The Second Amendment Goes to College

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I. INTRODUCTION

Historically, college campuses have served as forums for war protests,[1] academic experimentation,[2] and the free exchange of ideas.[3] Although demonstrations like those in the 1960s do not seem to be the primary method of political protest among students anymore, college campuses are inherently politically charged places used for the expression of many diverse opinions—nearly all American colleges host student political groups or issue-based groups that seek to bring awareness to a particular cause. When protests do happen, students sometimes get violent or the situation becomes chaotic, resulting in sit-ins, class disruptions, severe tensions between students and administrators, and even student arrests.[4] Despite these sometimes negative results, colleges and universities are well-aware that learning depends on the free exchange of ideas.[5] In fact, the learning environment that colleges seek to maintain depends on

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1. *See generally* THE VIETNAM WAR ON CAMPUS: OTHER VOICES, MORE DISTANT DRUMS (Marc Gilbert ed., 2000) (examining Vietnam protests on college campuses in the South and Midwest).

2. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 801 (2010).

3. *Id.*

4. Ben Margot, *Students Across USA Protest Over College Funding, Tuition*, USA TODAY, Mar. 5, 2010, http://www.usatoday.com/news/education/2010-03-04-university-protests_N.htm.

5. *See, e.g.*, CENTER FOR CAMPUS FREE SPEECH, STUDENTS AND FACULTY SPEAK OUT ON THE FREE EXCHANGE OF IDEAS IN PENNSYLVANIA COLLEGES AND UNIVERSITIES, CAMPUS VOICES 2 (2006), http://cdn.publicinterestnetwork.org/assets/lzljnMNJ0TECSbbAIlmThA/campus_voices.pdf.

the freedom to speak about controversial issues and the freedom to hear differing opinions.[6]

For these reasons, colleges and universities are unique public spaces. They are devoted to creating an atmosphere conducive to learning, thereby ensuring a quality education.[7] Colleges create this atmosphere through methods such as tenure,[8] protecting freedom of speech and assembly on portions of their campuses,[9] and establishing "gun-free zones" so students feel safe to express themselves.[10] Unlike public parks, for example, colleges and universities have not traditionally been open to the public, and they provide more than just opportunities for recreation. Rather, colleges have an interest in seeing their students well-educated, enabling them to become functioning members of our society.[11]

A good education requires students and faculty to feel safe and comfortable when expressing their ideas or making mistakes in the classroom. In order to provide this safe academic learning environment, the vast majority of colleges prohibit carrying or possessing guns on their campuses.[12] The learning environment could be severely compromised if students or faculty were potentially carrying a firearm because some individuals may feel threatened or intimidated, which could very well inhibit their ability to learn.[13]

The notion that universities should provide an environment where students and faculty feel safe enough to freely exchange ideas has been advocated for in the context of the First Amendment. For example, in response to Yale University Press's decision to remove images of Mohammed from a scholarly text, several academic and free-speech groups

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6. AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS 3 (2006), http://www.aaup.org/NR/rdonlyres/EBB1B33033D34A51B534CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf.

7. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

8. Walter Metzger, *Academic Tenure in America: A Historical Essay*, *in* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, 114–16 (1973).

9. *See* Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 481 (2005).

10. *See, e.g.*, Univ. of Utah v. Shurtleff, 252 F. Supp. 2d 1264, 1269 (D. Utah 2003) (The university asserted that the purpose of its gun-free policy included the preservation of the educational process.).

11. Grutter v. Bollinger, 539 U.S. 306, 331–32 (2003); *see also Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.").

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

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

urged higher-education institutions to "stand up for certain basic principles: that the free exchange of ideas is essential to liberal democracy; that each person is entitled to hold and express his or her own views without fear of bodily harm . . . ."[14] These principles should also be upheld within the context of deciding how guns should be regulated on college campuses.

Finally, implicit in the concept of the academic freedom doctrine is the notion that colleges and universities require autonomy and should have the power to dictate policy choices on their campuses.[15] For example, the U.S. Supreme Court has declared that "the essentiality of freedom in the community of American universities is almost self-evident . . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[16] It follows then that the academic freedom doctrine necessarily "restricts the scope of permissible legislative interference with public [colleges and] universities."[17]

Traditionally, regulating firearms has been under the authority of the states.[18] But two recent judicial opinions have changed Second Amendment jurisprudence and may affect how public colleges and universities regulate guns on their campuses. In *District of Columbia v. Heller*, the Supreme Court settled the debate as to whether the Second Amendment was a collective right related solely to state militia service, or whether it provided an individual right to keep and bear arms.[19] Specifically, the Court held that individual self-defense is "the central component" of the Second Amendment,[20] and law-abiding citizens must be permitted "to use arms in defense of hearth and home."[21] In dicta, however, the majority stated that "[l]ike most rights, the right secured by the Second Amendment is not unlimited,"[22] and it expressed support for tra-

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14. Peter Schmidt, *Colleges are Urged to Defend Free Speech*, CHRON. OF HIGHER EDUC., Nov. 30, 2009, http://chronicle.com/article/Colleges-Urged-to-Defend-Free/49297/. Yale University Press refused to publish the illustrations because it feared publication would trigger violence. *Id.* In response, academic and free-speech groups released a joint statement calling on colleges and universities to stand up for free expression. *Id.*

15. *Grutter*, 539 U.S. at 329; *see also Sweezy*, 354 U.S. at 265–66 (Frankfurter, J., concurring) (reasoning that the First Amendment created a right of academic freedom).

16. *Sweezy*, 354 U.S. at 250.

17. Wyer, *supra* note 13, at 1013. Part of the concern about legislative interference stems from the fact that a state may pass a statute that supersedes a college or university regulation. *See* discussion *infra* Part II.A.

18. McDonald v. Chicago, 130 S. Ct. 3020, 3125 (2010) (Breyer, J., dissenting) (arguing that private gun regulation is the quintessential exercise of a state's police power).

19. District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

20. *Id.*

21. *Id.* at 635.

22. *Id.* at 626.

ditional exercises of police power, including, but not limited to, "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 . . . ."[23]

Two years later, in *McDonald v. Chicago*, the Court incorporated the Second Amendment right recognized in *Heller* against the states through the Due Process Clause of the Fourteenth Amendment.[24] The Court reiterated its assurance that "longstanding regulatory measures" such as the prohibition of firearms in sensitive places would not be imperiled by either its holding in *Heller* or its incorporation of the Second Amendment.[25] But several questions remain. Do prohibitions of guns on college campuses infringe on a fundamental right? What standard of review should lower courts use when evaluating gun regulations? What types of regulations can survive? What should colleges do to maintain authority over their campuses? Because incorporation may imply that the right is fundamental, *McDonald* poses a legitimate threat to a public college's interest in prohibiting firearms on campus.

This Comment will argue that because *McDonald*'s holding limits the right under the Second Amendment to protect individuals using guns in defense of "hearth and home," public colleges and universities are constitutionally permitted to continue prohibiting guns on their campuses. And although the Court did not explicitly state the standard of review that should apply when determining whether a regulation unconstitutionally infringes on the right to keep and bear arms,[26] this Comment will argue that prohibition of guns on campuses and even in residence halls should survive strict scrutiny because the policy is narrowly tailored to achieve compelling interests in academic freedom and public safety.

Part II summarizes *Heller*, *McDonald*, and incorporation against the states, in general. Part III discusses recent lobbying efforts and explains how the *McDonald* case implicates public colleges and universities. Lastly, in Part IV, I argue that intermediate scrutiny should be the standard of review, but even if the courts use strict scrutiny, gun-free zones on public college campuses should be held constitutional.

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23. *Id*.

24. McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010).

25. *Id.* at 3047.

26. In *Heller*, the Court did appear to foreclose rational basis as the appropriate standard of review when it stated that banning from the home the most preferred firearm in the nation to use for self-defense would fail constitutional muster under any of the standards of scrutiny applied to enumerated constitutional rights. 554 U.S. at 628–29. In a footnote, the Court briefly elaborated on its standard of review discussion, stating, "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* at 628 n.27. Accordingly, this Comment does not address whether a gun-free zone would survive rational basis review.

II. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS IN SELF-DEFENSE OF HEARTH AND HOME

In this Part, I will summarize the holding in *Heller* and highlight some of the dicta that have left lower courts with more questions than guidance on the Second Amendment. Then I will briefly discuss the incorporation doctrine, the majority opinion in *McDonald*, and their implication on state regulation of firearms.

A. District of Columbia v. Heller

In spite of the Supreme Court's previous jurisprudence on the Second Amendment,[27] the majority in *Heller* found that the Second Amendment was an individual right rather than a collective right dependent upon service in a well-regulated militia.[28] The Court held that even if the purpose of codifying the Second Amendment was to preserve the state militia, individual self-defense was nevertheless the "central component" of the right.[29] In *Heller*, the gun-control regulation at issue was the essential prohibition of handguns within the District of Columbia.[30] The District made it a crime to carry any unregistered firearm and refused to register any handguns thereby making them unlawful.[31] The statute further required all lawfully registered firearms to be either unloaded or bound by a trigger lock.[32] The Court reasoned that the D.C. regulation

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27. *See* United States v. Miller, 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."); *see also* Presser v. Illinois, 116 U.S. 252, 265 (1886) (repeating its holding from *United States v. Cruikshank*—the Second Amendment is "one of the amendments that has no other effect than to restrict the powers of the national government"); United States v. Cruikshank, 92 U.S. 542, 553 (1875) ("[Bearing arms for a lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress.").

28. *Heller*, 554 U.S. at 591–92.

29. *Id.* at 599. It is beyond the scope of this Comment to discuss whether the majority's interpretation of the historical record was flawed. *See id.* at 639–40 (Stevens, J., dissenting) (arguing that the holding in *Miller*—which declared that the Second Amendment protects only the right to keep and bear arms for certain military purposes and does not diminish the power of Congress to regulate the nonmilitary use and ownership of weapons—is "both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption"); *see also* Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18 (2010); Saul Cornell, *Originialism on Trial: The Use and Abuse of History in* District of Columbia, 69 OHIO ST. L.J. 625 (2008). Although numerous articles have been written on the debate, this Comment accepts the majority opinion for what it now is—the law of the land.

30. *Heller*, 554 U.S. at 574.

31. *Id.* at 574–75.

32. *Id.* at 575.

prohibited from the home "the most preferred firearm in the nation to keep and use for protection" and therefore failed strict scrutiny.[33] Accordingly, it held that a total ban on the possession of handguns in the home unconstitutionally infringed on the right of a law-abiding individual to keep and bear arms for self-defense.[34]

The *Heller* Court declined to specify the standard of review lower courts should use when determining whether a gun regulation impermissibly infringes on an individual's Second Amendment right. In dicta, however, the majority stated that the right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[35] Furthermore, the Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, 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."[36] The Court even went so far as to identify these regulatory measures—now known as the *Heller* Safe Harbor—as examples of presumptively lawful regulations, the list of which is not exhaustive.[37]

Despite these reassurances, the majority opinion responded to Justice Breyer's dissent in which he discusses the standard of review courts should use when deciding whether a gun regulation meets constitutional muster.[38] Justice Breyer proposed a case-by-case interest-balancing approach that would differ from the traditionally expressed levels of strict scrutiny, intermediate scrutiny, and rational basis review.[39] In response, the majority stated, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[40] The Court then used the First Amendment as an example to illustrate its point:

> [T]he freedom-of-speech guarantee that the people ratified . . . included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and

33. *Id.* at 628–29.

34. *Id.* at 635.

35. *Id.* at 626.

36. *Id.* at 626–27.

37. *Id.* at 627 n.26.

38. *Id.* at 634.

39. *Id.* These traditional standards of review are also used to evaluate whether state laws violate the Fourteenth Amendment Equal Protection Clause. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 135–37 (2011).

40. *Id. But see* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 376 (2010) (arguing that modern First Amendment doctrine leans heavily toward balancing tests rather than the categorical approach adopted in *Heller*).

> wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.[41]

On one hand, this dictum might be helpful to those who wish to analogize the Second Amendment to the First when arguing for a particular standard of review. On the other, it may suggest that the right to keep and bear arms in self-defense of the home is absolute, meaning there would be no compelling government interest that could ever outweigh it. If the right is absolute, public colleges and universities would encounter significant difficulties in arguing the constitutionality of prohibiting the possession of guns in their residence halls.

B. Incorporation Doctrine

Because the Bill of Rights applies only to the federal government,[42] much of the scholarship written after the *Heller* decision came down revolved around whether the Court would next incorporate the Second Amendment against the states.[43]

The theory that the Fourteenth Amendment Due Process Clause incorporated the Bill of Rights in its entirety has never been embraced.[44] In *United States v. Cruikshank*, the Court held that the Second Amendment "shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress."[45] Two subsequent cases, *Presser v. Illinois* and *Miller v. Texas*, "reaffirmed that the Second Amendment applies only to the Federal Government."[46] These three cases, however, were decided before the Court began the process of "selective incorporation."[47] Through this process, the Court began to hold that particular

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

42. Barron v. City of Baltimore, 26 U.S. 243, 247 (1833) ("[T]he Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.").

43. *See generally* Ben Howell, *Come and Take It: The Status of Texas Handgun Regulation After* District of Columbia v. Heller, 61 BAYLOR L. REV. 215 (2009); Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of Inferior Courts*, 29 SYRACUSE L. REV. 185 (2008).

44. McDonald v. Chicago, 130 S. Ct. 3020, 3033 (2010); *see, e.g.*, Twining v. New Jersey, 211 U.S. 78, 99–91 (1908) (holding that neither the Privileges and Immunities Clause nor the Due Process Clause protects the right against self-incrimination from state action); Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the Due Process Clause does not protect the grand jury indictment requirement).

45. United States v. Cruikshank, 92 U.S. 542, 553 (1875).

46. *Heller*, 554 U.S. at 620.

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

rights contained in the first eight amendments applied to the states under the Due Process Clause of the Fourteenth Amendment.[48] In order to determine whether a right should be incorporated against the states, the Court has recognized that due process protects "rights that are the very essence of a scheme of ordered liberty and essential to a fair and enlightened system of justice."[49] Accordingly, First Amendment rights such as the freedom of religion,[50] the freedom of assembly,[51] and the freedom of the press[52] have all been incorporated against the states. The warrant requirement,[53] the exclusionary rule,[54] and the freedom from unreasonable searches and seizures under the Fourth Amendment[55] have also been incorporated. When the Court finds that the Due Process Clause protects an individual right, incorporation safeguards that right from impermissible infringement by state action, including action undertaken by public colleges and universities.

C. McDonald v. Chicago

Until 2010, the Second Amendment was on the short list of rights guaranteed by the Bill of Rights that were not incorporated against the states. *Heller* held that the Second Amendment protects the right to keep and bear arms in the home for the purpose of self-defense, but it did not address the issue of incorporation.

The majority in *McDonald* found that in order for the right recognized in *Heller* to apply against the states, the right must be "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[56] The Court cites its historical analysis from *Hel-*

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48. *Id.* at 3034; *see, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1936) (holding that freedom of assembly falls under the protection of the Due Process Clause); Powell v. Alabama, 287 U.S. 45, 53 (1932) (holding that assistance of counsel in capital cases is protected under the Due Process Clause); Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that freedom of speech and press fall under the protection of the Due Process Clause).

49. Palko v. Connecticut, 302 U.S. 319, 325 (1937); *see also* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (stating that the test for incorporation is "whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

50. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (incorporating the Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).

51. *De Jonge*, 299 U.S. at 364.

52. *Gitlow*, 268 U.S. at 666.

53. Aguilar v. Texas, 378 U.S. 108, 110 (1964).

54. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

55. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

56. McDonald v. Chicago, 130 S. Ct. 3020, 3034 (2010). There has been some debate as to whether the *McDonald* opinion distorted the incorporation test. *See id.* at 3093 (Stevens, J., dissenting) (arguing that "inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment"). Once again, however, it is beyond the scope of this Comment to engage in whether *McDonald* was decided correctly. Instead, I focus on

ler to show that the Second Amendment was deeply rooted in our country's history and tradition. The English Bill of Rights protected keeping arms for self-defense; during the ratification of the United States Bill of Rights, there was a fear that the federal government would disarm the people; and in the 1850s, when the perceived threat of militia disarmament faded, the right to keep and bear arms for self-defense was highly valued.[57] The Court further argued that the Civil Rights Act of 1866 "aimed to protect the constitutional right to bear arms and not simply to prohibit discrimination."[58] Based on this analysis, the Court found that "the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the State legislated in an evenhanded manner."[59] Taking all of this historical evidence into consideration, the *McDonald* Court held that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[60]

In dicta, the Court again offered reassurances. Even though the Second Amendment is fully binding on the States and "limits their ability to devise solutions to social problems that suit local needs and values," their ability to experiment with reasonable gun regulations has not been eliminated and will continue under the Second Amendment.[61] Additionally, the Court recognized that neither its holding in *Heller* nor its holding in *McDonald* should "cast doubt on such longstanding regulatory measures as . . . forbidding the carrying of firearms in sensitive places such as schools and government buildings."[62]

Finally, the Court once again did not explicitly state what standard of review lower courts should use when state and local gun regulations are inevitably challenged. The *McDonald* decision essentially states that the Second Amendment is fundamental enough to be incorporated against the States. Even though the Due Process Clause of the Fourteenth Amendment protects the liberty interest to keep and bear arms for self-defense in one's home, that does not necessarily mean the interest protected is a fundamental right warranting strict scrutiny. And the analysis for constitutionality depends on whether *McDonald* incorporated only a

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how the holding may affect regulating guns on college campuses regardless of whether the opinion was flawed.

57. *Id.* at 3036–38.
58. *Id.* at 3040–41.
59. *Id.* at 3043–44.
60. *Id.* at 3050.
61. *Id.* at 3046.
62. *Id.* at 3047.

liberty interest or a fundamental right, the latter of which would warrant heightened scrutiny.[63]

Because most of the Bill of Rights that have been incorporated against the states are considered fundamental rights,[64] local governments would be well-advised to assume that the highest level of review would apply and consider whether their current or proposed regulations would survive strict scrutiny. In particular, public colleges and universities will need to evaluate how the incorporation of the Second Amendment affects their authority to enforce gun-free zones on campus.

III. PUBLIC COLLEGES AND UNIVERSITIES' AUTHORITY TO REGULATE GUNS ON THEIR CAMPUSES

In this Part, I will explain the relationship between state legislatures and public colleges in reference to rulemaking authority. Then I will briefly discuss recent lobbying efforts that either support or oppose the carrying of firearms by concealed-carry permit holders on college campuses. I will also summarize the current trends of regulating guns on campuses—most colleges and universities have enacted total prohibitions. And finally, I will argue that state statutes allowing concealed weapons on campus threaten the ability of colleges and universities to make important policy decisions about the learning environment of their institutions.

A. A College's Authority to Promulgate Rules

Pursuant to statutory enactments by state legislatures, public colleges and universities have the authority to promulgate rules and regulations concerning the conduct of their students, faculty, staff, and visitors.[65] The overwhelming majority of college boards support total bans on guns and wish to maintain institutional autonomy to implement policies beneficial to the learning environment in higher education.[66] And

63. Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (holding that assisted suicide is not a fundamental liberty interest protected by the Due Process Clause, and therefore, rational basis review applies).

64. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the freedom of speech and the freedom of the press under the First Amendment are fundamental rights).

65. *See, e.g.*, UTAH CODE ANN. § 53B-3-103 (West 2007); WASH. REV. CODE § 28B.50.140(7) (2010).

66. *See* Langhauser, *supra* note 12, at 96; *see also* THOMAS L. HARNISCH, AM. ASS'N OF STATE COLLEGES & UNIVS., CONCEALED WEAPONS ON STATE COLLEGE CAMPUSES: IN PURSUIT OF INDIVIDUAL LIBERTY AND COLLECTIVE SECURITY 1 (2008), http://www.aascu.org/media/pm/pdf/pmdec08.pdf. For example, University of Arizona President Robert Shelton explained his stance on S.B. 1467, a bill that if passed would allow the concealed carry of weapons on Arizona college campuses:

with the exception of Utah, public colleges in every state have the statutory authority to prohibit or restrict firearms on their campuses.[67] Twenty-six states have either a statute or regulation that explicitly prohibits the possession of guns in colleges and universities.[68] Currently, there are twenty-five two- and four-year public colleges that allow concealed weapons to be carried on at least some portions of campus.[69] All twenty-five of these schools are located in Colorado, Michigan, Utah, and Virginia.[70]

The scope of these gun regulations varies. For example, in 2004, Utah's legislature passed a law that prohibited state and local entities from enacting or enforcing any ordinance, regulation, rule, or policy that in "any way inhibits or restricts the possession or use of firearms on either public or private property."[71] The university board felt so strongly about its authority to regulate its colleges that it fought all the way up to the state supreme court.[72] However, the court did not reach the issue of whether the university's claim of academic freedom under the First Amendment of the U.S. Constitution allowed it to exclude guns from campus in order to protect the free exchange of ideas.[73] Although that issue was to be litigated in federal court, the university agreed to settle in

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> The danger posed by guns is real, and well-documented. Bringing guns into classrooms simply increases the threat to those on campus. Universities provide a unique environment that is dependent on open and vigorous debate. Introducing guns into classrooms would dramatically and negatively impact the ability to engage in the exchange of ideas. Instead, we would see the intimidation inherent when guns are present—something that is antithetical to the very idea of a university.

Becky Pallack, *UA President Rejects the Idea of Gun-Toting Students*, ARIZ. DAILY STAR, Feb. 28, 2011, http://azstarnet.com/news/blogs/campus-correspondent/article_79fe66ac-4368-11e0-9309-001cc4c002e0.html.

67. LEGAL CMTY. AGAINST GUN VIOLENCE, GUNS IN SCHOOLS 15 (2010), http://www.lcav.org/content/Guns_in_Schools.pdf.

68. HARNISCH, *supra* note 66, at 2–3.

69. ARMED CAMPUSES, http://www.armedcampuses.org (last visited Aug. 22, 2011) (providing the names of the twenty-five colleges and universities that allow concealed guns on campus).

70. *Id.*

71. UTAH CODE ANN. § 53-5a-102 (West 2008).

72. *See* Univ. of Utah v. Shurtleff, 144 P.3d 1109 (Utah 2006). For many years, the University of Utah had banned students, faculty, and staff from carrying firearms on its college campuses. *Id.* at 1111. After the state legislature passed a statute that prohibited the university from enforcing its policy, the university sued for a declaration that the state constitution guaranteed it institutional autonomy, which would allow it to continue its enforcement of the firearm prohibition. *Id.* at 1112. But the court held that the state legislature had plenary authority to regulate public colleges and universities, and because the state constitution did not have a provision that stated otherwise, the university did not have the authority to disregard legislative enactments. *Id.* at 1119.

73. *Id.* at 1121.

return for a statutory amendment that allowed students living in dorm rooms to opt out of rooming with a student in possession of a firearm.[74]

Utah, however, represents an extreme reduction in institutional autonomy—no other state legislature has prohibited its public colleges and universities from adopting gun-control policies on their campuses.[75] And while most colleges declare their campuses gun-free zones, a select few have begun to relax the rules for concealed-carry permit holders. For example, Michigan State University allows permit holders to carry concealed weapons on campus, but possession of guns in university buildings, including residence halls, is still prohibited.[76] In general, Blue Ridge Community College prohibits firearms but allows permit holders to carry guns on its campus.[77]

B. Lobbying the Legislature

Significant lobbying efforts to allow concealed weapons on college campuses were underway long before the Supreme Court decided *McDonald*. For example, shortly after the 2007 massacre at Virginia Tech, during which an armed gunman killed thirty-two people before killing himself,[78] a college student from the University of North Texas founded the nonprofit organization Students for Concealed Carry on Campus (SCCC).[79]

One of the organization's primary functions is to push state legislators and college administrators into allowing those individuals with a state-issued concealed-carry permit to bring their weapons onto public college campuses.[80] SCCC has also begun litigating this issue in Colorado.[81] In *Students for Concealed Carry on Campus, Inc. v. Regents of the University of Colorado*, the organization challenged the university's prohibition of guns on campus under the state constitution.[82] While the court

74. David B. Kopel, *Pretend "Gun-Free" Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 529 (2009). The first compromise university administrators proposed—a ban on concealed firearms from sports arenas, faculty offices, residence halls, and classrooms—was rejected. Gwendolyn Bradley, *Universities Permitted Only Dorm-Room Restrictions*, ACADEME, Mar.-Apr. 2007, *available at* http://www.aaup.org/AAUP/pubsres/academe/2007/MA/NB/Gun.htm.

75. HARNISCH, *supra* note 66, at 2.

76. *See* MICH. COMP. LAWS § 28.425o(h) (2009).

77. *See* VA. CODE ANN. § 18.2-308 (West 2011).

78. Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1, *available at* http://www.washingtonpost.com/wpdyn/content/article/2007/04/16/AR2007041600533.html.

79. STUDENTS FOR CONCEALED CARRY ON CAMPUS, http://www.concealedcampus.org (last visited Aug. 22, 2011).

80. *Id.*

81. *See* Students for Concealed Carry on Campus v. Univ. of Colo., No. 09CA1230, 2010 WL 1492308 (Colo. App. Apr. 15, 2010).

82. *Id.* at *1.

expressed no opinion on the merits of the case, the plaintiffs survived a motion to dismiss on a single narrow issue: the inability to carry a firearm in a vehicle while traveling on or through a University of Colorado campus may infringe on the plaintiffs' right to bear arms in self-defense.[83] Even without a decision on the merits or under the U.S. Constitution, this case is instructive in that the court held that the claim for relief was not broad enough to include the prohibition of carrying guns on campus or in college buildings.[84]

In contrast to SCCC, surviving victims of the Virginia Tech tragedy, as well as the families of those who died, founded a nonprofit organization called Students for Gun Free Schools.[85] The mission of this organization is to oppose the efforts to allow concealed firearms to be carried on college campuses.[86] Thus, for several years now, the issue of whether gun-free zones on college campuses reflects the best policy for protecting students, faculty, and staff has been percolating. The question now is how *McDonald v. Chicago* affects the debate.

C. Current State Statutes

Prior to *McDonald*, the greatest threat to a public college's authority to regulate firearms on its campus stemmed from the passage of a state statute superseding a college regulation; only three states, however, have enacted statutes that either explicitly permit guns on college property or explicitly prohibit colleges from promulgating certain types of regulations.[87] For example, in Minnesota and Oklahoma, public colleges and universities may not prohibit the lawful carrying of firearms in parking lots.[88] Oklahoma also allows a college or university president to consent to "campus-carry" in individual circumstances.[89] As described previously, Utah has the most lenient policy, allowing anyone to carry a firearm anywhere.[90]

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83. *Id.* at *11.

84. The university appealed the decision to the Colorado State Supreme Court, which granted certiorari on October 18, 2010. Univ. of Colo. v. Students for Concealed Carry on Campus, No. 10SC344, 2010 WL 4159242, at *1 (Colo. Oct. 18, 2010). The issues up on appeal are (1) whether the General Assembly intended to divest the Board of Regents' authority to enact safety and welfare regulations, and (2) whether the standard of review for a constitutional challenge requires a less deferential standard than rational basis. *Id.*

85. STUDENTS FOR GUN FREE SCHOOLS, http://www.studentsforgunfreeschools.org (last visited Aug. 22, 2011).

86. *Id.*

87. LEGAL CMTY. AGAINST GUN VIOLENCE, *supra* note 67, at 15.

88. *Id.*

89. *Id.*

90. *See* UTAH CODE ANN. § 53-5a-102 (West 2008).

By allowing concealed weapons on college campuses, these statutes carve out an exception to gun-free zones that threatens the institution's academic freedom and the safety of students, faculty, and staff. Now that the Supreme Court has incorporated the Second Amendment against the states, legislatures may be persuaded to amend existing gun regulations, including total prohibitions of firearms on campuses.

IV. MOVING TOWARD A STANDARD OF REVIEW

In Part IV, I will argue that public colleges and universities should fall within the *Heller* Safe Harbor exception, which presumes constitutional any laws that prohibit carrying firearms in "sensitive places."[91] But even if a college campus does not fall within this exception, regulations banning guns on campus should still survive judicial review. In this Part, I will argue that intermediate scrutiny should be the standard of review courts use to determine whether a state or local regulation impermissibly infringes on the Second Amendment. Finally, I will analyze whether prohibitions of guns on campus and in residence halls can pass constitutional muster under strict scrutiny.

A. Heller*'s Safe Harbor*

Before addressing the standards of review, this Comment seeks to determine whether a college or university fits into the exception enumerated in *Heller*, which presumes constitutional "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[92] Although the broad definition of "school" technically includes institutions of higher education, *Black's Law Dictionary* has defined the term as "[a]n institution of learning and education, esp. for children. When used in a statute or other contract, 'school' usually does not include universities, business colleges, or other institutions of higher education unless the intent to include such institutions is clearly indicated."[93] Additionally, the term has generally been defined in statutes and state constitutions as referring only to common schools, grades K–12.[94] Consequently, it would be difficult to argue that the Supreme Court implicitly included colleges and universities within its definition of "schools."

The stronger argument is that public college and university campuses are within the definition of a "sensitive place," and therefore, gun-free zones are presumptively constitutional. Although decided before

91. *See* discussion *supra* Part II.A.
92. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).
93. BLACK'S LAW DICTIONARY (9th ed. 2009).
94. *Id.*

McDonald, in *Nordyke v. King* (*Nordyke IV*), the Ninth Circuit held that the Second Amendment was incorporated against the states,[95] and then it went on analyze whether a city ordinance that made "it a misdemeanor to bring onto or to possess a firearm or ammunition on County property" violated that right.[96] Avoiding the issue of what standard of review to apply, the court held that prohibiting firearms on the county fairgrounds was constitutional because the "open, public spaces the County's Ordinance covers fit comfortably within the same category as schools and government buildings and that prohibiting firearm possession on municipal property fits within the exception from the Second Amendment for 'sensitive places' that *Heller* recognized."[97]

Opponents of gun-free zones have often argued that such a regulation is virtually impossible to enforce because of the open, sprawling nature of college campuses.[98] But when following the reasoning in *Nordyke IV*, this fact suggests that a college campus would fit within the definition of a "sensitive place" *because* of its open nature, and therefore, any laws prohibiting the carrying of firearms on campus would be presumptively constitutional.

More recently, but for a different reason, the Virginia Supreme Court held that a public college or university meets the definition of "sensitive place" as expressed in *Heller*.[99] Because George Mason University is a school owned by the government, it necessarily falls within the definition.[100] The court also noted that a significant number of incoming freshman are under the age of eighteen, that thousands of children attend summer camp on campus, and that the university hosts various family activities including high school graduations, athletic games, and concerts.[101] For these reasons, the university had a compelling interest in

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95. *See* Nordyke v. King (*Nordyke IV*), 563 F.3d 439, 458 (9th Cir. 2010), *vacated*, 611 F.3d 1015 (9th Cir. 2010) (Opinion vacated, and case remanded for further consideration in light of *McDonald*.).

96. *Id.* at 458. Plaintiffs in this case were gun-show promoters who sued because the statute effectively prohibited them from holding gun shows on the county fairgrounds. *Id.* In the new opinion issued in May 2011, the Ninth Circuit deviated from this reasoning and instead adopted a "substantial burden" test to determine the standard of review for regulations of firearms. Nordyke v. King (*Nordyke V*), No. 07-15763, 2011 WL 1632063 (9th Cir. May 2, 2011). *See infra* notes 119–22 and accompanying text.

97. *Nordyke IV*, 563 F.3d at 460.

98. The open nature of college campuses and the difficulty in enforcing gun-free zones is often used as an example of how the regulation is not narrowly tailored in the least restrictive manner possible and thus would not survive strict scrutiny. *See* Lindsey Craven, Note, *Where do we go from Here? Handgun Regulation in a Post-*Heller *World*, 18 WM. & MARY BILL RTS. J. 831, 852 (2010). Strict scrutiny is discussed *infra* in Part III.C.

99. *See* DiGiacinto v. George Mason Univ., 704 S.E.2d 365, 370 (Va. 2011).

100. *Id.*

101. *Id.*

regulating firearms to ensure public safety.[102] Moreover, the university narrowly tailored its regulation because it did not completely ban weapons on campus but instead prohibited them from being carried inside all university buildings and at university events where individuals are most vulnerable.[103] But even if a court finds that a public college or university campus does not fit within the *Heller* Safe Harbor exception, gun-free zones, including total bans, should still withstand judicial review.

B. Intermediate Scrutiny is the Appropriate Standard

Challenges to state and local gun regulations should be reviewed under intermediate scrutiny for three reasons: (1) the Second Amendment protects only a liberty interest, not a fundamental right; (2) even if it does protect a fundamental right, fundamental rights do not usually trigger judicial review under strict scrutiny; and (3) most judicial decisions thus far have refused to apply strict scrutiny, giving great deference to the states' authority and local expertise.

In order for a right to be incorporated under the Due Process Clause, it must be "fundamental to our scheme of ordered liberty."[104] One could argue that the Second Amendment protects only a liberty interest to keep and bear arms for self-defense in the home, and therefore, the government has more leeway in the regulation of that interest. In the due process context, strict scrutiny—the highest standard of judicial review—is appropriate only if the right is deemed fundamental; anything less than that would warrant a lesser standard of review.[105]

After incorporation, however, some scholars have assumed that the Second Amendment is a fundamental right that would trigger strict scrutiny.[106] But fundamental rights do not always trigger this level of re-

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102. *Id.*

103. *Id.* It will be interesting to see how the courts continue to analyze the regulation of firearms in public places. On one hand, *Nordyke IV* states that the open nature of county fairgrounds necessarily classifies the property as a sensitive place, and therefore, the county's regulation was presumptively lawful. Nordyke v. King (*Nordyke IV*), 563 F.3d 439, 460, *vacated*, 611 F.3d 1015 (9th Cir. 2010). On the other hand, in *DiGiacinto*, the court found that because individuals could still possess or carry weapons on the open grounds of George Mason University, the regulation was narrowly tailored and therefore survived strict scrutiny. *DiGiacinto*, 704 S.E.2d at 370.

104. McDonald v. Chicago, 130 S. Ct. 3020, 3034 (2010); *see also* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

105. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

106. *See, e.g.*, Lawrence Rosenthal & Joyce Lee Malcolm, Colloquy, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws*, 105 NW. U. L. REV. 437, 455 (2011); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1465 (2009).

view;[107] some are reviewable under intermediate scrutiny or even under a rational basis test.[108] In fact, strict scrutiny is "actually applied quite rarely in fundamental rights cases."[109] Of the amendments in the Bill of Rights that have been incorporated against the states, only two trigger strict scrutiny: the First and the Fifth Amendments.[110] Moreover, not every provision of the Fifth Amendment is reviewed under the highest standard—when reviewing alleged violations of the Takings Clause courts use a deferential standard.[111] In sum, it is a fallacy to assume that simply because the Second Amendment is fundamental enough to be incorporated against the states, strict scrutiny will necessarily follow.

Even claims under the First Amendment do not always trigger strict scrutiny.[112] For example, the freedom of speech doctrine distinguishes between content-based and content-neutral regulations, and the latter are reviewed under a standard more deferential than strict scrutiny.[113] In the case of gun-free zones, such a regulation is content-neutral because it does not discriminate based on such considerations as race, gender, age, or mental health. Rather, the regulation is nondiscriminatory and applies to everyone on campus.

Furthermore, even protected free speech may be restricted by reasonable time, place, and manner regulations.[114] For example, most colleges and universities regulate when, where, and how individuals may exercise their freedom of speech and assembly on campus so as not to disrupt the academic learning environment.[115] Similarly, in the context of

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107. Nordyke v. King (*Nordyke V*), No. 07-15763, 2011 WL 1632063, at *6 (9th Cir. May 2, 2011); *see also* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227 (2006).

108. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 876–77 (1992) (joint opinion) ("The undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."); Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (using a rational basis-like standard to review a violation of the Fifth Amendment's Takings Clause); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (holding that content-neutral laws that regulate free speech are reviewed under a more deferential standard than strict scrutiny).

109. Winkler, *supra* note 107, at 227.

110. *Id.* at 233.

111. *Id.*

112. *Id.* at 237.

113. *Id.*; *see also* Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL. 273, 298 (2011).

114. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see also* Cameron Desmond, *From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1065 (2008).

115. *See, e.g.*, OR. ADMIN. R. 580-022-0045(1)(2) (1996) (stating that proscribed conduct includes obstruction or disruption of the university's teaching, research, administration, or other public service function and obstruction or disruption that interferes with freedom of movement on institutionally owned or controlled property); TENN. COMP. R. & REGS. § 0240-02-03-.02(2)(c)(d) (2009) (describing misconduct that is subject to disciplinary sanction as (1) disorderly conduct such

the Second Amendment, when a statute prohibits guns on campuses, the legislature (or university board) is simply regulating where the right may be exercised.[116] Accordingly, gun-free zones are analogous to the types of time, manner, and place restrictions often imposed on conduct protected by the First Amendment.[117] Because the holdings in *Heller* and *McDonald* protect the right to keep and bear arms for self-defense in the home, designating college campuses as gun-free zones would not be an unconstitutional restriction.

Finally, several cases demonstrate that courts are reluctant to impose the highest level of judicial review on Second Amendment challenges even though the right has been incorporated against the states. For example, one district court has held that the exclusions of the *Heller* Safe Harbor are inconsistent with strict scrutiny, instead operating more like content-neutral time, place, and manner restrictions.[118] Additionally, in *Nordyke v. King* (*Nordyke V*), the Ninth Circuit adopted a substantial burden framework similar to the standard used to review the constitutionality of abortion regulations.[119] In this case, the court held that "only regulations which substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment."[120] Because the court did not reach the question of whether the challenged city ordinance was a substantial burden, the court did not define precisely what type of heightened scrutiny would be proper.[121] Most importantly, at least in the context of this Comment, the court stated in dicta that "a regulation is particularly unlikely to impose a substantial burden on a constitutional

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as behavior that is "abusive, obscene, lewd, indecent, violent, excessively noisy, disorderly, or which unreasonably disturbs other groups or individuals," and (2) any intentional obstruction of or interference with institutional or school activities or facilities.); 8 VA. ADMIN. CODE § 90-10-60 (2010) (entitled, "The right to appropriate use of university premises in the pursuit of educational goals, occupational endeavors, and recreational activities"); WASH. ADMIN. CODE § 478-136-030 (2005) ("Freedom of expression is a highly valued and indispensable quality of university life. However, university facilities may not be used in ways which obstruct or disrupt university operations, the freedom of movement, or any other lawful activities. No activity may obstruct entrances, exits, staircases, doorways, hallways, or the safe and efficient flow of people and vehicles.").

116. *See* Desmond, *supra* note 114, at 1065.

117. *Id.*

118. United States v. Marzzarella, 595 F. Supp. 2d 596, 605–06 (W.D. Pa. 2009), *aff'd*, 614 F.3d 85 (3d Cir. 2010).

119. Nordyke v. King (*Nordyke V*), No. 07-15763, 2011 WL 1632063, at *6 (9th Cir. May 2, 2011).

120. *Id.* The court found that the gun-show promoters' Second Amended Complaint did not allege sufficient facts to survive a motion to dismiss. But because much of the Supreme Court's Second Amendment jurisprudence was decided after the Complaint was filed, the court vacated the district court's denial of leave to amend with prejudice. *Id.* at *8. As a result, the Nordykes will have the opportunity to show that the city ordinance prohibiting guns from county property substantially burdens their Second Amendment rights.

121. *Id.* at *8 n.12.

right where it simply declines to use government funds or property to facilitate the exercise of that right."[122]

Other courts have avoided the issue altogether. In *United States v. Skoien*, for instance, the government conceded that at least intermediate scrutiny was appropriate to challenge a law that prohibited persons convicted of a domestic violence misdemeanor from possessing a firearm.[123] In response, the court stated that "the concession is prudent, and we need not get more deeply into the 'levels of scrutiny' quagmire, for no one doubts that the goal of [the statute], preventing armed mayhem, is an important governmental objective."[124]

Gun regulations on campus, including total bans, would pass constitutional muster under intermediate scrutiny. To survive this standard of review, the government must demonstrate that the challenged regulation is substantially related to furthering an important government interest.[125] First, most people would not likely argue that a public college or university's interest in ensuring public safety on its campus is not an important government objective. Second, the prohibition of firearms—which are deadly weapons—is substantially related to furthering the interest of public safety on college campuses because, at the very least, the regulation would prevent injuries caused by accidental discharge. Although intermediate scrutiny would be the appropriate standard of review to evaluate firearm regulations, if the courts do begin applying strict scrutiny, gun-free zones on college campuses should still be found constitutional.

C. Gun-Free Zones Should Survive Strict Scrutiny

When reviewed under strict scrutiny, the "fit" between the government interest and the challenged regulation must be much closer than required under a lower standard. Under this test, the government bears the burden of showing that (a) it possesses a compelling interest; (b) it narrowly tailored the regulation to achieve its interest; and (c) no lesser restrictive alternative adequately addresses the challenged regulation.[126] First, this section will analyze under strict scrutiny the constitutionality of a complete prohibition of guns on campus. I will argue that both public safety and academic freedom are compelling government interests, which gun-free zones are narrowly tailored to achieve. Second, this section will also analyze the constitutionality of regulations that ban guns

122. *Id.* at *8.
123. United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).
124. *Id.* at 642.
125. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).
126. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S 442, 451–52 (2008).

from residence halls, ultimately concluding that such regulations would also survive strict scrutiny.

1. Total Prohibition of Guns on Entire Campuses

As discussed previously, the Second Amendment has been interpreted as a right to keep and bear arms in self-defense of hearth and home.[127] Therefore, prohibiting guns from college campuses does not infringe upon this right. But even if the holdings of *Heller* and *McDonald* are extended to self-defense in public places, a regulation prohibiting guns on campuses, and even in residence halls, should survive strict scrutiny.

a. Compelling Government Interest

The compelling government interest prong of the strict scrutiny test will not likely be disputed. Educational institutions have a clear and compelling interest to promote the safety and welfare of their students, faculty, staff, and visitors while they are on campus.[128] Gun prohibitions on campus seek to protect individuals from gun-related accidents, suicides, and crime.[129] Furthermore, colleges and universities are unique public places because they have the additional interest in ensuring academic freedom and a free exchange of ideas in the classroom. Accordingly, firearm prohibitions also seek to prevent coercion or intimidation by the display of guns, which may have an even broader effect on students' ability to learn.[130] Thus, the question becomes whether gun-free campuses are narrowly tailored and whether there is a less restrictive manner in which a college can achieve its interest.

b. Narrowly Tailored Regulation, Least Restrictive Alternative

Opponents of gun-free zones on college campuses often argue that a total prohibition of firearms is unconstitutionally broad for the following reasons: (1) empirical data does not prove that more gun control lessens crime; (2) gun-free zones disarm law-abiding citizens and infringe on their right to keep and bear arms in self-defense; and (3) concealed-

127. District of Columbia v. Heller, 554 U.S. 570, 635 (2008); *see* discussion *supra* Part II.A.

128. *See* Hudson v. Craven, 403 F.3d 691, 699 (9th Cir. 2008). *See also* Craven, *supra* note 98, at 851 (arguing that the fit between the compelling interest in public safety and a gun-free zone would not satisfy strict scrutiny).

129. *See* HARNISCH, *supra* note 66, at 5.

130. *See* David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Use: Results of a National Survey*, 15 VIOLENCE & VICTIMS 257, 272 (2000) (finding that firearms are used more frequently to threaten and intimidate than for self-defense); NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2004 38, http://nces.ed.gov/pubs2005/2005002.pdf (providing statistics for K–12 only).

carry permit holders should not have to disarm before entering a public college campus.

First, whether regulations will survive strict scrutiny does depend, in part, on providing empirical evidence that more guns will likely lead to more crime and that prohibiting guns will likely lessen crime.[131] Opponents dispute much of the data about the causal relationship between firearm laws and the rate of gun crime. For example, the gun lobby frequently argues that guns are used in self-defense 2.5 million times a year and are used five times as often to defend than to perpetrate crimes.[132] But a Harvard study recently found that this claim is based on flawed methodology.[133] What does not seem to be in dispute, however, is the fact that 93% of victimizations of college students take place off-campus.[134] In spite of the sensational stories such as the tragic Virginia Tech massacre, statistically, a college campus is one of the safest places you can be. For example, in 2002, less than 2% of students reported threats involving a gun at school.[135] In 2009, of the 13,636 homicides reported, (71.8% of which involved firearms),[136] only eight occurred on a public college or university campus.[137]

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131. Solid empirical evidence that prohibiting guns reduces crime would help satisfy the necessary prong of the strict scrutiny test.

132. LEGAL CMTY. AGAINST GUN VIOLENCE, THE 2010 REPORT: RECENT DEVELOPMENTS IN FEDERAL, STATE AND LOCAL GUN LAWS 19 (2010), http://lcav.org/publications-briefs/reports_analyses/2010_report.pdf; *see also* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).

133. *Comparing the Incidence of Self-Defense Gun Use and Criminal Gun Use*, BULLET*INS* (Harvard Injury Control Research Ctr., Spring 2009), http://www.hsph.harvard.edu/research/hicrc/files/Bullet-ins_Spring_2009.pdf. The report states that the often-cited number of 2.5 million uses of self-defense could occur only from comparing two "radically different" survey methodologies. *Id.* at 2. When the compared data comes from the same survey methodology, the "overwhelming conclusion" is that guns are used far more in crime than self-defense. *Id.* A further problem with the methodology included reliance on self-reporting where it is impossible to know if the survey respondent was the victim or the initial aggressor. *Id.*; *see also* DENNIS A. HENIGAN, LETHAL LOGIC: EXPLODING THE MYTHS THAT PARALYZE AMERICAN GUN POLICY 116–21 (2009); David Hemenway, *The Myth of Millions of Annual Self-Defense Gun Uses: A Case Study of Survey Overestimates of Rare Events*, 10 CHANCE 6, 6–7 (1997), http://www.isds.duke.edu/~dalene/chance/chanceweb/103.myth0.pdf.

134. KATRINA BAUM & PATSY KLAUS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995–2002 (2005), http://bjs.ojp.usdoj.gov/content/pub/pdf/vvcs02.pdf; *see also* Kopel, *supra* note 74, at 547.

135. Matthew Miller et al., *Guns and Gun Threats at College*, 51 J. AM. C. HEALTH 57, 63 (2002), *available at* http://www.hsph.harvard.edu/cas/Documents/Gunthreats2/gunspdf.pdf.

136. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES (2009), http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/homicide.html (justifiable homicides, i.e., incidents of self-defense, are not included in these figures).

137. *Id.*, *available at* http://www2.fbi.gov/ucr/cius2009/offenses/index.html (Click on Universities and Colleges link.).

Second, although some campus-carry proponents argue that gun-free zones only "serve to disarm law-abiding citizens who might otherwise be able to protect themselves,"[138] the need to carry guns for self-defense on a college campus is extremely limited.[139] Therefore, prohibiting guns on campuses is a much more narrowly tailored regulation than banning handguns in an entire city as was the case in both *Heller* and *McDonald*. The empirical data shows that a college's interest in maintaining the collective security of its campus by prohibiting guns outweighs any individual right of self-defense on its premises.

Third, some proponents for concealed carry on campus argue that a regulation prohibiting guns on college campuses is overly broad because it prevents citizens who may lawfully carry a firearm in other public places from doing so on a public college campus.[140] Most states, however, will not issue permits to individuals under twenty-one years of age, and therefore, most students would not be able to carry a concealed weapon anyway.[141] Accordingly, the regulation is narrowly tailored because it will not affect the majority of individuals on campus who are already prohibited from lawfully carrying a concealed weapon.[142]

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138. STUDENTS FOR CONCEALED CARRY ON CAMPUS, *supra* note 79.

139. *See* BAUM & KLAUS, *supra* note 134.

140. STUDENTS FOR CONCEALED CARRY ON CAMPUS, *supra* note 79.

141. *See, e.g.*, ARK. CODE ANN. § 5-73-309 (West 2003); ARIZ. REV. STAT. ANN. § 13-3112 (2010); COLO. REV. STAT. § 18-12-203 (2008); FLA. STAT. ANN. § 790.06 (West 2008); N.Y. PENAL LAW § 400.00 (McKinney 2005); TEX. GOV'T CODE ANN. § 411.172 (Vernon 2009). *But see* Amended Complaint, D'Cruz v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 5:10-cv-00140-C, 2010 WL 4527004, (N.D. Tex. Oct. 21, 2010) (claiming that the federal government's minimum age requirement of twenty-one to obtain a concealed weapons permit impermissibly infringes on plaintiff's Second Amendment rights); Complaint, D'Cruz v. Tex. Dep't of Safety, No. 10-141, 2010 WL 3693168, (N.D. Tex. Sept. 8, 2010) (claiming that the state's minimum age requirement of twenty-one to obtain a concealed weapons permit impermissibly infringes on plaintiff's Second Amendment rights).

142. Some state legislatures are seeking to permit faculty members to carry arms. *See, e.g.*, S.B. 1467, 2011 Leg., 50th Sess. (Ariz. 2011); S.B. 354, 2011 Leg., 82(R) Sess. (Tex. 2011). But the majority of professors, college administrators, and college police departments continue to oppose allowing guns carried on campus by anyone other than law enforcement. *See* Langhauser, *supra* note 12, at 63 n.a1 (stating that the purpose of the article focuses on the reality faced by college and university counsel—many of their clients wish to restrict gun possession on their campuses); HARNISCH, *supra* note 66, at 5 (stating that most college administrators and law enforcement personnel have "expressed serious reservations about allowing concealed weapons on campus"); LISA A. SPRAGUE, INT'L ASS'N OF CAMPUS LAW ENFORCEMENT ADM'RS, INC., POSITION STATEMENT ON CONCEALED CARRYING OF FIREARMS ON COLLEGE CAMPUSES 4 (2008) (stating the board of directors' belief that campus-carry initiatives do not make campuses safer), http://www.iaclea.org/visitors/PDFs/ConcealedWeaponsStatement_Aug2008.pdf.; Alia Beard Rau, *Arizona Guns-on-Campus Bill Advances*, ARIZ. REPUBLIC, Mar. 11, 2011 (stating that faculty organizations from all three state universities oppose S.B. 1467), http://www.azcentral.com/news/election/azelections/articles/2011/03/10/20110310arizona-guns-on-campus-bill-scaled-back.html; Jim Vertuno, *Texas Poised to Pass Bill Allowing Guns on Campus*, ASSOCIATED PRESS, Feb. 20, 2011 (University of

Additionally, because not all concealed-carry permit holders are necessarily law-abiding citizens,[143] allowing only permit holders to carry guns on campus, while certainly less restrictive, is not a reasonable alternative because it would not likely achieve a college's compelling interest in public safety. Although it is beyond the scope of this Comment to analyze the different methods for issuing concealed-carry permits, most states have "shall-issue" laws that require the official to issue the permit if the applicant is at least twenty-one years of age, passes a fingerprint-based background check, and takes a one-hour safety class.[144] Proponents for campus-carry argue that these safeguards should prevent a college from prohibiting permit holders from carrying on campus.[145] But statistics show that not all permit holders are responsible, law-abiding citizens: from May 2007 to August 10, 2011, 359 private citizens and eleven law enforcement officers have been killed by concealed-carry permit holders.[146] There have also been nineteen mass shootings and twenty-seven murder-suicides perpetrated by concealed-carry permit holders.[147] Notably, the Virginia Tech murderer was a lawful gun purchaser who passed a federal background check in spite of being adjudicated mentally incompetent two years prior to the incident.[148] Accordingly, although allowing concealed-carry permit holders to carry guns on campus would be a narrower regulation than a total prohibition, it is not a reasonable alternative that would achieve the public safety that a college has a compelling interest in ensuring.

Although proponents argue that concealed-carry permit holders would be able to thwart tragedies like Virginia Tech if allowed to carry

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Texas President William Powers stating his opposition to S.B. 354), http://www.salon.com/news/feature/2011/02/21/texas_allow_guns_on_campus.

143. VIOLENCE POLICY CENTER, http://www.vpc.org/index.htm (last visited Aug. 19, 2011).

144. Kopel, *supra* note 74, at 519–20. A minority of states have "may-issue" laws that allow the official to use some discretion in granting the permit even if the above criteria have been met. *Id.*

145. *Id.*

146. VIOLENCE POLICY CENTER, *supra* note 143. A current snapshot is available at http://www.vpc.org/ccwkillers.htm. For additional details, see http://www.vpc.org/fact_sht/ccwtotalkilled.pdf. This data is compiled through news sources and, based on its continuous updates, does not consider whether any accused persons will ultimately be acquitted of these crimes. Additionally, the reports indicate that at least one shooter has claimed the crime was committed in self-defense.

147. *Id.*

148. *See* Matthew Barakat, *Rules Should Have Barred Weapon Purchase*, ASSOCIATED PRESS, Apr. 20, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/20/AR2007042000167.html; Michael Luo, *U.S. Rules Made Killer Ineligible to Purchase Gun*, N.Y. TIMES, Apr. 21, 2007, at A1, *available at* http://www.nytimes.com/2007/04/21/us/21guns.html. Since the Virginia Tech massacre, fewer than half of states are complying with federal law, which "requires them to report to the national background-check system the names of individuals judged mentally incompetent or committed for mental-health treatment." Brady McCombs & Tim Steller, *Gun Rights vs. Gun Control*, ARIZ. DAILY STAR, Feb. 20, 2011, at A1, *available at* http://azstarnet.com/news/local/article_b8f1d999-1d81-549f-97ff-964cc5f5b6db.html.

guns on campus,[149] the actual likelihood of criminal deterrence is small.[150] In fact, possession of a gun seems to promote aggression rather than deterrence.[151] And with respect to mass shootings, "armed confrontation is not a deterrent; it is the point."[152] The notion that a concealed-carry permit holder would be able to deter a mentally disturbed individual is extremely unlikely. Even so, one scholar has argued that because active shooters generally kill themselves when they know the police have arrived, then it follows that "by far the best response to an active shooter is for someone to start shooting back."[153] When discussing the mindset of a mass shooter, however, the suicide likely occurs to avoid arrest as opposed to avoid armed confrontation. In most cases, death is the desired

149. *See generally* John R. Lott & David B. Mustard, *Crime, Deterrence, and the Right-to-Carry Handguns*, 26 J. LEGAL STUD. 1, 12 (1997); *see also* Kopel, *supra* note 74, at 543; STUDENTS FOR CONCEALED CARRY ON CAMPUS, *supra* note 79.

150. *See* Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1202–03 (2003) (finding that the statistical evidence that concealed-carry laws deter crime is "limited, sporadic, and extraordinarily fragile" and that stronger evidence supports the conclusion that these laws increase crime rather than decrease it); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Crime?*, 27 J. LEGAL STUD. 209, 218–19 (1998) (The authors answered the titular question in the negative and argued that the results published by Lott and Mustard, *supra* note 149, should not be used to formulate public policy. After reanalyzing Lott's data, the authors found that the conclusion that concealed-carry laws deter crime was based on data highly sensitive to small changes in their model and sample.); Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034 (2009) (concluding that even though successful uses of guns in self-defense do occur, the probability of such success is low for civilian gun users in urban areas); McCombs & Steller, *supra* note 148, at A18 (Kristen Rand, Legislative Director for the Violence Policy Center, stated, "Gun-rights groups' vision of an armed society is fantasy . . . guns are not always used correctly, especially in high-stress, chaotic situations such as mass shootings."). For example, on January 8, 2011, an armed gunman with a legally purchased semiautomatic weapon and high-capacity magazine attempted to assassinate Representative Gabrielle Giffords in a grocery store parking lot. He shot nineteen people and killed six. The attack took fifteen seconds. *Id.* at A1. Although Arizona has some of the most lenient gun laws in the nation, no one with a concealed-carry permit was able to prevent the massacre or reduce its carnage. *Id.*

151. Branas et al., *supra* note 150, at 2036 (estimating that people with a gun were 4.5 times more likely to be shot in an assault than those not possessing a gun).

152. Josh Horwitz, *Guns No Deterrent to the Suicidal*, N.Y. TIMES, Apr. 16, 2008, http://topics.blogs.nytimes.com/2008/04/16/guns-no-deterrent-to-the-suicidal/?scp=6&sq=&st=nyt.

153. Kopel, *supra* note 74, at 542. But the International Association of Campus Law Enforcement Administrators has argued that persons should not be allowed to carry concealed weapons on college campuses, in part, because "there is a real concern that campus police officers responding to a situation involving an active shooter may not be able to distinguish between the shooter and others with firearms." SPRAGUE, *supra* note 142, at 2. For example, at Fort Hood, one of the nation's largest military bases, a shooter was able to kill thirteen people and wound thirty before any trained military personnel were able to stop him with their own weapons. Kevin Whitelaw, *Massacre Leaves 13 Dead at Fort Hood*, NAT'L PUB. RADIO, Nov. 6, 2009, http://www.npr.org/templates/story/story.php?storyId=120138496. Senior U.S. officials have not ruled out that "some of the causalities were victims of 'friendly fire,' shot by authorities amid the mayhem and confusion at the scene." *Id.*

end, and whether it comes by suicide, the police, or an armed citizen is beside the point.[154]

Finally, in the rare occurrences that criminal activity can be deterred,[155] colleges and universities still have an interest in maintaining safety on their campuses, which includes regulating conduct that is not necessarily criminal.[156] For example, binge drinking and drug use are prevalent on college campuses;[157] adding guns to that mix could have dire consequences.[158] Allowing guns on campus could result in more accidental deaths,[159] would cause an increased risk of suicide for a demographic that is already at a greater risk than the rest of the population,[160] and could increase the likelihood of gun theft.[161] In addition, even if the

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154. For example, the shooter in the Virginia Tech massacre committed suicide when he realized the police were closing in. Shapira & Jackman, *supra* note 78. He also left a suicide note in his dorm room and sent a package of videos to NBC where he compared his death to that of Jesus Christ's. *Shooter: "You have blood on your hands,"* CNN, Apr. 18, 2007, http://edition.cnn.com/2007/US/04/18/vtech.nbc/index.html. Another mass shooter committed suicide after killing four of his professors at the University of Arizona School of Nursing. Jaime Holguin, *4 Dead at University of Arizona Shooting*, CBS NEWS, Oct. 29, 2002, http://www.cbsnews.com/stories/2002/10/29/national/main527308.shtml. Although the shooter at Fort Hood was shot by military soldiers, communication with al-Qaeda about suicide bombings indicates that his own death was the desired goal. Brian Ross & Rhonda Schwartz, *Major Hasan's E-mail: "I Can't Wait to Join you" in Afterlife*, ABC NEWS, Nov. 19, 2009, http://abcnews.go.com/Blotter/major-hasans-mail-wait-joinafterlife/story?id=9130339.

155. Ayres & Donohue, *supra* note 150, at 1202–03 (stating that statistical evidence proves that the likelihood of criminal deterrence is small). *Cf.* Kopel, *supra* note 74, at 544–45 (discussing five anecdotal examples of citizens stopping a shooter on a college or secondary school campus, two of whom were stopped by individuals not possessing firearms).

156. Because public colleges and universities incur liability for crimes and accidents that occur on their campuses, they should maintain control over how to regulate the conduct of their students, faculty, and staff. Courts have held that a college or university has a duty of reasonable care over students, faculty, and visitors against acts that are reasonably foreseeable. *See, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768, 780 (Kan. 1993) (holding that the university as a landlord owed a duty of reasonable care to its student–tenants); Johnson v. Washington, 894 P.2d 1366, 1371 (Wash. 1995) (stating that a criminal act by a third party is not an intervening act if it was reasonably foreseeable). It would be inappropriate to allow colleges and universities to maintain the burden of liability while at the same time restricting their authority to make institutional decisions about gun regulations.

157. OFFICE OF APPLIED STUDIES, RESULTS FROM THE 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH: VOLUME I. SUMMARY OF NATIONAL FINDINGS 24, 33 (2009) (finding that of full-time college students aged eighteen to twenty, 43.5% are binge drinkers, 16% are heavy drinkers, and 22.7% use illicit drugs), http://oas.samhsa.gov/NSDUH/2k9NSDUH/2k9ResultsP.pdf.

158. Miller et al., *supra* note 135, at 63.

159. *See* David Hemenway et al., *Unintentional Firearm Deaths: A Comparison of Other-Inflicted and Self Inflicted Shootings*, 42 ACCIDENT ANALYSIS & PREVENTION 1184 (2010).

160. LEGAL CMTY. AGAINST GUN VIOLENCE, *supra* note 67, at 4–5 (stating that access to firearms is a significant factor in the risk of suicide); CTRS. FOR DISEASE CONTROL & PREVENTION, SUICIDE FACTS AT A GLANCE 2 (2010) (finding that among eighteen- to twenty-four-year-olds, suicide was the third leading cause of death), http://www.cdc.gov/violenceprevention/pdf/Suicide_Data Sheet-a.pdf.

161. Once stolen, a gun is much more likely to be used in a subsequent crime. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST

guns are never used or even loaded, they can still be used to intimidate, to suppress academic discourse, and to create an environment that is not conducive to academic debate. Therefore, allowing concealed-carry permit holders to carry guns on campus for the small likelihood of deterring criminal activity, though more narrowly tailored than a complete ban, would not achieve a college's purpose in ensuring public safety. In fact, it would likely prevent a college from achieving this interest at all.

c. Academic Freedom

Colleges and universities also have a compelling government interest in ensuring academic freedom and supporting the free exchange of ideas between their students and faculty. Although the effect of guns on campus with respect to this interest has not yet been subject to statistical or sociological studies, there is evidence that the presence of guns may intimidate students from expressing their ideas in the classroom.[162] As discussed in Part III, the Utah Supreme Court ruled in *University of Utah v. Shurtleff* that the university could not ban guns from its campuses.[163] More specifically, the court held that the university did not have such a degree of institutional autonomy that it could act in contravention to legislative enactments.[164] While the court found the college's arguments for institutional autonomy persuasive, it was constrained by Utah's state constitution and statutory law.[165] The university's claim of academic freedom under the First Amendment was not decided, and the case never proceeded in the federal courts. But the chief justice's dissent in this case is informative. She stated that "the record . . . contains extensive evidence that practitioners and experts in higher education are convinced that a no weapons on campus policy is necessary to the educational enterprise."[166]

Four years after *Shurtleff* was decided, there have been no reports of mass shootings on Utah's college campuses or in their residence halls. Some students and professors, however, have continued to express intimidation resulting from the policy. A writer for the university newspaper quoted a professor saying that he had seen at least four concealed weapons in his classroom, and it was "unnerving" when the guns were dis-

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FIREARM TRAFFICKERS 20 (2000), http://www.bradycampaign.org/xshare/pdf/facts/2000-atf-following.pdf.

162. *See* Hemenway & Azrael, *supra* note 130, at 269.

163. Univ. of Utah v. Shurtleff, 144 P.3d 1109, 1121–22 (Utah 2006).

164. *Id.* at 1117.

165. *Id.* at 1121.

166. *Id.* at 1128.

played as the students put away class materials.[167] Passing out poor grades, especially when students often react in a heated manner, made the professor feel particularly vulnerable to the weapons policy at the University of Utah.[168] Two students responded to the article, arguing that the weapons were needed for self-defense and that more guns actually reduce crime.[169] But as noted previously, the claim that firearms are used more frequently in self-defense than in criminal acts has been widely discredited.[170]

Putting the interest of public safety aside, the question becomes whether firearms on campus inhibit a college's compelling interest in ensuring academic freedom and the free exchange of ideas, and whether a total prohibition is narrowly tailored to meet that objective. As of yet, no college or university has filed such a claim in federal court. And although the Utah Supreme Court seemed sympathetic to such an argument, it was bound by its own state constitution.[171]

2. Total Prohibition of Guns in Residence Halls

While the holdings in *Heller* and *McDonald* explicitly protect the right to keep and bear arms for self-defense in the home, college dormitories should not fall within the definition of "home."[172] First, residence halls are not privately owned or rented residences. Rather, they are communal living arrangements that often have shared bathrooms for an entire floor, common kitchen areas, and other shared spaces not typically found in private residences. Second, because the college, in this capacity, acts as a proprietor, it has greater power to restrict and regulate certain behavior on its property, including constitutionally protected rights.[173] Assuming, however, that a dormitory does fall under the definition of

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167. Rebecca Rasmussen, *Concealed Weapons Threaten Campus Safety*, DAILY UTAH CHRON., Sept. 28, 2010, http://www.dailyutahchronicle.com/opinion/concealed-weapons-threaten-campus-html.

168. *Id.*

169. Patrick Lee, *Better Safe Than Sorry*, DAILY UTAH CHRON., Sept. 29, 2010, http://www.dailyutahchronicle.com/opinion/better-to-be-safe-than-sorry-1.2349076.

170. *See supra* Part IV.C.1.b.

171. *Shurtleff*, 144 P.3d at 1121–22.

172. The subject of residence halls actually came up during oral argument in the *Heller* litigation. Justice Stevens asked whether the Second Amendment would allow colleges to ban guns from dormitories. Desmond, *supra* note 114, at 1072 n.263. The lawyer arguing against the D.C. ban of handguns stated that such a ban would likely be constitutional. *Id.* Of course, such an explicit exception was not stated in either the *Heller* opinion or the *McDonald* opinion.

173. Scholars are asking this same question with respect to public housing. *See generally* Jamie L. Wershbale, *The Second Amendment Under a Government Landlord: Is There a Right to Keep and Bear Legal Firearms in Public Housing?*, 84 ST. JOHN'S L. REV. 995 (2010).

"home," a regulation prohibiting students from possessing guns would still likely survive strict scrutiny.

Many of the same reasons for a total prohibition of guns on campuses carry over to residence halls. Once again, it would be hard to argue that a college or university does not have a compelling interest in ensuring and maintaining public safety on its campus. College students, especially those living together in large groups, are an at-risk group who engage in particularly risky behaviors such as binge drinking and drug use.[174] They have higher suicide rates than the rest of the population,[175] and 94% of suicide attempts with a firearm are successful.[176] If a college seeks to protect its students from the dangers of guns, which are exacerbated by alcohol and depression, the only way to achieve that interest is by prohibiting guns.[177]

At least one scholar has argued that "[t]aking away the right to own arms in the home purely because the individual chooses to pursue a higher education and live on campus is arbitrary and greatly over-inclusive."[178] But this argument fails because there is no lesser restrictive alternative that a college can implement to achieve its interest in preventing firearm-related crimes and accidents. Based on the statistical evidence presented above, colleges have made a reasonable determination that allowing guns in dorm rooms would have potentially deadly results, and the only way to achieve a safe and secure environment is to prohibit guns. If a state legislature were to pass a statute defining a dorm room as a "home," that may be damaging to a college's ability to ban guns from residence halls.[179] Until then, if a student wishes to keep a firearm, that right may be executed off-campus.

Accordingly, a regulation prohibiting guns in residence halls would likely be held constitutional under strict scrutiny because a total ban on guns is necessary to achieve a college's interest in protecting vulnerable students from either intentional or accidental gun violence. Such a regu-

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174. Miller et al., *supra* note 135, at 63.

175. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 160, at 2.

176. Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA 1029, 1029–35 (2007).

177. *See, e.g.*, *id.* ("Household firearm ownership levels are strongly associated with higher rates of suicide, consistent with the hypothesis that the availability of lethal means increases the rate of completed suicide."); Linda L. Dahlberg et al., *Guns in the Home and Risk of Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 932 (2004) (finding that a gun in the home is closely associated with an increased risk of homicide and suicide); Douglas J. Wiebe, *Firearms in U.S. Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711, 715 (2003) (finding that adults living in homes with guns had a 3.7 times greater risk of dying from an unintentional gunshot injury).

178. Craven, *supra* note 98, at 853.

179. Langhauser, *supra* note 12, at 97.

lation is also narrowly tailored because students are not required to live on-campus.

V. CONCLUSION

Although *McDonald v. Chicago* has incorporated against the states an individual right to keep and bear arms in self-defense of hearth and home, public colleges and universities should be able to maintain their authority to prohibit guns on their campuses and in their residence halls. Colleges have a recognized duty in reasonably ensuring a safe environment for their students, faculty, staff, and visitors. Accordingly, higher-education institutions should be able to operate autonomously and promulgate reasonable regulations that will mitigate the harm caused by firearms.

Most importantly, the top priority of colleges and universities is to provide an educational learning environment where academic freedom is celebrated and the exchange of ideas may flow freely. In 1957, Justice Frankfurter declared, "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation."[180] Overwhelmingly, college and university administrators agree that guns on campus would compromise the educational enterprise necessary for the free exchange of ideas among students and faculty. The concept of academic freedom, which has been enshrined within the First Amendment, necessarily restricts state legislatures from interfering with policy choices made by public colleges and universities.

180. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).