

Firing Blanks: Louisiana's New Right to Bear Arms

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INTRODUCTION

On December 14, 2012, a young man gunned down 20 students and six faculty members of Sandy Hook Elementary School in Newtown, Connecticut, before taking his own life.¹ Unfortunately, news stories similar to this one have become all too common across the United States. Not only do public slayings and fatal gun violence dominate the news headlines and stain our national conscience, but they also stoke the fire of a debate that rages across our nation's political landscape—To what extent should firearms be regulated? In 2010, there were 12,996 murders in the United States, 8,775 (67.5%) of which were caused by firearms.² Louisiana alone is responsible for 437 of those murders, 351 (80%) of which can be attributed to firearms.³ Based on this astounding data, it is clear that guns are a dangerous force in our society. However, it is also clear that guns hold a special place in the history and traditions of our nation. Indeed, the Bill of Rights explicitly guarantees the right to keep and bear arms to Americans,⁴ and since the nation's founding, many Americans have come to cherish that right.⁵ The juxtaposition of a constitutionally protected right to keep and bear arms with a daunting violent crime rate has created a uniquely complex political and legal environment within the United States, which lawmakers must carefully navigate.

In 2012, the Louisiana Legislature decided to wholly reconstruct its constitutional provision expressing the right to bear arms.⁶

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1. Kevin Dolak, *Newtown Shooting: Residents Shocked by Mass Shooting in 'Adorable Little Town,'* ABC NEWS (Dec. 14, 2012), <http://abcnews.go.com/US/newtown-shooting-residents-shocked-mass-killing-adorable-town/story?id=17976401>.

2. U.S. DEP'T OF JUSTICE FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (2010), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl11.xls>. 2010 crime rates are the most recent data available.

3. *Id.* This is the highest percentage of firearm murders of any state in the country. Louisiana also has the highest murder rate, 7.75 murders per 100,000 people, in the country outside of Washington D.C. *Id.*

4. U.S. CONST. amend. II.

5. *See generally* David T. Hardy, *Historical Bases of the Right to Bear Arms*, in REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS, 45–67 (1982), *available at* <http://www.guncite.com/journals/senrpt/senhardy.html>.

6. LA. CONST. art. 1, § 11. The proposed amendment was included on the ballot of the statewide election held on November 6, 2012. The official ballot read:

Guided by two recent U.S. Supreme Court decisions, *District of Columbia v. Heller*⁷ and *McDonald v. City of Chicago*,⁸ the Louisiana Legislature drafted an amendment creating the strongest right to bear arms provision in the entire country.⁹ The amendment, which became effective on December 10, 2012, declares a Louisiana citizen's right to bear arms to be fundamental, and any infringement on this right shall be subject to strict scrutiny judicial review.¹⁰ Thus, Louisiana has now become the first state to protect its right to bear arms using strict scrutiny, which is the most demanding level of judicial review.¹¹ Because of this exceptionally powerful language, certain existing Louisiana firearm regulations could very well be stricken down under the new amendment.¹² Yet, this legislative mandate does not inevitably spell the demise of Louisiana firearm regulations. According to U.S. Supreme Court jurisprudence, strict scrutiny review only poses a threat to firearm regulations that are not narrowly drawn to serve compelling state interests.¹³ By analyzing two Louisiana firearm regulations, this Comment argues that in spite of the legislative bolstering of Louisiana's right to bear arms, the state's existing firearm regulations are safe from judicial rebuff.

Part I of this Comment sets forth the intricacies of the constitutional amendment and explains the meaning of the new

“Do you support an amendment to the Constitution of the State of Louisiana to provide that the right to keep and bear arms is a fundamental right and any restriction of that right requires the highest standard of review by a court? (Amends Article I, § 11).” Act No. 874, 2012 La. Acts 3525–26. The Senate approved the amendment by a 31–6 margin on April 6, 2012. The House amended the bill and voted in favor by a 77–24 margin on May 24, 2012. The Senate approved the amendments made by the House and passed the measure by a 34–4 margin on May 29, 2012, thereby placing the amendment on the statewide ballot. *SB303 - 2012 Regular Session (Act 874)*, LOUISIANA ST. LEGISLATURE WEB PORTAL, <http://www.legis.la.gov/legis/BillInfo.aspx?s=12RS&b=SB303&sbi=y> (last visited Sept. 26, 2013).

7. 554 U.S. 570 (2008).

8. 130 S. Ct. 3020 (2010).

9. *Vote Yes on 2: Support the Second Amendment*, NRA-ILA INST. FOR LEGIS. ACTION, <http://nraila.org/yeson2> (last visited Oct. 9, 2012).

10. LA. CONST. art. 1, § 11. *See infra* Part I.A–B.

11. Marsha Shuler, *Gun Rights Amendment Passes Easily*, THE ADVOCATE, Dec. 5, 2012, <http://theadvocate.com/home/4351688-125/gun-rights-amendment-passes-easily>. In a 2007 analysis, Professor Adam Winkler found that no state court had employed strict scrutiny to review gun rights cases. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

12. *Constitutional Amendment 2 Would Put Public Safety at Risk: Leon Cannizzaro*, THE TIMES-PICAYUNE, Nov. 4, 2012, http://www.nola.com/opinions/index.ssf/2012/11/amendment_2_is_a_risky_idea_fo.html. *See infra* Part III.A–B.

13. *See infra* Part I.B.

language set forth in the amendment. This Section focuses specifically on the significance of the amendment's classification of the right to keep and bear arms as "fundamental" and therefore subject to a strict scrutiny standard of review. Next, Part II examines the recent course of Second Amendment jurisprudence in the wake of *Heller* and *McDonald*, illustrating that gun regulations have generally survived judicial scrutiny after *Heller* and *McDonald*. Part III provides a brief survey of Louisiana's right to bear arms jurisprudence, and Part IV analyzes the consequences of the amendment by applying strict scrutiny to two especially controversial Louisiana firearm regulations: Louisiana Revised Statutes section 40:1379.3 prohibiting concealed handguns on school campuses and Louisiana Revised Statutes section 14:95.1 prohibiting certain felons from possessing firearms.¹⁴ Part IV will demonstrate that by serving a compelling state interest and being narrowly tailored to that interest, Louisiana's gun regulations are capable of withstanding strict scrutiny judicial review. Although this amendment gives Louisiana the strongest right to bear arms in the nation, it will not overturn existing gun regulations nor will it necessarily preclude other regulations from taking effect.

I. THE AMENDMENT

A Louisiana citizen's right to keep and bear arms is expressly enumerated in article I, section 11 of the Constitution of Louisiana.¹⁵ Until November 2012, section 11 read: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person."¹⁶ The Louisiana Legislature, however, found this current provision to be an inadequate expression of the right to keep and bear arms and thus passed an amendment to section 11.¹⁷ The Legislature included the amendment on the ballot of the statewide elections held on November 6, 2012.¹⁸ The

14. These particular regulations are analyzed because they stand out as contested regulations that could likely become the subject of constitutional challenges in the wake of the amendment. See Alina Mogilyanskaya, *Louisiana Ballot Measure Could Mean More Guns on Campuses, Professor Says*, THE CHRON. OF HIGHER EDUCATION (Nov. 1, 2012, 1:05 PM) <http://chronicle.com/blogs/decision2012/2012/11/01/louisiana-ballot-measure-could-mean-more-guns-on-campuses-professor-says/>.

15. LA. CONST. art. I, § 11.

16. LA. CONST. art. I, § 11 (amended 2012).

17. S. Res. 303, 38th Leg. Sess. (La. 2012).

18. *Amendments to the Constitution of 1974*, LOUISIANA ST. LEGISLATURE, <http://legis.la.gov/lss/Constitution%20Amendments%20Table.pdf> (last visited Sept. 26, 2013).

amendment passed by an overwhelming majority,¹⁹ and as a result, the new language of article I, section 11 of the Constitution of Louisiana reads as follows:

§ 11. Right to Keep and Bear Arms

Section 11. The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.²⁰

The new provision sets forth two major substantive changes to Louisiana's constitutional right to keep and bear arms. First, article I, section 11 now expressly declares the right to keep and bear arms to be "fundamental," and second, it mandates that any infringement upon the right shall hereafter be subject to a strict scrutiny standard of judicial review.²¹ The amendment also removed the former provision that expressly preserved for the Legislature the power to regulate weapons concealed on the person.²² Each of these new features combines to form a substantial revision of article I, section 11 of the Constitution of Louisiana, the meaning and effects of which will be examined in the following Sections.

A. Fundamental Right

The amended section 11 declares the right to keep and bear arms to be "fundamental."²³ This is a designation that stems from recent federal jurisprudence interpreting the Second Amendment, which the Louisiana Legislature has chosen to codify.²⁴ The notion of a fundamental right has arisen over time from the U.S. Supreme Court's interpretation of the Bill of Rights.²⁵ In so doing, the Supreme Court has recognized that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁶ Most often, such rights are not expressly enumerated in the U.S. Constitution; rather, the Court draws them

19. The election results were as follows: 73.45% YES to 26.55% NO. LA. SEC'Y OF STATE, STATEWIDE ELECTION RESULTS (2012), available at http://static.results.sos.la.gov/11062012/11062012_Statewide.html.

20. LA CONST. art. I, § 11.

21. *Id.*

22. S. Res. 303, 38th Leg. Sess. (La. 2012).

23. LA CONST. art. I, § 11.

24. However, the Louisiana Legislature went beyond the rulings of *Heller* and *McDonald* by mandating strict scrutiny review. See discussion *infra* Part II.A–B.

25. Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 105–08 (2002).

26. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See *infra* Part II.A for a discussion of the United States Supreme Court's recognition of the right to bear arms as a fundamental right.

out of the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁷ Using such methodologies as tradition, social values, and abstract notions of liberty,²⁸ the Court has identified a number of fundamental rights, such as the right of privacy,²⁹ the right to marry,³⁰ and the right of peaceful assembly.³¹ Because fundamental rights are considered the most valuable for Americans, the Supreme Court has reviewed any restriction on a fundamental right with the highest degree of judicial scrutiny.³² Generally, any alleged infringement of a fundamental right must satisfy strict scrutiny in order to pass constitutional muster.³³

B. Strict Scrutiny

The notion of heightened scrutiny in judicial review was first introduced by Justice Stone in the now famous footnote 4 of *United States v. Carolene Products Co.*³⁴ Since Justice Stone penned this footnote in 1938, the Supreme Court has developed three levels of judicial scrutiny: rational basis, intermediate scrutiny, and strict scrutiny. Rational basis review is the standard most deferential to legislative action.³⁵ Strict is the most searching, and intermediate

27. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

28. Wolf, *supra* note 25, at 110.

29. See *Griswold*, 381 U.S. 479 (holding that a Connecticut law forbidding the use of contraceptives unconstitutionally intruded on the right of marital privacy).

30. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

31. See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

32. Wolf, *supra* note 25, at 110.

33. Although largely the accepted practice, this is not a firm rule that the federal courts must follow. In fact, there are fundamental rights that the Supreme Court does not subject to strict scrutiny. For instance, the Court has identified the right to an abortion as a fundamental right, yet it does not uniformly subject an infringement on this right to a strict scrutiny review. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (applying the “undue burden” test to restrictions on a woman’s fundamental right to abortion).

34. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to *more exacting judicial scrutiny* under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” (emphasis added)). The Supreme Court first used the precise term “strict scrutiny” in the 1942 case *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006).

35. See *Fullilove v. Klutznick*, 448 U.S. 448, 517 (1980) (Marshall, J. concurring) (describing rational basis as the “minimally rigorous” standard of review). Rational basis review demands that a law be rationally related to a legitimate government interest. See *Nebbia v. New York*, 291 U.S. 502, 556 (1934).

falls somewhere between the two.³⁶ In a constitutional challenge, the Court typically examines the interest at stake and adjusts the level of scrutiny according to the constitutional weight of that interest.³⁷

In the past, a strict scrutiny standard of review has been likened to a death sentence for laws that infringe upon a constitutionally protected right.³⁸ As the most rigid standard of judicial scrutiny administered by the Supreme Court, it sets the highest bar for restrictions on fundamental rights.³⁹ In order to pass strict scrutiny, not only must the government articulate a compelling interest, the law must be narrowly tailored to the pursuit of that compelling interest.⁴⁰ This searching standard, which has been coined “strict in theory but fatal in fact,” has led to the rebuke of countless federal and state laws that infringe on constitutionally protected rights.⁴¹

Despite its demanding requirements, a more recent history of the Court’s application of the strict scrutiny standard has evidenced that it may not be as “fatal in fact” as it once was.⁴² The Supreme Court has recently made an effort to clarify that strict scrutiny, although a strenuous test, is not meant to be an impossible barrier for legislation.⁴³ In *Grutter v. Bollinger*, the Court declared that “strict

36. See *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 467 (D. Md. 2012) (explaining that intermediate scrutiny requires that a law be substantially related to an important government interest). The Supreme Court has not presented these three tiers of scrutiny as hard and fast standards that apply uniformly to each particular case, rather they represent ranges that vary based on the context and circumstances of a case. See *Wolf*, *supra* note 25, at 107.

37. Judicial scrutiny levels have been shaped largely by the Supreme Court’s analysis of the Equal Protection Clause of the Fourteenth Amendment. For instance, the Court subjects race-based distinctions to strict scrutiny. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”). On the other hand, gender-based distinctions are subject to intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

38. See *Winkler*, *supra* note 34, at 805–07. Some laws that the Supreme Court found to further a compelling state interest have nonetheless been stricken down by the Supreme Court under strict scrutiny. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

39. *Winkler*, *supra* note 34, at 798–804.

40. See, e.g., *Adarand*, 515 U.S. at 227 (“We hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

41. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978).

42. See *Winkler*, *supra* note 34, at 808.

43. See *Adarand*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker.⁴⁴ With this principle in mind, the Court has more readily considered the broader circumstances and factual contexts facing legislatures and other government actors when making policy choices.⁴⁵ As a result, the use of strict scrutiny at the Supreme Court level is trending toward a less resolute standard than that of past decades.⁴⁶ Although it remains a formidable opponent for any policy that burdens a fundamental right, the Supreme Court has expanded the range of strict scrutiny analysis and clarified that it is not an impossible standard to meet.

II. SECOND AMENDMENT JURISPRUDENCE

Until very recently, there had been little Supreme Court jurisprudence interpreting the Second Amendment. In fact, in the 20th century, the Supreme Court addressed the Second Amendment only twice, and these decisions did not settle larger looming questions concerning the right to bear arms.⁴⁷ Consequently, the lion's share of Second Amendment legal interpretation has developed through doctrinal and scholarly works. In the past, scholarly debate raged over whether the right to bear arms secured a collective right (a right reserved for military defense) or an individual right (a right belonging to the people *en masse*).⁴⁸ This debate hinged on the interpretation of the Amendment's prefatory clause, which states: "A well regulated [m]ilitia, being necessary to the security of a free [s]tate . . ."⁴⁹ Collectivists assert that the clause narrows the scope of the right to bear arms to those persons in the military or common defense

44. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

45. *See id.* at 326–27 (explaining that context matters when reviewing race-based governmental action under strict scrutiny); *see also Adarand*, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

46. Winkler, *supra* note 34, at 808–13. After aggregating 459 cases that applied strict scrutiny between 1990 and 2003, this study found that a total 137 applications upheld the challenged laws. *Id.* This amounts to a 30% survival rate under strict scrutiny—illustrating that strict scrutiny is hardly fatal.

47. *See United States v. Miller*, 307 U.S. 174 (1939); *Lewis v. United States*, 445 U.S. 55 (1980). The Supreme Court has addressed the Second Amendment only five times total in its history. *Supreme Court Cases*, GUNCITE, <http://www.guncite.com/gc2ndsup.html> (last updated Aug. 28, 2010).

48. Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996). *See also* U.S. Dept. of Justice, *Whether the Second Amendment Secures an Individual Right*, 2004 WL 2930974 (U.S.A.G. 2004).

49. U.S. CONST. amend. II.

capacity. But individualists maintain that the Framers contemplated a militia of the whole, and thus every individual person has the right to bear arms.⁵⁰

A. *District of Columbia v. Heller*

The debate between individualists and collectivists came to a head in the 2008 Supreme Court case, *District of Columbia v. Heller*.⁵¹ In *Heller*, the Court evaluated the constitutionality of a handgun and trigger-lock restriction issued by the District of Columbia.⁵² D.C. imposed a ban on handguns and mandated that any lawful firearm in the home be disassembled or bound by a trigger lock.⁵³ In its holding, the Court concluded that the Second Amendment protects an individual's right to possess firearms unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home.⁵⁴ The outright ban of handguns and the trigger-lock mandate directly contradicted the right to possess firearms for self-defense, thus the Court found the laws unconstitutional.⁵⁵

Heller was the first Supreme Court case to expressly address whether the Second Amendment entails an individual right to keep and bear arms as opposed to a collective right reserved for militia and military purposes.⁵⁶ In the majority opinion, Justice Scalia confirmed that the text and history of the Second Amendment's operative clause demonstrates that it establishes an individual right to keep and bear arms.⁵⁷ He reasoned that the right to bear arms is intimately tied to the natural right of self-defense.⁵⁸ Thus, the Second Amendment is an embodiment of the right that every person

50. *Whether the Second Amendment Secures an Individual Right*, 2004 WL 2930974 at 1. The consequences of both interpretations have great impacts on the government's ability to regulate firearms. *Id.* at 46. For instance, a collectivist interpretation allows for heightened regulation of any firearm not used for military defense. *Id.* at 2. Because so few citizen-led militias exist today, it is conceivable that a collective interpretation could pave the way for large-scale firearm regulation outside of the military. *Id.* at 2.

51. 554 U.S. 570 (2008).

52. *Id.*

53. *Id.* at 574.

54. *Id.* at 570.

55. *Id.*

56. Prior to 2008, the Supreme Court decided only three cases addressing the Second Amendment, and the Court never determined that it guaranteed an individual right to keep and bear arms. Amy Hetzner, *Where Angels Tread: Gun-Free School Zone Law and an Individual Right to Bear Arms*, 95 MARQ. L. REV. 359, 365 n.30 (2011).

57. *Heller*, 554 U.S. at 595.

58. *Id.* at 599.

naturally possesses to defend oneself and one's property against an aggressor, and any law that obstructs the ability to defend oneself with a firearm is repugnant to the Second Amendment.⁵⁹

The Supreme Court did recognize, however, that the right of self-defense is not absolute, and thus, "[l]ike most rights, the right secured by the Second Amendment is not unlimited."⁶⁰ According to the Court, the right granted by the Second Amendment is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."⁶¹ The Court even condoned certain gun regulations in existence today.⁶² It expressly laid out a number of gun regulations that it considered presumptively lawful, such as restricting the possession of firearms by felons and the mentally ill, as well as laws forbidding the carrying of firearms in sensitive places like schools and government buildings.⁶³

Most importantly, the *Heller* opinion effectively reshaped Second Amendment analysis for future firearm regulation challenges. The Court not only established an individual right to bear arms for self-defense, but it acknowledged a scope of behavior to which this right always applies.⁶⁴ The Court narrowed the right to bear arms to a core right: self-defense within the home "where the need for defense of self, family, and property is most acute."⁶⁵ The Court, however, did not fully develop the scope of the core right; rather it left it to the lower courts to determine what activities and regulations fall within this core right.⁶⁶ Finally, the *Heller* opinion did not clarify a standard of review to be implemented in future Second Amendment cases. The Court ultimately determined that the D.C. handgun ban amounted to the prohibition of an entire class of arms that Americans use for the lawful purpose of self-defense,⁶⁷ and for that reason, the ban would fail any level of scrutiny.⁶⁸

59. *Id.* at 626.

60. *Id.*

61. *Id.*

62. *Id.* at 626–27.

63. *Id.* at 626–27 n.26. It is not clear whether these regulatory measures are considered presumptively lawful because they fall outside the scope of the conduct protected by the Second Amendment or because they survive under the appropriate standard of scrutiny. Either way, the Court determined that they should be considered exceptions to the Second Amendment guarantee, and this list is not exhaustive. *Id.* See *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

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

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 628–29. Nevertheless, scholars and practitioners have criticized the *Heller* opinion for its practical deficiencies. Many think that the Court's broad language has opened the door to future Second Amendment challenges, and the

B. McDonald v. City of Chicago

Two years after *Heller*, the Supreme Court further developed its Second Amendment jurisprudence by applying it to the states in *McDonald v. City of Chicago*.⁶⁹ In *McDonald*, the Court once again assessed the validity of a handgun ban implemented in Chicago.⁷⁰ However, unlike *Heller*, *McDonald* involved a municipal weapons ban, thus marking the first Supreme Court ruling on whether the Second Amendment applies to the states through incorporation.⁷¹ In reaching its determination, the Court first declared that the Second Amendment sets forth a fundamental right to keep and bear arms.⁷² Subsequently, a plurality of justices concluded that this right applies to the states through the Due Process Clause of the Fourteenth Amendment.⁷³ As a result, a majority concluded that Chicago's handgun ban was unconstitutional.⁷⁴ Further, the Supreme Court reaffirmed the validity of presumptively lawful longstanding regulatory measures, and as in *Heller*, the Court declined to establish a standard of review for Second Amendment cases.⁷⁵

Through *Heller* and *McDonald*, the Supreme Court reaffirmed the legal significance of the Second Amendment. The Court in *Heller* finally resolved the debate between collectivists and individualists, stating conclusively that every American has the right to keep and bear arms for self-defense.⁷⁶ Moreover, a plurality in *McDonald* agreed that the Second Amendment does, in fact, apply to the states through incorporation,⁷⁷ and despite any doubts remaining after *Heller*, the *McDonald* Court clarified that the right to bear arms is indeed a fundamental right.⁷⁸ However, in neither case did the Supreme Court firmly assert which level of scrutiny

opinion will create confusion and inconsistency in the lower courts. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009).

69. 130 S. Ct. 3020 (2010).

70. *Id.* at 3021.

71. *Id.* at 3031.

72. *Id.* at 3042.

73. *Id.* at 3050. Justice Thomas concurred arguing that incorporation should occur through the Privileges and Immunities Clause of the Fourteenth Amendment, rather than the Due Process Clause. *Id.* at 3059–87 (Thomas, J. concurring).

74. *Id.* at 3021.

75. *Id.* at 3042.

76. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

77. *McDonald*, 130 S. Ct. at 3031.

78. *Id.* at 3042.

must be applied to future Second Amendment challenges.⁷⁹ Instead, it left this question for the lower courts to decide.

C. Second Amendment Challenges in Federal Courts After Heller and McDonald

In the wake of *Heller* and *McDonald*, a number of challenges to federal gun regulations, particularly laws prohibiting firearm possession in sensitive places and by convicted felons, have emerged.⁸⁰ Claimants have asserted that such firearm regulations unconstitutionally infringe upon their fundamental, individual right to bear arms.⁸¹ However, after *Heller* and *McDonald*, certain firearm regulations appear to be safe from constitutional invalidation.⁸² In *Heller*, the majority opinion stated:

[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.⁸³

This statement not only recognizes certain common firearm regulations, but it also provides constitutional protection for any such longstanding firearm regulations.⁸⁴

Despite this express Supreme Court safeguard, federal circuit courts have faced a number of constitutional challenges to various elements of 18 U.S.C. § 922, the comprehensive federal gun regulation statute.⁸⁵ In addressing these challenges, circuit courts have developed certain trends in their interpretations of *Heller* and

79. *Id.*; *Heller*, 544 U.S. at 628.

80. Scholars predicted correctly that the broad language in *Heller* and *McDonald* would open the doors to extensive Second Amendment challenges in the lower courts. *See* Wilkinson, *supra* note 68, at 283 (explaining some of the questions that remain after the narrow holding of *Heller*).

81. *See, e.g.*, *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc).

82. *Heller*, 544 U.S. at 626.

83. *Id.* *See also McDonald*, 130 S. Ct. at 3047. The majority in *McDonald* re-emphasized this point made in *Heller*. *Id.* It stated: “We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures We repeat those assurances here.” *Id.*

84. *See United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009) (using the longstanding prohibition dicta from *Heller* to uphold the constitutionality of 18 U.S.C. § 922(g)(7), prohibiting felons from possessing firearms, despite *Heller*’s holding that the Second Amendment confers an individual right to possess firearms); *see also United States v. Gieswein*, 346 F. App’x. 293 (10th Cir. 2009).

85. *See infra* note 99.

McDonald.⁸⁶ Most notably, circuit courts have expounded upon *Heller*'s dicta declaring the Second Amendment to be a limited right.⁸⁷ In other words, despite being fundamental, the right to bear arms is subject to legislative regulation. Under this premise, lower federal courts have consistently upheld existing firearm regulations after *Heller* and *McDonald*.⁸⁸

Federal circuit courts have predominately relied on two analytical frameworks in assessing the constitutionality of firearm regulations: (1) *Heller*'s list of presumptively lawful regulations and (2) the traditional ends–means scrutiny examination.⁸⁹ In cases involving regulations found on *Heller*'s presumptively lawful list of prohibitions,⁹⁰ many courts have simply pointed to the list as a source of regulations categorically excluded from Second Amendment protection and upheld the application of the law in that case.⁹¹ In such cases, the courts determined that because of their exclusion from Second Amendment protection, such regulations did not warrant any ends–means analysis.⁹² The Eleventh Circuit has even included by analogy certain regulations that do not appear in *Heller*'s list, such as violent misdemeanor crimes.⁹³

Other courts have analyzed challenges to firearm regulations under the traditional ends–means analysis, instead of relying on

86. See *infra* note 88.

87. *Heller*, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited . . .”). See, e.g., *United States v. Booker*, 644 F.3d 12, 22–24 (1st Cir. 2011) (reaffirming this *Heller* dicta).

88. *United States v. Skoien*, 614 F.3d 638, 638 (7th Cir. 2010) (en banc) (upholding 18 U.S.C. § 922(g)(9), which prohibits possession of firearms by individuals convicted of a misdemeanor crime of domestic violence); *Booker*, 644 F.3d at 26; *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (upholding a prohibition of firearm possession by a felon, 18 U.S.C. § 922(g)(1)).

89. See *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1313–16 (M.D. Ga. 2011), *aff'd*, 687 F.3d 1244 (11th Cir. 2012) (discussing the various analytical methods employed by the federal circuit courts).

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

91. See *Rozier*, 598 F.3d at 771 (upholding a prohibition of firearm possession by a felon, 18 U.S.C. § 922(g)(1)); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (upholding the same prohibition against felon possession, 18 U.S.C. § 922(g)(1)); *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009).

92. *Rozier*, 598 F.3d at 771.

93. *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (stating that 18 U.S.C. § 922(g)(8), prohibiting the possession of a firearm by anyone convicted of a misdemeanor crime of domestic violence, deserved a place on the “list of longstanding prohibitions on which *Heller* does not cast doubt”).

Heller's list.⁹⁴ These courts have examined the regulation at issue in order to uncover a sufficient showing to justify the restriction on the right to bear arms.⁹⁵ Finally, some courts have analyzed guns laws under both frameworks: analogizing to *Heller*'s presumptively lawful regulations as well as subjecting it to an ends–means scrutiny examination.⁹⁶

Federal courts have also varied the level of scrutiny in Second Amendment cases after *Heller*. The Court in *Heller* specifically rejected rational basis scrutiny for laws burdening the Second Amendment, but it declined to explicitly endorse either intermediate or strict scrutiny.⁹⁷ In light of the Supreme Court's ambiguity, circuit courts have likewise declined to acknowledge a universal standard of scrutiny for Second Amendment cases; instead, they have reasoned that the level of scrutiny applied will depend on the extent to which the right is burdened.⁹⁸ Under this reasoning, the majority of federal circuits have found intermediate scrutiny, which examines whether there is a reasonable fit between the law and an important government interest, to be the most appropriate standard to apply.⁹⁹ However, several circuits have recognized that certain

94. See *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (applying an ends–means analysis to a challenge to 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by anyone convicted of a misdemeanor crime of domestic violence); see also *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

95. *Skoien*, 614 F.3d at 641–42.

96. See *United States v. Walker*, 709 F. Supp. 2d 460, 464 (E.D. Va. 2010) (“[D]ue to the . . . uncertainty over the proper analysis in other Circuits, this Court will apply both approaches.”).

97. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions of irrational laws, and would have no effect.”). The Court also noted that the handgun ban in question was so burdensome that it failed constitutional muster under any level of scrutiny. *Id.* at 628–29 (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights [the ban] . . . would fail constitutional muster.”).

98. See *United States v. Decastro*, 682 F.3d 160, 164–68 (2d Cir. 2012) (holding that a law regulating the availability of firearms is not a substantial burden on the right to keep and bear arms and therefore heightened scrutiny is not appropriate). “[H]eightedened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment.” *Id.* at 164.

99. See *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (determining that 18 U.S.C. § 922(g)(8), which prohibits possession of firearms by anyone who is subject to a domestic protection order, shall be subject to intermediate scrutiny); *Marzzarella*, 614 F.3d at 96 (suggesting that because the *Heller* Court explicitly rejected rational basis scrutiny for Second Amendment restrictions, yet struck down the handgun ban, implies that it applied some form of heightened scrutiny); *Skoien*, 614 F.3d at 641 (concluding that 18 U.S.C. §

restrictions on the Second Amendment may warrant a higher level of scrutiny.¹⁰⁰ They agree that certain regulations may be so burdensome on the right to bear arms that they warrant strict scrutiny, and a small number of courts have even gone so far as to apply strict scrutiny.¹⁰¹ Ultimately, regardless of the level of scrutiny applied, federal courts have consistently upheld gun regulations that burden the Second Amendment right to bear arms in the wake of *Heller* and *McDonald*.¹⁰²

922(g)(9), prohibiting any person convicted of a misdemeanor crime of domestic violence from possessing a firearm, was subject to intermediate scrutiny); *see also* *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

100. *Marzzarella*, 614 F.3d at 96–97 (“[T]he right to free speech, an undeniably enumerated fundamental right, . . . is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different.”); *United States v. Skoien*, 587 F.3d 803, 813 (7th Cir. 2009) (“The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right.”).

101. *See Reese*, 627 F.3d at 804 n.4 (stating that, although it declared intermediate scrutiny the appropriate level of review, 18 U.S.C. § 922(g)(8) could also pass strict scrutiny); *United States v. Ligon*, No. 3:04-cr-00185 HDM, 2010 WL 4237970, at *6 (D. Nev. Oct. 20, 2010) (applying strict scrutiny and upholding 18 U.S.C. § 922(g)(1)); *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1021–25 (E.D. Wis. 2008) (analyzing 18 U.S.C. § 922(g)(8), which prohibits firearm possession by a person convicted of a misdemeanor crime of domestic violence, primarily by analogy to *Heller*’s presumptively lawful regulations, but also concluding that it would survive strict scrutiny as well); *see also* *United States v. Masciandaro*, 648 F. Supp. 2d 779, 789–91 (E.D. Va. 2009) (applying strict scrutiny and upholding 36 C.F.R. § 2.4(b) (2007), which prohibited the possession of a loaded firearm in a motor vehicle in a National Park), *aff’d*, 638 F.3d 458 (4th Cir. 2011) (applying intermediate scrutiny); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231–35 (D. Utah 2009) (applying strict scrutiny and upholding 18 U.S.C. § 922(g)(9)); *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 WL 4534058 (N.D.N.Y. Oct. 6, 2008); *Bateman v. Perdue*, 881 F. Supp. 2d 709 (E.D.N.C. 2012); *United States v. Bay*, No. 2:09-CR-83 TS, 2009 WL 3818382 (D. Utah Nov. 13, 2009); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (upholding 18 U.S.C. § 922(g)(8), prohibiting felons from possession of firearms). “Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, *narrowly tailored* specific exceptions” *Id.* (emphasis added).

102. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012) (explaining that no Second Amendment challenge to any provision of 18 U.S.C. § 922(g), a part of the amended Gun Control Act of 1968 that forbids gun possession by nine classes of individuals, has succeeded). *See also supra* note 88.

D. The Fourth Circuit's Approach

The most consistent Second Amendment analysis to develop since *Heller* has emerged from the United States Court of Appeals for the Fourth Circuit. Over a series of Second Amendment challenges, the Fourth Circuit has established a unique criterion to determine the gravity of a particular challenge.¹⁰³ The Fourth Circuit has focused its Second Amendment analysis on the core right first established in *Heller*—a law-abiding citizen's right to keep and bear arms for defense of hearth and home.¹⁰⁴ If a particular exercise of the Second Amendment falls completely within the scope of this core right, the court will apply a strict scrutiny standard of review to ensure that the core right is afforded the highest protection.¹⁰⁵ However, if the regulated behavior does not fall firmly within the scope of this core right, then the court will apply a less demanding scrutiny.¹⁰⁶ In other words, if the firearm regulation in question does not involve the restriction of an individual's use of a firearm for self-defense within his home, then the court will not subject it to a strict scrutiny review.¹⁰⁷

The Fourth Circuit applied this reasoning in *United States v. Chester*,¹⁰⁸ a case in which the appellant challenged 18 U.S.C. § 922(g)(9),¹⁰⁹ which prohibits the possession of a firearm by any person convicted of a misdemeanor crime of domestic violence, as an infringement of his protected right to bear arms.¹¹⁰ This as-applied Second Amendment challenge compelled the court to decide the appropriate amount of Second Amendment protection afforded to the defendant under this particular statute.¹¹¹ The court first identified the *Heller* core right as “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹¹² Then the court determined that the appellant's prior conviction of misdemeanor domestic violence placed him outside the scope of this

103. See *Chester*, 628 F.3d 673; *Masciandaro*, 638 F.3d 458.

104. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). See also *Chester*, 628 F.3d at 676.

105. *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 467 (D. Md. 2012).

106. *Id.* at 468–70.

107. *Id.*

108. 628 F.3d 673.

109. 18 U.S.C. § 922(g)(9) (“It shall be unlawful for any person—who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . .”).

110. *Chester*, 628 F.3d 673.

111. *Id.* at 678.

112. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

core right.¹¹³ Because of his criminal history, the appellant, Chester, could not be classified as a law-abiding citizen; therefore, the court concluded that this case did not warrant the Second Amendment's highest protection.¹¹⁴

The Fourth Circuit further refined its Second Amendment analysis in *United States v. Masciandaro*. Here, the appellant challenged a statute that prohibited loaded guns in a National Park.¹¹⁵ Unlike Chester, Masciandaro had no criminal history, thus he fell within the scope of a law-abiding citizen.¹¹⁶ However, the court distinguished Masciandaro's access to the core right on other grounds. The court tightened the scope of the right by restricting it to the use of firearms within the home.¹¹⁷ In this case, Masciandaro was convicted of possessing a gun not in his home but in a public park.¹¹⁸ Accordingly, the court concluded that because the statute pertained to the possession of a firearm outside of the home, it did not burden the core Second Amendment right, and therefore, a lesser scrutiny review was appropriate.¹¹⁹

Based on these two cases, the Fourth Circuit has effectively adopted the same core Second Amendment right as posited by the majority in *Heller*: the right of a law-abiding citizen to keep and bear arms within the home for the purpose of self-defense.¹²⁰ Any circumstance that does not include these elements falls outside of the scope of the core right and thus will not receive the Second Amendment's strongest protection.¹²¹ In applying the core right analysis to a gun regulation challenge, a court must consider the circumstances of the defendant in relation to his position within the

113. *Chester*, 628 F.3d at 683.

114. *Id.*

115. *United States v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011); 36 C.F.R. § 2.4(b) (2007).

116. *Masciandaro*, 638 F.3d at 470.

117. *Id.* at 471. Also in *Heller*, the Court stated that the home is "where the need for defense of self, family, and property is most acute." 554 U.S. at 628.

118. *See Masciandaro*, 638 F.3d at 470. The court discussed the fact that when a firearm leaves the privacy of a home, it becomes a more significant issue of public security. *Id.* The state has a greater interest in regulating guns outside of the home, especially those in a national park open to the general public. *Id. See also Heller*, 554 U.S. at 625 (noting that this reasoning is reflected by the majority of courts in the 19th century ruling it lawful to regulate the possession of concealed handguns under the Second Amendment).

119. *Masciandaro*, 638 F.3d at 471.

120. *See United States v. Chester*, 628 F.3d 673, 673 (4th Cir. 2010); *Masciandaro*, 638 F.3d at 460.

121. *See United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012) (applying the core right analysis to a Second Amendment challenge to 18 U.S.C. § 922(g)(1), prohibiting felons from possessing firearms); *see also United States v. Moore*, 666 F.3d 313, 319–20 (4th Cir. 2012).

scope of the right.¹²² The Fourth Circuit's reasoning would dictate that a statute prohibiting behavior that falls outside of a law-abiding citizen's use of a firearm for self-defense within the home will be better positioned to pass a strict scrutiny examination.¹²³ Accordingly, statutes such as felony-firearm restrictions and school-zone restrictions will be more likely to meet strict scrutiny because they do not burden the core right—They extend to firearm use beyond the home and to individuals outside of the law-abiding class.¹²⁴ If this is the case, similar firearm regulations may have a strong chance of survival, even under strict scrutiny.

III. LOUISIANA'S RIGHT TO BEAR ARMS JURISPRUDENCE

Louisiana's gun rights case law has developed out of important cases dating back to the 19th century. In the past, the Supreme Court of Louisiana has recognized the right to keep and bear arms; however, traditionally, it has ruled with considerable deference to the Legislature regarding gun regulations.¹²⁵ Louisiana courts have previously addressed past firearm legislation, such as concealed-carry and felony-firearm restrictions, that are akin to modern regulations that remain the focus of the contemporary gun law debate.¹²⁶ In doing so, they have laid an important methodological foundation for future challenges to Louisiana firearm regulations.

A. Concealed-Carry Regulations

The Supreme Court of Louisiana first addressed a citizen's right to bear arms in a line of cases beginning with *State v. Chandler* in 1850.¹²⁷ In *Chandler*, the court faced a challenge against a law that

122. See *Chester*, 628 F.3d 673; *Masciandaro*, 638 F.3d 458. In other words, the defendant must be a law-abiding citizen using a firearm within his home for the purpose of self-defense.

123. *Masciandaro*, 638 F.3d at 471. In other words, the court may recognize that a statute regulating behavior outside of the core right is more narrowly tailored than a law that regulates behavior resting firmly within the scope of the core right. Because such a regulation is narrowly tailored, it will have a better chance of passing strict scrutiny.

124. LA. REV. STAT. ANN. §§ 14:95.1, .2 (2009). These statutes fall outside of the scope of the core right to bear arms because they regulate behavior outside of a private home and pertain to people with criminal histories. They do not regulate law-abiding citizens using firearms within the home for self-defense.

125. Louisiana courts have consistently applied rational basis review to gun-regulation challenges. See *infra* note 151.

126. See *infra* Parts III.A–B.

127. *State v. Chandler*, 5 La. Ann. 489, 490 (La. 1850).

criminalized the carrying of a concealed weapon.¹²⁸ The court found that such a regulation did not offend the Second Amendment's guarantee to the right to bear arms.¹²⁹ The court reasoned that this law did not interfere with a citizen's right to carry arms in open view, which is the central right guaranteed by the Constitution of the United States.¹³⁰ Indeed, the court acknowledged that the right to bear arms was attached to the right to defend oneself, thus implicitly recognizing the individual nature of the right.¹³¹

The Supreme Court of Louisiana again addressed a law against carrying concealed weapons in *State v. Smith*.¹³² As in *Chandler* two years before, the court concluded that the concealed-weapons regulation was constitutional.¹³³ In this decision, the court made the notable declaration that the Second Amendment "never intended to prevent the individual States from adopting such measures of police as might be necessary."¹³⁴ The court concluded that this law was, in fact, necessary to protect the citizens from the dangerous use of weapons.¹³⁵ Because the law met this necessary purpose requirement, the court professed that there is "nothing in the Constitution of the United States which requires of us a rigorous construction of the statute in question."¹³⁶

The most notable concealed-carry case in Louisiana dates back to 1858. The Supreme Court of Louisiana in *State v. Jumel* assessed the lawfulness of prohibiting the possession of concealed weapons.¹³⁷ In its brief analysis, the court concluded: "The statute in question does not infringe the right of the people to keep or bear arms which is found dangerous to the peace of society."¹³⁸ Although the court did not consciously engage in an ends-means scrutiny analysis,¹³⁹ one can easily draw a contemporary, syllogistic formula

128. *Id.*

129. *Id.* The right to bear arms was not explicitly recognized in Louisiana until the Constitution of 1879; consequently, this case was a challenge based on the Second Amendment of the U.S. Bill of Rights. *Id.*

130. *Id.*

131. *Id.*

132. *State v. Smith*, 11 La. Ann. 633 (La. 1856).

133. *Id.* at 633.

134. *Id.*

135. *Id.*

136. *Id.* at 634. The court makes a point to expressly dismiss the need for a higher standard of review for this statute. *Id.* Because it meets the requirement of being a necessary policing measure, it need not undergo further scrutiny. *Id.*

137. *State v. Jumel*, 13 La. Ann. 399, 399 (La. 1858).

138. *Id.* at 399–400.

139. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The principle of heightened judicial scrutiny did not emerge until the mid-20th century. It dates back to footnote 4 of *Carolene*. *Id.* *See discussion supra* Part I.B.

out of this opinion. The court first recognized a right to keep and bear arms,¹⁴⁰ then identified the state interest of maintaining peace in society, and finally determined that this restriction was particular, or narrow, enough to further this state objective.¹⁴¹

Jumel stemmed from a different era of legal history and evolution, yet its reasoning remains helpful. A Louisiana state court today must engage in a contemporary form of judicial review, but a mere change in verbiage does not necessarily denote a change in fundamental analysis.¹⁴² When examining the constitutionality of Louisiana's current concealed handgun permit statute,¹⁴³ the court must apply a similar mechanical analysis as that employed by the court in *Jumel*, only now, because of the amendment's strict scrutiny mandate, a more rigorous inquiry is required.

B. Firearm Restrictions for Convicted Felons

The state courts of Louisiana have, in the past, faced a number of challenges to Louisiana Revised Statutes section 14:95.1, which prohibits certain felons from possessing firearms,¹⁴⁴ as an unconstitutional infringement of the right to keep and bear arms guaranteed by the Constitution of Louisiana.¹⁴⁵ In *State v. Amos*, the Supreme Court of Louisiana ruled on the constitutionality of prohibiting firearms from convicted felons.¹⁴⁶ In its decision, the court set forth a number of significant points. First, the court recognized that the right to keep and bear arms is a guaranteed right, but it is not absolute.¹⁴⁷ The court then acknowledged that the right may be regulated in order to protect the public health, safety, and morals or general welfare, so long as the regulation is a reasonable one.¹⁴⁸ Using this reasonableness test, the court concluded that denying weapons from serious felons is a reasonable measure to take in the interest of public welfare and safety, and therefore

140. *See State v. Chandler*, 5 La. Ann. 489 (La. 1850). At the time, the Louisiana Constitution did not include an express right to keep and bear arms provision. David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1136 (2010).

141. *Jumel*, 13 La. Ann. at 399–400.

142. *See* Kopel & Cramer, *supra* note 140, at 1113.

143. *See* LA. REV. STAT. ANN. § 40.1379.3 (2010).

144. LA. REV. STAT. ANN. § 14:95.1 (2009). *See infra* Part IV.C.

145. *See, e.g., State v. Cobb*, 428 So. 2d 935 (La. Ct. App. 1983).

146. *State v. Amos*, 343 So. 2d 166 (La. 1977).

147. *Id.* at 168. This point is consistent with the same point made in *Heller* some 40 years after this case. *See District of Columbia v. Heller*, 554 U.S. 570, 682–83 (2008).

148. *Amos*, 343 So. 2d at 168.

section 14:95.1 did not impermissibly infringe upon the rights guaranteed by the Constitution of Louisiana.¹⁴⁹

C. Louisiana's Contemporary Approach to Reviewing Firearm Regulations

These past cases illustrate that, over the course of its history, the Supreme Court of Louisiana has consistently recognized the principle that the right to bear arms is not an absolute right. The Supreme Court has continued to extend this reasoning to cases in more recent history. In particular, the court in *State v. Blanchard* applied a rational basis standard of review to a statute that criminalized the possession of a firearm while in possession of a controlled dangerous substance.¹⁵⁰ The court held “that there is a rational relationship between the statute’s scope . . . and its legitimate state purpose of preventing drug-related violence.”¹⁵¹

Blanchard illustrates that leading up to the passage of the section 11 amendment, the Supreme Court of Louisiana was committed to rational basis scrutiny, the least demanding standard of review, for gun regulation challenges.¹⁵² The *Blanchard* opinion reflects an analysis consistently employed by the Supreme Court of Louisiana in preceding cases addressing Second Amendment challenges.¹⁵³ Accordingly, proponents of the amendment’s strict scrutiny mandate are concerned that the court’s commitment to rational basis review has left the existing right to bear arms vulnerable to further legislative and judicial exploitation.¹⁵⁴ By applying rational basis review, the judiciary has essentially put the integrity of the right to bear arms exclusively in the hands of the Legislature.¹⁵⁵ However,

149. *Id.*; LA. CONST. art. 1, § 11. Note the current version of section 11 is the same as it was in 1974.

150. *State v. Blanchard*, 776 So. 2d 1165, 1173 (La. 2001).

151. *Id.* The court was applying a rational basis test to an equal protection analysis. *Id.* Although the rights at issue may be different, the analysis is fundamentally the same. The court must find a means that is rationally related to the state’s end. This is the exact language employed by the court in this opinion. *Id.*

152. *See supra* note 35.

153. *See State v. Clement*, 368 So. 2d 1037 (La. 1979); *State v. Hamlin*, 497 So. 2d 1369 (La. 1986) (holding that it is reasonable for the Legislature, in the interest of public safety and welfare, to require the registration of a sawed-off shotgun whose customary use is in the perpetuation of crime).

154. *See* Video: Judiciary C Hearing on S.B. 303 (La. 38th Regular Session 2012) (on file with Louisiana State Senate, Broadcast Archives) where Senator Neil Riser expresses his concern that the existing gun laws are vulnerable to judicial challenge.

155. Generally, rational basis is characterized as a very limited review. *See United States v. Skoien*, 587 F.3d 803, 814 (7th Cir. 2009). It affords nearly

such judicial deference will no longer be possible as a result of this amendment. The judiciary is now bound to apply strict scrutiny to any law that burdens the right to bear arms, and this much more thorough judicial examination will demand the utmost justification for any legislation in question.

IV. EFFECTS OF THE AMENDMENT: THE IMPACT OF THE AMENDMENT ON CURRENT FIREARM REGULATIONS

The new section 11 of the Constitution of Louisiana reads: “The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.”¹⁵⁶ Although proponents of the amendment assert that their goal is to secure a lasting right to bear arms in Louisiana by codifying the holdings of *Heller* and *McDonald*, the amendment extends beyond these two decisions.¹⁵⁷ The U.S. Supreme Court in both *Heller* and *McDonald* denied the opportunity to mandate strict scrutiny review for firearm regulations.¹⁵⁸ Instead, the Court left the level of review open to the discretion of the lower courts.¹⁵⁹ Nevertheless, the Louisiana Legislature has gone a step further than the Supreme Court by mandating strict scrutiny for any infringement of Louisiana’s fundamental right to keep and bear arms.¹⁶⁰ Such a substantial revision of section 11 of the Constitution of Louisiana undoubtedly signifies an intention to break from existing state jurisprudence and spawn a new line of judicial interpretation for Louisiana’s right to bear arms.¹⁶¹ Because challenges to gun laws are sure to arise in the wake of this amendment, it is imperative to understand how strict scrutiny will affect Louisiana’s firearm regulations.

A. Breadth of the Amendment

In order to fully comprehend the consequences of a strict scrutiny standard of review for Louisiana’s gun regulations, the

complete deference to the legislative process. *Id.* If the legislature sees fit to pass a law to address a particular concern, the court will not interfere. *Id.*

156. LA. CONST. art. 1, § 11.

157. Video: Judiciary C Hearing on S.B. 303, *supra* note 154.

158. *See supra* Part II.A, B.

159. *See supra* Part II.A. Also note, in his opinion Scalia stated that a rational basis review for a Second Amendment infringement would not be appropriate. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

160. LA. CONST. art. 1, § 11.

161. Video: Judiciary C Hearing on S.B. 303, *supra* note 154.

language and scope of the statutes must be carefully dissected. Because there have been no Louisiana state court cases addressing a Second Amendment challenge post-*Heller* and *McDonald*, it is necessary to consider how other state courts and federal circuit courts have handled such challenges. Although existing Louisiana jurisprudence concerning the right to bear arms remains binding on its own courts, it is now, alone, insufficient. Louisiana courts have consistently applied the equivalent of rational basis review to firearm regulation challenges, but in the face of the amendment's strict scrutiny mandate, courts must now develop a new approach to analyzing restrictions on the right to bear arms.¹⁶²

As a result of the amendment, any new or existing Louisiana firearm regulation, each of which impacts the fundamental right to bear arms, is now susceptible to challenge under the new section 11.¹⁶³ Accordingly, it is crucial for any gun regulation's survival that it not only serve a compelling state interest but that it is narrowly tailored so as to be absolutely necessary to serve that state objective.¹⁶⁴ Despite valid concerns, many of Louisiana's existing gun laws are, indeed, capable of passing strict scrutiny. As exhibited by the firearm regulations discussed in the Subsections below, Louisiana gun laws do serve compelling state interests and are narrowly tailored to those interests.

B. Concealed Handguns

There are currently 83 laws regulating firearms in Louisiana.¹⁶⁵ These laws regulate various facets of buying, selling, and using guns. Many such regulations are known as time, place, and manner restrictions.¹⁶⁶ These laws govern a person's ability to carry and use a firearm, and they are often some of the most restrictive regulatory measures.¹⁶⁷ Because these regulations present significant burdens on the right to keep and bear arms, they are often the measures that fall under constitutional attack.¹⁶⁸ Louisiana has a number of laws

162. See LA. CONST. art. 1, § 11; *supra* Part III.C.

163. LA. CONST. art. 1, § 11.

164. See *supra* Part I.B.

165. Video: Judiciary C Hearing on S.B. 303, *supra* note 154.

166. See Michael Anthony Lawrence, *Government As Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 49 (2007).

167. See LA. REV. STAT. ANN. § 40:1379.3 (2010).

168. Nicholas Johnson, Associated Press, *Gun-rights Backers Expect Suits Against NY Gun Law*, FORDHAM U. (Jan. 16, 2013), <http://law.fordham.edu/28746.htm>.

that restrict guns in certain locations and from certain people.¹⁶⁹ Because every Louisiana citizen now has the fundamental right to own and carry a firearm, any such restriction must be able to withstand strict scrutiny.¹⁷⁰

Louisiana Revised Statutes section 40:1379.3 stipulates that anyone who qualifies for a permit under the provisions of the statute is eligible to carry a concealed handgun on his person in any parish in Louisiana for a period of five years.¹⁷¹ This statute restricts a person's ability to carry a firearm, consequently it infringes a Louisiana citizen's fundamental right to bear arms and must be subject to strict scrutiny.

Under this statute, an applicant must meet 19 minimum requirements in order to qualify under the statute.¹⁷² The applicant must be at least 21 years old and must undergo training in pistol handling.¹⁷³ Also, the statute precludes those with mental infirmity due to disease, illness, or retardation, as well as those convicted of a felony or a crime of violence, from qualifying under the statute.¹⁷⁴ In addition to these threshold requirements, an applicant must "demonstrate competence with a handgun."¹⁷⁵ A person who completes any National Rifle Association (NRA) handgun safety or training course conducted by an NRA-certified instructor is deemed competent with a handgun.¹⁷⁶ The completion of any training course offered by a law enforcement agency will also suffice as proof of handgun competency.¹⁷⁷

This statute's most problematic provision is set forth in the second subsection of the statute, which states: "A Louisiana resident shall be required to possess a valid concealed handgun permit issued by the state of Louisiana pursuant to the provisions of this section in order to carry a concealed handgun in the state of Louisiana."¹⁷⁸ In other words, the carrying of a concealed handgun is unlawful unless the carrier has a valid permit issued in accordance with this statute. Beyond this basic restriction, the statute includes two more

169. See, e.g., LA. REV. STAT. ANN. §§ 14:95.1, .2 (2009).

170. LA. CONST. art. 1, § 11.

171. LA. REV. STAT. ANN. § 40:1379.3 (2010). In 2010, the Legislature amended this statute to extend the lifetime of the permit from four to five years. H.B. 1272, Act no. 944.

172. Nicole Montagnet Smith, *Packing Heat in Louisiana: An Analysis of Louisiana's New Concealed Handgun Legislation and Its Possible Constitutional Ramifications*, 43 LOY. L. REV. 239, 241 (1997).

173. LA. REV. STAT. ANN. § 40:1379.3(C)(1), (4) (2009).

174. *Id.* § 40:1379.3(C)(5), (6), (9).

175. *Id.* § 40:1379.3(D)(1).

176. *Id.* § 40:1379.3(D)(1)(a); Smith, *supra* note 172, at 241.

177. § 40:1379.3(D)(1)(b) (listing other additional methods of training).

178. *Id.* § 40:1379.3(B)(2).

prohibitions that burden a Louisiana citizen's right to bear arms. First, it prohibits qualified permit holders from carrying a concealed handgun while under the influence of alcohol or drugs,¹⁷⁹ and second, a qualified permit holder cannot carry a concealed handgun "in any facility, building, location, zone, or area in which firearms are banned by state or federal law,"¹⁸⁰ or in any "school, school campus, or school bus."¹⁸¹ Consequently, this statute imposes three restrictions on the right to keep and bear arms for Louisiana citizens. Generally, it restricts the freedom to freely carry a concealed handgun on one's person;¹⁸² and for those persons who hold a concealed handgun permit pursuant to this statute, it restricts the possession of a handgun when using alcohol or drugs and the possession of a handgun within certain unauthorized locations.¹⁸³

This statute can be dissected into three distinct restrictions on the right to bear arms, but most likely a claimant will mount an attack against the statute's more constitutionally vulnerable prohibitions,¹⁸⁴ such as the prohibition against carrying concealed handguns in sensitive places.¹⁸⁵ "Place restrictions" on firearms are blanket prohibitions that constitute a direct infringement on the express fundamental right to bear arms.¹⁸⁶ Because these prohibitions burden the right to bear arms so heavily, it is more difficult to justify their necessity under strict scrutiny.

1. Concealed Handguns in Schools

One likely battleground to emerge from within Louisiana Revised Statutes section 40:1379.3 will be the prohibition of

179. *Id.* § 40:1379.3(I)(1).

180. *Id.* § 40:1379.3(M).

181. *Id.* § 40:1379.3(N)(11). This was amended in 2010 to remove "firearm free zone," which includes any area within 1,000 feet of a school campus. 2010 La. Sess. Law Serv. Act 925 (H.B. 556) (West). Accordingly, a concealed handgun permit holder in Louisiana can now carry a concealed handgun on any public property within 1,000 feet of a school campus. *Id.*

182. One should note that this has no bearing on Louisiana's open carry law. *See, e.g., State v. Ferrand*, 664 So. 2d 396, 397 (La. 1995) ("[T]he public possession of an openly displayed handgun is not a crime in Louisiana and does not alone provide probable cause for an arrest.").

183. LA. REV. STAT. ANN. § 40:1379.3 (2009).

184. For instance, a court will likely have little trouble surmising the legality of a prohibition against drunk people carrying concealed handguns as set forth Louisiana Revised Statutes section 40:1379.3(I)(1). Such a prohibition clearly serves a compelling state interest in public safety and is tailored to include only those inhibited by alcohol.

185. § 40:1379.3(M).

186. LA. CONST. art. 1, § 11.

handguns on school campuses.¹⁸⁷ In light of the recent Newtown, Connecticut, tragedy, guns on school campuses have become the central issue of a heated, nationwide debate.¹⁸⁸ Louisiana, like many other states, restricts the presence of firearms, including concealed handguns, on school campuses.¹⁸⁹ With limited exceptions, no person is permitted to carry a weapon, concealed or not, on school property.¹⁹⁰ Although this law constitutes a direct infringement of the fundamental right to keep and bear arms,¹⁹¹ it remains a permissible infringement because it is narrowly tailored to a compelling state interest.¹⁹²

a. Compelling State Interest

The first prong of strict scrutiny analysis requires the existence of a compelling state interest. In *State v. Jumel*, the court recognized that banning concealed weapons fulfilled the state's goal of achieving social peace.¹⁹³ In this same vein, Louisiana continues to have a right, if not a duty, to ensure peace and safety for its citizens.¹⁹⁴ This public safety interest also extends to, and may even be heightened on, school campuses where large groups of young people gather to pursue educational and social activities.¹⁹⁵

Generally speaking, the regulation of concealed handguns is an attempt to promote safety and thwart violence in society. A handgun concealed on a person poses a threat to innocent bystanders, as well as to law enforcement officers as they attempt to create a secure environment in public places.¹⁹⁶ It is in the best interest of the state

187. § 40:1379.3(N)(11).

188. *Guns and Gun Control*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/g/gun_control/index.html (last visited Sept. 30, 2013). See generally *Gunfight in America*, USATODAY.COM, <http://www.usatoday.com/topic/9694898b-d569-45b7-82b8-f3c6f5192868/gunfight-in-america> (last visited Jan 21, 2013) (compiling several updated news sources relating to the current gun regulation debate).

189. § 40:1379.3(N)(11); LA. REV. STAT. ANN. § 14:95.2(A) (2009).

190. LA. REV. STAT. ANN. § 14:95.2 (2009).

191. LA. CONST. art. 1, § 11.

192. See *supra* Part I.B.

193. *State v. Jumel*, 13 La. Ann. 399, 399 (La. 1858).

194. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (recognizing public safety to be a compelling state interest); see also *Lochner v. New York*, 198 U.S. 45, 53 (1905) (stating that due process rights are limited by the states' powers to protect the safety, health, morals, and general welfare of the public).

195. See *United States v. Masciandaro*, 648 F. Supp. 2d. 779, 790 (E.D. Va. 2009).

196. See *United States v. Skoien*, 614 F.3d 638, 642–43 (7th Cir. 2010) (discussing studies finding that an assault with a gun is five times more deadly than an assault with a knife).

to impose regulations to ensure that those permitted to carry concealed weapons are well-trained and safe individuals. This lends itself to a secondary purpose of the statute: to allow qualified citizens the ability to legally defend themselves with a handgun.¹⁹⁷ Accordingly, this statute aims to facilitate public safety and prevent violence by providing state regulation and oversight of guns while still allowing those qualified to exercise their fundamental right to bear arms for self-defense.

In addition to the state's interest in general public safety, schools are especially sensitive places in need of heightened regulation.¹⁹⁸ The state has a vested interest in ensuring the best education possible for its citizens. An element of this goal includes the responsibility to provide a safe and healthy environment in which students can effectively interact and learn.¹⁹⁹ Also, schools are public places where large amounts of people, often strangers, gather together.²⁰⁰ Whenever large groups of people congregate in a public place, a unique security interest arises.²⁰¹ Applying this sensible reasoning, a Louisiana court will likely agree that protecting students and other members of the public on school campuses amounts to a compelling state interest.

b. Narrowly Tailored Means

The second prong of strict scrutiny examines the sufficiency of the means used to achieve the compelling state interest.²⁰² Under this heightened review, section 40:1379.3 must be narrowly tailored

197. Smith, *supra* note 172, at 239 (describing Governor Foster's express purpose behind the concealed handgun permit statute).

198. LA. REV. STAT. ANN. § 40:1379.3(N)(11) (2009).

199. *The Case Against Guns on Campus*, THE CAMPAIGN TO KEEP GUNS OFF CAMPUS, <http://www.keepgunsoffcampus.org/brady.html> (last visited Dec. 13, 2012).

200. *See Masciandaro*, 648 F. Supp. 2d at 790 (making sense of the *Heller* sensitive places reference, the court made a distinction between a public place and a private home).

201. *See id.* at 789–90. Applying strict scrutiny to a statute prohibiting loaded firearms in national parks, the federal district court determined that the governmental interest of public safety in national parks is important and compelling. *Id.* It reasoned that, like schools and government buildings, National Parks are public properties attracting large numbers of people for recreational and educational activities. *Id.* Unlike a home or other private property where the “need for defense of self, family, and property is most acute,” national parks, schools, and government buildings are sensitive places where the necessity and means of firearm regulation must be left up to the legislature to decide, not the judiciary. *Id.* at 790 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

202. Winkler, *supra* note 34, at 727.

to the state's interest of promoting safety on school campuses. Often, this part of the review presents the largest problems for legislation.²⁰³ Generally, the statute in question must effectively address the state's concern or objective without being under- or over-inclusive.²⁰⁴ Also, the state must not have any less restrictive alternatives to achieve its goal.²⁰⁵ In other words, the regulation must not impose any burden on the fundamental right to keep and bear arms that is not necessary for the furtherance of protecting school campuses from violence.

Although section 40:1379.3 falls outside the scope of the core right because it restricts behavior outside of the home, it nonetheless infringes on a Louisiana citizen's fundamental right to keep and bear arms.²⁰⁶ While most school administrators and gun control activists vehemently oppose guns on school campuses, others question the effectiveness of such a regulation in preventing violence.²⁰⁷ Many gun lobbyists argue that an environment with the lawful presence of guns is inherently safer.²⁰⁸ These activists often cite statistics illustrating that gun bans do not translate into a reduction in crime rates.²⁰⁹ It follows that if a law is inherently ineffective, it will unlikely be considered narrowly tailored; however, this data remains inconclusive, and it will ultimately fall upon the court to decide its relevance.²¹⁰

i. A Potential Weakness

One aspect of this regulation has fallen under particular criticism: Section 40:1379.3, when read *in pari materia* with section 14:95.2 prohibiting the possession of firearms on school property,

203. *Id.* at 800.

204. *Id.* at 801 n.31.

205. *See* Woollard v. Sheridan, 863 F. Supp. 2d 462, 467 (D. Md. 2012).

206. *See supra* Part I.A; *see also* Heller, 554 U.S. at 634 (establishing the natural right of self defense).

207. John R. Lott, *More Guns Equal Less Violent Crime*, L.A.R.G.O., <http://www.largo.org/Lott.html> (last visited Mar. 26, 2013).

208. *See generally* JOHN R. LOTT, *MORE GUNS, LESS CRIME* (2d ed. 2000).

209. Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws*, 105 NW. U. L. REV. 437, 457 (2011).

210. For instance, several published criticisms have undermined the findings set forth in Lott's, *More Guns, Less Crime*, *supra* note 208, by criticizing the quality of his evidence or by demonstrating conflicting evidence using a similar methodology. *See also* Franklin E. Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, 32 J.L. MED. & ETHICS 34 (2004) (collecting studies and asserting that guns are about five times more deadly than knives in a violent attack).

creates an inconsistency in the law.²¹¹ Section 14:95.2 declares that its provisions shall not apply to a “student who possesses a firearm in his dormitory room or a student who is carrying a firearm to and from his vehicle.”²¹² Meanwhile, such activity is banned by section 40:1379.3 for qualified permit holders.²¹³ In other words, a student without a concealed handgun permit can lawfully possess a firearm in his dorm room and can carry the firearm to and from his car on campus, but a professor or school employee who holds a concealed handgun permit shares no equivalent right.²¹⁴ The concern here lies in the school employee’s inability to exercise his right to defend himself while at work and while walking to and from his vehicle. Conceivably a nighttime walk to one’s vehicle can be a dangerous journey, even on a school campus, yet this statute prevents a vulnerable employee from protecting himself with a concealed handgun.²¹⁵ Such a deficiency could be viewed by a court as an indication that this regulation is over-inclusive and therefore not narrowly tailored to safety on school campuses.

ii. Rectifying the Contradiction

On the other hand, a distinction between these two different provisions exists. The language of section 95.2(C)(8) indicates that allowing a student to carry a gun to and from his car is an incidental exception necessary to preserve the student’s right to possess a firearm in his dorm room.²¹⁶ Prohibiting a student from carrying his firearm from his car to his campus residence would render his right to possess a firearm in his dormitory meaningless. Without this transportation exception, the statute would create a legal paradox whereby a student would have to violate the law in order to exercise his right to possess a firearm in his dorm room.

The key here is the statute’s recognition of the student’s right to keep arms in his campus residence. In this sense, the Legislature has

211. See Video: Judiciary C Hearing on S.B. 303, *supra* note 154 for Professor Maurice Franks’s explanation of some of the inconsistencies in Louisiana firearm regulations.

212. LA. REV. STAT. ANN. § 14:95.2(A) (2009) (reading in pertinent part: “Carrying a firearm . . . by a student or nonstudent on school property . . . is unlawful.”).

213. LA. REV. STAT. ANN. § 40:1379.3(N)(11) (2009).

214. *Id.*

215. U.S. DEP’T OF JUSTICE FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES BY STATE BY UNIVERSITY AND COLLEGE (2010), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-9/10tbl09la.xls>. 2010 crime rates are the most recent data available.

216. LA. REV. STAT. ANN. § 14:95.2(C)(8) (2009).

analogized a student's dormitory to his home. Because the right to self-defense is strongest within one's home, a resident student must be afforded the right to keep and bear arms in order to defend himself and his property.²¹⁷ Based on this reasoning, the school employee is in a fundamentally different position than the resident student. Although they may spend the majority of their time there, professors do not live on campus and thus are not entitled to the same core right of self-defense as the student.²¹⁸ Nevertheless, a court could recognize the school employee's self-defense interest as significant enough to outweigh the general objective of keeping guns out of schools.²¹⁹ This deficiency in the concealed handgun permit statute could render it overbroad, and accordingly, a court could strike down the school prohibition provision, section 40.1379.3(N)(11).²²⁰

The more likely result, however, would be for a court to recognize the important distinction between the rights of a resident student and the rights of a school employee. As in *United States v. Chester*, a school employee does not fit firmly within the scope of the core right²²¹—the right of a law-abiding citizen to keep and bear arms for the purpose of self-defense within the home.²²² Unlike an employee, a resident student maintains his private place of residence in an on-campus dorm room,²²³ thus he or she carries a much

217. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (declaring that the right to defense is most acute in the home).

218. This point raises another possible gap in section 14:95.2. It is possible that a school employee may live on campus. The statute is silent on whether a resident employee would enjoy the same right to possess a firearm in his residence as a student. Although the law is silent on this point, a court could logically place a resident employee in the same position as a resident student. Both share the same core right to keep arms for defense of themselves and their property, which in this case is on a school campus.

219. *See Heller*, 554 U.S. at 626 (stating that all citizens have the right to keep and bear arms for the purpose of self defense).

220. *See supra* Part I.B.

221. Note that if the employee does maintain residence on the school campus then he or she would fit into the core right. *See supra* Part II.C (discussing the core right).

222. *See supra* Part II.C (discussing the core right). Although a Louisiana court has not expressly defined the core right in this way, the leading Second Amendment jurisprudence since *Heller* has done so. Federal cases will be persuasive precedent in a Louisiana court's first application of strict scrutiny to a gun regulation challenge such as this. It is also important to note that the Louisiana Legislature has implicitly acknowledged this core right as indicated by the reservation of a resident student's right to keep firearms in his dorm room found in Louisiana Revised Statutes section 14:95.2(C)(8).

223. *See Heller*, 554 U.S. at 635. A dorm room falls within the meaning of "home and hearth." The dorm room is a student's place of residence, thus it is his or her "home." *See discussion supra* Part II.A.

stronger constitutionally protected right to keep and bear arms on campus, which the Legislature has recognized in this statute.²²⁴ Such an inconsistency should not render this provision an over-inclusive restriction that undermines the purpose of public safety by keeping handguns off of school campuses. Rather, this illustrates the Legislature's recognition of an evolving right to keep and bear arms. They have narrowly tailored both sections 14:95.2 and 40:1379.3 together to effectively maintain campus security while ensuring that resident students can enjoy their constitutionally protected rights.

iii. Additional Tailoring

As a more general matter, section 40.1379.3 possesses other important specifications and exceptions that tailor it to the state interest of public safety. Section 40.1379.3(N)(11) is limited in scope to "any school, school campus, or school bus."²²⁵ Section 14:95.6(C)(1) defines "school" as a "public or private elementary, secondary, high school, or vocational-technical school, college, or university in this state,"²²⁶ and "school campus" as "all facilities and property within the boundary of the school property."²²⁷ Excluded from the statute is any termed "firearm free zone," which is defined as "any school campus and the area within one thousand feet of any such school campus."²²⁸ As originally enacted, section 40.1379.3 included this firearm-free-zone restriction, but it was removed by a 2010 legislative amendment.²²⁹ If the statute still included the firearm-free zone limitation, a strong argument could be posited against this remedy as an overbroad restriction.²³⁰ As the Legislature came to realize, there are many cities in Louisiana where it is nearly impossible to not be within 1,000 feet of a school.²³¹ Thus, such a restriction would render the concealed handgun permit statute useless. Accordingly, this provision was removed from the statute resulting in a more viable, narrowly tailored regulation.

Additionally, if again read *in pari materia* with section 14:95.2, there are additional exceptions to the school concealed handgun ban.

224. In *Heller*, the Supreme Court struck down the D.C. handgun ban because it extended "to the home, where the need for defense of self, family and property is most acute." 554 U.S. at 628.

225. LA. REV. STAT. ANN. § 40:1379.3 (2009).

226. LA. REV. STAT. ANN. § 14:95.6(C)(1) (2009).

227. *Id.* § 14:95.6(C)(2).

228. *Id.* § 14:95.6(A).

229. 2010 Amendment H.B. 556 Act 925.

230. Hetzner, *supra* note 56, at 359.

231. *Id.* This restriction left people living near schools without the ability to defend themselves when walking dogs, exercising, etc.

For example, it remains lawful to possess a firearm contained entirely within a vehicle on a school campus.²³² It is also lawful for a student to possess a firearm whenever necessary for a class or activity authorized by a university, including carrying the firearm to and from that class.²³³ Each of these exceptions remains consistent with the goal of campus and public safety while allowing qualified citizens to freely exercise their fundamental rights.

Based on the compelling state interest of avoiding violence on school campuses and the narrowly tailored means of achieving that goal, Louisiana Revised Statutes section 40:1379.3 stands a promising chance of surviving a strict scrutiny review. The Legislature has taken adequate measures to ensure that the statute restricts only behavior that is necessary to achieve its goal of providing safety on school campuses. In doing so, the Legislature has left untouched behavior falling within the scope of the core right of self-defense, as well as any activities attendant to educational needs.²³⁴ Not only does the statute serve a compelling state interest, but it does so in a fashion narrowly tailored to that state interest sufficient to justify its infringement of Louisiana's fundamental right to bear arms.

C. Firearm Possession for Felons

Just as Louisiana regulates how one is permitted to use a firearm and where one can carry a firearm, the state also has laws that dictate *who* is permitted to possess a firearm. One such regulation is Louisiana Revised Statutes section 14:95.1, which prohibits persons convicted of certain felonies from possessing firearms.²³⁵ This law holds generally that violent criminals, as well as sex offenders and violators of the Uniform Controlled Dangerous Substance Law, are prohibited from owning or possessing firearms.²³⁶ Similar felony weapon bans are common throughout the country among both state

232. LA. REV. STAT. ANN. § 14:95.2(C)(5) (2009). In this provision, the Legislature declares that it does not have the power to regulate the right to possess a firearm in one's vehicle. *Id.* Again, this is evidence of the Legislature's implicit recognition of a core right to keep and bear arms that it cannot restrict. Apparently, it believes that this core right extends to a private vehicle. *See supra* note 222.

233. *See* LA. REV. STAT. ANN. § 14:95.2(C)(7), (8) (2009).

234. *Id.*

235. *Id.* § 14:95.1(A).

236. *Id.* Although not inherently violent crimes, drug crimes are included in Louisiana Revised Statutes section 14:95.1(A) because there is a strong correlation between drugs and violence in society. *See* Lana Harrison & Joseph Gfroerer, *The Intersection of Drug Use and Criminal Behavior: Results from the National Household Survey on Drug Abuse*, 38 CRIME & DELINQ. 422, 439 (1992) (finding drug use to be a strong correlate to violent crime in the United States).

and federal laws; consequently, they have frequently been the subject of Second Amendment constitutional challenges.²³⁷ On its face, section 14:95.1 contradicts the new article I, section 11 of the Constitution of Louisiana, which declares that all citizens have the fundamental right to keep and bear firearms; therefore, this regulation must be subject to strict scrutiny review upon judicial challenge.²³⁸ However, because this regulation is narrowly tailored to a compelling state interest, it is equipped to pass strict scrutiny review.

Louisiana Revised Statutes section 14:95.1 provides: “It is unlawful for any person who has been convicted of a crime of violence . . . to possess a firearm or carry a concealed weapon.”²³⁹ This statute imposes a firearm prohibition against any person who has been convicted of a violent crime or other certain felonies in the preceding ten years.²⁴⁰ Not only does the statute ban basic firearm possession, but it also denies a felon eligibility to register for a concealed handgun permit;²⁴¹ consequently, it must be subject to strict scrutiny.²⁴²

In 1977, the Supreme Court of Louisiana upheld Louisiana Revised Statutes section 14:95.1 in *State v. Amos*. In *Amos*, the Supreme Court applied a “reasonable and legitimate” test in examining the regulation.²⁴³ The court stated in its opinion that “such regulation is constitutionally permissible as a reasonable and legitimate exercise of police power.”²⁴⁴ Under strict scrutiny, however, simply being reasonable and legitimate will not be a sufficient ground for constitutionality. Instead, the court will need to

237. See, e.g., *United States v. Skoien*, 614 F.3d 639 (7th Cir. 2010).

238. LA. CONST. art. I, § 11.

239. LA. REV. STAT. ANN. § 14:95.1 (2009). A “crime of violence” is defined as:

an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.

Id. § 14:2(B).

240. “Firearm” is defined as “any pistol, revolver, rifle, shotgun, machine gun, submachine gun, black powder weapon, or assault rifle, which is designed to fire or is capable of firing fixed cartridge ammunition or from which a shot or projectile is discharged by an explosion.” *Id.* § 14:95.1(D).

241. *Id.* § 14:95.1.

242. LA. CONST. art. I, § 11.

243. *State v. Amos*, 343 So. 2d 166, 168 (La. 1977).

244. *Id.* (noting that courts of other states with comparable statutes and right to bear arms constitutional provisions have made similar conclusions about their lawfulness).

identify a compelling state interest, and the statute will have to be necessary or narrowly tailored to that interest.²⁴⁵

1. Compelling State Interest

As is the case with most gun regulations, by restricting the possession of firearms from convicted felons, the state is trying to curb gun-related violence in order to protect social peace and safety.²⁴⁶ In an effort to ensure safety, the Louisiana Legislature has restricted the possession of firearms from persons who “have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity.”²⁴⁷ Many courts have noted that statistics reveal felons, such as domestic abusers, are especially inclined to recidivism.²⁴⁸ They pose a unique risk to society, and thus their access to firearms should be limited.²⁴⁹ Accordingly, protecting peace and safety by limiting felons from gun possession can rather convincingly amount to a compelling state interest.²⁵⁰

2. Guidance Toward a Narrowly Tailored Means

Louisiana Revised Statutes section 14:95.1 is also narrowly tailored to the state objective of protecting peace and safety by

245. See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (defining the strict scrutiny standard of review).

246. See *Amos*, 343 So. 2d at 168 (recognizing the state’s interest in protecting public health, safety, and morals or general welfare by prohibiting convicted felons from possessing firearms); see also *U.S. v. Skoien*, 614 F.3d 638, 642–45 (7th Cir. 2010). In its analysis, the Seventh Circuit Court of Appeals determined that the government’s objective of 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by anyone convicted of a misdemeanor crime of domestic violence, was to prevent “armed mayhem.” *Id.* at 642. The court concluded that preventing this class of criminals from possessing firearms maintained a substantial relationship with the government’s objective of preventing armed mayhem. *Id.*

247. *Amos*, 343 So. 2d at 168.

248. See *Skoien*, 614 F.3d at 644.

249. See *id.* (citing a study that asserts that domestic assaults with firearms are approximately 12 times more likely to end in the victim’s death than are assaults without firearms); *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (“Irrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens.”).

250. See *United States v. Reese*, 627 F.3d 792, 804 n.4 (10th Cir. 2010) (concluding that the state’s objective of keeping firearms out of the hands of domestic abusers because of the credible threat they posed to those around them was a compelling government objective).

keeping firearms out of the hands of dangerous criminals. Its narrowly tailored qualities are especially apparent in light of issues raised in two recent cases addressing similar statutes. In *United States v. Skoien*, the appellant contended that a lifetime disqualification from gun possession due to his past domestic abuse conviction, as set forth in 18 U.S.C. § 922(g)(9), was overbroad because the propensity for violence among domestic abusers declines with an increase in age.²⁵¹ Although the Seventh Circuit rejected this argument as applied to the appellant in this case,²⁵² the court recognized the potential viability of a challenge by a misdemeanor who has since been law abiding.²⁵³ Based on the Seventh Circuit's reasoning, it is possible that prohibiting a non-violent criminal from possessing firearms may fail to meet the substantial relationship standard of intermediate scrutiny and thus would be even more likely to fail the narrowly tailored standard of strict scrutiny.²⁵⁴

The North Carolina Supreme Court addressed a similar issue in *Britt v. State*.²⁵⁵ Here, the claimant challenged the constitutionality of a lifetime prohibition of gun possession for convicted felons.²⁵⁶ The plaintiff had previously pled guilty to felony possession with the intent to sell and deliver a controlled substance.²⁵⁷ The court noted that this crime was non-violent and did not involve the use of a firearm.²⁵⁸ In addition, it noted that in the 30 years since his drug possession charge, the plaintiff had not been convicted of any other crimes, nor had any agency or court made a determination that he was violent, potentially dangerous, or more likely than the general public to commit a crime with a firearm.²⁵⁹ Based on these facts, and because the statute in question provided no possible exceptions to its

251. *Skoien*, 614 F.3d at 644. In other words, statistically, as the appellant grows older, the chances of him committing another abuse offense will decline.

252. *Id.* at 645. The appellant, Skoien, had been convicted twice of domestic battery and arrested while in possession of multiple guns just one year after his second conviction. *Id.* See also *United States v. Solerno*, 481 U.S. 739, 745 (1987) (stating that a person to whom a statute properly applies cannot obtain relief based on arguments that a differently situated person might present).

253. *Skoien*, 614 F.3d at 645. See also *United States v. Barton*, 633 F.3d 168, 174 (3rd Cir. 2011) (making the same point that a statute prohibiting the possession of a weapon by a law-abiding, non-violent criminal may be an improper infringement of a Second Amendment right).

254. *Skoien*, 614 F.3d at 646.

255. *Britt v. State*, 681 S.E.2d 320, 321 (N.C. 2009).

256. *Id.*; N.C. GEN. STAT. ANN. § 14-415.1(a) (Westlaw 2013) ("It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm.").

257. *Britt*, 681 S.E.2d at 321.

258. *Id.*

259. *Id.* at 322.

firearm ban, the court concluded that the statute was an “unreasonable” regulation and “not fairly related” to the preservation of public peace and safety, thereby it constituted a violation of the plaintiff’s right to keep and bear arms as enumerated in the North Carolina Constitution.²⁶⁰

3. *Distinguishing Louisiana’s Law*

Considering these two decisions, there are several key characteristics that comparatively distinguish Louisiana Revised Statutes section 14:95.1 as a narrowly tailored regulation. As opposed to the North Carolina statute, which was a general firearms ban for any person convicted of a felony, section 14:95.1 limits its ban to those persons convicted of a crime of violence, sex offenders and violators of the Uniform Controlled Dangerous Substance Law.²⁶¹ Also, section 14:95.1 includes a time limit of ten years from the date the sentence is completed for the applicability of the ban, whereas the North Carolina statute, as well as the federal statute in *Skoien*, both involved an unconditional lifetime ban from firearms.²⁶²

These substantive measures in the law give Louisiana’s firearm ban a significant edge in constitutional viability. Both of the chief concerns raised by the North Carolina Supreme Court²⁶³ are addressed in section 14:95.1: a narrow focus on certain felons and a temporal restriction on the ban.²⁶⁴ Not only does such a regulation attempt to take guns out of the hands of violent criminals, but it does

260. *Id.* at 323; N.C. CONST. art. I, § 30. The language of this section is identical to that of the Second Amendment to the Constitution of the United States of America. Also note, the dissent in this case points out that the majority cites no direct authority or precedent to support its opinion. *Britt*, 681 S.E.2d at 325 (Timmons-Goodson, J. dissenting). The dissent argues that it is the responsibility of the legislature to make laws in the interest of public welfare and safety, and policy decisions such as these should be left up to the executive and legislative branches. *Id.* He also emphasized that this decision will open the floodgates to individual challenges to statutes prohibiting firearm possession by incompetents and the mentally insane. *Id.*

261. LA. REV. STAT. ANN. § 14:95.1 (2009). The statute provides a list of specific felonies contemplated by the ban. *Id.* Also note that in *State v. Cobb*, as an example, the court determined that the distribution of marijuana was a crime sufficient to meet the threshold of this statute. 428 So. 2d 935, 936 (La. Ct. App. 1983). The defendant’s appeal against the charge of felony in possession of a firearm was dismissed. *Id.* at 937.

262. N.C. GEN. STAT. ANN. § 14-415.1 (Supp. 2007) (Westlaw 2013); *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010); LA. REV. STAT. ANN. § 14:95.1(C).

263. *Britt*, 681 S.E.2d at 323.

264. LA. REV. STAT. ANN. § 14:95.1 (2009).

so in a specifically tailored fashion. Only individuals convicted of particularly dangerous felonies are susceptible to punishment under this statute, and the effects of this regulation expire after ten years from the date of completion of the sentence in the absence of subsequent felony convictions.²⁶⁵ Targeting only those criminals who have shown a propensity for serious crime is a calculated effort to keep guns away from those people who have proven to be the most dangerous in society, thereby making the state a safer place.²⁶⁶ Placing a ten-year limit on the statute's applicability also facilitates this objective. If a violent criminal can remain law abiding for a continuous ten-year period, then he or she has presumably displayed strong signs of reform, and such a criminal does not pose the same threat of violence as one with a more recent conviction.²⁶⁷ Both of these statutory elements sufficiently narrow the scope of this regulation and, in turn, strengthen its constitutional viability in light of strict scrutiny.²⁶⁸

4. *The Core Right Analysis*

In addition, when assessing the constitutionality of a statute that prohibits a felon's possession of a firearm, the jurisprudence of the federal circuit courts compel the application of a core right analysis.²⁶⁹ Because it is federal jurisprudence, Louisiana courts are not bound by this analysis; however, considering the federal circuit courts' extensive experience dealing with Second Amendment challenges in the wake of *Heller*, this methodology may prove a helpful guide to Louisiana courts in addressing the new strict scrutiny mandate.²⁷⁰ Because of the gravity of the revised article I, section 11, Louisiana courts will not likely have the luxury of

265. *Id.* Louisiana courts have held that the ten-year cleansing period can be interrupted by committing any felony, not only the felonies enumerated in Louisiana Revised Statutes section 14:95.1(A). *State v. Batiste*, 701 So. 2d 729, 733 (La. Ct. App. 1997), *writ denied*, 740 So. 2d 648 (La. 1999).

266. *See supra* note 249.

267. *See Skoien*, 614 F.3d at 645; *State v. Glover*, 997 So. 2d 137 (La. Ct. App. 2008).

268. In addition to these two tailored features of Louisiana Revised Statutes section 14:95.1, Louisiana courts have created a jurisprudential exception to this firearm restriction in the form of an affirmative defense for a felon in possession of a firearm. If the felon can prove an imminent threat of force from another with no reasonable alternative to possession of the firearm, he may justify his possession of a firearm for self-defense. *See State v. Qualls*, 921 So. 2d 226, 237 (La. Ct. App. 2006); *State v. Recard*, 704 So. 2d 324, 327–29 (La. Ct. App. 1997), *writ denied*, 805 So. 2d 200 (La. 1998).

269. *See supra* Part II.C.

270. *See discussion supra* Part IV.A.

revisiting Louisiana's prior right to bear arms jurisprudence.²⁷¹ Instead, the strict scrutiny mandate demands a break from the past and a wholly new analysis of the right.²⁷²

The United States Court of Appeals for the Fourth Circuit has identified the core Second Amendment right as the right of a law-abiding citizen to keep and bear arms for the purpose of self-defense within the home.²⁷³ The statute in question regulates the possession and use of firearms by persons convicted of certain felonies.²⁷⁴ This is a blanket prohibition, thus extending to the use of weapons within the home.²⁷⁵ In so doing, this restriction offends the traditional notion of self-defense that *Heller* described as the foundation of our right to keep and bear arms.²⁷⁶ However, the statute applies to felons, not law-abiding citizens. Accordingly, this regulatory measure does not fall firmly within the scope of the core right.²⁷⁷ Because the statute does not infringe upon the core Second Amendment right to keep and bear arms, it does not trigger the strongest Second Amendment protections.²⁷⁸ Because this statute falls outside of the core right and because the Legislature has tailored the statute by including both temporal and criminal limitations, Louisiana Revised Statutes section 14:95.1 remains constitutionally viable under a strict scrutiny review.²⁷⁹

V. CONCLUSION

Louisiana's article I, section 11 constitutional amendment marks the strongest expression of the right to bear arms to date for any jurisdiction within the United States. Never before has any state subjected its right to keep and bear arms to a strict scrutiny judicial review. Despite any reservations, Louisiana courts must now

271. See discussion *supra* Part III.C.

272. See discussion *supra* Part III.C.

273. See *supra* Part II.C.

274. LA. REV. STAT. ANN. § 14:95.1 (2009).

275. *Id.*

276. See *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (discussing the natural right of self-defense).

277. See *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). The Fourth Circuit came to this same conclusion about a law prohibiting gun possession by a person convicted of a misdemeanor crime of domestic violence.

278. The Legislature typically has more liberty to regulate any behavior that does not involve law-abiding citizens. See *supra* Part II.C.

279. See discussion *supra* Part II.C. Also, restricting firearms from felons was a regulation included in *Heller's* list of presumptively lawful regulatory measures. Although Louisiana courts are not bound by *Heller*, the Supreme Court's endorsement may serve as additional support for this statute. See *Heller*, 554 U.S. at 626–27.

abandon their longstanding right to bear arms jurisprudence in lieu of a daunting strict scrutiny standard of review, which they have never before applied to firearm challenges. This unexplored scrutiny has now become the judicial gauge by which courts will evaluate a Louisiana citizen's right to bear arms. No hallow restriction will be able to slip through the judicial cracks. The battle lines have been drawn, but the fate of Louisiana gun laws is far from sealed. Despite the severity of strict scrutiny, any regulation that is carefully drafted pursuant to a compelling public interest is poised to pass a strict scrutiny review. In the flood of challenges that will inevitably follow this amendment, courts will soon have the opportunity to address these concerns. The Legislature has passed the regulatory torch to the judiciary. The fate of Louisiana's gun regulations is now in its hands.

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