Marquette Law Review

Volume 95
Issue 1 *Symposium: Changing Conceptions of Water in the Law*

Article 1

Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms

Amy Hetzner

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

 Part of the Law Commons

Repository Citation

Amy Hetzner, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 Marq. L. Rev. 359 (2011).
Available at: http://scholarship.law.marquette.edu/mulr/vol95/iss1/1

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

WHERE ANGELS TREAD: GUN-FREE SCHOOL ZONE LAWS AND AN INDIVIDUAL RIGHT TO BEAR ARMS

In separate opinions issued in 2008 and 2010, the United States Supreme Court held that the Second Amendment to the U.S. Constitution guarantees an individual right to bear arms. For as lengthy as those opinions were, however, the justices only briefly dealt with possible limits to that right. Both decisions provided that their holding would not invalidate "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."

This Comment argues that the uncertainty about the scope of the Second Amendment right has hardly been tempered by the Court's limiting language and that federal and state laws criminalizing the possession of loaded handguns within 1000 feet of schools might be in danger. The Comment further argues that the utility of gun-free school zone laws has been hampered and that lawmakers should consider necessary changes in light of potential legal challenges as well as recent legislative actions. These recommended changes would penalize the discharge but not the possession of a handgun within 1000 feet of schools, while they would also eliminate the requirement in current statutes that the individual know that he is within a school zone before punishment can be meted out.

I. INTRODUCTION 360
II. THE STATE OF THE SECOND AMENDMENT AND THE COURTS AFTER *HELLER* AND *MCDONALD* 365
A. Heller and McDonald and the Changing Second Amendment Jurisprudence 366
B. Court Decisions After Heller and McDonald 369
III. THE FIRST AMENDMENT AS A BLUEPRINT FOR EVOLVING SECOND AMENDMENT JURISPRUDENCE 374
IV. THE CONSTITUTIONALITY OF GUN-FREE SCHOOL ZONE LAWS AFTER *HELLER* AND *MCDONALD* 381
A. The Development of Gun-Free School Zone Laws 384
B. The Second Amendment Protection for an Individual's Right to Carry a Loaded Weapon Within 1000 Feet of a School 390

C. Gun-Free School Zone Laws' Chances of Surviving Challenges Based on Different Levels of Scrutiny.....395
1. Strict Scrutiny.....396
2. Intermediate Scrutiny.....399
3. Reasonable or Rational Basis.....400
V. SUGGESTED CHANGES TO GUN-FREE SCHOOL ZONE LAWS.....401
VI. CONCLUSION.....407

I. INTRODUCTION

Over nine inexplicable months in 1988 and 1989, disturbed adults armed with a various array of firearms entered schoolyards in three states spanning from one coast to the other and opened fire.[1] In their wake, the incidents left eight elementary students dead and forty-three people wounded and spawned a raft of unprecedented gun-control measures throughout a shocked nation.[2] Among the new laws adopted in the first half of the 1990s were the federal Gun-Free School Zones Act of 1990, which established a 1000-foot perimeter around school grounds in which it is illegal to carry a loaded weapon (barring certain exceptions),[3] and similar statutes that are still in place in California[4] and Illinois.[5] In introducing legislation to create the federal law, U.S. Senator Herb Kohl of Wisconsin pointed to the need to combat the "growing problem . . . [of t]he proliferation of firearms in our schools."[6] Senator Kohl cited the cases of Laurie Dann, who killed one eight-year-old boy and wounded five other children at a Winnetka, Illinois elementary school in May 1988,[7] and Patrick Purdy, who sprayed a Stockton, California elementary school playground with bullets, killing

1. *See* Elsa Walsh, *Heavy Legislative Fire Aims at Gun Sale Curbs: Schoolyard Shootings Alarm Lawmakers*, WASH. POST, Feb. 9, 1989, at D1.

2. *See id.*

3. Gun-Free School Zones Act of 1990 § 1702(b)(2)(25), 18 U.S.C. §§ 921(25), 922(q) (2006). This Comment involves the Gun-Free School Zones Act of 1990 and its 1996 amendments as opposed to the similarly named Gun-Free Schools Act, which requires states receiving federal education funds to pass laws mandating the expulsion of students in possession of firearms on school grounds. *See* 20 U.S.C. § 7151 (2006).

4. *See* CAL. PENAL CODE § 626.9 (West 2010 & Supp. 2011).

5. *See* 720 ILL. COMP. STAT. ANN. 5/24-1(c)(1)–(1.5) (West 2010).

6. 136 CONG. REC. 1165 (1990) (statement of Sen. Herb Kohl).

7. *See id.*; Lisa Black & Bonnie Miller Rubin, *Unshakeable Anguish: Old Wounds and New Paths Emerge for 3 Two Decades After Dann Shooting Rampage*, CHI. TRIB., May 20, 2008, § 2, at 1.

five children and wounding thirty others in January 1998.[8] Kohl added to the record,

> My home State, Wisconsin, is not immune from this wave of gun violence. Last year, the Milwaukee school system expelled more than a dozen students for weapons violations. And the number of Milwaukee County juveniles charged with handgun possession has doubled over the past 2 years. According to Gerald Mourning, the director of school safety for Milwaukee, "[K]ids who did their fighting with their fists, and perhaps knives, are now settling their arguments with guns."[9]

Today, a little more than two decades later, these gun-control efforts are coming under increased pressure after the Supreme Court's recent rulings declared that the Second Amendment protects an individual right to bear arms.[10] This battle is occurring not only in courts but in statehouses around the nation. For example, within a couple of years of the Court's decisions, Louisiana and Wisconsin replaced their gun-free school zone laws with more permissive versions.[11]

The Second Amendment to the U.S. Constitution's famous and often-confusing words provide as follows: "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."[12] For years, these clauses were interpreted by courts and legal scholars as preventing federal interference with the states' abilities to support militias.[13] Only in recent decades has the protection of an individual right become a matter of debate.[14] The Court finally resolved this issue on June 26, 2008, with its

---

8. *See* 136 CONG. REC. 1, 1165; Walsh, *supra* note 1.

9. 136 CONG. REC. 1165 (alteration in original).

10. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010); District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (noting, however, that Second Amendment should not be read "to protect the right of citizens to carry arms for *any sort* of confrontation").

11. *See* LA. REV. STAT. ANN. § 14:95.2 (2004 & Supp. 2011); WIS. STAT. § 948.605 (2009–2010), *amended by* 2011 Wis. Act 35, §§ 91–96.

12. U.S. CONST. amend. II.

13. *See, e.g.*, United States v. Miller, 307 U.S. 174, 178 (1939); United States v. Cole, 276 F. Supp. 2d 146, 149 (D.D.C. 2003) (stating that courts had interpreted the Second Amendment as protecting a collective right "associated with the maintenance of a regulated militia" for the previous six decades); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640 (1989).

14. *See, e.g.*, Levinson, *supra* note 13, at 640–42; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 801, 810 (1998).

opinion in *District of Columbia v. Heller*, where a 5–4 majority held that the Second Amendment protects an individual's right to have a loaded handgun for self-defense.[15] Two years and two days later, the Court extended the *Heller* Court's holding in *McDonald v. City of Chicago*, ruling that the Second Amendment right to bear arms applies to the states, thus limiting the ability of states and municipalities to regulate firearm possession.[16] But, despite the lengthy opinions issued in each case, the Court left open many issues that relate to the constitutionality of numerous gun-control laws. As Fourth Circuit Court of Appeals Judge J. Harvie Wilkinson III, complained, "The Court has invited future [Second Amendment] challenges by not defining the scope of the right to bear arms, by not providing a standard of review for firearms regulation, and by creating a list of exceptions to the newfound personal Second Amendment right."[17]

The Fifth Circuit Court of Appeals in *United States v. Emerson* provides a comprehensive round-up of the state of the law at the time of its 2001 decision. According to the majority,

> In the last few decades, courts and commentators have offered what may fairly be characterized as three different basic interpretations of the Second Amendment. The first is that the Second Amendment does not apply to individuals; rather, it merely recognizes the right of a state to arm its militia. This "states' rights" or "collective rights" interpretation of the Second Amendment has been embraced by several of our sister circuits. . . .
>
> Proponents of the next model admit that the Second Amendment recognizes some limited species of individual right. However, this supposedly "individual" right to *bear* arms can only be exercised by members of a functioning, organized state militia who bear the arms while and as a part of actively participating in the organized militia's activities. The "individual" right to *keep* arms only applies to members of such a militia, and then only if the federal and state governments fail to provide the firearms necessary for such militia service. . . .
>
> The third model is simply that the Second Amendment recognizes the right of individuals to keep and bear arms. . . . The individual rights view has enjoyed considerable academic endorsement, especially in the last two decades.

270 F.3d 203, 218–20 (5th Cir. 2001). In the end, the *Emerson* court found the last argument the most persuasive (supporting an individual right to bear arms) but held that the law challenged in this case did not unconstitutionally infringe upon this right. *Id.* at 261.

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

16. *McDonald*, 130 S. Ct. at 3026.

17. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009). Judge Wilkinson III noted that "[t]he cases filed since *Heller* and the multitude of federal, state, and municipal gun control regulations threaten to suck the courts into a quagmire." *Id.*

In sidestepping such issues, the Court has practically invited a flood of litigation[18] by politically connected and motivated parties on both sides of the gun-control issue.[19] Indeed, on the same day as the *McDonald* decision, an interest group filed a lawsuit challenging a North Carolina law that forbids the carrying of firearms off of one's property during a declared state of emergency.[20] Dick Heller, the same plaintiff from the *District of Columbia v. Heller* case decided by the Court in 2008, filed a new lawsuit challenging the statute adopted by the District of Columbia in response to the municipality's loss before the Court.[21] Similarly, Chicago's new ordinance was challenged in federal court shortly after the city council voted for its adoption.[22] A wide-ranging set of lawsuits elsewhere have sought to overturn other gun-control laws including a Texas law that restricts the issuance of permits for the concealed carrying of handguns to individuals at least twenty-one years of age,[23] a Maryland law that allows firearm permits only for people with a "good and substantial reason" to carry a handgun,[24] a Georgia law

18. *See* Kristin Myles et al., *Supreme Court Watch: Guns, Incorporated*, S.F. ATT'Y, Fall 2010, at 48, 51 (describing *McDonald*'s legacy as "much more litigation"); Wilkinson, *supra* note 17, at 288 (predicting that "now . . . the litigation will take off").

19. *See* Wilkinson, *supra* note 17, at 301 (noting that the National Rifle Association has over four million members, and, on the opposing side, the Coalition to Stop Gun Violence brings together many organizations nationwide such as child welfare advocates, religious associations, and public health professionals).

20. *See* Complaint at 2, 7–8, Bateman v. Perdue, No. 5:10-cv-265-H (E.D.N.C. June 28, 2010); Cheryl Corley, *Gun Activists to Challenge Local Gun Laws*, NPR (July 1, 2010), http://www.npr.org/templates/story/story.php?storyId=128240691.

21. *See* Del Quentin Wilber & Paul Duggan, *D.C. Is Sued Again over Handgun Rules*, WASH. POST, July 29, 2008, at B1. The lawsuit seeks to toss out many of the new requirements and also challenges a long-existing ban on machine guns, which includes most types of semiautomatic pistols. *Id.*

22. *See* Myles et al., *supra* note 18, at 51. The new ordinance includes strict guidelines on who can apply for a permit, prohibits gun shops within city limits, confines the possession of loaded firearms to the home, and requires handgun owners to have both city permits and state firearms identification cards. *See* Mark Guarino, *Chicago Passes Revised Gun Law, Allowing Handgun Ownership*, CHRISTIAN SCI. MONITOR (July 2, 2010), http://www.csmonitor.com/USA/Society/2010/0702/Chicago-passes-revised-gun-law-allowing-handgun-ownership.

23. *See* TEX. GOV'T CODE ANN. § 411.172(a)(2) (West 2005 & Supp. 2010); Matt Hamilton, *Two 18 Year Olds Challenge Gun Laws*, CONNECTAMARILLO.COM (Nov. 28, 2010), http://www.connectamarillo.com/news/story.aspx?id=547076.

24. *See* MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (LexisNexis 2003); Complaint at 6, Woollard v. Sheridan, No. JFM-10-20668 (D. Md. Dec. 29, 2010); Maria Glod, *Gun Rights Advocates Take Aim at Md. Limits: Federal Suit Challenges State's Restrictions on Handgun Carry Permits*, WASH. POST, July 30, 2010, at B6.

banning handguns in churches,[25] and gun-free school zone (school zone) laws.[26]

These last challenges—to the statutes that establish a 1000-foot firearm-free perimeter around schools—are the focus of this Comment. Because the constitutionality of such laws has been challenged before (albeit on different grounds)[27] and the issue remains a visceral one for citizens struggling with a solution to school violence,[28] a methodical exploration of this issue is necessary. Part II.A of this Comment will discuss the state of Second Amendment jurisprudence established by the Court's decisions in *Heller* and *McDonald*. Part II.B will examine how courts have dealt with challenges to gun-control laws in the shadow of those decisions. Part III will evaluate possible judicial interpretations of the Second Amendment using the evolution of First Amendment interpretation as a model. Part IV dissects how courts could evaluate the school zone laws by analyzing whether such laws infringe upon a protected right and balancing this possible infringement using the different levels of scrutiny that could determine the laws' constitutionality. Part V recommends solutions that legislatures in California and Illinois, as well as the United States Congress, can explore to avoid the possibility that their school zone laws could be voided as unconstitutional and to strengthen the utility of those laws. The solutions recommended in this Comment also can be considered by other states that have abandoned the restrictions in school zones in recent years due to legal concerns. In fact, states with some of the most permissive gun laws that allow citizens to carry loaded firearms without

25. GA. CODE ANN. § 16-11-127(b)(4) (2006); *see also* Rhonda Cook, *Suit Aims to Lift Ban on Guns in Church*, ATLANTA J.–CONST., July 10, 2010, at B1. A district court dismissed this challenge finding that, while possessing a firearm in a place of worship was protected by the Second Amendment, the restriction was substantially related to an important governmental interest. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306, 1319 (M.D. Ga. 2011).

26. Complaint at 3, Hall v. Garcia, No. CV10-3799 (N.D. Cal. Mar. 17, 2011); Amended Complaint at 11–12, Wisconsin Carry, Inc. v. City of Milwaukee, No. 2:10-CV-9-CNC (E.D. Wis. Feb. 17, 2010) [hereinafter *Wisconsin Carry* Complaint]; *see also* Bruce Vielmetti, *Gun Group Sues over Restriction*, MILWAUKEE J. SENTINEL, Jan. 9, 2010, at 3B; Matt Smith, *Man Sues for Right to Carry Gun near Cole Valley's Grattan School*, S.F. WKLY. BLOGS (Aug. 27, 2010, 2:10 PM), http://blogs.sfweekly.com/thesnitch/2010/08/gun_open_ carry_school.php.

27. *See* United States v. Lopez, 514 U.S. 549, 559–68 (1995) (holding 18 U.S.C. § 922(q) invalid as beyond Congress' power under the Commerce Clause).

28. *See, e.g.*, Carl W. Chamberlin, *Johnny Can't Read 'Cause Jane's Got a Gun: The Effects of Guns in Schools and Options After* Lopez, 8 CORNELL J.L. & PUB. POL'Y 281, 287–88 (1999) (contending that firearms have "increased both the incidence and lethality of school violence").

a state-issued license might want to reconsider their stance given the possible conflict that such laws create with the once nearly defunct federal Gun-Free School Zones Act.[29]

II. THE STATE OF THE SECOND AMENDMENT AND THE COURTS AFTER *HELLER* AND *MCDONALD*

For nearly seventy years leading into the twenty-first century and the *Heller* decision, the contemporary view held by the Supreme Court was that the Second Amendment protected the right to keep and possess a weapon only insofar as the weapon bore "some reasonable relationship to the preservation or efficiency of a well regulated militia."[30] In *United States v. Miller*, the most recent pre-*Heller* case to consider the issue, the Court in 1939 upheld a law prohibiting possession of an unregistered sawed-off shotgun in violation of the National Firearms Act.[31] Rejecting the defendants' argument that the regulation violated their Second Amendment right to bear arms, the Court concluded that the Constitution does not guarantee a right to carry such a weapon.[32] As such, the Court interpreted the right's protection as extending to the "obvious purpose to assure the continuation and render possible the

29. *See State Firearms Laws Are Taking a Radical, Dangerous Turn*, USA TODAY, Apr. 25, 2011, at 8A (reporting that Wyoming became the fourth state, joining Alaska, Arizona, and Vermont, to allow citizens to carry firearms without licenses). Because the federal law exempts persons carrying weapons in school zones who have been issued licenses by their states, it follows that residents in these states will be less likely to have permits and, therefore, may be more likely to commit felonies by traveling in school zones with their loaded firearms. *See* Gun-Free School Zones Act of 1990, 18 U.S.C. § 921(q)(1) (2006); Bruce Vielmetti, *Gun Charge Against Sheboygan Falls Man Dismissed Again: Bicyclist Carried Firearms Within 1,000 Feet of School*, JSONLINE (June 17, 2010), http://www.jsonline.com/news/wisconsin/96625354.html; marktwain, *Sheboygan Falls Open Carry GFSZ Case (Personal Account by Matthew Hubing)*, FREEREPUBLIC.ORG (June 19, 2010, 4:06 PM), http://www.freerepublic.com/focus/f-news/2538149/posts [hereinafter *Personal Account of Matthew Hubing*].

30. United States v. Miller, 307 U.S. 174, 178 (1939). Prior to 2008, the U.S. Supreme Court decided three cases addressing the Second Amendment, each time holding that it granted only a "collective right" to an armed militia as opposed to an "individual right" to keep and bear arms. *See* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, *in* THE SECOND AMENDMENT IN LAW AND HISTORY 1, 1 (Carl T. Bogus ed., 2000). The push for an "individual rights" view of the Second Amendment among scholars was launched with a student article in 1960, building over the next few decades and attracting adherents even among law professors considered liberal and, therefore, assumed to be inclined against such an interpretation. *Id.* at 1–13.

31. *Miller*, 307 U.S. at 178, 183.

32. *Id.* at 178.

effectiveness of [militia] forces."[33] In addition, among federal appellate courts, between the *Miller* and *Heller* decisions only the Fifth Circuit Court of Appeals recognized that the Second Amendment protects an individual's right to bear arms, although the court also upheld a challenged law encroaching upon this right.[34]

A. Heller *and* McDonald *and the Changing Second Amendment Jurisprudence*

The Court's prevailing view, established in *Miller*, that the Second Amendment only protects a collective right to bear arms, changed with the Court's decision in *Heller*.[35] In the landmark 2008 decision, the Court found that the Second Amendment protected an individual's right to bear arms, rendering unconstitutional a District of Columbia ordinance that had the effect of prohibiting the possession of handguns or other firearms in readily-operable condition in private homes.[36] The case concerned an ordinance prohibiting individuals from carrying unregistered firearms, while simultaneously prohibiting the registration of handguns within the nation's capital.[37] The ordinance also required residents to keep their registered firearms unloaded and inoperable—either disassembled or trigger-locked—unless located in a place of business or used for lawful recreational activities.[38] The plaintiff, Dick Heller, a special police officer at the Federal Judicial Center, filed his lawsuit challenging the ordinance after he applied for and was denied registration for a handgun in his home.[39] The Court determined that the ordinance had the effect of barring the possession of a handgun in the home in a state that would allow it to be readily used for an individual's self-defense, an effect that the majority determined was a violation of the Second Amendment's protection of an individual's right to keep and bear arms.[40]

With *McDonald v. City of Chicago* in 2010, the Court found that the

33. *Id.*

34. *See* United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 691 (2007).

35. *See* District of Columbia v. Heller, 554 U.S. 570, 591 (2008).

36. *See id.* at 635.

37. *See id.* at 574–75 (citing D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)).

38. *See id.* at 575 (citing D.C. CODE § 7-2507.02).

39. *Id.* at 575.

40. *Id.* at 628–29.

Second Amendment was enforceable against the states, thus invalidating ordinances in the Illinois municipalities of Chicago and Oak Park that had the effect of preventing residents from possessing handguns.[41] In that case, the Chicago ordinance prohibited the possession of unregistered firearms and prohibited registration of most handguns by most residents.[42] The Oak Park municipal code made it illegal for individuals to possess "pistols, revolvers, guns and small arms . . . commonly known as handguns."[43] Several of the plaintiffs in *McDonald* contended that they had been targeted by threats of violence and wished to possess handguns in their homes for self-defense but were prevented from doing so by the ordinances.[44] The bulk of the Court's decision in *McDonald* centered not on whether an individual right to possess a handgun in the home for self-defense was protected by the Second Amendment,[45] which it already had established in *Heller*,[46] but whether the protection of this right under the Second Amendment could be extended to the states and their subsidiaries (which a plurality found an affirmative basis in the Due Process Clause of the Fourteenth Amendment).[47]

The Court failed to define the scope of this Second Amendment right, however, beyond the facts posed by the restrictive ordinances considered in *Heller* and *McDonald*.[48] In an opinion authored by Justice Scalia, the Court stated that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[49] Other than ruling out the use of a permissive type of interest balancing, the Court declined to identify a specific standard of review to be used by courts in evaluating the

41. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

42. *Id.* at 3026; CHI. MUN. CODE §§ 8-20-040(a), 8-20-050(c) (2009).

43. *McDonald*, 130 S. Ct. at 3026 (quoting OAK PARK, ILL., MUN. CODE §§ 27-2-1 (2007), 27-1-1 (2009)).

44. *Id.* at 3026–27.

45. *See id.* at 3026.

46. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

47. *See McDonald*, 130 S. Ct. at 3050. Justice Thomas argued in a concurring opinion that the Second Amendment is applied to the states through the Fourteenth Amendment's Privileges and Immunities Clause. *See id.* at 3059 (Thomas, J., concurring).

48. *See id.* at 3026 (detailing the challenged ordinances in Chicago and Oak Park); District of Columbia v. Heller, 554 U.S. 570, 629, 635 (2008). In the majority opinion for *Heller*, Justice Scalia identified the District of Columbia's handgun ban as one of the most restrictive laws in the nation's history. *Id.*

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

constitutionality of other firearm restrictions.[50] In addition, although probably trying to head off potential challenges, the majority appears to have confused matters further by proffering a non-exhaustive list of laws that would withstand judicial scrutiny.[51] In dicta,[52] the Court wrote,

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[53]

The Court did not provide a clear rationale for its choices of permitted laws.[54]

In *McDonald*, the Court failed to elaborate on what has been called "*Heller*'s asterisk."[55] Instead, a plurality of the Court "repeat[ed] those assurances" that the listed laws would not be in jeopardy, adding "incorporation does not imperil every law regulating firearms."[56] The *McDonald* Court also quoted thirty-eight state amici supporting the challenge to the Chicago and Oak Park ordinances: "[S]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."[57] Muddying its efforts to pacify the

---

50. *See id.* at 634–35.

51. *Id.* at 626–27, 627 n.26.

52. "Dictum," the singular form of the word "dicta," is defined as "[a] statement of opinion or belief considered authoritative because of the dignity of the person making it." BLACK'S LAW DICTIONARY 519 (9th ed. 2009). Thus, although "dicta" can be considered a pejorative and outside of a court's holding, by definition it carries with it a certain weight of authority. As the Fourth Circuit Court of Appeals has noted, "Supreme Court *dicta* controls when it is on point and it is the only available authority." *See* United States v. Chester, 367 F. App'x 392, 397 (4th Cir. 2010). Such dicta has been described as nearly as binding as the Court's holdings. *See* Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996). Furthermore, the *Heller* Court's dicta has been described as "dicta of the strongest sort." *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1372 (2009).

53. *Heller*, 554 U.S. at 626–27.

54. *See id.* at 635 (acknowledging that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us").

55. *See* Miguel E. Larios, *To* Heller *and Back: Why Many Second Amendment Questions Remain Unanswered After* United States v. Hayes, FED. LAW., Sept. 2009, at 58, 60.

56. McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010).

57. *Id.* at 3046 (internal quotation marks omitted).

fears of local officials, however, the Court in *McDonald* acknowledged that protections against state infringement of constitutional rights can differ from protections for federal infringement[58] and that its decision "will to some extent limit the legislative freedom of the [s]tates."[59] Thus, with its opinion in *McDonald*, the Court ignored judges who had been practically begging for a clearer standard upon which to evaluate the constitutionality of gun-control regulations.[60]

B. Court Decisions After Heller *and* McDonald

Commentators and courts have cited the lack of guidance provided in the *Heller* and *McDonald* decisions for prompting numerous legal challenges to come.[61] Such was the argument made by Justice Stevens in his dissent to *Heller* where he criticized the Court's majority for leaving a "formidable task" to future courts and questioned whether it would substantially increase the caseload of federal judges.[62]

In the wake of *Heller* and *McDonald*, challenges to gun-control laws have been rife in federal courts, even when the implicated laws were explicitly supported by the language in the cases' dicta. The most common challenges in the immediate aftermath have been brought by felons contesting prohibitions on their possession of firearms by 18

58. *Id.* at 3032. Justice Stevens reiterated this idea in his dissent, arguing that "[t]he rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights." *Id.* at 3093 (Stevens, J., dissenting). Stevens later suggested that "[s]o long as the regulatory measures they have chosen are not 'arbitrary, capricious, or unreasonable' we should be allowing [states] to 'try novel social and economic' policies." *Id.* at 3114 (Stevens, J., dissenting).

59. *Id.* at 3050.

60. *See, e.g.*, United States v. Smith, 742 F. Supp. 2d 855, 857 (S.D. W. Va. 2010) (noting that the *Heller* Court "declined to announce the appropriate level of constitutional scrutiny for review of the firearms restriction at issue in that case"); United States v. Staten, No. 09-CR-00235, 2010 U.S. Dist. LEXIS 91653, at *5 (S.D. W. Va. Sept. 2, 2010) (blaming uncertainty by courts in evaluating subsequent Second Amendment cases on "the absence of direct guidance" and "what some view as a categorical carve out for certain firearm regulations" provided by the Court in *Heller*); Warden v. Nickels, 697 F. Supp. 2d 1221, 1228 (W.D. Wash. 2010) (noting the "limited guidance as to how to evaluate the constitutionality of gun regulations under the Second Amendment" provided by *Heller*); United States v. Masciandaro, 648 F. Supp. 2d 779, 787 (E.D. Va. 2009) (pointing out that the *Heller* decision "does not squarely address or decide the appropriate level of scrutiny to be applied to statutes and regulations subject to Second Amendment challenges").

61. *See* Myles, *supra* note 18, at 51; Wilkinson, *supra* note 17, at 280, 288 (predicting after *Heller*, but before the *McDonald* decision, that "the litigation will take off" due to the many questions left open by the *Heller* opinion).

62. District of Columbia v. Heller, 554 U.S. 570, 679–80 (2008) (Stevens, J., dissenting).

U.S.C. § 922(g)(1).[63] Ten circuits, as well as a number of district courts, have thus far upheld the statute against such challenges.[64] Three of these circuits held that the presumption favoring gun controls on felons is not dicta but rather a condition that is part of the individual right to bear arms and, therefore, "the Supreme Court's discussion in *Heller* of the categorical exceptions to the Second Amendment was not abstract and hypothetical; it was outcome-determinative."[65] Similarly, at least one district court has rejected a challenge to the federal Gun-Free School Zones Act based on the same language in *Heller*.[66] Courts' deference to lawmakers in these and other decisions has resulted in an expansion of the Court-given exceptions,[67] sometimes without applying the historical analysis that the Court seemed to favor.[68]

In considering what the Court meant in establishing its exceptions to the Second Amendment right for individuals to bear arms, some courts have examined the general ideas that those exceptions seem to support and have applied those general ideas to the circumstances presented by individual cases.[69] Such a reading led a Washington district judge to

63. Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1248 (2008–2009).

64. *See* United States v. Barton, 633 F.3d 168, 172 (3d Cir. 2011); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010); United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 805 (2010); United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010); United States v. Stuckey, 317 F. App'x 48, 50 (2d Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009), *cert. denied*, 129 S. Ct. 2814 (2009); United States v. Frazier, 314 F. App'x 801, 807 (6th Cir. 2008); United States v. Brunson, 292 F. App'x 259, 261 (4th Cir. 2008); United States v. Irish, 285 F. App'x 326, 327 (8th Cir. 2008); Denning & Reynolds, *supra* note 63, at 1248–49 & nn.23–25. *But cf.* Britt v. State, 681 S.E.2d 320, 323 (N.C. 2009) (finding a state law prohibiting a felon from possessing a firearm violated the state's constitutional protection of an individual right to bear arms as applied to a nonviolent offender whose civil rights had been restored to him).

65. *Barton*, 633 F.3d at 172; *see also Rozier*, 598 F.3d at 771 & n.6; *Vongxay*, 594 F.3d at 1115.

66. *See* United States v. Lewis, 50 V.I. 995, 1000–01 (D.V.I. 2008).

67. *See* Denning & Reynolds, *supra* note 63, at 1248.

68. *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *5 (N.D. Cal. Mar. 17, 2011) ("Where a challenged statute apparently falls into one of the categories signaled by the Supreme Court as constitutional, courts have relied on the 'presumptively lawful' language to uphold laws in relatively summary fashion."). Not only did the Court undertake its own historical review in *Heller*, it also used the qualifier "longstanding" in defining the types of gun-control laws and regulations it deemed constitutional. *See* District of Columbia v. Heller, 554 U.S. 570, 605–26 (2008); Recent Case, United States v. Bledsoe, *No. SA-08-CR-13(2), 2008 U.S. Dist. LEXIS 60522 (W.D. Tex. Aug. 8, 2008)*, 122 HARV. L. REV. 827, 831–32 (2008) [hereinafter *Texas Upholds Gun Regulation*].

69. *See, e.g.*, Warden v. Nickels, 697 F. Supp. 2d 1221, 1229 (W.D. Wash. 2010).

deem that banning guns in parks fell within the Court's exceptions for laws prohibiting possession of firearms in "sensitive places."[70] The court determined that "[a]s with a government building or a school, a city-owned park where children and youth recreate is a 'sensitive' place where it is permissible to ban possession of firearms."[71]

Such broadly drawn interpretations of *Heller*'s exceptions are often coupled with a narrow construction of the decision's central holding.[72] Justice Stevens, in his dissent, found the majority's holding restrained to "the right 'to possess and carry weapons in case of confrontation.'"[73] The majority itself seemed to limit even further the application of the Second Amendment right to only weapons "in common use at the time" of the amendment's ratification,[74] in certain confrontations,[75] as well as for certain manners and purposes.[76] The manners and purposes of this constitutional right are without much elaboration in the opinion, although self-defense (or "immediate self-defense")[77] is unquestionably protected.[78]

The caution by lower courts to not overturn existing legislation could be the result of confusion over which standard of review to apply when evaluating the constitutionality of gun-control laws—a quandary that Justice Breyer predicted when *Heller* was decided.[79] The majority ruled out tests that would ask whether a law burdens a protected interest disproportionately to other important government interests[80] or whether a law is justified by advancing a "legitimate state interest."[81] But, the majority did not leave many more breadcrumbs as to which standard of

70. *See id.*

71. *Id.*

72. *See* United States v. Masciandaro, 648 F. Supp. 2d 779, 787–88 (E.D. Va. 2009) (stating that "*Heller*'s dicta is notable for the degree to which it confirms the limited scope of the case's holding").

73. District of Columbia v. Heller, 554 U.S. 570, 646 (2008) (Stevens, J., dissenting) (quoting the majority).

74. *Id.* at 627.

75. *See id.* at 595 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation.").

76. *See id.* at 626 (citing early treatises and cases finding that the Second Amendment right "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose").

77. *Id.* at 635.

78. *See id.* at 628–29.

79. *See id.* at 718 (Breyer, J., dissenting).

80. *See id.* at 634–35.

81. *See* Winkler, *supra* note 34, at 699–700.

review would be appropriate. Although Justice Scalia rejected the application of interest balancing for laws that would restrict an individual's Second Amendment rights,[82] the language of *Heller* raises questions about whether he meant to exclude all forms of interest balancing or simply the limited form that he attributed to Justice Breyer's dissent.[83] In fact, Justice Scalia suggested that Justice Breyer's form of interest balancing for Second Amendment rights would not meet the requirements for the strict scrutiny, intermediate scrutiny, or rational-basis tests.[84] Therefore, by explicitly denying the application of only the novel interest-balancing approach and rational-basis test, the Court left open whether it intended other forms of interest balancing to be used to evaluate laws or whether it favored a categorical approach.[85]

As a result, lower courts have used strict scrutiny, intermediate scrutiny, and an undue burden-type test in evaluating whether laws violate the Second Amendment right recognized in *Heller*.[86] Under strict scrutiny, a law would have to be shown to serve a compelling government interest and also be narrowly tailored to serve that interest to be found constitutional.[87] Intermediate scrutiny, on the other hand, requires the government to show a "substantial relationship" between its restriction on a constitutional right and an "important" government objective.[88] Both of those tests are more common than the undue-burden test, which is largely confined to analyzing laws restricting abortion rights.[89] Under the undue burden test, introduced by the Supreme Court in *Planned Parenthood v. Casey*, a law runs afoul of the Constitution when it poses an undue burden on an individual's ability to exercise a recognized right.[90]

Commentators also have recommended "a deferential reasonableness" balancing test, in which nearly any regulation that does

---

82. *See Heller*, 554 U.S. at 634–35.

83. *Id.* at 634.

84. *See id.* at 634–35.

85. *See id.* at 635 (identifying, without explicit clarity, some categorical carve-outs of individuals' Second Amendment rights but not identifying this approach as the governing test). For a more thorough discussion, see *infra* notes 125–41 and accompanying text.

86. United States v. Masciandaro, 648 F. Supp. 2d 779, 787 (E.D. Va. 2009).

87. *See* Abrams v. Johnson, 521 U.S. 74, 82 (1997).

88. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671 (3d ed. 2006).

89. *See* Mark Tushnet, *Permissible Gun Regulations After* Heller*: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1437 (2009).

90. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

not amount to an outright ban could be supported by the government's "compelling interest,"[91] or a "deferential form of strict scrutiny" in which "a reviewing court would accord the government limited deference in satisfying both the compelling-interest and narrow-tailoring prongs" of a traditional strict scrutiny inquiry.[92] Such discord could be good news for gun-control advocates, in whose favor the lower courts thus far have sided, by upholding existing laws restricting firearm rights.[93] But how long the string of decisions in their favor can last is uncertain.

Even though courts thus far have gone out of their way to preserve existing gun restrictions, these recent decisions have not quelled predictions that statutes will fall.[94] Given the brevity with which the Supreme Court dispatched its list of presumably constitutional gun-control laws, a careful analysis by courts should be triggered when weighing challenges to such laws, even if they appear to fall within the Court's dicta. As one commentator noted in an example, Justice Scalia—a former school rifle team member—likely did not intend to uphold bans on guns used at private schools that teach defensive gun use or hunting skills, despite writing that he would support laws banning firearms in schools.[95] In her dissent to an en banc opinion vacating the decision of a three-judge panel of the Seventh Circuit Court of Appeals, Judge Diane Sykes provided a spirited argument for a more thorough review by courts and a greater effort by public officials to defend their gun-control restrictions:

---

91. *See* Cameron Desmond, Comment, *From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1062 (2008).

92. Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1572 (2009).

93. *See* Robert J. Cahall, Note, *Local Gun Control Laws After* District of Columbia v. Heller*: Silver Bullets or Shooting Blanks? The Case for Strong State Preemption of Local Gun Control Laws*, 7 RUTGERS J.L. & PUB. POL'Y 359, 372–73 (2010).

94. *See* William G. Merkel, Heller *as Hubris, and How* McDonald v. City of Chicago *May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221, 1254 (2010) (predicting that conflicts between the *Heller* Court's dicta and Justice Scalia's favoring of gun rights will doom the now-protected restrictions).

95. *See* David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 518, 522 (2009) (noting separately that Justice Scalia was a member of his school's rifle team and that the *Heller* dicta should not be read as if it were a statute that would allow the ban on their use at private schools that teach defensive gun use or hunting skills).

> [T]here are several ways to understand the Court's analysis in *Heller* in light of its limiting dicta about exceptions. But we cannot read *Heller's* dicta in a way that swallows its holdings. The government normally has the burden of justifying the application of laws that criminalize the exercise of enumerated constitutional rights. We should follow that norm, not pay lip service to it.[96]

The majority in *Heller* predicted—indeed, almost invited—these challenges.[97] Justice Scalia's opinion referenced the long history of litigation that followed the Court's "first in-depth Free Exercise Clause case"[98] as support for his lack of specificity about the types of gun-control laws that would withstand judicial evaluation after the 2008 decision.[99] He also justified the exceptions enumerated in "*Heller*'s asterisk"[100] by comparing them to the lack of First Amendment protections for "obscenity, libel, and disclosure of state secrets."[101] Commentators likewise have drawn comparisons between the First and Second Amendment in predicting how future cases that elaborate on the individual right guaranteed by the Second Amendment will be decided.[102] Thus, the copious First Amendment jurisprudence that is already available could provide worthwhile lessons for those searching for a roadmap on how to define the newfound rights guaranteed by the Second Amendment.

III. THE FIRST AMENDMENT AS A BLUEPRINT FOR EVOLVING SECOND AMENDMENT JURISPRUDENCE

Many have suggested, both leading up to and after the decisions in

96. United States v. Skoien, 614 F.3d 638, 654 (7th Cir. 2010) (Sykes, J., dissenting). A similar sentiment was voiced in a concurring opinion to a Tenth Circuit decision that upheld 18 U.S.C. § 922(g)(1), the federal statute prohibiting firearm possession by felons. *See* United States v. McCane, 573 F.3d 1037, 1047–48 (10th Cir. 2009) (Tymkovich, J., concurring) (expressing concern over "the possible tension between *Heller*'s dictum and its underlying holding" and that "the dictum inhibits lower courts from exploring the contours of *Heller* and its application to firearm restrictions").

97. *See* District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

98. *See id.* at 635; Reynolds v. United States, 98 U.S. 145, 168 (1878) (upholding a law criminalizing polygamy).

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

100. *See* Larios, *supra* note 55, at 60 (commenting on "*Heller*'s Asterisk").

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

102. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 377–81, 399 (2009); Desmond, *supra* note 91, at 1065–71.

Heller and *McDonald*, that the Court should follow the same approach in interpreting Second Amendment rights as has been taken to define an individual's rights under the First Amendment.[103] Indeed, Justice Scalia's reference to the voluminous case law establishing the Court's jurisprudence in the First Amendment's Free Exercise Clause cases would seem to bolster this approach.[104] Gun-rights proponents likely are drawn to the First Amendment because several of its provisions—namely the freedoms of association and assembly—prompt a strict scrutiny review by courts.[105] But this ignores other rights under the First Amendment that do not receive such protection.[106] According to Professor Joseph Blocher, "free speech doctrine has been pockmarked with categorical exclusions and stretched and trimmed with balancing tests."[107] The Court's decision in *Heller*, with its enumerated exceptions,[108] could be interpreted as creating similar categorical carve-outs for individuals' Second Amendment rights.

Under a categorical approach, courts determine the scope of the rights protected by the Constitution and then evaluate whether a challenged activity infringes upon these protected rights.[109] In contrast, with the generally defined interest-balancing approach, a court is called upon to weigh an individual's constitutionally-protected right against the government's interest in an activity that infringes on that more broadly-drawn right.[110] As such, categoricalism is seen as a way to remove the judge from the equation in defining infringement of a fundamental constitutional right or, as conservatives would put it, prevent judicial activism.[111] As Blocher explains,

---

103. *See* United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958, 958–59 (2011); Blocher, *supra* note 102, at 399; Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. 85, 102–03 (2010); Winkler, *supra* note 34, at 706.

104. *See Heller*, 554 U.S. at 635.

105. *See* Winkler, *supra* note 34, at 693.

106. *See* Blocher, *supra* note 102, at 402.

107. *Id.*

108. *See Heller*, 554 U.S. at 635.

109. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293–94 (1992) ("When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement.").

110. *See* Blocher, *supra* note 102, at 381–82.

111. *See* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 558 (2010) (arguing that Republican lawmakers have traditionally equated judicial

> Categoricalism allows a judge to transform some background value into a rule that will govern all subsequent cases inside the category without any further reference to the background principle or value. The creation of the category cuts off future adjudicators from the underlying value and prohibits the reweighing of interests.[112]

The critical factor in categoricalism, therefore, is to define the fundamental value protected by the Constitution and ensure that the categories of activities that fall within and outside this value are protected or excluded from constitutional guarantees.[113]

Applied to the First Amendment's Free Speech doctrine, the categories of obscenity, libel, and child pornography have been declared by the Court to not receive constitutional protection.[114] This would appear to be a strong case of categoricalism in which large categories of speech are deemed not to receive the constitutional protections extended to other types of speech. But, at the same time, commercial speech has been declared to fall under the Free Speech protections of the First Amendment, but not under the same level of protection accorded to political speech.[115] In this aspect of distinguishing the protections provided to commercial versus political speech, therefore, the Court could be seen as engaging in—and, by extension, instructing lower courts also to employ—a sort of interest balancing by evaluating whether laws are constitutional under a certain level of scrutiny. Likewise, the time, place, and manner restrictions that the Court allows for protected speech indicate something other than a categorical approach.[116] In cases involving such permitted restrictions on constitutionally-protected speech, courts have generally applied a form

---

activism with a willingness to limit government on constitutional grounds).

112. Blocher, *supra* note 102, at 382.

113. *See id.* at 383 (noting that when a category and underlying value do not align "absurdities such as significant over- or underinclusion can undermine the category's legitimacy and stability").

114. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography); Miller v. California, 413 U.S. 15, 23 (1973) (obscenity); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (libel); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (libel).

115. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978) (reasoning that "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech").

116. *See* Blocher, *supra* note 102, at 397.

of intermediate scrutiny in weighing whether the government interest justifies the burden on speech.[117] Thus, the courts have engaged in interest balancing for some forms of speech protected by the First Amendment.[118]

The differences between the categorical approach and the interest-balancing approach can be seen in how courts treat offensive, but not obscene, speech. This was the issue before the Court in *Federal Communications Commission v. Pacifica Foundation*, the renowned case involving the threatened punishment of a radio station for broadcasting comedian George Carlin's "Filthy Words" monologue in the middle of a weekday.[119] Although the issue was not before the Court in the case, if the Court had determined that the monologue was obscene, its inquiry would have ended and the Federal Communications Commission's (FCC) actions would have been upheld as an allowable regulation on unprotected speech not in violation of the Constitution.[120] On the other end of the spectrum, if the monologue had been determined to be of political nature, the Court indicated that the radio station could receive absolute protection under the First Amendment and the commission's attempt to regulate it would have been unlawful.[121] Such deference shows the high value that the courts place on political speech, and the corresponding high hurdle that the government would have to overcome to demonstrate that its interest in regulating such speech justified its regulation.

But, because Carlin's monologue was merely considered indecent with no political bent, the Court evaluated whether the speech deserved protection under the First Amendment and how much protection it should be afforded through a form of interest balancing that placed a lower value on his speech.[122] In the end, the Court held that the individual circumstances in which such offensive language is used determine whether the speech will be constitutionally protected from a

117. *See id.* at 391–92.

118. *See id.* According to Blocher, "intermediate scrutiny in all of its forms represents 'an overtly balancing mode'—perhaps 'the only genuine balancing mode that we have.'" *Id.* at 392 (quoting Sullivan, *supra* note 109, at 297; and Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 606 (1992)).

119. Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726, 729–30 (1978).

120. *See id.* at 742, 746 (noting the radio station's argument that, as long as the broadcast was not obscene, the Constitution does not permit any regulation).

121. *See id.* at 746.

122. *See id.* at 746–48.

particular regulation.[123] As Justice Stevens identified in his plurality opinion, "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context."[124]

Turning to the First Amendment for guidance in interpreting the Court's decisions in *Heller* and *McDonald*, the Court's exemption for laws that forbid the possession of firearms by felons and the mentally ill[125] could be compared to the First Amendment categorical exemptions for "obscenity, libel, and disclosure of state secrets."[126] Does this then endorse a categorical approach in interpreting the Second Amendment? In a categorical approach, laws are evaluated on whether they fall within a category protected by an underlying value of a right in which regulation will not be permitted[127] as opposed to, say, whether the law is "rationally related to legitimate governmental objectives"[128] or "substantially related to an important governmental objective,"[129] as provided under different levels of scrutiny. When considered within the right to protect oneself in one's home, laws that single out certain types of people (e.g., felons and the mentally ill)[130] and weapons (e.g., firearms not in common use at our nation's founding),[131] and that are generally unnecessary to protect that right should be found constitutional. This would appear to be the Court endorsing a categorical approach to interpreting the infringement of an individual's Second Amendment right.

But the *Heller* Court's allowance for laws that exclude "the carrying of firearms in sensitive places such as schools and government buildings"[132] more closely resembles "time, place, and manner restrictions" under the First Amendment,[133] which require courts to

123. *See id.* at 747–48.

124. *Id.* at 747.

125. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010); District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

126. *See Heller*, 554 U.S. at 635.

127. *See* Blocher, *supra* note 102, at 382.

128. *See* Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (stating that this is the minimum requirement to uphold the constitutionality of government legislation).

129. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (defining this as intermediate scrutiny, applicable to classes based on gender or illegitimacy).

130. *McDonald*, 130 S. Ct. at 3047; *Heller*, 554 U.S. at 626.

131. *Heller*, 554 U.S. at 627; United States v. Miller, 307 U.S. 174, 179 (1939).

132. *Heller*, 554 U.S. at 626.

133. *See* Desmond, *supra* note 91, at 1065–71.

apply an interest-balancing approach.[134] Using time, place, and manner restrictions, the Court has upheld content-neutral regulations on speech such as requiring parade licenses,[135] limiting where abortion protesters can demonstrate,[136] and mandating volume controls at outdoor concerts[137] by weighing the restrictions' reasonableness in service of a significant government interest against the First Amendment rights of the regulated speakers.[138] A court could determine that the *Heller* Court meant to allow a similar balancing of the government's interest in protecting "sensitive places" against an individual's Second Amendment right to carry a firearm.[139] Certainly, such a restriction is analogous to the First Amendment's restrictions that acknowledge certain places where speech can be restricted.[140] Thus, the Court could be seen to have endorsed the same level of interest balancing that is used to evaluate the First Amendment's time, place, and manner restrictions for the Second Amendment's "sensitive places" restrictions: intermediate scrutiny.[141]

One resolution to this conundrum, in which the Court appears to endorse both categoricalism and some form of interest balancing, suggests that the category of rights established for protection by *Heller* relates to whether such a right was subject to regulation at the time of the writing of the Constitution.[142] Essentially, this view determines the values protected by the Second Amendment based on the types of laws that existed when the amendment was ratified.[143] Several aspects of the *Heller* decision, including its lengthy discourse on eighteenth-century laws, dictionary terms, and nineteenth-century interpretations,[144] support this historical approach. "*Heller*'s asterisk" refers to the possibility of

134. *See* Blocher, *supra* note 102, at 397.

135. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

136. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994).

137. *See* Ward v. Rock Against Racism, 491 U.S. 781, 789–92 (1989).

138. *See id.* at 791.

139. *See* Blocher, *supra* note 102, at 408.

140. Although the Court has declared that students do not shed their constitutional rights at the schoolhouse door, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969), it also has determined that more restrictions can be placed on speech within the school environment than in other public places, *id.* at 507.

141. *See* Blocher, *supra* note 102, at 391–92, 397.

142. *See* United States v. Skoien, 614 F.3d 638, 649–51 (7th Cir. 2010) (Sykes, J., dissenting). Judge Sykes asserted in *Skoien* that where historians disagree about the status of a particular law at the time of ratification, courts should be hesitant about upholding laws that infringe upon an individual's Second Amendment rights. *Id.* at 651.

143. *See id.*

144. *See* District of Columbia v. Heller, 554 U.S. 570, 580–619 (2008).

employing "exhaustive historical analysis" to determine the "full scope of the Second Amendment" as well as whether the "longstanding" prohibitions on Second Amendment rights are still lawful.[145] Furthermore, the Court interprets the ruling in *United States v. Miller* as a restriction on the protection of weapons "in common use at the time" of the Second Amendment's ratification, finding that the earlier Court had difficulty with the type of weapon involved in the case and not that the possession was unrelated to militia activity.[146] Under this type of historical interpretation, a law is presumptively constitutional if it or an analogous restriction was employed in 1791.[147] This approach was arguably taken by Judge Sykes in her original opinion for a three-judge panel of the Seventh Circuit in *United States v. Skoien*,[148] which was overturned by an en banc decision.[149] In her dissent to that later decision, Judge Sykes criticized her colleagues for not undertaking a historical review of the gun-control law challenged in the case (a federal statute forbidding those convicted of misdemeanor domestic violence from possessing firearms)[150] to determine whether it violated the Second Amendment.[151]

But there are problems with this approach, namely the burden it places upon inexpert judges with weighty caseloads to conduct adequate historical research before determining the constitutionality of the nation's myriad gun-control laws.[152] Such examinations also could produce results even more confusing than under the categorical approach, upholding regulations solely based on whether they existed at the time of the country's founding while ruling out regulations without such historical ties that would otherwise deserve to be upheld.[153]

---

145. *Id.* at 626–27; *see also* Larios, *supra* note 55, at 60 (commenting on "*Heller*'s Asterisk").

146. *See Heller*, 554 U.S. at 627.

147. *Texas Upholds Gun Regulation*, *supra* note 68, at 831.

148. United States v. Skoien, 587 F.3d 803, 809 (7th Cir. 2009), *vacated*, 614 F.3d 638 (7th Cir. 2010).

149. *Skoien*, 614 F.3d at 644–45.

150. *See* 18 U.S.C. § 922(g)(9) (2006).

151. *Skoien*, 614 F.3d at 648 (Sykes, J., dissenting) (criticizing the majority opinion for interpreting a categorical protection for a law criminalizing persons convicted of misdemeanor domestic violence when whether "categorical disarmament is proper as part of the original meaning of the Second Amendment has not been established" (internal quotation marks omitted)).

152. *See Texas Upholds Gun Regulation*, *supra* note 68, at 833.

153. *See id.*

Furthermore, it is not apparent that such a historical approach could be taken when determining the constitutionality of limiting an individual's Second Amendment rights in particular places. Although a ban on the possession of deadly weapons by felons or the mentally ill could have a seemingly clear-cut historical basis, defining what constitutes a "sensitive" place requires a flexibility not afforded by a strictly historical, categorical approach. Airports, for example, pose a problem that a historical analysis would have to contort itself to solve; so too, in an age of fear about biological or other forms of terrorism, do water treatment plants and even food distribution facilities.[154]

What is likely to result, then, is precisely what commentators and the Court itself suggested in *Heller*: a combination of categorical and interest-balancing approaches to enforcing the Second Amendment.[155] Those laws that exclude certain types of people from receiving permits to carry firearms or restrict certain types of firearms will likely constitute a categorical exception to the Second Amendment's protection of an individual right to possess a handgun for ready use in self-defense and be evaluated according to whether they fall within or outside of the scope of that right. At the same time, those laws that restrict the possession of firearms in certain places will most likely be evaluated by whether they are tied closely enough to a government interest that justifies an infringement on a constitutional right, perhaps with special deference paid to whether that restriction was present at the time of ratification and is presumptively lawful.

IV. THE CONSTITUTIONALITY OF GUN-FREE SCHOOL ZONE LAWS AFTER *HELLER* AND *MCDONALD*

Following the Court's decision in *Heller*, numerous lawsuits were filed in both federal and state courts challenging the constitutionality of gun-control laws.[156] Two of those suits sought to overturn school zone laws in California and Wisconsin that restricted the possession of

154. *See* Mara Rose Williams, *On the Front Lines of Bioterror Defense—Killer Pathogens Could Bring Disaster: K-State Experts Lead the Way*, KAN. CITY STAR, Sept. 25, 2006, at A1.

155. *See* Blocher, *supra* note 102, at 413 (arguing that although the *Heller* majority professed to be taking a categorical approach, in defining whether laws violate an individual's Second Amendment rights, the Court likely will adopt a mixture of categoricalism and interest balancing as it has done with the First Amendment).

156. *See, e.g.*, *supra* note 64 and sources cited therein.

firearms within 1000 feet of school grounds.[157] A district court judge upheld the California law against the pro se attack.[158] Meanwhile, the Wisconsin Legislature likely rendered moot the pending lawsuit challenging its statute when it erased the 1000-foot gun-free perimeter around state schools for licensed carriers.[159] As this Comment will argue, however, there is a better way for legislatures to approach the issue in preserving citizens' Second Amendment rights and protecting schoolchildren from violence.[160] This bears consideration both in states that already have changed their laws and those concerned that existing statutes might not survive legal challenges.

Although one district court has already upheld the federal school zone law against a Second Amendment challenge,[161] a federal appeals court previously raised questions about whether the law would survive judicial scrutiny.[162] The Fifth Circuit introduced the possibility of a successful challenge in a footnote to its decision in *United States v. Lopez*, a case that resulted in the prior version of the federal Gun-Free School Zones Act being ruled unconstitutional by the Supreme Court on Commerce Clause grounds.[163] The appellate court wrote in the pre-*Heller* decision, "It is also conceivable that some applications of section 922(q) might raise Second Amendment concerns. Lopez does not raise the Second Amendment and thus we do not now consider it. Nevertheless, this orphan of the Bill of Rights may be something of a brooding omnipresence here."[164]

Although the Fifth Circuit opinion predates the Supreme Court's decisions in *Heller* and *McDonald*, little from those recent opinions would explicitly shield school zone laws today. The *Heller* decision qualifies the types of gun-control laws that would be found constitutional with the word "longstanding,"[165] while also protecting laws

157. *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *1, *16 (N.D. Cal. Mar. 17, 2011); *Wisconsin Carry* Complaint, *supra* note 26, at 11–12.

158. *See Garcia*, 2011 U.S. Dist. LEXIS 34081, at *1, *16.

159. WIS. STAT. § 948.605 (2009–2010), *amended by* 2011 Wis. Act 35, §§ 91–96.

160. *See infra* Part V.

161. *See* United States v. Lewis, 50 V.I. 995, 1000–01 (D.V.I. 2008).

162. *See* United States v. Lopez, 2 F.3d 1342, 1364 n.46 (5th Cir. 1993).

163. United States v. Lopez, 514 U.S. 549, 552 (1995).

164. *Lopez*, 2 F.3d at 1364 n.46.

165. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008). The common interpretation appears to be that the Court was affirming longstanding laws prohibiting firearm possession by felons and the mentally ill as well as longstanding prohibitions on firearm possession in sensitive places. *See Texas Upholds Gun Regulation*, *supra* note 68, at

prohibiting firearm possession "in" sensitive places such as schools.[166] A Court that reached back to the 1773 edition of Samuel Johnson's dictionary to supply a definition for its opinion would be unlikely to view the state or federal school zone acts as longstanding.[167] Furthermore, individuals within the 1000-foot school zone perimeter are arguably not "in" sensitive areas.

The preceding sections contained an examination of the types of review that the Court endorsed in its decisions in *Heller* and *McDonald* as well as those that have been recommended by observers.[168] Although the standard of review is yet to be determined, the best way to apply the Court's decision in future Second Amendment cases would be through a two-part test.[169] First, a court must ask whether a challenged regulation implicates a right protected by the Second Amendment by looking at whether the restrictions (1) impose upon firearm possession by a category of people or type of firearms that have not been subject to

832. It also could be argued that the "longstanding" modifier only applies to the first part of the sentence and not the laws identified farther from this modifier. In that case, laws that restrict firearm possession in sensitive places and laws that place "conditions and qualifications on the commercial sale of arms" would be viewed as constitutional regardless of when they were instituted. *See* Heller, 554 U.S. at 626–27.

166. *Heller*, 554 U.S. at 626.

167. *See id.* at 581.

168. *See supra* Parts II–III.

169. Several courts and commentators have suggested similar approaches, although the one suggested here may not be completely identical. The Third Circuit has advocated an approach that starts the inquiry by asking whether a challenged law burdens conduct falling within the Second Amendment's protection. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d. Cir. 2010), *cert. denied*, 131 S. Ct. 958, 958–59 (2011). If it does not, the law is constitutional. *Id.* If the law does implicate protected conduct, then the court should subject the law to means-end scrutiny to determine if the law is constitutional or invalid. *Id.* The Fourth Circuit has applied this two-prong approach. *See* United States v. Chester, 628 F.3d 673, 680–82 (4th Cir. 2010). One commentator also supports a similar two-prong approach, suggesting that the first prong regarding whether a challenged activity is protected by the Second Amendment be based on whether the challenged regulation implicates a lawful purpose of firearm use or a class of firearms in use at the time of ratification. *See* Gould, *supra* note 92, at 1562–64. In the Seventh Circuit, Judge Sykes started the analysis in her later-vacated opinion by evaluating whether a law is categorically invalid under the Second Amendment or, alternately, valid because it regulates conduct "that falls outside of the term of the right as publicly understood when the Bill of Rights was certified." United States v. Skoien, 587 F.3d 803, 808–09 (7th Cir. 2009), *vacated*, 614 F.3d 638 (7th Cir. 2010). A court need perform no further exploration for such a categorically valid law, she wrote. *Id.* at 809. But all other laws should be subjected to a level of means-end scrutiny based on "how closely the law comes to the core right and severity of the law's burden on that right," according to Sykes' analysis. *Id.*

"longstanding" laws that prohibit their possession[170] or (2) infringe upon a lawful purpose for firearm possession (i.e., not just "any sort of confrontation").[171] If enforcement of the law does not impose upon a lawful purpose of firearm possession by all people, but instead imposes blanket restrictions upon a class of people that have not been subject to such legal regulations for very long or upon a group of weaponry commonly in use at the time of ratification, then a court should categorically strike the law down.[172] If a court finds that the regulation implicates the second category, however, by infringing upon an otherwise lawful purpose no matter who the law applies to or what types of firearms it regulates, the court must determine if the regulation is constitutional by evaluating whether the challenged restriction survives a certain standard of review.[173]

Given that the school zone laws potentially fall into the second type of restriction—implicating a lawful purpose of firearm possession rather than banning possession by a class of persons or of a group of weaponry—this Comment will evaluate the constitutionality of the states' school zone laws by analyzing whether the right to carry a loaded firearm on public property within 1000 feet of a school is protected by the Second Amendment. The analysis will continue by assessing whether the laws can still survive different levels of scrutiny that could be applied by the courts if they were to find that the school zone laws infringe upon a protected right. The origins of these laws are important in determining how much deference courts should grant to the drafters of the school zone laws.

A. The Development of Gun-Free School Zone Laws

Laws in California and Illinois banning the possession of loaded firearms within 1000 feet of schools were adopted within five years of each other and the federal Gun-Free School Zones Act during the first half of the 1990s.[174] At the time, widely publicized incidents had raised

170. *See, e.g.*, *Chester*, 628 F.3d at 676, 680; *Marzzarella*, 614 F.3d at 89–95; *Skoien*, 587 F.3d at 808–09; Gould, *supra* note 92, at 1562–64.

171. *See Heller*, 554 U.S. at 595.

172. *See Marzzarella*, 614 F.3d at 91, 94; Gould, *supra* note 92, at 1563–64.

173. *See Chester*, 628 F.3d at 676; *Skoien*, 587 F.3d at 809; Gould, *supra* note 92, at 1562–64.

174. *See* 87th GEN. ASSEMB., H.R. TRANSCRIPTION DEBATE 150–51 (Ill. June 18, 1992) (statement of Rep. Laurino); SENATE FLOOR BILL ANALYSIS OF AB 645, at 1 (Cal. Aug. 22, 1994); Andrew Gottesman, *Guns Are Shattering Quiet Around Schools in Suburbs*, CHI.

fears about the safety of schools.[175] In advocating for the federal law in 1990, U.S. Senator Herb Kohl of Wisconsin highlighted cases of individuals who killed or wounded children with firearms on school grounds as well as concerns about the escalating presence of weaponry among students.[176] When the law was revised, President Bill Clinton reiterated the purpose of the law as a way to combat campus violence and keep schools safe.[177]

In June 1992, the Illinois General Assembly passed an amendment adding a firearms ban to an existing statute that outlawed drugs within 1000 feet of schools, parks, and public housing.[178] Arguing in favor of passage of the new law, Illinois State Representative Bill Laurino referenced increasing problems with violence, not just in the city of Chicago, but throughout the state.[179] Representative Laurino stated the following on the floor of the Illinois House of Representatives:

> This year alone we're already about 20% ahead of last year's record-setting [murder] rate and this piece of legislation is trying to put a cap on some of these people that think it's okay just to drive around your neighborhoods and use innocent people as targets, just because they think it's fun.[180]

During the 1992–1993 school year, "158 guns were confiscated on or near public school grounds" in Chicago.[181] Similarly, California's law was introduced as an answer to a concern about the growing issue of school violence in that state.[182]

TRIB., Sept. 23, 1993, § 1, at 1.

175. *See* Jeremy Gerard, *Jennings Creates a Gun-Control Special*, N.Y. TIMES, Jan. 23, 1990, at C18; *Schools Are Relatively Safe, U.S. Study Says*, N.Y. TIMES, Nov. 19, 1995, § 1, at 40; Walsh, *supra* note 1, at D1.

176. *See supra* notes 6–9 and accompanying text.

177. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO AMEND THE GUN-FREE SCHOOL ZONES ACT OF 1990, H.R. DOC. NO. 104-72, at 1 (1995) ("I am committed to doing everything in my power to make schools places where young people can be secure, where they can learn, and where parents can be confident that discipline is enforced.").

178. *See* 87th GEN. ASSEMB., H.R. TRANSCRIPTION DEBATE 143, 151 (Ill. June 18, 1992) (statement of Rep. Laurino).

179. *See id.* at 150.

180. *Id.*

181. *See* Andrew Gottesman, *Guns Are Shattering Quiet Around Schools in Suburbs*, CHI. TRIB., Sept. 23, 1993, § 1, at 1.

182. *See* SENATE FLOOR BILL ANALYSIS OF AB 645, at 1 (Cal. Aug. 22, 1994). A

Although linked, the federal and state laws vary in certain ways. The federal Gun-Free School Zones Act makes it a crime to knowingly possess a firearm that has moved in or otherwise affects interstate or foreign commerce within 1000 feet of a public or private school.[183] The law makes exceptions if possession is on private, non-school grounds; if the state has licensed the individual to carry the firearm; if the firearm is not loaded and is contained in a locked container or firearm rack within a motor vehicle; if the firearm's use is part of a school-sanctioned program; if the possession is by law enforcement in an official capacity; or if the firearm is unloaded and carried by a person gaining access to hunting grounds and has been approved by school personnel.[184]

The law was originally adopted in 1990 before being invalidated in 1995 by the Supreme Court as an unconstitutional exercise of Congress' lawmaking power under the Commerce Clause.[185] Congress re-enacted the law in 1996, introducing the limitation that the firearm must have moved in interstate commerce.[186] While that revision did little to limit the law's potential application,[187] the federal law has been regarded as "mostly irrelevant" given that many states and school districts already had their own bans by the time it was enacted[188] and criminal activity and education have traditionally been governed by state law.[189] In addition, the enactment of state laws in recent years that expanded the permitting of firearms also has limited the federal law's effect, given its exception that allows licensed individuals within the 1000-foot gun-free zone.[190]

---

measure proposed as a penalty enhancer for felonies committed by gang members within 1000 feet of schools was to address the fact that "[a] bulk of actual violence and crime occurs right around the campus." ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS OF AB 645, at 2 (Cal. Apr. 20, 1993). According to the measure's author, "increas[ing] penalties for crimes committed in a school zone will hopefully deter such actions around our schools and provide a greater degree of safety for our children and teachers." *Id.* School zone law opponents, however, point out that prior to passage of the federal law in 1990, only seven shootings had taken place at American schools; in contrast, seventy-eight incidents followed in the seventeen years after passage of that law and similar state statutes. *See* Kopel, *supra* note 95, at 519.

183. *See* Gun-Free School Zones Act of 1990 § 1702(b)(2), 18 U.S.C. § 922(q)(2) (2006).

184. *See id.*

185. *See* United States v. Lopez, 514 U.S. 549, 551–52 (1995).

186. *See* Chamberlin, *supra* note 28, at 331; Kopel, *supra* note 95, at 519.

187. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO AMEND THE GUN-FREE SCHOOL ZONES ACT OF 1990, H.R. DOC. NO. 104-72, at 1 (1995).

188. *See* Kopel, *supra* note 95, at 518–19.

189. *See* Chamberlin, *supra* note 28, at 306.

190. *See* Kopel, *supra* note 95, at 518–20. Since 1961, forty states have implemented

That could change, however, with the recent movement toward "constitutional carry" laws where certain residents are allowed to carry firearms—openly or concealed—without obtaining a state permit.[191] If such permissive laws result in fewer residents obtaining permits from their states, then the federal law may see new life—as well as face new legal challenges.

Neither Illinois nor California's school zone law exempts licensed gun carriers; thus, those statutes are currently more restrictive than the federal version.[192] In addition, the California law provides an exception for when the person has obtained a restraining order and is in fear of danger[193] and only applies to firearms "capable of being concealed on the person."[194] The Illinois law, on the other hand, appears more restrictive and has fewer exceptions than either the California or federal law.[195] Not only does the Illinois statute establish similar 1000-foot gun-free perimeters around public parks, courthouses, public transportation facilities, and public housing projects, but the only exceptions it allows to these prohibitions are for law enforcement and school security officers as well as students who have school permission.[196]

Other states provide varying levels of regulations on gun possession on school grounds. A few states have no statutes criminalizing firearms on or near school grounds or they have laws that sanction firearm possession by an extremely limited group of adults or only for certain purposes on school grounds.[197] More common are general prohibitions

---

"shall issue" laws—many of them passed in the 1980s and 1990s, where permits to carry concealed handguns are not issued on subjective standards; in the forty-eight states that issue permits to carry concealed weapons, the expectation is that the permits are valid throughout the states with only a few exceptions. *Id.*

191. *See State Firearms Laws Are Taking a Radical, Dangerous Turn*, *supra* note 29.

192. *Compare* CAL. PENAL CODE § 626.9 (West 2010 & Supp. 2011), *and* 720 ILL. COMP. STAT. ANN. 5/24-1(c)(1)–(1.5) (West 2010), *with* Gun-Free School Zones Act of 1990 § 1702(b)(2), 18 U.S.C. § 922(q)(2) (2006).

193. *See* CAL. PENAL CODE § 626.9(c)(3).

194. *See id.* § 626.9(c)(2).

195. *Compare* 720 ILL. COMP. STAT. ANN. 5/24-1(c)(2)–(3), *with* 18 U.S.C. § 922(q)(2), *and* CAL. PENAL CODE § 626.9.

196. *Compare* 720 ILL. COMP. STAT. ANN. 5/24-1(c)(2)–(3), *with* 18 U.S.C. § 922(q)(2)(b) (allowing exceptions for private property not part of school grounds, approved school programs, an individual acting in accordance with a contract between the school and the individual, and law enforcement officers acting in an official capacity), *and* CAL. PENAL CODE § 626.9(m)–(o) (allowing exceptions for authorized security guards, existing shooting ranges on a school campus, and authorized honorably-retired peace officers).

197. *See* ALA. CODE § 13A-11-72(c) (LexisNexis 2005) (prohibiting possession with intent to do bodily harm of a firearm on public school grounds); ALASKA STAT.

on loaded firearms within schools or at school-sanctioned events.[198] These laws assign differing levels of knowledge, exemptions, and penalties to the criminal possession of firearms on school grounds.[199] California and Illinois are the only remaining states that establish 1000-foot perimeters around school grounds on which the vast majority of citizens could not legally transport loaded firearms while on public property, although some states establish 1000-foot zones for the purpose of forbidding unpermitted users from being near schools.[200] Both

§ 11.61.195(a)(2)(A) (2010) (penalizing possession of firearms by felon on school grounds or adjacent parking lots); UTAH CODE ANN. §§ 53-5-704, 76-10-505.5 (LexisNexis 2008) (forbidding non-licensed firearm possessors on school grounds). Many statutes also allow individual schools to decide whether to permit individuals to carry loaded weapons on school grounds. *See infra* note 200. The superintendent of a Texas school district that allows guns in its schools justified this position by saying, "to say that the only people who can protect themselves have to [have] a badge . . . that's just ludicrous." *See* Stacy Teicher Khadaroo, *School Shootings: In Nebraska, a Proposal to Arm Teachers*, CHRISTIAN SCI. MONITOR (Jan. 19, 2011), http://www.csmonitor.com/USA/Education/2011/0119/School-shootings-In-Nebraska-a-proposal-to-arm-teachers.

198. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3102 (2010); ARK. CODE ANN. § 5-73-119 (1997); COLO. REV. STAT. § 18-12-105.5 (2010); CONN. GEN. STAT. ANN. § 53a-217b (West 2007); GA. CODE ANN. § 16-11-127.1 (2011); IDAHO CODE ANN. § 18-3302D (2004); IND. CODE ANN. § 35-47-9-2 (LexisNexis 2009); IOWA CODE ANN. § 724.4B (West 2003); KAN. STAT. ANN. § 21-4204 (2007); KY. REV. STAT. ANN. § 527.070 (LexisNexis 2008); ME. REV. STAT ANN. tit. 20-A, § 6552 (2008); MD. CODE ANN., CRIM. LAW § 4-102 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 269, § 10(j) (West 2008); MICH. COMP. LAWS ANN. § 750.237a(4) (West 2004); MINN. STAT. ANN. § 609.66 (West 2009 & Supp. 2010); MISS. CODE ANN. § 97-37-17 (2006); MO. ANN. STAT. § 571.030 (West 2003 & Supp. 2010); NEB. REV. STAT. § 28-1204.04 (2008); NEV. REV. STAT. ANN. § 202.265 (LexisNexis 2006 & Supp. 2009); N.J. STAT. ANN. § 2C:39-5(e) (West 2005 & Supp. 2011); N.M. STAT. ANN. § 30-7-2.1 (2004); N.Y. PENAL LAW § 265.01 (Consol. 2000 & Supp. 2011); N.C. GEN. STAT. § 14-269.2 (2009); N.D. CENT. CODE § 62.1-02-05 (2010); OKLA. STAT. ANN. tit. 21, § 1277 (West 2002 & Supp. 2011); 18 PA. CONS. STAT. ANN. § 912 (West 1998); S.C. CODE ANN. § 16-23-420, -430 (2003); S.D. CODIFIED LAWS § 13-32-7 (2004); TENN. CODE ANN. § 39-17-1309 (2010); TEX. PENAL CODE ANN. § 46.03(a)(1) (West 2003 & Supp. 2010); VT. STAT. ANN. tit. 13, § 4004 (2009); VA. CODE ANN. § 18.2-308.1 (2009); WASH. REV. CODE ANN. § 9.41.280 (West 2010); W. VA. CODE ANN. § 61-7-11a (LexisNexis 2010); WYO. STAT. ANN. § 6-8-104(t) (2011).

199. *See* statutes cited *supra* note 198.

200. *See* DEL. CODE ANN. tit. 11, §§ 1442, 1457 (2007) (defining permitted users as law enforcement and security officials, students possessing a deadly weapon as part of a course instruction, people possessing the weapon as a part of recreational or sporting activity, and those with a weapon within a private residence); FLA. STAT. ANN. § 790.115 (West 2007) (providing that permitted gun holders include individuals within 1000 feet of a school that carry firearms when enrolled in school-approved programs or classes, are on an on-campus firearm training range, store a weapon in a vehicle in a manner consistent with school policy, or are law enforcement officers, but criminalizing the unlawful discharge of these weapons within the gun-free zone); LA. REV. STAT. ANN. § 14:95.2 (West 2004 & Supp. 2011) (prohibiting firearm possession by licensed carriers in schools but not within 1000 feet of school property).

Wisconsin and Louisiana had school zone laws similar to California and Illinois' until state lawmakers recently amended their state statutes to permit individuals who had been given concealed carry licenses to possess their weapons within the 1000-foot zone.[201]

The unique school zone laws in California[202] as well as in Wisconsin[203] (before the Wisconsin state legislature's recent revision)[204] drew legal opposition following the Court's *Heller* decision.[205] The legal challenge to Wisconsin's former school zone statute that had been pending in the U.S. District Court for the Eastern District of Wisconsin alleged that the law "covers such a broad area that it practically forecloses a meaningful right to keep and bear arms in large parts of the state."[206] For example, a map depicting the approximate locations of school zones in Milwaukee covered the majority of the city,[207] including a gas station where one of the plaintiffs allegedly was arrested for violating the statute.[208] The plaintiffs and other members of Wisconsin Carry, Inc. said that they "desire to exercise their state and federal constitutional rights to bear arms but are in fear of doing so because they live, work, and spend leisure time within 1000 feet of schools."[209] One of the plaintiffs, who was planning an "open carry picnic" at his home in Greenfield, Wisconsin, where attendees would be encouraged to carry firearms

201. *See* LA. REV. STAT. ANN. § 14:95.2; WIS. STAT. § 948.605 (2009–2010); Ed Anderson, *Bills to Stop Contractors Who Bribe Are Now Law - Measures to Fight Public Corruption*, TIMES-PICAYUNE (New Orleans), July 8, 2010, at A2 (describing different laws signed by Governor Jindal, including a change to gun-free school zones); Jason Stein, *Concealed Weapons Bill Signed; State Law to Take Effect in November; Effect on Safety Still Debated*, MILWAUKEE J. SENTINEL, July 10, 2011, at B1 (noting the governor's signing of gun bill that included eliminating penalty for concealed carry permit holders within school zones). Interestingly, the Louisiana amendment was enacted the day after another firearm restriction—a prohibition on carrying guns in places of worship—was curbed with the signing of a law that allows concealed weapons in houses of worship as part of security efforts. *See* Ed Anderson & Jan Moller, *'Gun-in-Church' Bill Is Signed into Law by Jindal - It Goes into Effect on Aug. 15*, TIMES-PICAYUNE (New Orleans), July 7, 2010, at A2.

202. CAL. PENAL CODE § 626.9 (West 2010 & Supp. 2011).

203. WIS. STAT. § 948.605 (2009–2010).

204. *See* 2011 Wis. Act 35, §§ 91–96.

205. *See supra* note 26 and sources cited therein.

206. *Wisconsin Carry* Complaint, *supra* note 26, at 8.

207. *Id.*

208. *See id.* In its response to the plaintiffs' complaint, the City of Milwaukee and Kurt Kezeske denied that plaintiff Bernson had been arrested for possession of a handgun within 1000 feet of a school. *See* Answer of Defendants City of Milwaukee and Kurt Kezeske to Amended Complaint at 5, Wisconsin Carry, Inc. v. City of Milwaukee, No. 2:10-cv-9-CNC (E.D. Wis. Mar. 23, 2010).

209. *Wisconsin Carry* Complaint, *supra* note 26, at 8.

lawfully and unconcealed, was allegedly warned regarding his event in a letter from the city's chief of police.[210] The chief of police allegedly cautioned that the "property is barely 50 feet outside of a school zone. Any picnic attendee straying into the school zone while armed risks arrest and prosecution."[211]

In the California case, a San Francisco man brought a lawsuit questioning the constitutionality of his state's school zone law after local school officials refused to give him permission to carry a firearm near an elementary school.[212] Software programmer Kevin Hall, who lived within 1000 feet of a school and represented himself in the case,[213] asserted in his lawsuit that he wished to carry the weapon for self-defense,[214] which was the crux of the Supreme Court's decision in *Heller*.[215] But Hall's statements to a local blogger cast doubt on his true reasons for filing the lawsuit after being rejected by the school. Hall stated that "[i]f they had said, 'You can do it,' [he] probably wouldn't be interested."[216] A federal court rejected Hall's challenge in March 2011, finding that the burdens the school zone law imposed on him were not great enough to implicate his Second Amendment rights.[217] The court reasoned, "[T]he law has no impact on Hall's right to possess a handgun at home or on any other private property. Hall also is not restricted from carrying a firearm in a school zone in a locked container or in the locked trunk of a car."[218]

B. The Second Amendment Protection for an Individual's Right to Carry a Loaded Weapon Within 1000 Feet of a School

Looking to *Heller* and *McDonald* for guidance, the first issue that courts must consider when determining if a law violates an individual right protected by the Second Amendment is whether the challenged restriction implicates a core constitutional right.[219] In evaluating the

210. *Id.* at 6–7.

211. *Id.* at 7.

212. *See* Complaint at 4–5, Hall v. Garcia, No. CV10-3799 (N.D. Cal. Aug. 26, 2010).

213. *See* Hall v. Garcia, No. C 10-03799 RS, U.S. Dist. LEXIS 34081, at *1 (N.D. Cal. Mar. 17, 2011); Smith, *supra* note 26.

214. *See* Complaint at 1, *Garcia*, No. CV10-3799.

215. *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

216. Smith, *supra* note 26.

217. *See Garcia*, U.S. Dist. LEXIS 34081, at *14–16.

218. *Id.*

219. *See* United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958, 958–59 (2011).

scope of the right protected by the Second Amendment, the Third Circuit in *United States v. Marzzarella* parsed the text and structure of the *Heller* decision, finding that the Court intended to "protect[] the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home" along with the right of citizens to possess firearms for purposes that were lawful pre-ratification.[220] The three-judge panel of the Third Circuit, however, fell short in applying this understanding to whether the Second Amendment protected defendant Michael Marzzarella's right to possess a handgun with an obliterated serial number.[221] While finding that unmarked firearms are not protected as a class of weaponry by the Second Amendment, the panel determined that the right to possess a handgun with an obliterated serial number *could* still deserve constitutional protection.[222] The court reasoned in favor of this possibility "because [the defendant's] possession of the Titan pistol in his home implicates his interest in the defense of hearth and home—the core protection of the Second Amendment."[223] But the panel ultimately left unanswered the question of whether such possession actually is protected, stating that Marzzarella's challenge would fail anyway because the government's restriction would survive the court's evaluation under an intermediate scrutiny standard of review.[224]

In *United States v. Chester*, a three-judge panel of the Fourth Circuit determined that individuals convicted of misdemeanor domestic violence retain their Second Amendment rights.[225] In doing so, the panel distinguished misdemeanants from felons, whom the Court in *Heller* and *McDonald* singled out in their exemption from Second Amendment protections, and evaluated the historical foundations of the law at issue.[226] Although the panel found "inconclusive" the historical evidence that prohibitions on felons possessing firearms were a "founding era understanding," it also determined that such prohibitions were at least more longstanding than the federal law applying to persons convicted of misdemeanors.[227] The panel remanded the case to the

220. *Marzzarella*, 614 F.3d at 92.
221. *See id.* at 95.
222. *See id.* at 94–95.
223. *Id.* at 94.
224. *See id.* at 95.
225. United States v. Chester, 628 F.3d 673, 680–82 (4th Cir. 2010).
226. *See id.* at 676–77.
227. *Id.* at 680–81. The court noted that the federal law dispossessing felons of firearms

district court so that the government could submit arguments, under an intermediate scrutiny standard, that a reasonable fit exists between the law and a "substantial" governmental objective.[228]

The first stage of applying this kind of analysis to school zone statutes requires determining whether these laws implicate a lawful purpose protected by the Second Amendment.[229] It is necessary to evaluate the laws using this approach because the laws do not appear to be protected as a category based on their historical underpinnings or longstanding legal roots.[230] The laws have only been in place for twenty years and, therefore, lack the "historical justification" that earned the Court's blessing in *Heller*.[231]

At least one court has deemed school zone laws presumptively legal due to *Heller*'s list of exceptions.[232] But that might have been a mistake. Although the Supreme Court specifically included schools as examples of "sensitive places" where laws forbidding the possession of firearms would be considered "presumptively lawful,"[233] it is not clear whether the Court intended to include areas near such sensitive places within its list, as would be required to protect the 1000-foot radius of the gun-free school zones. The Court's decisions in *Heller* and *McDonald* used the preposition "in" when referring to schools,[234] as opposed to using "around" or "near" (words that might have provided better constitutional protection to the 1000-foot perimeter established by the California and Illinois laws).

Of course, that is not to say that the Court might not have considered the area immediately outside of a school to be a sensitive place. If a school is a proper place from which firearms could

---

has existed "in some form or another since the 1930s." *Id.* at 681.

228. *Id.* at 683.

229. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

230. *See supra* notes 165–73 and accompanying text. It should be noted, however, there are some historical groundings for some of the restrictions placed on firearms for some of the "sensitive places" considered by the Court. *See* Larson, *supra* note 52, at 1378–79. Professor Carlton F.W. Larson points out that a Missouri law that made it illegal to carry a firearm into a school was upheld by that state's Supreme Court in 1886. *Id.*

231. *See Heller*, 554 U.S. at 635.

232. *See* United States v. Lewis, 50 V.I. 995, 1000–01 (2008). The court declined to enter into a discussion about what level of scrutiny should apply. *Id.* Instead, it stated, "It is beyond peradventure that a school zone, where [the defendant] is alleged to have possessed a firearm, is precisely the type of location of which *Heller* spoke. Indeed, *Heller* unambiguously forecloses a *Second Amendment* challenge to that offense under any level of scrutiny." *Id.*

233. *Heller*, 554 U.S. at 626, 626–27 & n.26.

234. *Id.* at 626; *McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 626).

constitutionally be kept from entering, then it is likely that the public sidewalk just outside that school, which the schoolchildren entering and exiting the schools have to traverse, also could be considered sensitive. And, certainly, the Court was aware of the existence of laws criminalizing the possession of firearms near schools.[235] But this question—to where such a sensitive zone extends and whether a 1000-foot perimeter can be justified in light of the burden it imposes on individuals' Second Amendment rights—is more properly considered as part of a court's standard of scrutiny review in the second part of this inquiry.

Therefore, in evaluating whether the laws implicate a lawful purpose, it is important to start by noting that the school zone laws exempt the transportation of firearms within the 1000-foot perimeter that are (1) unloaded and encased,[236] (2) for target practice on school shooting grounds,[237] (3) carried by law enforcement or school security officers,[238] (4) allowed with the consent of school authorities,[239] or (5) on private property not part of school grounds.[240] Additionally, Illinois' law includes a provision that exempts carrying firearms for hunting,[241] and California exempts individuals who believe they are in grave danger from someone against whom they have a court order.[242] The California law also requires that an individual knows, or reasonably should know, that he is in a school zone to support a conviction.[243] As such, the most likely challenge to a school zone law in any of these jurisdictions would probably center on whether the law interferes with the need for immediate self-defense in a public place. It is arguable whether the

235. *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *12–13 (N.D. Cal. Mar. 17, 2011) (stating the *Heller* Court "was certainly cognizant" of the federal gun-free school zone law and its criminal penalties for firearm possession within 1000 feet of schools).

236. Gun-Free School Zones Act of 1990 § 1702(b)(2), 18 U.S.C. § 922(q)(2)(B)(iii) (2006); CAL. PENAL CODE § 626.9(c)(2) (West 2010 & Supp. 2011); 720 ILL. COMP. STAT. ANN. 5/24-1(c)(3) (West 2010).

237. 18 U.S.C. § 922(q)(2)(B)(iv) (permitting firearm use by individuals in school-approved programs); CAL. PENAL CODE § 626.9(n); 720 ILL. COMP. STAT. ANN. 5/24-1(c)(3).

238. 18 U.S.C. § 922(q)(2)(B)(vi); CAL. PENAL CODE § 626.9(m)–(o); 720 ILL. COMP. STAT. ANN. 5/24-1(c)(3).

239. 18 U.S.C. § 922(q)(2)(B)(v); CAL. PENAL CODE § 626.9(b); 720 ILL. COMP. STAT. ANN. 5/24-1(c)(3).

240. 18 U.S.C. § 922(q)(2)(B)(i); CAL. PENAL CODE § 626.9(c)(1).

241. 720 ILL. COMP. STAT. ANN. 5/24-1(c)(3).

242. CAL. PENAL CODE § 626.9(c)(3).

243. *Id.* § 626.9(b).

Court provided such protection in *Heller* or *McDonald*.

Central to the Court's holding in both *Heller* and *McDonald* was the protection of the individual right to self-defense in one's own home,[244] which is still protected in school zone laws by the exemption of their application to private property outside of school grounds.[245] The laws also allow the carrying of firearms within the gun-free zones, so long as the weapons are unloaded and encased.[246] What a plaintiff likely would have to argue, then, is that the ban on loaded firearms on public property within 1000 feet of school grounds infringes on an individual's right to defend oneself in public by requiring individuals to travel for brief times within the zones with unloaded and encased firearms. Although unloading and placing into a case a handgun that one wishes to carry in public might constitute a burden, it is not clear that this is a burden on a constitutional right that has thus far been recognized by the Supreme Court. Both the *Heller* and *McDonald* decisions focus on restrictions on the use of handguns in the home, where, the *Heller* majority states, "the need for defense of self, family, and property is most acute."[247]

It would be a misreading of the Court's cases, however, to limit their holdings to protect an individual's right to possess a handgun solely on one's own property. The overwhelming thrust of the majority's concern was on the ability of firearms to be used for self-defense.[248] To the Court, the fact that the challenged laws in both cases extended to one's home simply underscored the extent of their infringement upon this right.[249] Indeed, the fact that the Court found the need to declare that bans on weapons in sensitive places such as government buildings and schools were permissible shows that it foresaw the potential extension of the Second Amendment right to public places.[250] However, the Court's

244. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010); District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

245. *See* Stein, *supra* note 201. This, of course, would not extend to Illinois residents who live in public housing, where the state law also prohibits firearm possession. *See* 720 ILL. COMP. STAT. ANN. 5/24-1(c)(1.5)–(2).

246. *See* CAL. PENAL CODE § 626.9(c)(2); 720 ILL. COMP. STAT. ANN. 5/24-1(c)(3).

247. *Heller*, 554 U.S. at 628.

248. *See McDonald*, 130 S. Ct. at 3048; *Heller*, 554 U.S. at 599 (stating self-defense "was the *central component* of the right itself").

249. *See McDonald*, 130 S. Ct. at 3105; *Heller*, 554 U.S. at 628.

250. *See* Larson, *supra* note 52, at 1384 (noting that "if the right has little applicability outside the home, there would be no need for the Court to single out 'sensitive' places, as opposed to places outside the home more generally").

limitation on such public possession of firearms should not have a bearing on whether the Court recognized a right to possess a weapon in public for the purpose of self-defense. Such restrictions are more properly evaluated under the prong of this two-part test that employs different possible standards of review to see whether they are constitutionally valid.[251]

Thus, it is likely the Court established in *Heller* and *McDonald* that the right to possess a firearm for purposes of self-defense extended outside of the home to public places and that the 1000-foot perimeter established by the school zone acts implicates this right.

C. Gun-Free School Zone Laws' Chances of Surviving Challenges Based on Different Levels of Scrutiny

The problem for courts in evaluating the school zone acts then would likely boil down to which level of scrutiny to employ to analyze the laws' constitutionality. One district court that examined the federal Gun-Free School Zones Act failed to even consider this question, much like the *Heller* majority, determining the Court "foreclose[d] a Second Amendment challenge" to laws forbidding the possession of a firearm in a school zone "under any level of scrutiny."[252] The district court that examined the California law also did not confine itself to determining the appropriate level of scrutiny to apply[253] or even, for that matter, to whether school zone laws should be considered categorically constitutional.[254] Because the courts declined to analyze the law using any level of scrutiny, determining the appropriate level of scrutiny to use in such cases remains open for another court.

---

251. *See, e.g.*, United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d. Cir. 2010), *cert. denied*, 131 S. Ct. 958, 958–59 (2011); United States v. Skoien, 587 F.3d 803, 808–09 (7th Cir. 2009), *vacated*, 614 F.3d 638 (7th Cir. 2010); Gould, *supra* note 92, at 1562–64.

252. *Compare* United States v. Lewis, 50 V.I. 995, 1000–01 (2008) (stating that "*Heller* unambiguously forecloses a Second Amendment challenge to that offense under any level of scrutiny"), *with Heller*, 554 U.S. at 628–29 (noting "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster" (internal citations omitted)).

253. *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *14 (N.D. Cal. Mar. 17, 2011).

254. *See id.* at *5–9.

1. Strict Scrutiny

Employing strict scrutiny in considering whether the existing school zone laws violate the Second Amendment protection of an individual's right to bear arms requires, first, an analysis of whether the government has a "compelling interest" to support the enactment of the laws.[255] A compelling interest requires the government to show it had "an extremely important reason" for enacting the law.[256] Second, the law in question must be examined as to whether it is "narrowly tailored" to serve that interest.[257] This requires a law to be so limited that it neither restricts a constitutional right unrelated to advancing the government interest, nor omits restrictions on rights related to that interest.[258] Strict scrutiny is often seen as "fatal" to any law that implicates a constitutional right deserving of its protection,[259] and its application to most gun-control laws would likely produce a similar result.

As evidenced by the records available when the school zone laws were passed, the laws were driven by a desire to protect children and other innocent residents from violence and even death.[260] In addition to protecting the physical well-being of students and staff, measures taken to prevent violence on school campuses can prevent a negative educational environment.[261] Furthermore, laws governing criminal activity and education have traditionally been viewed as the responsibility of the states.[262] This likely would support the states' ability to demonstrate a compelling interest in exercising their police powers in the enactment of school zone legislation.

Yet, although such gun-control laws might be shown to serve a

255. *See* Rosenthal & Malcolm, *supra* note 103, at 85–86.

256. *See* CHEMERINSKY, *supra* note 88, at 694–95.

257. *See* Winkler, *supra* note 34, at 691, 727.

258. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987).

259. *See* CHEMERINSKY, *supra* note 88, at 671; Winkler, *supra* note 34, at 727.

260. *See* 87th GEN. ASSEMB., H.R. TRANSCRIPTION DEBATE 143, 145 (Ill. June 18, 1992) (statement of Rep. Laurino); 136 CONG. REC. 1165 (1990) (statement of Sen. Herb Kohl).

261. *See* NAT'L CTR. FOR EDUC. STATISTICS & BUREAU OF JUSTICE STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, at 2 (2010) [hereinafter INDICATORS OF SCHOOL CRIME & SAFETY] (stating that victimized children "[i]n addition to experiencing loneliness, depression, and adjustment difficulties . . . are more prone to truancy, poor academic performance, dropping out of school, and violent behaviors" and that, "[f]or teachers, incidents of victimization may lead to professional disenchantment and even departure from the profession altogether" (citations omitted)).

262. *See* Chamberlin, *supra* note 28, at 306.

compelling government interest, many would likely fail to survive the second prong in the analysis requiring that they be narrowly tailored to serve that interest. Demonstrating the efficacy of gun-control laws, necessary to support an argument of narrow tailoring, is difficult.[263] Indeed, as many commentators have pointed out, in recent years the District of Columbia had one of the worst homicide rates in the country despite also having one of the most restrictive gun-control laws.[264] Gun-rights proponents argue that a further distribution of weaponry among law-abiding citizens in the country also might serve to reduce gun violence against innocent people, not increase it.[265] This viewpoint has been disputed, however.[266]

Moreover, although homicides of youths between five and eighteen years of age and serious violent incidents against students who are twelve through eighteen years of age have declined at schools since 1992, so have homicides and violent incidents off of school grounds.[267] And there is no indication that the states that instituted the 1000-foot gun-free perimeters have been any more effective in reducing violent school incidents than other states.[268] Thus, not only have other states determined that they can achieve the goal of reducing school violence through less restrictive means than establishing gun-free zones outside of their schools in which otherwise law-abiding citizens could not carry loaded firearms, they have not experienced any worse results than the

263. *See* Rosenthal & Malcolm, *supra* note 103, at 86.

264. *Id.* at 105 (noting that a study comparing the District of Columbia to forty-nine other major cities found the District's homicide rate was "substantially higher" than the rates for the other cities after the 1976 handgun ordinance was passed).

265. *See* JOHN R. LOTT, JR., MORE GUNS LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 323–24 (3d ed. 2010); Kopel, *supra* note 95, at 536–46; Rosenthal & Malcolm, *supra* note 103, at 105–06. Following the killing of an assistant principal and wounding of a principal by a student, a Nebraska lawmaker introduced a bill that would allow teachers to carry concealed guns in schools. *See* Khadaroo, *supra* note 197. Similar proposals in Arizona, Nevada, Oklahoma, and Wisconsin were unsuccessful. *Id.*

266. *See, e.g.*, Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (2009) (finding in a Philadelphia-based study that individuals who carried guns were more likely to be deliberately shot by someone else than those who did not carry guns).

267. *See* INDICATORS OF SCHOOL CRIME & SAFETY, *supra* note 261, at 88 tbl.1.1, 90 tbl.2.1.

268. *See id.* at 97 tbl.4.2. Although Wisconsin high school students reported being subject to fewer violent incidents and threats of violence than the national average in 2009, the percentage of Wisconsin students who reported being subject to such incidents or threats rose between 2003 and 2009 while the national average dropped. *Id.* at 90 tbl.2.1, 97 tbl.4.2.

states that have established such perimeters.[269]

In addition to the challenges to their efficacy, the school zone laws likely would face arguments that they are overinclusive in their effect on an individual's right to self-defense in public places. By granting only a few exceptions, the laws could be shown to inconvenience and even infringe upon the rights of those who wish to carry firearms in public for protection.[270] This right is not to be taken lightly. For example, a lawsuit filed in New Jersey featured plaintiffs seeking to possess firearms for self-defense, including a store owner who alleged he was mistakenly kidnapped and subsequently threatened by members of the Hell's Angels motorcycle gang[271] and a civilian employee of the Federal Bureau of Investigations who was warned of a threat from members of an Islamic fundamentalist group.[272]

Given these problems with the effectiveness and overinclusiveness of the school zone laws, proponents of the gun-free school zones, therefore, are likely to encounter problems in showing that the laws are narrowly tailored enough to meet the requirements of a strict scrutiny standard of review.

But strict scrutiny is not necessarily the standard of review that will be employed by courts in evaluating challenged laws. The Fifth Circuit in *United States v. Emerson*, for example, used a test more akin to a "reasonable basis" test than strict scrutiny.[273] Despite finding an individual right to bear arms guaranteed by the Second Amendment, the court upheld a federal law prohibiting anyone under a restraining order from possessing a firearm.[274] Indeed, even when courts profess to employ strict scrutiny, they may in fact be relying on a lesser standard than is commonly understood to protect fundamental constitutional rights.[275] Therefore, it is necessary to explore how the laws would stack

269. *See id.* at 97 tbl.4.2.

270. *See supra* notes 192–96. The only exceptions to the Illinois and California school zone laws are for certain exceptional circumstances such as for law enforcement officers and people who have been specifically allowed by schools to carry firearms or for certain enumerated circumstances. *See* CAL. PENAL CODE § 626.9 (West 2010 & Supp. 2011); 720 ILL. COMP. STAT. ANN. 5/24-1(c)(2)–(3) (West 2010). Neither exempts widely permitted carriers. *See* CAL. PENAL CODE § 626.9; 720 ILL. COMP. STAT. ANN. 5/24-1(c)(2)–(3).

271. *See* Complaint for Deprivation of Civil Rights Under Color of Law at 6–8, Muller v. Maenza, No. 2:10-cv-06110-WHW-CCC (D.N.J. Nov. 22, 2010).

272. *See id.* at 8–9.

273. *See* Winkler, *supra* note 34, at 691.

274. *See* United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001).

275. *See* Winkler, *supra* note 34, at 728–30 (evaluating cases where courts, in applying

up against the other standards of review such as intermediate scrutiny and rational-basis tests.

2. Intermediate Scrutiny

In applying intermediate scrutiny to examine the school zone laws in California and Illinois, a court would examine whether the laws are "substantially related to an important governmental objective."[276] As already discussed, the important government objective likely to be advanced in defense of the laws would be protecting the states' citizens—and, specifically, innocent children who are mandated to attend schools for a certain number of years—from gun violence.[277] This is well within a state's interests, which include providing a public education as well as deterring and preventing criminal activity against its citizens.[278]

The question of whether the laws are "substantially related" to this mission is a less stringent standard than strict scrutiny's "narrowly tailored" requirement.[279] Thus, questions of the challenged laws' efficacy, which can demonstrate or disprove that the laws have been narrowly tailored to achieve a solution, are not likely to play as important a role as they would in an inquiry employing strict scrutiny. Instead, a court probably would look to evidence that the government could present to show that the law forbidding individuals from carrying loaded firearms within 1000 feet of schools is substantially related to its interest in protecting school children and other people on school campuses from being violently injured or killed. Indeed, this interest was cited by the California district court that dismissed the challenge to that state's school zone law.[280]

As would also probably occur in a less-deferential strict scrutiny review, there might be some debate about whether such a perimeter is necessary, given that many other states simply forbid the possession of weapons on school grounds, and whether there is a reason for setting 1000 feet as the limit instead of 500 or 2000 feet. But a court is likely to defer to the government's judgment that the zone is necessary for

---

strict scrutiny to gun-control laws, have possibly watered down the standard).

276. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

277. *See supra* notes 260–62 and accompanying text.

278. *See* Chamberlin, *supra* note 28, at 306–08.

279. *See* CHEMERINSKY, *supra* note 88, at 671; Winkler, *supra* note 34, at 691.

280. *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *14 (N.D. Cal. Mar. 17, 2011).

protection and substantially related to its well-established interest in preventing violence against minors.[281] Therefore, it is probable that the laws could survive a review based on intermediate scrutiny.[282]

3. Reasonable or Rational Basis

Lastly, even though Justice Scalia rejected application of a rational-basis test in his majority opinion for the *Heller* case,[283] a court still might apply such a test—albeit under a different name.[284] Indeed, the Fourth Circuit accused other courts that treated the *Heller* dicta as a "safe harbor" for certain laws as engaging in a type of rational-basis review.[285] Professor Adam Winkler also points out that the Fifth Circuit in *United States v. Emerson*, while seemingly applying a sort of strict scrutiny test in calling for "narrowly tailored" exceptions to a Second Amendment right, ended up permitting "reasonable" restrictions and a much lower standard level of review.[286]

A rational-basis test under any name would call for a court to simply analyze whether a law is justified by advancing a "legitimate state interest."[287] Undoubtedly, a court easily could be persuaded that the government has a legitimate interest in protecting school children and others on school campuses from the potential dangers posed by loaded firearms.[288] That such firearms can be discharged from 1000 feet away and injure a child or another person on school property could be found to justify the government's imposition of such a gun-free zone around schools.[289]

---

281. *See id.*

282. *But see* Georgiacarry.org, Inc. v. Georgia, 764 F. Supp. 2d 1306, 1318–19 (M.D. Ga. 2011) (finding it unclear whether the government's interest in preventing crime is substantially related to a law that prohibits the possession of firearms in church under an intermediate scrutiny approach).

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

284. *See* Winkler, *supra* note 34, at 690–91 (noting a court decision that mixed the language of strict scrutiny with that of reasonableness review).

285. *See* United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010).

286. *See* Winkler, *supra* note 34, at 690–91.

287. *See id.* at 700.

288. *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *14 (N.D. Cal. Mar. 17, 2011) ("The government's stated interest, of preventing harm to children, is well-established as more than an important governmental objective. As the Supreme Court has observed, 'It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.'" (quoting New York v. Ferber, 458 U.S. 747, 756–57 (1982) (internal citation omitted))).

289. According to the Texas Parks and Wildlife Department, some bullets can travel up

Alternatively, a court could evaluate the law under a slightly more rigorous "reasonable regulation test," which asks "whether the challenged law is a reasonable method of regulating a right to bear arms."[290] This type of test traditionally has been used by state courts to evaluate laws challenged as violating the right to bear arms guaranteed in most state constitutions.[291] In addition to asking whether the school zone laws serve a legitimate government interest, this test asks whether the regulations the laws impose are reasonable.[292] This is still an extremely deferential test,[293] and the school zone laws likely would be upheld as reasonable because they have some exceptions such as allowing weapons on one's own property or allowing weapons to be carried, unloaded, and encased. These exceptions allow a person to possess a firearm, just not in a readily usable capacity on public property near a school.[294] Although Justice Scalia had concerns about such a situation when a firearm is kept for self-defense in the home,[295] carrying a loaded weapon near a school is another matter altogether.

In sum, it is likely that even if a court were to find that *Heller* and *McDonald* established an individual right for a person to carry a loaded handgun in close proximity to a school, the only way that a school zone law would not be held valid would be under a faithful strict scrutiny approach. Thus, although most courts likely would uphold the laws against legal challenges, the possibility exists that the laws could be overturned by future courts.

V. SUGGESTED CHANGES TO GUN-FREE SCHOOL ZONE LAWS

Even though the school zone laws are likely to be struck down only by a court using the highest standard of protection for a constitutional right, legislators still should consider changes to their statutes. In the years since the federal Gun-Free School Zones Act was passed, many states have scaled back the law's application without adverse effect

---

to five miles. *Firearms: Distances Bullets Travel*, TEX. PARKS & WILDLIFE, http://www.tpwd.state.tx.us/learning/hunter_education/homestudy/firearms/bullets.phtml (last visited Oct. 18, 2011).

290. Winkler, *supra* note 34, at 717.

291. *See id.* at 716–17.

292. *See id.* at 717.

293. *See id.* at 718.

294. *See* Hall v. Garcia, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081, at *14 (N.D. Cal. Mar. 17, 2011).

295. *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

through expansion of the numbers of people legally allowed to carry firearms.[296] In most states, holders of valid permits are now allowed to carry their weapons near, and sometimes even on, school grounds without risk of penalty.[297] In 2010, Louisiana amended its school zone law to allow individuals with valid permits to carry concealed firearms near schools, although not on school grounds.[298] The legislator who sponsored the change argued it was necessary to allow gun owners to carry their weapons while walking their dogs near schools or, for residents who lived within 1000 feet of schools, from their homes to their vehicles.[299] Wisconsin enacted a similar change as part of a larger bill passed in 2011 that established a licensing system under which residents could legally carry concealed firearms,[300] and thus the change that eliminated the 1000-foot zones around schools did not get much attention in the debate. Changing the state's school zone law was critical to gun advocates like Wisconsin Carry, however, which advocated for a version of a concealed carry law most likely to limit the importance of school zones.[301]

Significantly, even though state laws have neutered the federal school zone law to a certain extent, a provision penalizing the discharge of a firearm within 1000 feet of a school still threatens punishment for gun carriers whether licensed or not.[302] That provision makes it unlawful for a person to, "knowingly or with reckless disregard for the safety of another," discharge or attempt to discharge a firearm in a place that he knows is a school zone.[303] Exceptions are limited to people on private property within the school zone, participants in certain school-sanctioned activities, people who have received authorization from school authorities, and law-enforcement officers acting in their official

296. Violent crimes against students in schools have fallen in recent years nationwide, even with the passage of more permissive gun laws. *See* INDICATORS OF SCHOOL CRIME & SAFETY, *supra* note 261, at 90 tbl.2.1; *State Firearms Laws Are Taking A Radical, Dangerous Turn*, *supra* note 29 and accompanying text.

297. *See* Kopel, *supra* note 95, at 519–21; *State Firearms Laws Are Taking a Radical, Dangerous Turn*, *supra* note 29.

298. *See* Anderson & Moller, *supra* note 201.

299. *See id.*

300. *See* Stein, *supra* note 201.

301. *See* Gitte Laasby, *Chief Slams Firearm Measure*, MILWAUKEE J. SENTINEL, June 3, 2011, at A1; *Wisconsin Carry Urges Support of SB-93 As Amended*, WISCONSIN CARRY, INC. (May 24, 2011), http://www.wisconsincarry.org/default.html.

302. *See* Gun-Free School Zones Act of 1990 § 1702(b)(2), 18 U.S.C. § 922(q)(3)(A) (2006).

303. *Id.*

capacities.[304] Unfortunately, the federal law includes the requirement that the violator knows (or have reasonable cause to believe) that he is in a school zone,[305] an element that has caused problems for prosecutors enforcing similar laws.

Although his case was not part of the lawsuit brought by Wisconsin Carry in the U.S. District Court for the Eastern District of Wisconsin that challenged the state's school zone law, twenty-three-year-old Sheboygan Falls, Wisconsin resident Matthew Hubing's experience illustrates some of the reasons why legislators should eliminate the knowledge aspect of the school zone laws. Hubing was arrested in May 2010, after he had strapped an unloaded rifle to his shoulder, holstered a loaded handgun on his hip, mounted his bicycle, and pedaled to a friend's house.[306] On his way home, he was questioned by police, eventually jailed for sixteen days, and charged with violating Wisconsin's school zone law.[307] The charges were later dismissed by a Sheboygan County circuit court judge.[308] The first time the judge dismissed the charges it was because Hubing was able to show that he had been on private property and, therefore, was exempt from prosecution under the law.[309] Hubing was later recharged, but the judge again dismissed the charges by ruling that prosecutors could not show Hubing knew he had transgressed into the school zone.[310] The cops' measurement put Hubing forty-six feet inside the 1000-foot perimeter surrounding the school near his home; whereas Hubing's calculation put him outside of the zone.[311] Both gun-rights advocates and a local district attorney later said Hubing's case exposed failings in the Wisconsin law.[312] But, while the district attorney focused on the limitations the law posed for enforcement, the gun-rights advocate complained about its potential implications for gun owners.[313] Nik Clark, president of Wisconsin Carry, Inc., stated as follows: "That's 46 feet between a felony or not? That's ridiculous. Are we going to send police with laser

304. *Id.* § 922(q)(3)(B).
305. *Id.* § 922(q)(2)(A).
306. *See* Vielmetti, *supra* note 29; *Personal Account of Matthew Hubing*, *supra* note 29.
307. *See Personal Account of Matthew Hubing*, *supra* note 29.
308. *See* Vielmetti, *supra* note 29.
309. *Id.*
310. *Id.*
311. *Id.*
312. *See id.*
313. *See id.*

measuring devices every time?"[314]

Other alterations should be made to school zone laws—in addition to removing the knowledge element from the California and federal laws[315]—to bring them into conformance with the emerging Second Amendment jurisprudence. Despite the school zone laws' success thus far in withstanding legal assault, lawmakers should consider changes to the laws in the interest of preserving the core protections of such statutes and avoiding what could lead to protracted court battles. Although politicians had important reasons for introducing the idea of gun-free school zones in the early 1990s,[316] the experience of the majority of the states suggests that more modest measures can be as effective in addressing the public's concerns over school violence.[317] Indeed, as has been noted by others, some of the exceptions to the existing gun-free school zone statutes have essentially rendered the statutes useless in some areas. The federal government's allowance for individuals legally permitted to carry loaded weapons within the zones has made having such zones nearly meaningless in most states.[318] The requirement under both California and federal law of a knowing (or a reason to believe) violation before a penalty is invoked makes those statutes difficult to enforce. In addition, some states that want to allow more citizens to legally carry firearms may have unwittingly expanded the group of potential violators who could be nabbed for an unpermitted transgression into a federal gun-free school zone and charged with a felony.[319] The politicians who favored these permissive changes to the gun laws likely would endorse a different approach.

Those interested in strengthening the nation's gun law should consider changes to the school zone laws as well. Not only are the school zone laws difficult to enforce because of the requirement that an individual know he is in a school zone,[320] the laws' effectiveness is becoming more and more hampered by the large number of states that

---

314. *Id.*

315. *See* Gun-Free School Zones Act of 1990 § 1702(b)(2), 18 U.S.C. § 922(q)(3)(A) (2006); CAL. PENAL CODE § 626.9(b) (West 2010 & Supp. 2011).

316. *See, e.g.*, Walsh, *supra* note 1 (detailing schoolyard shootings that alarmed lawmakers).

317. *See supra* notes 267–69, 296–98 and accompanying text.

318. *See* Kopel, *supra* note 95, at 518–19 (calling the federal Gun-Free School Zones Act "irrelevant"); *supra* notes 206, 296–301.

319. *See supra* note 29.

320. *See, e.g.*, Vielmetti, *supra* note 29.

now allow residents to carry concealed firearms.[321]

A compromise between those who want to allow citizens to carry firearms in public for self-defense and those who want to protect schoolchildren from the threat of violence posed by the public possession of readily usable weapons, therefore, is in order. Such a compromise can be reached by replacing the current school zone laws with ones that make it unlawful only to fire a weapon or attempt to fire a weapon within a 1000-foot radius of a school.[322] This would address the greatest fear prompting such laws—that a firearm shot near a school might harm a child or another person associated with that school—while not implicating a person's ability to carry or display such a weapon in a lawful manner. As noted, the federal school zone law already has such a provision in place, albeit with the requirement that the person knows he is in a school zone,[323] which has limited the effectiveness of the state school zone laws.[324]

A better law would be one that eliminates the requirement that a person know he is within a school zone when he fires a weapon. In such a case, the person who fires the gun can be held criminally liable even without knowing, or reasonably knowing, that he is within 1000 feet of a school. An exception should exist, as it does in the federal statute, for when the person is on private property or has another reasonable justification.[325] Such limited circumstances should be enough to protect an individual's constitutional right to self-defense at home, without implicating the rights of innocent others. In addition, the self-defense argument also would be available to rebut charges in court for those who fire or attempt to fire a weapon on public property within the 1000-foot zone.[326] Because lack of knowledge would not be a defense for

321. *See* Stein, *supra* note 201 (noting that Wisconsin became the forty-ninth state in July 2011 to allow citizens to carry concealed guns). After Wisconsin's law was enacted, Illinois became the only state to not permit the carrying of concealed weapons. *See id.*

322. Maine penalizes the discharge, but not the possession, of a firearm within 500 feet of a school and prohibits possession on public school property but does not prohibit possession within 500 feet of a school. *See* ME. REV. STAT ANN. tit. 20-A, § 6552 (2008). Minnesota makes it a crime to recklessly handle or intentionally point a firearm at another within 300 feet of a school. *See* MINN. STAT. ANN. §§ 152.01(14a), 609.66 (West 2009 & Supp. 2011). The change in Wisconsin's law left intact a provision that makes it a felony to discharge a firearm in a place that the person knows is within 1000 feet of a school. *See* WIS. STAT. § 948.605(3) (2009–2010), *amended by* 2011 Wis. Act 35, §§ 91–96.

323. *See* 18 U.S.C. § 922(q)(3)(A) (2006).

324. *See id.* § 922(q)(2)(A), (q)(3)(A).

325. *See id.* § 922(q)(3)(B)(i)–(iv).

326. A successful claim of self-defense requires a defendant to show he faced a "serious"

others who are firing their weapons in public places, the new law could have more teeth than what is currently in place with the federal and California laws.

Although it could be argued that this change in the laws would tie law enforcement's hands when it comes to questioning and restraining those with firearms who are near schools, the reality is that police are likely enforcing the law after receiving notice of a prior incident anyway.[327] This would lead to little difference in how the law would be enforced under the proposed change.

The new law would be well-positioned to withstand the scrutiny of most courts. Even under a kind of heightened scrutiny, the new law's focus on the firing of guns near school grounds where innocent children are likely to get hurt should convince a judge that the law has enough focus and purpose to withstand a legal challenge. First, by restricting the provisions that penalize simple possession of a firearm to a school building or school grounds, the law clearly falls within *Heller*'s dicta that explicitly endorsed laws that ban firearm possession in schools and would be viewed as a narrow restriction tied to a significant government interest.[328] Second, by allowing firearms to be carried within the school zone and only fired for certain limited exceptions, the law would still protect an individual's ability to possess a weapon that could be used for a person's self-defense in his home, which the Court found in *Heller* and *McDonald* to be the core guarantee of the Second Amendment.[329]

Even in the current vitriolic political climate,[330] such a measure

---

and "imminent" threat of bodily harm and that this response was "necessary and proportionate" to the harm faced. *See* V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1239 (2001).

327. *See, e.g.*, Vielmetti, *supra* note 29; Christine Won, *Man: Police Did Not Like Him Openly Carrying*, RACINE J. TIMES (Sept. 11, 2009), http://www.journaltimes.com/news/local/article_cae54460-9f44-11de-8897-001cc4c03286.html; *Personal Account of Matthew Hubing*, *supra* note 29. Police officers in Racine, Wisconsin, arrested Frank Hannan-Rock during their response to a call that a shot had been fired and a man was reloading his handgun in the street. When officers encountered Hannan-Rock openly carrying a gun in a holster on his own front porch, Hannan-Rock refused to give them his name or address and was arrested. *See* Won, *supra*; Letter from Michael E. Nieskes, Dist. Att'y, Racine Cnty, to Frank Hannan-Rock (Oct. 13, 2009), http://www.wisconsincarry.org/pdf/GFSZA_Legal_Documents/Hannan-Rock_Racine-Letters.pdf; Letter from Michael E. Nieskes, Dist. Att'y, Racine Cnty., to Frank Hannan-Rock (June 18, 2010), http://www.wisconsincarry.org/pdf/GFSZA_Legal_Documents/Hannan-Rock_Racine-Letters.pdf.

328. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

329. *See id.* at 628–29; McDonald v. City of Chicago, 130 S. Ct. 3020, 3048 (2010).

330. *See* Dan Balz, *Debt Talks Show Breakdown in Governing*, WASH. POST, July 24, 2011, at A1 (calling the 2011 political climate a "period of partisanship as intense as it has

should garner broad support from politicians of different persuasions. Indeed, in a state as divided as Wisconsin was in 2011,[331] several Democrats joined Republicans to support the passage of the law allowing the concealed carrying of firearms.[332] The problem likely would lie in getting support from the gun lobby, which has successfully pushed for a nationwide easing of restrictions on gun possession for the past two decades.[333] On the other hand, one of the gun lobby's most successful arguments has been to distinguish the lawful possession of firearms from their criminal use.[334] Limiting the school zone laws to the firing or attempted firing of weapons near school grounds, rather than the possession of firearms, might just pacify this powerful interest group.

VI. CONCLUSION

More than two decades after Laurie Dann and Patrick Purdy made victims of dozens of innocent people in Illinois and California, another lone gunman killed six people and wounded thirteen more in a supermarket parking lot in Tucson, Arizona.[335] Among the dead on that day in January 2011 were a nine-year-old girl and a federal judge.[336] Among the wounded was a U.S. congresswoman.[337] Public calls emerged anew after the Tucson shooting for increasing, and in some cases even restoring, firearm regulations.[338] Equally compelling reasons drove school zone laws when they first were initiated in the early 1990s.[339] But the Court's recent decisions endorsing an individual right to bear arms

---

been in many years").

331. *See* Monica Davey, *Recall Elections in Sharply Divided Wisconsin Are Ending on Frenetic Note*, N.Y. TIMES, Aug. 9, 2011, at A11 (stating that Wisconsin is currently experiencing "one of the most polarized, vitriolic political years in memory").

332. *See* Jason Stein, *Concealed Carry Bill Heads to Walker: Assembly Passes GOP Gun Plan with Bipartisan Support*, MILWAUKEE J. SENTINEL, June 22, 2011, at A1 (noting that 11 Assembly Democrats voted for the bill that included changes to the state's school zone law); Press Release, Office of Wis. State Sen. Lena C. Taylor, Statement on Conceal Carry Bill (June 9, 2011), http://legis.wisconsin.gov/senate/sen04/news/Press/2011/pr2011-029.asp.

333. *See State Firearms Laws Are Taking a Radical, Dangerous Turn*, *supra* note 29.

334. *See* Laasby, *supra* note 301; *State Firearms Laws Are Taking a Radical, Dangerous Turn*, *supra* note 29.

335. *See* Marc Lacey & David M. Herszenhorn, *Congresswoman Is Shot in Rampage near Tucson*, N.Y. TIMES, Jan. 9, 2011, at 1.

336. *See id.*

337. *See id.*

338. *See, e.g.*, Editorial, *Saner Gun Laws*, N.Y. TIMES, Jan. 23, 2011, at WK9.

339. *See supra* Parts I, IV.A.

should prompt states to consider changes to existing laws that prevent the carrying of loaded firearms within 1000 feet of school grounds. Although such laws could withstand most legal challenges, policymakers should pursue reforms to head off any problems while improving the laws in the process. Such laws are especially vulnerable should the Court determine that the ability to carry a weapon for self-defense on public property near schools is a right guaranteed by the Constitution and that any law to the contrary must pass a strict scrutiny test.[340]

The California and federal school zone laws also are currently hampered in their application by requiring knowledge on the part of armed individuals who enter the zones to be successfully prosecuted.[341] A change that allows prosecution of individuals who fire weapons within public places in these zones, without providing an exception for whether they knew of their presence within the zone, would likely serve many of the same goals of the original legislation while surviving even the closest look by the courts.

Policymakers need to do what they can to try to ensure that what Laurie Dann and Patrick Purdy did will not occur again. But lawmakers also need to evaluate the effectiveness of legislation passed in the emotion of a moment and adapt the laws to the evolving conception of the Second Amendment.

AMY HETZNER*

340. *See supra* Part IV.C.1.

341. *See* Stein, *supra* note 201; Vielmetti, *supra* note 29.

* J.D. anticipated May 2012, Marquette University Law School.