose that essentially provides a means of implementing the Anglo-American common law right to self-defense.

Both collective and individual rights proponents emphasize the "defense" aspect of the Second Amendment—the former stressing defense of the state and the latter stressing defense of one's self, one's home, and one's family.[93] In this respect, the two positions "reinforce one another."[94] Moreover, the historical justifications of the right to bear arms emphasize a "common theme of defense: of self, of other individuals, and of the community as a whole."[95]

The law has always recognized a common law right to protect one's security, liberty, and private property.[96] William Blackstone acknowledged that the right to possess arms was a corollary of this natural right of self-preservation, necessary "when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[97] Therefore, as one commentator noted, it would be rather "tendentious to reject out of hand the argument that one purpose of the Amendment was to recognize an individual's right to engage in armed self-defense against criminal conduct."[98]

Most controversial gun control laws, and the ones most likely to face constitutional challenges in the wake of an individual rights interpretation of the Second Amendment, are those that purportedly infringe on the *self-defense* aspect of the right. Notably, the plaintiff in *Heller* brought suit under the sole contention that the District's "functional firearm" ban inhibited his right to self-protection.[99] The Supreme Court agreed, finding that the Second Amendment protects an individual right to bear arms for defensive purposes.[100]

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92. *Id.*

93. Massey, *supra* note 11, at 1106.

94. *Id.*

95. *Id.*; *see also* Laurence H. Tribe & Akhil Reed Amar, Op-Ed, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31 ("The fact is, almost none of the proposed state or Federal weapons regulations appears to come close to offending the Second Amendment's core right to self-protection. The right to bear arms is certainly subject to reasonable regulation in the interest of public safety.").

96. WILLIAM BLACKSTONE, 1 COMMENTARIES *129.

97. *Id.* at *129, *144.

98. Levinson, *supra* note 22, at 645-46.

99. District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008); *see also* Parker v. District of Columbia, 478 F.3d 370, 374 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) ("Essentially, the appellants claim a right to possess what they describe as 'functional firearms,' by which they mean ones that could be 'readily accessible to be used effectively when necessary' for self-defense in the home.").

100. *Heller*, 128 S. Ct. at 2803 (stating that individual self-defense "was the *central component* of the right itself") (emphasis in original).

IV. TOWARD A "REASONABLE" STANDARD OF REVIEW

Although the Supreme Court has held that the Second Amendment protects an individual right to bear arms, legislatures should be given substantial flexibility and latitude to adopt reasonable regulations of that right. Heightened judicial review, in the form of strict scrutiny, could call into question many long-standing gun control laws at both the state and federal level.[101]

Recognizing that there is an individual right does not necessarily mean that strict scrutiny should apply to every law burdening that right. To be sure, most individual protections enumerated in the Bill of Rights do not come under such harsh judicial review.[102] Although the federal appellate courts have not clearly established a standard of review, state court opinions consistently apply a reasonableness standard to state constitutional individual right provisions and thus may help to clarify the issue.[103] Furthermore, heightened scrutiny is not warranted where, as in this case, the political process provides adequate safeguards against unconstitutionally burdensome laws.[104]

A. *The Federal Courts' Attempt to Create a Workable Standard*

The two circuit court opinions finding an individual right to bear arms used language consistent with a deferential standard of review.[105] However, neither articulated a clear standard from which lower courts can effectively implement the Second Amendment right.

In *United States v. Emerson*, the Fifth Circuit settled on a broad interpretation of the Second Amendment but ultimately upheld the federal gun control statute in question.[106] In doing so, the court struggled to articulate a standard of review:

> Although . . . the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to

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101. Winkler, supra note 11, at 713.

102. *See id.* at 684 ("Only a small number of those provisions are governed by the strict scrutiny standard: free speech, free exercise of religion, and freedom of association under the First Amendment, and substantive due process and the implicit equal protection guarantee of the Fifth Amendment. In other words, strict scrutiny is applied in cases arising from only two textual provisions of the Bill of Rights, the First and Fifth Amendments.").

103. Brief for Petitioners at 58, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter *Brief for Petitioners*]; Massey, *supra* note 11, at 1125.

104. *See infra* Part IV.E and accompanying notes.

105. United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001); Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

106. *Emerson*, 270 F.3d at 260; *see* 18 U.S.C. § 922(g)(8)(C)(ii) (2000) (banning the possession of a firearm for those subject to a court order prohibiting the use, attempted use, or threatened use of physical force against an intimate partner or child).

> individually keep and bear their private arms as historically understood in this country.[107]

This standard appears to be at once deferential (requiring that the restrictions be "reasonable") and skeptical (requiring that the restrictions be "narrowly tailored"), thus providing little guidance for actual application of the individual right. Despite the inconsistent language, the end result indicates a standard closer to that of rational basis than strict scrutiny.[108]

The statute at issue in *Emerson* banned possession of firearms for persons subject to a court order prohibiting physical force, or the threat of physical force, against a child or intimate partner.[109] The statute lacked any requirement of an explicit finding that a credible threat exist.[110] Rejecting the defendant's claim that the statute unconstitutionally infringed on his Second Amendment right to bear arms, the court held that "the nexus between firearm possession by the party so enjoined and the threat of lawless violence, is sufficient, though likely barely so, to support the deprivation . . . of the enjoined party's Second Amendment right to keep and bear arms . . . ."[111] The court essentially held that the defendant could be deprived of his individual right to bear arms before any finding that he was an actual threat.

Following *Emerson*, in 2004, the Department of Justice under the Bush Administration officially adopted the individual rights position,[112] but did little to clarify the issue. The Department of Justice made a point not to comment on the "substance of that right, including its contours or the nature or type of governmental interests that would justify restrictions on its exercise."[113]

The circuit court in *United States v. Parker* (renamed as *District of Columbia v. Heller* upon appeal to the Supreme Court)[114] articulated a more detailed standard, one that appears to be much less deferential than that of *Emerson*, but equally indiscernible. The D.C. Circuit court created a purportedly "reasonable" standard of review but managed to sidestep its application by fitting the District's laws within a newly created category of "per se" unconstitutional restrictions.[115]

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107. *Emerson*, 270 F.3d at 261.

108. *See* TUSHNET, *supra* note 22, at 122 (noting that *Emerson* treats the right to bear arms more like the right to own a car than the right to free speech).

109. 18 U.S.C. § 922(g)(8)(C)(ii) (2000).

110. *Id.*; *Emerson*, 270 F.3d at 263.

111. *Emerson*, 270 F.3d at 264.

112. Winkler, *supra* note 11, at 687.

113. STEVEN G. BRADBURY ET AL., U.S. DEP'T OF JUSTICE, MEMORANDUM OPINION FOR THE ATTORNEY GENERAL, WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT 2 (Aug. 2004).

114. Because the D.C. Circuit Court in *Parker* found that the lead plaintiff, Shelly Parker, lacked standing, the case name changed to *District of Columbia v. Heller* upon appeal to the Supreme Court. *Parker*, 478 F.3d at 374-76.

115. Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) ("Once it is determined-as we have done-that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them.").

Under *Parker*'s standard, laws that ban "arms" within the meaning of the Second Amendment are automatically invalid and thus avoid judicial review (reasonable or otherwise).[116] According to the court, "arms" within the meaning of the Second Amendment are those weapons "in common use" that are "lineal decedants" of a "founding-era weapon."[117] The court ultimately concluded that handguns do constitute "arms," and that the District's laws prohibiting them were unconstitutional.[118]

B. *The Impracticality of Categorical Bans*

Under a reasonable regulation standard, a court will strike down a law only to the extent that the burden on the individual right is unreasonable in light of the legislature's purpose for enacting the law.[119] The test "focuses on the balance of the interests at stake,"[120] in this case an individual's right to keep and bear arms for lawful purposes and the government's police power "to protect the health, safety, and welfare of its citizens."[121] By concluding that the ban on handguns is "per se" unconstitutional, the D.C. Circuit avoided addressing whether the District's laws were reasonable in light of public safety concerns at the time of enactment.[122] A closer look at the reasoning and implications of *Parker*'s categorical ban on certain laws shows that it is an unworkable method of implementing the individual right to bear arms.

Parker's categorical approach has no basis in Supreme Court Second Amendment doctrine, namely, *United States v. Miller*.[123] In *Miller*, the Supreme Court held that sawed-off shotguns were not "arms" within the meaning of the Second Amendment and thus not protected.[124] *Parker* "confus[es] the necessary with the sufficient"[125] by interpreting this to mean that all laws regulating (or banning) a protected "arm" are unconstitutional.[126] The flawed reasoning goes

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116. *Id.*

117. *Id.* at 398.

118. *Id.* at 400.

119. Winkler, *supra* note 11, at 717.

120. Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1223 (N.H. 2007) (quoting State v. Cole, 665 N.W.2d 328, 338 (Wis. 2003)).

121. State v. Hamdan, 665 N.W.2d 785, 800 (Wis. 2003).

122. *See Parker*, 478 F.3d at 399 n.17 ("[T]he District's virtual ban on handgun ownership is . . . justified solely as a measure to protect public safety. As amici point out, and as D.C. judges are well aware, the black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns. It is unnecessary to consider that point, for we think the D.C. laws impermissibly deny Second Amendment rights.").

123. 307 U.S. 174 (1939).

124. *Id.* at 178.

125. Petition for a Writ of Certiorari at 29, District of Columbia v. Heller, No. 07-290 (filed Sept. 4, 2007) [hereinafter *Petition for Writ of Certiorari*].

126. *Id.*

something like this: Because weapons that are not "arms" are not protected, it must follow that weapons that are "arms" are protected. This is a basic error in logical reasoning.[127]

Secondly, state courts applying the individual right to bear arms of their respective state constitutions have not held that bans on particular types of weapons are immune from judicial review.[128] State courts have "carefully and consistently" drawn a distinction between those laws equating to total disarmament of the citizenry and those laws merely banning particular types of firearms.[129] A court may find that a total ban on all weapons is unreasonable because, *on balance*, the law effectively "nullifies" the individual right to bear arms.[130] But the balance still takes place, whether the law is a complete ban on all weapons or a mere licensing or registration requirement.[131] The D.C. Circuit held otherwise. It determined that all bans on "arms" within the meaning of the Second Amendment are "unreasonable" without balancing the competing interests.[132] Contrary to the court's holding, a ban on certain types of weapons requires a balance of several factors, "including whether a particular kind of firearm is commonly possessed, poses specific dangers, or has unique uses, as well as the availability of functional alternatives."[133]

Moreover, *Parker*'s creation of categorical restrictions could lead to illogical results.[134] A court could plausibly interpret "arms" under this test to mean all weapons effective in a military setting as well as weapons used for the purpose of self-defense and hunting—in other words, basically all firearms.[135] Further,

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127. *Id.* Just because "if x, then y" is true, it does not necessarily follow that "if not-x, then not-y." GARRY GOETZ & HARVEY STARR, NECESSARY CONDITIONS: THEORY, METHODOLOGY, AND APPLICATIONS 7-8 (2002). While x is a *sufficient* condition for y, it is not a *necessary* condition for y because factors other than x may cause y. *Id.*

128. *See generally* Winkler, *supra* note 11 (discussing the standards of review applied to state constitutional provisions guaranteeing an individual right to bear arms).

129. Brief for New York et al. as Amici Curiae Supporting Petitioners at 12-13, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

130. Winkler, *supra* note 11, at 688.

131. *Cf.* Massey, *supra* note 11, at 1137 (stating that "*material infringements*" of the individual right shifts the burden to the government to show that the "regulation, in *purpose and effect*, is *substantially related* to the achievement of a *compelling objective*").

132. *See* Parker v. District of Columbia, 478 F.3d 370, 399 n.17 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) ("[T]he District's virtual ban on handgun ownership is . . . justified solely as a measure to protect public safety. As amici point out, and as D.C. judges are well aware, the black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns. It is unnecessary to consider that point, for we think the D.C. laws impermissibly deny Second Amendment rights.").

133. *United States Amicus Brief*, *supra* note 32, at 22.

134. *Cf. id.* at 9 ("If [the categorical approach is] adopted by this Court, such an analysis could cast doubt on the constitutionality of existing federal legislation prohibiting the possession of certain firearms, including machineguns.").

135. *Cf. id.* at 22 ("And because automatic rifles like the M-16 are now standard-issue military weapons for rank-and-file soldiers, the court's reference to the 'lineal descendant[s]' of the weapons used in Founding-

although the court ultimately concluded that handguns are "arms" within the meaning of the Second Amendment, arguably, a handgun is no more a "lineal descendant" of the one-shot muskets used during the founding era than the sawed-off shotguns at issue in *Miller*—which were constitutionally banned.[136]

Although the court avoided applying a standard of review, dicta in *Parker* indicates that had the court undergone the reasonableness balance, it would have found the District's law unreasonable.[137] The court implied that the District's laws would not survive this purportedly "reasonable" standard of review. Upon closer analysis of the court's language in *Parker*, the standard appears to be closer to that of strict scrutiny than the deferential "reasonableness" standard.[138] In a footnote, the court discussed the District's justification for enacting the measures, "solely as a measure to protect public safety," and pointed out that easy access to guns through the black market may result in "irrationally prevent[ing] only law abiding citizens from owning handguns."[139] The court implied that the District would have the burden of proving that the laws actually reduce the danger to the public (i.e., gun-related violence, accidents, and suicide) and not just that they *reasonably could* reduce the danger to the public.[140]

C. *The Supreme Court Speaks, but Doesn't Say Much*

At the Supreme Court level, the majority focused on the textual and historical bases for the individual right rather than on the implications of such a finding.[141] The majority in *Heller* reserved further analysis of the contours of the individual right for future opinions: "[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ."[142]

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era militia operations . . . on its face would cover machineguns and other firearms that represent vast technological improvements over the 'Arms' available in 1791."); *Brief for Petitioners*, *supra* note 103, at 45 (stating that the test is "impractical" and may lead to "tragic results").

136. *Cf. Brief for Petitioners*, note 103, at 45 ("As for the lineal-descendant requirement, a short-barreled shotgun seems at least as related to its forebears as modern automatic handguns are to the pistols used by the militia in 1792.").

137. *See Parker*, 478 F.3d at 399 n.17 ("[T]he District's virtual ban on handgun ownership is . . . justified solely as a measure to protect public safety. As amici point out, and as D.C. judges are well aware, the black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns. It is unnecessary to consider that point, for we think the D.C. laws impermissibly deny Second Amendment rights.").

138. A reasonableness standard of review would require balancing the interests at stake and would give deference to the government. Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1223 (N.H. 2007).

139. *Parker*, 478 F.3d at 399 n.17.

140. *See id.* ("[T]he District's virtual ban on handgun ownership is . . . justified solely as a measure to protect public safety. . . . [T]he black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns.").

141. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2788-816 (2008).

142. *Id.* at 2821.

Although it failed to articulate a standard of review, the Court did state that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ."[143] The Court purported to create a presumption that such laws do not violate the Second Amendment;[144] however, as Justice Stevens aptly pointed out in his dissenting opinion, the individual rights protected by the First and Fourth Amendments do not limit the class of protected people to "law-abiding, responsible citizens."[145] Unless the "people" referred to in the Second Amendment are not the same "people" protected under the First and Fourth Amendments, the Court's statement regarding felons and the mentally ill may hold little weight.[146] Later cases will undoubtedly address this issue and attempt to resolve the gaps left open by the Supreme Court.

D. Filling the Gap: Application of the Individual Right in State Courts

State law Second Amendment analogs applying a deferential "reasonableness" test may help to fill the gap left open by the Supreme Court and the federal appellate courts.[147] As of 2007, all but eight state constitutions included an individual right to bear arms.[148] In his article *Scrutinizing the Second Amendment*, Adam Winkler notes that states have consistently applied a deferential standard under which "[a]ll but a tiny fraction" of gun control laws have been upheld.[149] This deferential "reasonableness" standard of review requires balancing the interests at stake—here, an individual's right to keep and bear arms for self-defense and the government's interest in the public welfare.[150] State courts give legislatures broad deference to control the dangerous weapons that pose an "extraordinary threat" to the public safety.[151] This standard allows "overinclusive" laws that significantly burden the right to bear arms.[152] Such laws likely would not survive heightened scrutiny.[153]

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143. *Id.* at 2817.

144. *Id.* at 2817 n.26.

145. District of Columbia v. Heller, 128 S. Ct. 2783, 2827 (2008) (Stevens, J., dissenting) (internal quotations omitted).

146. *See id.* at 2826-27 (discussing the problems inherent on the majority's focus on "the people" as a basis for finding that the Second Amendment protects an individual right and that the individual right is limited to certain groups).

147. Winkler, *supra* note 11, at 686-87.

148. *Id.* at 686. Only six states—California, Iowa, Maryland, Minnesota, New Jersey, and New York—have no right to bear arms provision in their respective constitutions. *Id.* at 686 n.11.

149. *Id.* at 686-87.

150. Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1223 (N.H. 2007); State v. Hamdan, 665 N.W.2d 785, 800 (Wis. 2003).

151. Winkler, *supra* note 11, at 720.

152. *Id.* at 688.

153. *Id.*

E. Why Deference is Warranted

Applying a heightened level of judicial review by placing the burden on the government to show that it has a significant or compelling interest and that the law at issue is narrowly tailored to meet that interest may call into question many current gun-control laws.[154] "[E]xtreme caution is necessary when, as in the case of the right to bear arms, the Court would undo in one fell swoop decades of consistent, uniform case law from dozens of jurisdictions in the name of establishing a federal right already recognized at the state level."[155] Certainly, public safety—preventing murder, suicide, and gun-related accidents—is a compelling government interest.[156] The difficulty, however, lies in the latter part of the test—that the regulation be "narrowly tailored" to meet the compelling interest.[157] This often requires a showing that there were no less restrictive means, a difficult task given the lack of evidence that specific gun control measures actually reduce violence and/or accidents.[158] "Governments must often act in the absence of perfect data," especially in the case of gun control.[159] Both sides of the gun control debate have long emphasized different statistics with different results.[160] "Technically, if your study is big enough . . . you can generate results that satisfy the formal requirements of statistical significance almost at will."[161] Many gun rights proponents claim that restrictive gun control measures in fact *increase* violence and accidents.[162] If there is little certainty that a specific gun control measure actually reduces violence and accidents, the government may never meet this burden. Even the court in *Emerson*, which applied a more deferential standard, found it difficult to justify upholding the gun control law at issue (although it ultimately did).[163]

One of the often cited justifications for applying heightened scrutiny is the failure of the political process to ensure adequate participation and representation

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154. *Id.* at 713.

155. *Id.* at 712.

156. Massey, *supra* note 11, at 1132.

157. *See id.* (stating that this area will "likely prove to be the litigation battleground").

158. *See id.* at 1095, 1130-31 ("Opponents of recognizing any individual right of armed self-defense typically claim that any increase in public access to firearms produces higher dangers for the public as a whole . . . but in the highly imperfect society in which we actually live there is no credible evidence that increased access to firearms for self-defense purposes truly increases public danger.").

159. Jon S. Vernick, James G. Hodge, Jr. & Daniel W. Webster, *The Ethics of Restrictive Licensing for Handguns: Comparing the United States and Canadian Approaches to Handgun Regulation*, 35 J.L. MED. & ETHICS 668, 676 (2007).

160. *See, e.g.*, Allison Klein, *Killings in D.C. Up After Long Dip: Jump in Gun Crime Accompanies 2007 Death Toll of 181*, WASH. POST, Jan. 1 2008, at A1 (stating how critics of the District's laws claim that the laws are ineffective, while proponents argue that "matters would be even worse without the law[s]").

161. TUSHNET, *supra* note 22, at 81.

162. *E.g.*, Students for Concealed Carry, *supra* note 6.

163. TUSHNET, *supra* note 22, at 121.

for certain groups (i.e., "suspect classes").[164] According to the "political process" theory of judicial review, courts must ensure equal representation for minority groups that cannot effectively participate in the political process.[165] Although a large majority of Americans support some form of gun control,[166] it does not follow that gun rights proponents are a "suspect class" requiring heightened scrutiny of laws affecting their right to bear arms.[167] The "political process" theory of judicial review fails to take into account the strength of a minority group's political lobbying power.[168]

The National Rifle Association ("NRA") is an extremely powerful lobbying group with incredible political influence over state and federal legislatures.[169] Many of the failures in enacting stricter gun control legislation have been attributed to the gun lobby's political power.[170] Gun rights advocates have succeeded in amending twelve state constitutions to include an individual right to bear arms.[171] This powerful political group has also been remarkably successful in pushing through legislation permitting the carrying of concealed firearms.[172] Moreover, regarding gun-free campuses, the NRA is the force behind a Utah law prohibiting public schools and state universities from barring firearms on campus.[173] Certainly, gun owners and gun rights proponents are not the "victims of a process failure" and do not need extra protection in the form of heightened scrutiny for laws affecting the right to bear arms.[174] Gun rights proponents are adequately represented in the political process such that most, if not all, gun regulations will be well within Constitutional limits. Given the amount of influence gun rights groups have on the political process, an overly restrictive law that comes close to violating the Second Amendment would likely never get passed.

Furthermore, prudential and practical reasons counsel judicial restraint in this area. The complicated process of sifting through the competing claims, analyzing the empirical data, and weighing the risks and benefits is beyond the competence of the courts and is best left to the legislature.[175] Experimentation on the local

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164. JOHN HART ELY, DEMOCRACY AND DISTRUST 75-76, 105-34 (1980).

165. *Id.*

166. TUSHNET, *supra* note 22, at 127.

167. *Brief for Petitioners*, *supra* note 103, at 43.

168. *See* TUSHNET, *supra* note 22, at 159 (noting that the problem with John Hart Ely's political process theory is that it "overlooks politics").

169. Dorf, *supra* note 24, at 333; Jeanne Cummings, *Why the NRA Gets Its Way*, THE POLITICO, Apr. 18, 2007, *available at* http://www.cbsnews.com/stories/2007/04/18/politics/politico/main2698141.shtml (on file with the *McGeorge Law Review*).

170. Cummings, *supra* note 169.

171. Winkler, *supra* note 11, at 702.

172. *Id.* at 703.

173. UTAH CODE ANN. § 63-98-102 (2004); BRADY CENTER TO PREVENT GUN VIOLENCE, NO GUNS LEFT BEHIND: THE GUN LOBBY'S CAMPAIGN TO PUSH GUNS INTO COLLEGES AND SCHOOLS 1 (May 2007).

174. Dorf, *supra* note 24, at 333.

175. Winkler, *supra* note 11, at 713-14; Dorf, *supra* note 24, at 333.

level provides one means of finding solutions to the difficult issues raised in the gun control/gun rights debate.[176] Further, some contend that the Supreme Court, as final arbiter of contested political issues, has no political accountability for its decisions and is thus less constrained than other branches of the government.[177] For these reasons, the legislature's "predictive judgments" in this area should be entitled to great deference.[178]

V. PROPOSED ANALYTICAL FRAMEWORK FOR APPLYING THE INDIVIDUAL RIGHT TO BEAR ARMS TO GUN-FREE ZONES

As this Comment has argued, courts should give legislatures maximum deference to enact gun control regulations according to local needs.[179] The application of a deferential reasonableness standard requires balancing the interests at stake.[180] Given the compelling interest in protecting the public welfare from violent crime and accidents, most gun control regulations will pass constitutional muster under this standard.[181] But, as even the most stringent gun control advocates concede, recognition of an individual right means that some types of regulation would have to be unconstitutional.[182] Although the legislature can invariably show a compelling interest, "if a compelling interest overrides a right in nearly every circumstance in which the right may be exercised, one might as well say that there is no right."[183] Thus, a complete firearm ban or total disarmament, for example, would be unconstitutional because it essentially nullifies the right protected.[184] From this perspective, to the extent that the District's laws in *Heller* (banning possession of handguns and requiring lawful firearms to be disassembled or locked in the home) amounted to a "functional weapons ban," the case says little about the actual scope of the legislature's

176. *See* Winkler, *supra* note 11, at 702 (describing states as "laboratories of democracy").

177. *See* Michael Anthony Lawrence, *Government as Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 2 (2007) ("It is a valid question why a court, composed of unelected officials not directly accountable to the people (in federal courts, at least), should be allowed to nullify the actions of a voting majority.").

178. *Brief for Petitioners*, *supra* note 103, at 50.

179. *See supra* Part IV.

180. Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1223 (N.H. 2007); State v. Hamdan, 665 N.W.2d 785, 800 (Wis. 2003).

181. Dorf, *supra* note 24, at 345.

182. *See id.* ("If a court were to find that, notwithstanding the threat to public safety, the Second Amendment protects an individual right to firearm possession, it is highly unlikely that the same court would go on to find a compelling interest that would justify strong gun control measures.").

183. *Id.*

184. *See* People v. Blue, 544 P.2d 385, 391 (Colo. 1975) (holding that under the state constitutional right to bear arms, laws cannot render that right "nugatory").

ability to regulate guns.[185] It merely reiterates what courts and commentators have long held; total bans on all firearms are unconstitutional.[186]

While total bans may be unconstitutional, gun regulations that do not rise to the level of total disarmament—such as registration and licensing requirements, safe-storage laws, waiting periods, or bans on certain weapons—will likely fall within constitutional bounds.[187] Under the reasonableness balancing test, the government's strong interest will outweigh any burden imposed by such laws.[188] *Heller* is once again informative in this context. A court could interpret the District's gun control laws in *Heller* as mere *regulations* deserving of deference, as opposed to a total ban, which would be unconstitutional.[189] Gun control proponents could argue that the District's laws are distinguishable from *complete* bans on *all* gun possession because: (1) the District did allow some guns (rifles and shotguns) and (2) even if the laws did amount to a "functional weapons ban," it was merely a *local* ban.[190] Read in this light and applying the reasonableness balancing test laid out above, the regulations may not violate the Second Amendment. The strength of the government's interest in protecting the safety of its citizens would likely outweigh any burden on the individual right to bear arms.[191]

The proposed analytical framework first considers whether the law at issue is a mere regulation or total firearm ban. While gun control regulations require application of the balancing test, laws that appear to abrogate the right to bear arms, such as "local" bans in the form of gun-free zones, must undergo a different sort of analysis. Although various gun-free zones may appear to be a complete nullification of the right to bear arms—at least in certain locations—this Comment suggests that, taking into consideration analogous provisions in the First Amendment, they may in fact be constitutional. This analysis first requires defining the phrase "gun-free zone" as used in this Comment.

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185. TUSHNET, *supra* note 22, at 121.

186. Winkler, *supra* note 11, at 688.

187. Dorf, *supra* note 24, at 344 ("[M]ost 'contemporary gun control proposals, which by and large do not seek to ban all firearms, but seek only to prohibit a narrow type of weaponry (such as assault rifles) or to regulate gun ownership by means of waiting periods, registration, mandatory safety devices, or the like . . . are plainly constitutional,' even under the individual right view of the Second Amendment." (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 902 (1999) (alteration in original)).

188. *Id.*

189. *See Petition for Writ of Certiorari*, *supra* note 125, at 28 (arguing that the District's laws were reasonable because they still allowed individuals to possess a rifle or shotgun in their homes to protect themselves).

190. *Brief for Petitioners*, *supra* note 103, at 43 ("[T]he Framers' overarching desire to support state prerogatives (consistent with basic concepts of federalism) requires that the Amendment at a minimum allow local governments to make different tradeoffs based on local conditions.").

191. *See Petition for Writ of Certiorari*, *supra* note 125, at 22-29 (arguing that the District's laws are reasonable given effectiveness of the laws and the government's strong interest in protecting the safety of its citizens).

A. *Defining "Gun-Free Zones"*

Despite the apparent plain meaning of the phrase "gun-free zone," it is not used in this Comment to refer to areas where guns are absolutely prohibited. Rather, a gun-free zone is an area where the legislature has banned guns to the extent that they are not available for the purposes of self-defense outlined above. Insofar as the District's laws in *Heller* amounted to a "functional firearms" ban,[192] the city was effectively a gun-free zone.[193] The issue was not whether individuals were allowed to *own* firearms (since the statutes did allow possession of rifles and shotguns) but whether they could be effectively used for the purpose of self-defense.[194] According to the lower court, the District's safety requirements for permissible guns (that they be "kept unloaded and disassembled or bound by trigger lock") rendered them ineffective for self-defense—"a useless hunk of 'metal and springs.'"[195] Although this contention is debatable,[196] it served as the main reason why the statutes were invalidated.[197] Similarly, a college campus may be a gun-free zone notwithstanding the fact that guns are allowed on the premises, because guns are prohibited for any meaningful self-defense purpose (in fact, Virginia Tech allowed guns on campus so long as they were kept locked in a storage area[198]). Likewise, an airplane is a gun-free zone not because guns are completely disallowed (they may be packed in checked-luggage) but because they are not accessible for the purpose of self-defense. Further, in all three of the above examples, certain personnel—like police officers, campus security, or air marshals—*can* possess arms, thus showing that a gun-free zone is not completely gun-free. Accordingly, the question becomes: To what extent is a gun-free zone, defined in these terms, a constitutionally permissible regulation of the right to bear arms for self-defense?

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192. *See* Parker v. District of Columbia, 478 F.3d 370, 374 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (discussing the plaintiff's contention that the District's laws restricted his use of "functional firearms" for the purpose of self-defense).

193. *See id.* at 401 (stating that the laws reduced pistols to "useless hunk[s] of 'metal and springs'").

194. *Id.*

195. *Id.*

196. *See* Brief for Appleseed Center for Law and Justice et al. as Amici Curiae Supporting Petitioners at 29-30, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter *Appleseed Brief*] (pointing out that a shotgun is often the preferred method of protecting the home and that even with the District's safe-storage requirements, "locked guns can be ready for use in under a minute").

197. District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008) ("But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.").

198. Per Virginia Tech's policy, students and employees (other than police) had to check their guns into a locked storage facility. Greg Esposito, *Gun Bill Targets Colleges*, ROANOKE TIMES, Jan. 26, 2006, http://www.roanoke.com/politics/wb/49915 (on file with the *McGeorge Law Review*).

B. Analogizing Gun-Free Zones to Time, Place, and Manner Restrictions

Gun rights proponents have long opposed gun-free zones.[199] Prior to both the Virginia Tech shooting and *Heller*, the gun lobby actively questioned the constitutionality of laws and regulations that banned "law-abiding citizens" from carrying guns in certain areas.[200] Most notably, the NRA managed to lobby for legislation prohibiting public schools and state universities in Utah from enacting any "policy pertaining to firearms that in any way inhibits or restricts the possession or use of firearms on either public or private property."[201] In the wake of the Virginia Tech massacre, students began to question the constitutionality of such gun-free zones.[202] Given the Supreme Court's landmark decision holding that the Second Amendment protects an individual right to bear arms, we can only expect this debate to escalate.

Various standards of review applied in the First Amendment context may help in understanding how an apparent abrogation of the right to bear arms in the form of a gun-free zone may in fact pass constitutional muster.[203]

Even protected speech under the First Amendment (an indisputably "fundamental" right) is subject to reasonable time, place, and manner restrictions.[204] For example, in *Hill v. Colorado*, the Supreme Court upheld a Colorado statute that created a 100-foot buffer-zone restricting speech around health care facilities.[205] The court distinguished "regulations" of speech from "regulations of the *places* where some speech may occur," and held that the statute at issue constituted the latter.[206] A buffer-zone restricting where one may exercise his or her right to free speech is analogous to a gun-free zone restricting where one may exercise his or her right to keep and bear arms under the Second Amendment. In this context, the legislature merely regulates the places where possession of arms is allowed.

Courts have already extended the reasonable time, place, and manner analysis to other liberty interests.[207] For example, in *Lutz v. City of York*, the Third Circuit reasoned by analogy that the constitutional right to intrastate travel

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199. *See* Ken Schwartz, *Packing Heat in Lecture*, BUS. TODAY ONLINE J., Mar. 1, 2006, http://www.businesstoday.org/index.php?option=com_content&task=view&id=205&Itemid=43 (on file with the *McGeorge Law Review*) (describing an NRA supported bill preventing companies from banning firearms at work).

200. *See id.* (describing an NRA supported bill preventing companies from banning firearms at work).

201. UTAH CODE ANN. § 63-98-102(5) (2004).

202. Ana McKenzie, *Campuses Push to Carry Handguns*, DAILY TEXAN, Dec. 12, 2007, http://media.www.dailytexanonline.com/media/storage/paper410/news/2007/12/12/University/Campuses.Push.To.Carry.Handguns-3142461.shtml (on file with the *McGeorge Law Review*).

203. *See* Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) ("The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment.").

204. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

205. Hill v. Colorado, 530 U.S. 703, 707-08 (2000).

206. *Id.* at 719 (emphasis added).

207. Lawrence, *supra* note 177, at 49.

in the Fourteenth Amendment was subject to reasonable time, place, and manner restrictions.[208] The court in *Lutz* emphasized that the First Amendment does not give one "the right to speak whenever, wherever and however one pleases."[209] Similarly, the Second Amendment should not give one the right to keep and bear arms "whenever, wherever and however one pleases."[210] Thus, a gun-free zone is analogous to a time, place, and manner restriction on the right to bear arms under the Second Amendment.[211] But the analysis does not end there. The determination as to whether a gun-free zone is constitutional depends on if it is a *reasonable* time, place and manner regulation of the right to bear arms.[212]

Time, place, and manner restrictions on protected speech under the First Amendment are reasonable so long as (1) the government's interest is significant; (2) the regulation is narrowly tailored to meet that significant interest; and (3) the law provides ample alternative means of exercising the right.[213]

1. A Significant Government Interest

In *Hill*, the Supreme Court found that the state had a "significant and legitimate" interest that justified burdening free speech.[214] The Court gave substantial deference to the state legislature: "[W]hether or not the [law] is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the Colorado Legislature."[215] It concluded that "unimpeded access to health care facilities" and avoiding the potential trauma of unwanted political confrontations were "unquestionably legitimate" governmental interests.[216] The government's interest in *Hill* is identical to the government's interest in the Second Amendment context—the health and safety of its citizens.[217]

The government may have interests beyond just the safety of its citizens that justify creating gun-free zones. An institution of higher learning, for example, must provide an atmosphere conducive to learning, both inside and outside the

208. Lutz v. City of York, 899 F.2d 255, 269 (3d Cir. 1990).

209. *Id.*

210. *See id.* at 269 ("[J]ust as the right to speak cannot conceivably imply the right to speak whenever, wherever and however one pleases—even in public fora specifically used for public speech—so too the right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases—even on roads specifically designed for public travel.").

211. *See* Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) ("The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment.").

212. Time, place, and manner restrictions allowable under the First Amendment must likewise be reasonable. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

213. *Id.*

214. Hill v. Colorado, 530 U.S. 703, 725 (2000).

215. *Id.* at 727.

216. *Id.* at 715.

217. *Id.*

classroom. Colleges and universities have "academic freedom," firmly grounded in the First Amendment, to create policies burdening individual rights for the purpose of "maintain[ing] an appropriate educational atmosphere."[218] Therefore, "[t]o the extent that [a] University's gun policies reflect its educational judgment, they should be entitled to deference under the academic freedom doctrine."[219]

Without exception, the government's interest in this context will be significant—whether the gun-free zone is an airport, college campus, or city.

2. Narrowly Tailored Regulations

To determine whether a time, place, and manner restriction is narrowly tailored, a court must analyze "the degree of connection between [the government's] objective and the means chosen to achieve it."[220] The government's purpose in creating the gun-free zone and the nature of that zone are thus relevant.[221]

A narrowly tailored time, place, and manner restriction must "respond[] precisely to the substantive problem which legitimately concerns the [government]."[222] In other words, it should specifically address the purpose of the government regulation. For example, in *City Council of Los Angeles v. Taxpayers for Vincent*, the Supreme Court held that a government ordinance prohibiting the posting of signs on public property was narrowly tailored to meet the significant government interest of advancing aesthetic values.[223] The Court reasoned that the "substantive evil—visual blight . . . is created by the [activity] itself."[224] Therefore, a prohibition of the activity "responds precisely to the substantive problem" at issue.[225] Similarly, in the Second Amendment context, the presence of guns creates the "substantive evil" of gun violence (of course, without guns, there would be no gun violence). Therefore, the most direct method of dealing with the problems created by guns (e.g., crime, homicide, suicide, and accidents)

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218. Kathy L. Wyer, *A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah*, 2003 UTAH L. REV. 983, 1016 (2003).

219. *Id.*

220. Massey, *supra* note 11, at 1132.

221. *Cf.* Banner, *supra* note 12, at 906 ("Under the individual rights model, courts would also have to devise a doctrinal mechanism for deciding exactly what the Second Amendment protects. . . . The Second would no doubt be interpreted . . . with some kind of test like the ones used for the First and the Fourteenth, in which courts assess the strength of the government's interest in regulating, the extent to which the law at issue is tailored to that interest, and so on.").

222. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 810-11 (1984).

223. *Id.*

224. *Id.*

225. *Id.*

is to prohibit them.[226] A gun-free zone "curtails no more [of the right] than is necessary to accomplish its purpose."[227]

Although a prohibition of that which creates a substantive evil *directly addresses* a legitimate government concern, if the law is "substantially broader than necessary to protect the [government's] interest," it will not meet the "narrowly tailored" requirement.[228] The nature of the prohibition is thus relevant. The Court in *Hill* considered the size of the buffer-zone restricting speech around health care facilities before determining that it was a reasonable regulation narrowly tailored to meet the government's interest.[229] The Court also considered the locations where the statute applied, holding that it was narrowly tailored despite its impact on "every entrance to every health care facility everywhere in the State of Colorado," not just abortion clinics.[230]

Similarly, in the Second Amendment context, the nature of the gun-free zone depends on both its size and location. If the Second Amendment protects an individual's right to bear arms for the defense of one's self, one's home, and one's family,[231] regulations covering broad locations in which people live are likely more burdensome (and less "tailored") than zones in which people merely work, attend school, or socialize.[232]

The determination of whether a gun-free zone is a narrowly tailored time, place, and manner restriction also depends on the government's ability to monitor and enforce its no-gun policy.[233] The extent to which there is "leakage" of guns into the gun-free zone is relevant to whether the zone is so broad as to be ineffective and thus not "narrowly tailored" to meet its purpose.[234] A controlled environment where the entrances and exits can be effectively monitored—such as an elementary school or airport terminal—is more likely to withstand a constitutional challenge than a gun-free zone covering an expansive area where leakage is more difficult to detect and prevent. In fact, one of the main arguments against the constitutionality of gun-free zones is that they essentially disarm only

226. *See* Metromedia, Inc. v. San Diego, 453 U.S. 490, 508 (1981) (stating that a law prohibiting billboards was the most direct and effective way of eliminating the problems they created).

227. *Vincent*, 466 U.S. at 810.

228. *Id.* at 808.

229. Hill v. Colorado, 530 U.S. 703, 726-27 (2000).

230. *Id.* at 715.

231. BLACKSTONE, *supra* note 96, at *129.

232. *Cf. Vincent*, 466 U.S. at 811 (discussing citizens' interests in "controlling the use of [their] own property").

233. *See* McKenzie, *supra* note 202 (quoting advocates of allowing guns on campus as saying that "[i]f hanguns are allowed on campuses . . . laws should be enforced more strictly").

234. *See* D. W. Webster, J. S. Vernick & L.M. Hepburn, *Relationship Between Licensing, Registration, and Other Guns Sales Laws and the Source of State Crime Guns*, 7 INJ. PREVENTION 184, 188 (2001) ("The potential benefits from comprehensive state gun control measures appear to be diminished by the lack of such controls in other states . . . [because] proximity to people living in states with weak gun laws increased the proportion of a city's crime guns originating from out-of-state gun dealers.").

law abiding citizens, since those who want to possess guns illegally can find a way to do so from neighboring areas where guns are readily accessible.[235]

Notably, however, a reasonable time, place, and manner restriction under the First Amendment is not invalid just because it does not constitute the least intrusive or least restrictive means of satisfying the government's interest.[236] Therefore, in the Second Amendment context, even if an alternative, less restrictive gun regulation serves the same purpose of public safety,[237] the gun-free zone is not necessarily unconstitutional.

3. Ample Alternative Means of Exercising the Right

To withstand constitutional scrutiny, a gun-free zone, like a reasonable time place and manner restriction under the First Amendment, must leave open "ample alternative channels" of exercising the right.[238] What constitutes "ample alternative means" will differ depending on the purpose and nature of the individual right to bear arms.[239] As discussed above,[240] historical analysis and textual interpretation of the individual right show that it was intended to serve the purpose of defense—of one's self, one's home, and one's community.[241]

Case law also supports this view. In holding that the District's ban on handguns violated the Second Amendment, the Supreme Court focused on the self-defense aspect of the individual right.[242] It adopted the lower court's reasoning that "the pistol is the most preferred firearm in the nation to 'keep' and use for protection of one's home and family."[243] The lower court lamented that the combination of the ban on registering handguns and the requirement that lawful firearms (i.e., rifles and shotguns) be kept "unloaded and disassembled" or "bound by a trigger lock"[244] amounted "to a complete prohibition on the lawful

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235. Students for Concealed Carry, *supra* note 6.

236. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984); Hill v. Colorado, 530 U.S. 703, 726 (2000).

237. For example, the student group, Students for Concealed Carry on Campus, argues that allowing concealed weapons on college campuses will make campuses safer. Students for Concealed Carry, *supra* note 6.

238. *See Clark*, 468 U.S. at 293 (stating that a reasonable time, place, and manner restriction on the right to free speech must "leave open ample alternative channels" of exercising that right).

239. *Cf. Appleseed Brief*, *supra* note 196, at 23 (discussing how the right protected under the Second Amendment "must be tethered to a right to keep and bear arms for a legitimate purpose").

240. *See supra* Part III and accompanying notes.

241. Massey, *supra* note 11, at 1106; *see also* Tribe & Amar, *supra* note 93 ("The fact is, almost none of the proposed state or Federal weapons regulations appears to come close to offending the Second Amendment's core right to self-protection. The right to bear arms is certainly subject to reasonable regulation in the interest of public safety.").

242. District of Columbia v. Heller, 128 S. Ct. 2783, 2803 (2008) (stating that individual self-defense "was the central component of the right itself") (emphasis in original).

243. *Id.* at 2817 (citing Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008)).

244. D.C. CODE § 7-2507.02 (2001).

use of handguns for self-defense."[245] Moreover, because the guns that were allowed (shot-guns and rifles) could still be used for hunting or recreational purposes, the District was a gun-free zone insofar as it negated the right to *self-defense.*[246]

Given the Supreme Court's holding that the Second Amendment protects an individual right for the purposes of self-defense, the practical concern is the "realit[y] of functional disarmament."[247] Although a reasonable time, place, and manner restriction must leave open "ample alternative channels" for exercising the right, the alternative means do not have to be "precisely equivalent" to that which is banned.[248] Thus, just because the use of arms for self-defense purposes is restricted in gun-free zones, it does not follow that the right to bear arms is unconstitutionally abrogated. Whether the gun-free zone is a college campus, shopping mall, or airport terminal, there are other safety mechanisms in place (e.g., police or other security forces, locks, gates, or other, less dangerous weapons).

In upholding Colorado's time, place, and manner restriction on speech surrounding abortion clinics in *Hill*, the Supreme Court discussed the fact that the protestors could exercise their right to free speech immediately outside the "buffer-zone."[249] Although individuals could not protest within 100 feet of the abortion clinics, they could adequately portray their message in other locations. Similarly, whether a gun-free zone leaves open ample alternative means of exercising the right to bear arms depends on the extent to which people have a choice (and the means) to avoid the gun-free zone and exercise their right elsewhere. Under this standard, a city that functions as a gun-free zone is less likely to leave open ample alternative means of exercising the right than a gun-free campus or building.

C. *From Cities to Schoolyards*

As stated, a reasonable time, place, and manner restriction on the right to bear arms in the form of a gun-free zone must forward a significant government interest and be sufficiently narrowly tailored, while leaving open ample alternative means of exercising the right.[250] To determine whether a gun-free zone meets this standard, courts should consider the nature of the zone, including its size and location and whether people have a choice and means of avoiding the

245. *Parker*, 478 F.3d at 401.

246. The law only required that all lawfully owned forearms be kept "unloaded and disassembled or bound by trigger lock or similar device." D.C. CODE § 7-2507.02.

247. *Brief for Petitioners*, *supra* note 103, at 48.

248. *Id.*

249. Hill v. Colorado, 530 U.S. 703, 729 (2000).

250. *See supra* Part V.B.1-3.

zone.[251] They should also look to the practicality of monitoring and enforcing the no-gun policy, including the extent to which there is "leakage" of guns and the availability of alternative safety mechanisms.[252] Under this standard, a gun-free zone that spans an entire city may exceed the scope of permissible gun control regulation because it likely fails the "narrowly tailored" requirement set out above. However, gun-free zones on school grounds, including college campuses, will likely withstand any constitutional challenge.

Schools have interests beyond just the safety of their students; they must create an environment conducive to learning.[253] Furthermore, gun-free zones on school campuses are not so broad as to encompass more than necessary to further the government's goals. Given the limited size of the zone, administrators at primary schools and college campuses can monitor "leakage" of weapons more effectively than can government agencies in cities. They can also implement alternative safety measures to protect students, thus reducing the need to posess a gun for self-defense.

In *Heller*, the majority opinion stated that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ." are presumptively constitutional.[254] To the extent that "sensitive places" include college campuses, this language seems to support the constitutionality of laws creating gun-free zones on college campuses. However, opponents of gun-free zones may argue that this presumption does not comport with the Court's strong emphasis on the right to bear arms for defensive purposes. The Court laments that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[255] Though a college campus is not technically a student's "home," many college students (most of whom are adults old enough to purchase firearms) live and work on campus, and, as the Virginia Tech massacre unfortunately showed, students are not immune from the criminal element. Thus, as some may contend, the Court's focus on the defense aspect of the individual right to bear arms seems to conflict with its statements regarding the presumptive validity of certain laws. This Comment proposes a logical way to analyze the constitutionality of such gun-free zones.[256]

VI. CONCLUSION

In the wake of the Virginia Tech tragedy, Americans began to question the constitutionality of gun regulations restricting lawful citizens' ability to protect

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251. *Id.*
252. *Id.*
253. Wyer, *supra* note 218, at 1016.
254. District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008).
255. *Id.* at 2821.
256. *See infra* Part V.

themselves against the criminal element.[257] Although many wondered how such a tragedy could have been prevented,[258] no one knows for sure what the result *would* have been had Virginia Tech allowed guns on its campus.[259] This Comment does not answer that question, nor does it evaluate the effectiveness of various gun-control or "shall-issue" laws.[260] Instead, this Comment proposes a framework for analyzing the extent to which an individual rights interpretation of the Second Amendment allows such gun-free zones.

The unique difficulties inherent in protecting the public welfare against gun violence warrant giving maximum flexibility to policy makers in this area. But, this Comment acknowledges that legislatures cannot completely abrogate the individual right by disarming the citizenry.[261] Thus, to the extent that local weapons bans (i.e., gun-free zones) nullify the right to bear arms in certain locations, a plausible argument exists that they violate the Second Amendment. This Comment has argued the contrary: Gun-free zones may in fact be constitutional by analogy to First Amendment time, place, and manner restrictions.[262]

The Supreme Court's historic decision has led to more questions than it answered. It has opened the door to an abundance of litigation regarding the constitutionality of many long-standing laws. Future litigation will almost certainly address the constitutionality of gun-free zones.[263]

But, as this Comment has argued, the implications of an individual right to bear arms may not be as dire as many gun control proponents fear.

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257. Whitaker, *supra* note 7.

258. *See, e.g.*, Ken Stanton, *Letter: Protesting for the Right to Carry Concealed Weapons*, COLLEGIATE TIMES, Oct. 18, 2007, http://www.collegiatetimes.com/stories/2007/10/18/letter__protesting_for_the_right_to_carry_concealed_weapons (on file with the *McGeorge Law Review*) ("Many of us look back on tragedies and wonder how they could have been prevented.").

259. Laurence Hammack, *Activists Debate Campus Gun Laws*, ROANOKE TIMES, May 6, 2007, *available at* http://www.roanoke.com/vtreactions/wb/115856 (on file with the *McGeorge Law Review*) ("[A] citizen caught in the midst of a chaotic shooting would have a hard time returning fire in a way that would not make things worse.").

260. For a general overview of various concealed weapons laws, see Raneta Lawson Mack, *This Gun for Hire: Concealed Weapons Legislation in the Workplace and Beyond*, 30 CREIGHTON L. REV. 285 (1997).

261. *See supra* Part V and accompanying notes.

262. *See supra* Part V.B-C and accompanying notes.

263. Chemerinsky, *supra* note 31, at 485. In fact, during the oral argument before the Supreme Court, Justice Stevens posed the exact question this Comment seeks to address. He specifically asked about the effect of an individual rights interpretation on a state university's ability to "ban students having arms in the dormitory." Transcript of Oral Argument at 81, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-250). The appellee's attorney had no definitive answer to the Justice Stevens' question. *Id.* ("We would have to do some fact finding. It's something that might be doable, but, again, that's so far from what we have here.").