

# COMMENTS

## REGULATION RELOADED: THE ADMINISTRATIVE LAW OF FIREARMS AFTER *DISTRICT OF COLUMBIA v. HELLER*

JONATHAN ZIMMER\*

### TABLE OF CONTENTS

Introduction .....	190
I. <i>District of Columbia v. Heller</i> .....	192
A. What <i>Heller</i> Said .....	195
B. What <i>Heller</i> Exempted .....	197
C. What <i>Heller</i> Left Undone .....	197
II. Incorporation of the Second Amendment: Reasoning and Effects on Regulation.....	198
A. Footnote 27 Anticipates Heightened Scrutiny .....	199
B. Incorporation Follows Heightened Scrutiny.....	202
C. Incorporated Rights Require Effective Due Process of Law...	206
III. Adjudicatory Standards, Due Process, and Firearms Regulations After <i>Heller</i> .....	209
A. Liberty Interests, Property Interests, and the “Arbitrary and Capricious” Standard.....	210
B. Judicial Review of Firearms Regulation and Supporting Evidence Under the APA .....	214
Conclusion .....	220

---

\* J.D. Candidate, May 2011, American University Washington College of Law; B.S.F.S. International Politics, Georgetown University, 2002. Staff, 2009–2010, *Administrative Law Review*. I would like to thank Professor Jeffrey Lubbers (American University Washington College of Law), Professor Adam Winkler (University of California Los Angeles School of Law), and Professor David Kopel (University of Denver Sturm College of Law) for their helpful comments on earlier drafts. Special thanks to Jenna Hudson and Colleen O’Boyle for their editorial assistance and to Baylen Linnekin, Andrew Paul Kawel, Alexia Emmermann, and the editors and staff of the *Administrative Law Review* for their generosity of time, talent, and inspiration. This Comment is dedicated to my parents, Walter and Cynthia Zimmer, for everything they have taught and given me.

## INTRODUCTION

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.<sup>1</sup>

With its 5–4 decision in *District of Columbia v. Heller*,<sup>2</sup> the United States Supreme Court at last gave effect to the Second Amendment to the Constitution.<sup>3</sup> This watershed case declared that the Second Amendment guarantees an individual right to keep and bear arms for self-defense.<sup>4</sup> It also struck down two District of Columbia laws that banned all handgun possession and required that all firearms in the home be kept inoperable.<sup>5</sup> A delight to advocates of a strong right to keep and bear firearms,<sup>6</sup> and a horror to advocates of stronger controls on firearms,<sup>7</sup> *Heller* leaves “a *tabula* much more *rasa* than is ordinarily the case.”<sup>8</sup>

The headlines following *Heller* naturally focused on the majority opinion’s emphatic statement that there is now an outer limit to firearms regulation that the political branches cannot pass without risking judicial intervention. Justice Scalia, concluding the majority opinion in *Heller*, gives a glimpse of how the Supreme Court now sees its role in protecting the Second Amendment:

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces

---

1. U.S. CONST. amend. II.

2. 128 S. Ct. 2783 (2008).

3. *Heller* was decided sixty-nine years after *United States v. Miller*, 307 U.S. 174 (1939), a case that was much less about the Second Amendment than the federal government’s power to tax and regulate firearms. See *infra* note 17.

4. *Heller*, 128 S. Ct. at 2799.

5. *Id.* at 2821–22.

6. “The 32-year nightmare of the law-abiding citizens of Washington, D.C. is over. They can legally use firearms in defense of their homes against violent predators. . . . A new chapter has opened in the story of mankind’s struggle for freedom.” ALAN KORWIN & DAVID B. KOPEL, *THE HELLER CASE: GUN RIGHTS AFFIRMED!* 259 (2008).

7. “Today’s opinion turns legal logic and common sense on its head. . . . [T]he Court has ignored our nation’s history of mass shootings, assassinations, and unparalleled gun violence. It has instead accepted an abstract academic argument with dangerous real-world results for residents of the District of Columbia.” Press Release, Violence Policy Center, Statement of Violence Policy Center on Supreme Court Ruling in *District of Columbia v. Heller* Overturning DC Handgun Ban (June 26, 2008), <http://www.vpc.org/press/0806heller.htm>.

8. Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 Nw. U. L. REV. 2035, 2035 (2008).

provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.<sup>9</sup>

Less noted in the extensive commentary on *Heller* is the role that administrative agencies play in shaping the course of firearms law. Firearms laws and regulations are inextricably linked; they rise and fall together, and as the *Heller* case itself showed, a single, careless, unheralded government act in furtherance of a seemingly uncontroversial regulation may contain the seed of a court challenge that ultimately strikes down the law the agency aims to enforce.<sup>10</sup> Although much has been written on *Heller*'s future as a legal doctrine, nothing has yet been written on what this decision means for those charged with the administration of firearms through regulations. This Comment will attempt to provide a roadmap through this uncharted territory for firearms regulators.

Part I summarizes the holding in *Heller*—what the Court's interpretation of the Second Amendment covers, what it exempts from its holdings, and what it says nothing about. Part II examines the debate that will most influence the Second Amendment's administrative future—whether the Amendment will be incorporated against the states as virtually all other provisions of the Bill of Rights have—and what incorporation would mean for state firearms regulations facing new scrutiny post-*Heller*. Part III considers the likely due process and evidentiary standards courts will use when reviewing administrative and regulatory adjudications involving firearms in light of *Heller*.<sup>11</sup> This Comment concludes by noting that *Heller* is not the end of all gun control, but that those who seek to restrict the right to keep and bear arms in its wake through state regulation will have to approach these rights with a clear justification for their restriction and the same care and deference shown to the other rights enumerated in

---

9. *Heller*, 128 S. Ct. at 2822.

10. In fact, the plaintiff in *Heller*, who sought to keep a pistol in his home in the District of Columbia while the D.C. gun laws challenged in the case were still in effect, may have saved his eponymous case when a friend urged him

to do something that was, on the surface, pointless: . . . go down to the gun control office . . . and fill out the form to try to register one of the handguns Heller owned but stored away from his District home.

That act turned out to be one of the most *important* futile, pointless, meaningless bureaucratic gestures in American history. Without that sad, ignored, rejected piece of government-issued paper, a copy of which was dutifully attached to all the early filings in the case . . . not a single one of the carefully selected [plaintiffs] would have been legally considered to have had standing.

BRIAN DOHERTY, GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT 65 (2008).

11. See 5 U.S.C. § 706(2) (2006) (allowing federal courts to hold unlawful administrative actions found to be arbitrary, capricious, an abuse of discretion, contrary to constitutional right, or unsupported by substantial evidence on the record or facts reviewed de novo by the court).

the Constitution.

### I. *DISTRICT OF COLUMBIA V. HELLER*

*District of Columbia v. Heller* was the culmination of over twenty years of work, study, and debate by academics and activists seeking to preserve the original meaning of the Second Amendment<sup>12</sup> from its detractors who

---

12. See generally, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984) (surveying the history of the Second Amendment's legislative drafting and finding that it protected an individual right to keep and bear arms); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994) (tracing the history of the right to keep and bear arms in Great Britain from the medieval era to the 20th Century); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992) (noting that fundamental rights are those guaranteed to citizens and not states, and that some "hybrid" provisions of the Bill of Rights protecting both may need to "shed their state-right husk" before being incorporated); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 *TEX. L. REV.* 1125 (1996) (arguing that the conditions that motivated the Founders to draft the Second Amendment still persist today); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 *YALE L.J.* 995 (1995) (reviewing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)) (expanding on Malcolm's history of the right to bear arms in Great Britain, including its late 20th century "evisceration" there); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *GEO. L.J.* 309 (1991) (noting the importance of the right to keep and bear arms in securing minority rights against hostile majorities); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 *OKLA. L. REV.* 65 (1983) (critiquing the judicial analysis of the Second Amendment in the early 1980s); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 *VAL. U. L. REV.* 131 (1991) (concluding that the Framers understood the "militia" as a collection of individuals and not as a creature of the states); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 *LAW & CONTEMP. PROBS.* 151 (1986) (concluding that the Framers intended the right to bear arms to encompass concealed carrying of weapons); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 *CONST. COMMENT.* 87 (1992) (analyzing the works of founding-era philosophers on the topic of self-defense); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204 (1983) (analyzing what arms and practices the Founders believed the Second Amendment did not protect); Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989) (calling upon the legal academy to take the individual-rights interpretation of the Second Amendment seriously); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 *TEX. REV. L. & POL.* 157 (1999) (criticizing restrictions on firearms ownership resulting from restraining orders as overbroad and unevenly applied); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 *GA. L. REV.* 1 (1996) (noting that the Second Amendment can still fulfill its purpose after advances in arms just as the First Amendment has after advances in communications); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *TENN. L. REV.* 461 (1995) (noting substantial agreement among legal scholars between 1985 and 1995 that the Second Amendment protects an individual right to keep and bear arms); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 *J. AM. HIST.* 599 (1982) (analyzing the connections between the right to keep and bear arms and the "republican" philosophy of the Founders); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *DUKE L.J.* 1236, 1241 (1994) ("To trust to [an] arrested treatment of the Second Amendment—and

argued that it was anachronistic, guaranteed no substantive rights, and was rightfully outweighed by larger social interests.<sup>13</sup> It was also a carefully crafted test case designed to avoid the snare that had trapped most other Second Amendment litigation: where most plaintiffs asserting a right to keep and bear arms were criminals challenging their convictions in court,<sup>14</sup> *Heller*'s lawyers specifically chose plaintiffs without criminal records who needed firearms for self-defense.<sup>15</sup> With a surprise victory in the D.C.

---

of the Fourteenth Amendment—in 1994, in short, is as though one were inclined so to trust to the arrested treatment of the First Amendment in 1904.”); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (analyzing state and federal constitutional provisions with a similar grammatical structure to the Second Amendment, and concluding that rights attached to justificatory clauses do not automatically expire when the justifications do). Nine years before *Heller*, this scholarship attracted the attention of Supreme Court justices. See *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (“Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.”).

13. There were still many academics critical of the individual-rights model. See Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000) (contending that an interpretation of the Second Amendment limiting the scope of gun control is not justified by any interpretive theory and effectively nullifies the Amendment’s prefatory “militia clause”); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000) (claiming that the Second Amendment was concerned with limiting the powers of the federal government and not an infringement of the states’ police powers); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (explaining how the “collective right” interpretation of the Second Amendment is justified by changes to constitutional text and interpretation since the Founding Era); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993) (asserting that the Second Amendment’s purpose was to allow states to maintain militias to control their subjugated slave populations, and that the end of slavery did not shift the Amendment’s focus to an individual right); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (contending, contra Cottrol and Diamond, that the Afro-American experience with firearms only proves that all citizens should be subject to strict gun-control regulations); Wendy Brown, Comment, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson’s The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989) (arguing that the republican state and polity Professor Levinson imagined are historical figures with no relevance to their modern descendants); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984) (arguing that the Founders’ intention in the Second Amendment was to create a militia to obviate the need for standing armies, not to create an individual right to arms).

14. In every major Supreme Court case pre-*Heller* dealing with the Second Amendment, the appellant was a criminal defendant appealing a conviction. See, e.g., *United States v. Miller*, 307 U.S. 174, 174 (1939) (appealing conviction for possessing an illegal sawed-off shotgun); *Presser v. Illinois*, 116 U.S. 252, 253 (1886) (appealing conviction for possessing a rifle unconnected to militia service). For in-depth discussion of pre-*Heller* Second Amendment precedents generated by criminal appellants and their frequent misinterpretation by courts, see generally DOHERTY, *supra* note 10. See also KORWIN & KOPEL, *supra* note 6; Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48 (2008).

15. Robert A. Levy, *Anatomy of a Lawsuit: District of Columbia v. Heller*, ENGAGE, Oct. 2008, at 28. Dick Anthony Heller—the only one of the six plaintiffs found to have

Circuit Court of Appeals that confirmed a circuit split,<sup>16</sup> the individual-rights view of the Second Amendment received the full Supreme Court hearing it had been denied in the Court's last Second Amendment case, *United States v. Miller*.<sup>17</sup> Oral arguments in *Heller* demonstrated the weakness of the collective-rights view.<sup>18</sup>

---

standing by the D.C. Circuit Court of Appeals—was a D.C. Special Police Officer who, although entitled to carry a gun at his job as a security guard at the Federal Judicial Center near the Capitol, could not keep one at his home in the District. *Id.* at 28–29.

16. *Compare* *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007) (finding that the Second Amendment guarantees an individual right to keep and bear arms), and *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001) (finding, in dicta, that the Second Amendment guarantees an individual right to keep and bear arms), with *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2002) (holding that the Second Amendment guarantees no individual right to keep and bear arms apart from militia service), and *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (finding no state or federal constitutional right to keep and bear arms independent of militia service).

17. 307 U.S. 174 (1939). This case, again involving criminals caught in possession of an illegal weapon—here, a sawed-off shotgun that the defendants had not paid federal taxes on in violation of the National Firearms Act of 1934—resulted in an oddly argued case; Miller's lawyer did not present a case and told the Court to rely on the Government's brief alone. KORWIN & KOPEL, *supra* note 6, at 400. The result was a muddled decision that stated, in dicta, that the purpose of the Second Amendment was to guarantee the existence of state militias and the arms needed for them, which did not include sawed-off shotguns. *Miller*, 307 U.S. at 178. Subsequent cases and scholarship concluded that *Miller*'s holding was actually quite narrow: it found only that Congress possessed the power to tax firearms, and all the discussion of the right to bear arms "suitable for militia service" is dicta. *See, e.g.,* *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) ("[W]e do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it . . ."); Frye, *supra* note 14, at 50 ("*Miller* did not adopt a theory of the Second Amendment guarantee, because it did not need one.>").

18. Former Solicitor General Walter Dellinger, arguing on behalf of the District of Columbia, told the Justices that the D.C. handgun ban contained a self-defense exception. Transcript of Oral Argument at 85, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 731297. Justice Roberts caught this inaccuracy, noting that the D.C. handgun ban was so comprehensive it even banned a handgun's owner from carrying it from one room of the owner's house to another. *Id.* at 87. Alan Gura, arguing for the plaintiffs, later pointed out that D.C. had twice been presented with an opportunity to urge the courts to adopt a self-defense exception to the handgun ban, and they declined to do so in both cases. *Id.* at 49–50; *see also* *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1978) (holding that the District's Firearms Act rightfully made no distinction between residences and businesses in terms of self-defense, for the reason that the city council found "that for each intruder stopped by a firearm there are four gun-related accidents within the home"); *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 104 (D.D.C. 2004) (recognizing, at the district court level of the case, that the D.C. handgun ban contains no self-defense exception). Along these lines, one of Dellinger's more egregious but less noticeable distortions was an assertion that rifles and shotguns are as adequate for personal self-defense as handguns. Transcript of Oral Argument, *supra*, at 85. One commentator later deduced that this reasoning likely came from the pro-gun-control Violence Policy Center, which itself was quoting literally a tongue-in-cheek passage from a firearms training manual that said "the only purpose of a handgun is to battle your way back to your rifle." KORWIN & KOPEL, *supra* note 6, at 259. Gura, by contrast, made an important concession that would weigh heavily on the Court's final analysis, noting that nothing in the Second Amendment forbade a gun-licensing law that was enforced objectively rather than "in an

### A. *What Heller Said*

Prior to *Heller*, there was no “right of the people to keep and bear arms” in the nation’s capital.<sup>19</sup> The plaintiffs in *Heller* sought to challenge Washington, D.C.’s ban on handguns, which was passed in 1976. Under this law, all handguns (save those registered before the law was enacted) were forbidden to private citizens. Even handguns that had been registered prior to the ban had to be secured with trigger locks, and kept unloaded and inoperable at all times, as did all rifles and long guns.<sup>20</sup> The majority opinion in *Heller*, written by Justice Antonin Scalia and joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito, struck down this de facto total ban on handguns as well as the requirement that all allowed guns be stored unloaded and with a trigger lock.<sup>21</sup> Further, it held that the Second Amendment right to keep and bear arms was not contingent upon service in an organized militia and that the prefatory clause of the amendment (“A well regulated Militia, being necessary to the security of a free State”) did not limit the scope of the Amendment’s operative clause (“the right of the People to keep and bear arms shall not be infringed”), which granted the individual right.<sup>22</sup> The

---

arbitrary and capricious manner.” Transcript of Oral Argument, *supra* note 18, at 75.

19. U.S. CONST. amend. II.

20. D.C. Code §§ 7-2502.02(a)(4), 7-2507.02, 22-4504, 22-4515 (2001). In theory, long guns could be unlocked if kept in a person’s “place of business” or “while being used for lawful recreational purposes within the District of Columbia.” § 7-2507.02. However, there is only one record of a case asserting (unsuccessfully) the “place of business” exception, and no record of any case asserting the “lawful recreational purpose” exception at all. § 7-2507.02 (notes of decisions).

21. 128 S. Ct. at 2821–22.

22. U.S. CONST. amend. II; *Heller*, 128 S. Ct. at 2803. Of interest is that the majority opinion considers the operative clause of the Amendment first, then the prefatory justification clause, a mode of interpretation consistent with laws and court decisions contemporary to the Second Amendment’s drafting. See generally Volokh, *supra* note 12, at 812 (noting that it is both possible and common to interpret an operative clause in light of a prefatory justification clause while giving full effect to both). But see Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1107 (2009) (criticizing Scalia’s interpretation as a “Cheshire Cat Rule of Construction [where] the preamble disappears during interpretation and only reappears if there is an ambiguity that needs to be resolved”). The majority defined the “right of the people” in the Second Amendment’s operative clause as extending to the same class of people protected by the First Amendment’s Assembly and Petition Clauses, and the Fourth Amendment’s Search and Seizure Clause, a class broader than the “militia.” *Heller*, 128 S. Ct. at 2790. The majority, analyzing the term *arms*, relied on the definitions used at the time of the Second Amendment’s drafting, as contained in dictionaries and state laws; it found that the word included weapons designed for military use, even if used for nonmilitary purposes. The majority further dismissed the commonplace argument that only firearm types in common use at the Founding were protected by its terms; in a simple analogy, the majority said that just as the First Amendment protects forms of communication which did not exist at the Founding, such as radio and television, the Second Amendment similarly protected arms which did not exist at

majority concluded that none of the Court's prior cases precluded this interpretation of the Second Amendment, commenting that it took between 150 and 200 years for crucial questions arising under the First Amendment to receive consideration by the Court and that, like those questions, the scope of the Second Amendment's effect on gun laws did not present itself until now.<sup>23</sup>

Turning to the District of Columbia gun laws under challenge, the majority noted that under any standard of constitutional review used for enumerated constitutional rights, both the handgun ban and the trigger-lock requirement would fail.<sup>24</sup> Additionally, it held that issuing handgun licenses to Heller and other citizens who need a firearm for self-defense was an acceptable and far less draconian way for the District to preserve its interests than a de facto total ban.<sup>25</sup> Justices John Paul Stevens and Stephen Breyer, joined by Justices Ruth Bader Ginsburg and David Souter, criticized the majority's reasoning, with Stevens's dissent criticizing the majority's historical interpretations.<sup>26</sup>

---

the Founding. *Id.* at 2791. The majority then defined *keep arms* as simply the right to have weapons, and *bear arms* as the right to carry these weapons on one's person. *Id.* at 2792–93. The majority criticized Stevens's definition in the dissent of *keep and bear arms* as the right to carry arms connected with militia service; it said that this was not the meaning that the terms had to the drafters of the Second Amendment, that such a definition was “an absurdity that no commentator has ever endorsed,” and that if such a definition were adopted, the resulting right would be “incoherent.” *Id.* at 2794. Only then did the majority construe the meaning of *well-regulated Militia*, as “all males physically capable of acting in concert for the common defense,” a body that, the majority notes, “is assumed by Article I already to be *in existence*,” and is not something created by Congress. *Id.* at 2799–2800 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). *Well regulated*, according to the majority, simply meant subject to discipline and training. *Id.* Finally, *security of a free State*, according to the majority, means “security of a free polity,” not simply the security of individual states. *Id.* at 2800; *see also* Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1, 6 (2007) (citing sources familiar to the Founders in defining a “free state” as one which preserved popular liberty and prevented despotism).

23. 128 S. Ct. at 2816.

24. On the handgun ban itself, the Court noted that a handgun is “the quintessential self-defense weapon. . . . [I]t can be pointed at a burglar with one hand while the other hand dials the police. . . . [A] complete prohibition of their use is invalid.” *Id.* at 2818. The trigger-lock rule likewise failed to meet any standard of constitutional review as the majority found that this law was a de facto prohibition on all armed self-defense, inside the home and out. *Id.*

25. *Id.* at 2819.

26. In contrast to Scalia, Stevens begins his textual analysis with the prefatory clause of the Second Amendment, noting that it “makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free state; and it recognizes that the militia must be ‘well-regulated.’” *Id.* at 2824 (Stevens, J., dissenting). After an equally exhaustive review of previous precedent, Stevens concludes that the Second Amendment's purpose is the protection of the militia, not the militia's arms, noting that the prefatory clause “both sets forth the object of the Amendment and informs the meaning of the remainder of its text.” *Id.* at 2826. Turning to the operative clause's “right of the people,” Stevens criticizes Scalia's analogy of the Second Amendment to the protections of the First and Fourth



### B. *What Heller Exempted*

The Supreme Court, however, made it clear that “the right secured by the Second Amendment is not unlimited.”<sup>27</sup> Having defined the scope of the right to keep and bear arms, the majority turned to its exceptions. The majority noted that the right to keep and bear arms “was not a right to keep and carry any weapon whatsoever and for whatever purpose.”<sup>28</sup> Specifically, the majority pointedly acknowledged that four classes of restrictions on the right to bear arms do not violate the Second Amendment: (1) laws banning possession by felons and the mentally ill, (2) laws banning carrying weapons in “sensitive places” such as government buildings, (3) laws placing conditions and qualifications on the sale of arms, and (4) laws limiting the right to keeping and bearing arms “in common use.”<sup>29</sup> The Court also said this list was only exemplary, not comprehensive.<sup>30</sup>

### C. *What Heller Left Undone*

The majority opinion leaves two major gaps. First, while the Court found that the D.C. handgun ban and trigger-lock rules were both unconstitutional, *Heller* did not provide any standard of review for other courts to follow in future cases challenging gun laws.<sup>31</sup> Although the

---

Amendments, noting that “[t]hese rights contemplate collective action.” *Id.* at 2827. Stevens then relies on the fact that the Framers could have, but chose not to, add explicit text to the Second Amendment specifically protecting a right to bear arms “for the defense of themselves” in concluding that the operative clause “[K]eep and bear arms’ thus perfectly describes the responsibilities of a framing-era militia member.” *Id.* at 2828, 2830 (alteration in original). Stevens concludes that the Second Amendment right to arms refers only to the militia; “no more than that was contemplated by its drafters or is encompassed within its terms.” *Id.* at 2831.

27. *Id.* at 2816 (majority opinion).

28. *Id.* at 2819.

29. *Id.* at 2816–17.

30. *Id.* at 2817 n.26.

31. A brief review of these standards is in order. The lowest, most deferential standard of review is rational-basis scrutiny. Defined broadly, it requires only that a court ask whether a legislative rule bears a “rational relationship” to a constitutionally permitted end of government. JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 14.3 (3d ed. 2007). The end does not have to be dramatically vital, just within the legislature’s legitimate ends, and the means chosen need only be rational as well—a standard which applies to a majority of laws. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 9.1.2 (2d ed. 2002). Under rational-basis scrutiny, a law’s challengers bear the burden of proof, and it is rare for laws to fail to meet this bare minimum standard of review, *id.*, though not impossible, *see, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that state constitutional provision prohibiting gays and lesbians from enjoying benefits of class-based protections did not meet rational-basis scrutiny). The second level of scrutiny, intermediate scrutiny, requires more searching judicial review and has a higher burden of proof. Intermediate scrutiny requires a challenged law to have a “substantial relationship” to an “important government interest.” *See United States v. Virginia*, 518 U.S. 515, 533

majority sharply criticizes Justice Breyer's dissent for proposing "a free-standing 'interest-balancing' approach" as the test for Second Amendment challenge cases,<sup>32</sup> the majority specifically declined to set down a standard, preferring "to expound upon the historical justifications for the exceptions [to the Second Amendment] we have mentioned if and when those exceptions come before us."<sup>33</sup> Second, *Heller* did not answer whether the Second Amendment is "incorporated" against the states through the Fourteenth Amendment's Due Process Clause. Although the majority left these questions unanswered, examining the logic of the *Heller* majority gives clear signals as to how the Court will rule on these issues in the future.

## II. INCORPORATION OF THE SECOND AMENDMENT: REASONING AND EFFECTS ON REGULATION

As originally drafted, the Bill of Rights applied only to the federal government and not the states.<sup>34</sup> With the adoption of the Fourteenth

---

(1996) (holding that in intermediate scrutiny cases the "burden of justification is demanding and it rests entirely on the State"). The final and most demanding level of constitutional scrutiny is strict scrutiny. Under strict scrutiny, a court must not show any deference to the decision of the legislature, but must conduct its own inquiry into three questions: (1) whether the reviewing court must decide whether the government is acting in service of a compelling end, (2) whether the law is necessary to that end, *see* *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (holding that, under strict scrutiny, race-based classifications "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose"), and (3) whether the law is "narrowly tailored" to meet that interest. To be narrowly tailored, a law cannot be either overinclusive—applying to more classes of people than would be necessary for the government to achieve its desired ends—or underinclusive—applying to some individuals that government sees fit, but not to others similarly situated. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* § 9.1 (2d ed. 2002). As in intermediate scrutiny, the government bears the burden of proof of showing that its laws pass review. *Id.*

32. Breyer writes that "any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry. . . . I would simply adopt such an interest-balancing inquiry explicitly." *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting). Breyer further comments that it is normally the job of courts to defer to legislatures, especially "where a legislature is likely to have greater expertise and greater institutional factfinding capacity. . . . Here, we have little prior experience." *Id.* at 2852–53. Scalia responds,

We know of no other enumerated constitutional right whose core protection has been subjected to a free standing "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

*Heller*, 128 S. Ct. at 2821 (majority opinion).

33. *Id.*

34. *See* *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Fifth Amendment and the Bill of Rights applied only to the federal government).

Amendment after the Civil War,<sup>35</sup> the Supreme Court, through the process of “selective incorporation,” used the power of the Fourteenth Amendment’s Equal Protection and Due Process Clauses to extend most of the provisions of the first eight amendments of the Bill of Rights to the states.<sup>36</sup> *Heller* may be the first step in the Second Amendment joining its contemporaries as a provision that binds states as well.

#### A. Footnote 27 Anticipates Heightened Scrutiny

The *Heller* majority opinion contains very little discussion of which, if any, standards of review the Supreme Court should adopt, but the discussion it does contain is very significant. It is only in footnote 27 of the opinion that Justice Scalia and the *Heller* majority anticipate future decisions on the constitutionality of gun laws and look to a standard of review. The text of that note states, in full,

Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. 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.<sup>37</sup>

This footnote includes two citations for support. The first citation is to a case decided mere months before *Heller*—*Engquist v. Oregon Department of Agriculture*,<sup>38</sup> an employment discrimination case where Chief Justice Roberts noted that the Fourteenth Amendment’s guarantee of equal protection requires a “rational reason” before like persons can be treated differently under the law.<sup>39</sup> Scalia thus implies that rational basis is the standard for as-applied challenges to valid laws or regulations but not for

---

35. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

36. See 2 RONALD P. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 14.2 (4th ed. 2007).

37. *Heller*, 128 S. Ct. at 2817 n.27 (citations omitted).

38. 128 S. Ct. 2146 (2008).

39. “When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being ‘treated alike, under like circumstances and conditions.’” *Id.* at 2153.

facial challenges to laws or regulations such as those in *Heller*. The second, earlier and more well-known citation is the famed “Footnote Four” of *United States v. Carolene Products Co.*,<sup>40</sup> which, as quoted and interpreted by Justice Scalia, says that “[t]here may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”<sup>41</sup> So according to Justice Scalia, if the Second Amendment is construed as the *Heller* majority construes it—as an individual right to keep and bear arms—rational basis cannot be the standard of review in cases where legal or administrative restrictions on the right itself come under Second Amendment attack.<sup>42</sup> However, rational basis may be the standard when the challenge is an as-applied challenge to a restriction that already comports with the Second Amendment.

With rational basis excluded, the only remaining choice for the *Heller* majority, short of elaborating an entirely new standard of review, is to apply a form of heightened scrutiny to facial challenges to gun regulations—either intermediate scrutiny or strict scrutiny. Neither footnote 27 nor any other parts of the *Heller* majority opinion suggest which of the two should apply.<sup>43</sup>

But in practice, a safe bet for gun regulators is to assume that strict scrutiny will be the standard. As a matter of logic, any regulation that

---

40. 304 U.S. 144, 152–53 n.4 (1938).

41. *Heller*, 128 S. Ct. 2783, 2817–18 n.27 (quoting *Carolene Products*, 304 U.S. at 152 n.4).

42. *But see* Mark Tushnet, *Permissible Gun Regulations After Heller*, 56 UCLA L. REV. 1425, 1428–29 (2009) (“[L]ower courts will, I think, be reluctant to apply strict scrutiny because of concern that such a standard imperils too many well-established, long standing gun regulations.”). Tushnet argues that federal courts will apply either intermediate scrutiny or rational-basis scrutiny to gun regulations, and will do so following state precedent on the level of protection given to the right to keep and bear arms. *Id.* However, Tushnet concedes that this “speculation is predicated on the assumption that the Supreme Court will not take up another Second Amendment case in the near future,” *id.* at 1430, an assumption challenged by the Supreme Court’s recent grant of certiorari in a new Second Amendment case dealing with the incorporation of the Second Amendment against the states. *See infra* note 60.

43. Justice Breyer suggests that Justice Scalia and “the majority implicitly, and appropriately, rejects” strict scrutiny by carving out such a broad list of exceptions. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting); *see also supra* Part I.B (listing gun regulations the *Heller* majority found allowable). And there could, in fact, be other forms of scrutiny entirely. *See, e.g.*, Tushnet, *supra* note 42, at 1437 (suggesting that courts will apply an “undue burden” analysis drawn from the Court’s decisions on abortion, despite the fact that “abortion jurisprudence itself has given it almost no content”); Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J. L. & PUB. POL’Y 607, 628 (2008) (suggesting that the Supreme Court will have to construct a new standard of review for Second Amendment cases, with the most likely analogue found in the Court’s prior jurisprudence on First Amendment freedom-of-speech protections).

passes the strict-scrutiny standard, the narrowest standard used by the Supreme Court, would also pass any other standard the Supreme Court might impose, whether intermediate scrutiny or an entirely new standard. This is not as radical as it sounds; even under strict scrutiny, many gun regulations would likely survive. While some claim that strict-scrutiny review almost always results in the challenged law being struck down,<sup>44</sup> the empirical evidence demonstrates that many laws do, in fact, pass strict scrutiny.<sup>45</sup> Reading section III of the majority opinion, the restrictions on the Second Amendment that are specifically constitutional—bans on felons and the mentally ill possessing guns, place restrictions on carrying, qualifications for the sale of arms, and limitations to arms “in common use at the time”<sup>46</sup>—do not simply pass rational basis, but would likely pass strict scrutiny. Consider bans on possession of firearms by felons and the mentally ill: there is little doubt of a compelling government interest in preventing felons<sup>47</sup> and the mentally ill<sup>48</sup> from having lethal weapons, and the classification is narrowly tailored to achieve that end.<sup>49</sup> True, there might still be challenges over the definitions of terms like *felon*<sup>50</sup> or

---

44. See Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny review as “‘strict’ in theory and fatal in fact”).

45. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (calculating that overall as many as 30% of all challenges to laws under strict scrutiny result in the law being upheld). Nevertheless, Professor Winkler argues that the Supreme Court will not use strict scrutiny as the standard of review in Second Amendment cases since gun regulations are not based on invidious motives and the rights are not considered central to democracy, the two hallmarks of strict scrutiny. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 700–05 (2007). Professor Winkler writes, as Justice Breyer does in his dissent, that any attempt to apply strict scrutiny in Second Amendment cases will end up applying a de facto rational basis standard, a standard that both Justice Breyer and Professor Winkler would explicitly adopt. *Id.* at 725–26.

46. *Heller*, 128 S. Ct. at 2816–17 (majority opinion) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

47. According to a 1997 survey, 17.2% of all repeat state offenders and 18.4% of all repeat federal offenders carried a gun during the commission of their latest crimes; for repeat offenders convicted of a violent crime, 28.4% of state repeat offenders and 38.4% of federal repeat offenders did so. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FIREARM USE BY OFFENDERS 6 (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf>.

48. One recent and tragic example is the April 2007 massacre at Virginia Tech, where student Seung-Hui Cho, who had been previously declared by a state magistrate to be mentally ill and “an imminent danger” to himself, was nonetheless allowed to purchase two handguns, which he used in a rampage that killed thirty-two people and injured seventeen more. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 5, 23–24 (2007), <http://www.governor.virginia.gov/TempContent/techPanelReport.cfm>.

49. See, e.g., 18 U.S.C. § 922(d)(1) (2006) (prohibiting the sale of firearms to any person who has been convicted of or is under indictment for a felony, is a fugitive from justice, or has been previously involuntarily committed to a mental institution or “adjudicated as a mental defective”).

50. See *id.* § 922(d) (defining a felon as a person who “is under indictment for, or has

mentally ill,<sup>51</sup> but if there is a basis for the classification, then the person so classified is not entitled to the same rights as a person who does not have that classification; per Justice Scalia's implication in footnote 27 of *Heller*, those would be decided under the rational-basis test.<sup>52</sup> Given how many firearms regulations have a clear safe harbor under the strict-scrutiny standard and the logic of the *Heller* majority, an assumption that the Supreme Court will apply strict scrutiny in facial challenges to firearms laws and regulations is reasonable.<sup>53</sup> And if the Court does apply it in a future case, gun regulators whose regulations fall under *Heller*'s exceptions, and who have empirical evidence showing a compelling government interest,<sup>54</sup> will have a much easier time defending their regulations in court than those whose regulations do not.

### B. Incorporation Follows Heightened Scrutiny

Applying heightened scrutiny to Second Amendment cases answers the other question left open by the Supreme Court in *Heller*: the right to keep and bear arms is incorporated against the states through the Fourteenth Amendment. As a general rule, if the Supreme Court applies heightened scrutiny, it is a strong indicator that the underlying right is fundamental<sup>55</sup> and is incorporated against the states through the Due Process Clause of the Fourteenth Amendment under the title of "substantive due process."<sup>56</sup> The

---

been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, is a fugitive from justice, or is an unlawful user of or addicted to any controlled substance"). *But see* *Small v. United States*, 544 U.S. 385, 391–92 (2005) (holding that a person convicted in a foreign court of weapons smuggling is not a *felon* for purposes of U.S. firearms regulation because Congress did not intend to include such convictions).

51. *See* 27 C.F.R. § 478.11 (2008) (defining *adjudicated as a mental defective* to include persons found insane or incompetent to stand trial in a criminal proceeding).

52. *See supra* Part II.A. This would explain why the majority of litigants making *Heller* claims, who are by and large felons, are not succeeding in their claims. *See* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1566 (2009) (tallying cases challenging gun-control laws as "Exceptions: 75, Individual Right: 0."). As Gura and the *Heller* litigation team recognized, it is difficult to mount a facial challenge to a law that seeks strict-scrutiny review with a client who falls into one of the law's as-applied exceptions and consequently gets rational-basis review. *See supra* note 18.

53. *But see* Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1197 (2009) (arguing that *Heller*'s "discussion of other presumptively constitutional [gun] laws surely must be read as a rejection of the strict scrutiny standard").

54. *See infra* Part III.B.

55. *See* *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (defining *fundamental rights* as "immunities that are valid as against the federal government by force of the specific pledges of particular amendments [that] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states"), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (footnote omitted).

56. *See* ROTUNDA & NOWAK, *supra* note 36, § 15.6(b) (discussing the incorporation of the Bill of Rights into the Fourteenth Amendment); *see also* Nelson Lund, *Anticipating*

language of the Second Amendment's prefatory clause—"necessary to the security of a free State"<sup>57</sup>—testifies that its authors thought the right to keep and bear arms was fundamental and that it should be incorporated under the Fourteenth Amendment.<sup>58</sup> Thus, if the Supreme Court follows its own incorporation precedent, the Second Amendment will be incorporated, and the states will be bound by its meaning.

Whether the Second Amendment is incorporated is the subject of a current circuit split between the Ninth Circuit on the one side—which found that it is incorporated—and the Second and Seventh Circuits on the other—which found that it was not.<sup>59</sup> The Seventh Circuit's cases will be heard in the Supreme Court's current Term,<sup>60</sup> with the same team that

---

*Second Amendment Incorporation*, 59 SYRACUSE L. REV. 185, 192 (2008) (noting that the majority of the rights in the Bill of Rights are applied against the states under substantive due process). Lund, however, notes that "the [Supreme] Court has never developed a legal test that provides a coherent way of explaining all of its incorporation decisions." *Id.*

57. U.S. CONST. amend. II.

58. The Second Amendment, unlike any other provision of the Bill of Rights, includes a prefatory phrase expressing its sense of the fundamental importance of the Amendment. Moreover, that phrase contains language whose meaning is virtually identical to that of the language in the *Palko* incorporation test: the Supreme Court's reference to those rights that are 'of the very essence of a scheme of ordered liberty' is nothing but a slightly reworded version of the Second Amendment's reference to what is 'necessary to the security of a free State.' It is as though the Court had taken its legal test for incorporation directly from the Second Amendment itself . . . .

Lund, *supra* note 56, at 194 (quoting *Palko*, 302 U.S. at 325, and U.S. CONST. amend. II). *But see* Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 5-6 (2009) (arguing that historical evidence on the issue of Second Amendment incorporation is unreliable when viewed from either the intent of the drafters or the original public meaning of the amendment, and provides "no satisfactory basis for resolving the incorporation question").

59. *Compare* *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) (holding that the Second Amendment is incorporated against the states through the Fourteenth Amendment Due Process Clause), *reh'g en banc granted*, No. 07-15763 (9th Cir. July 29, 2009), *with* *Nat'l Rifle Ass'n v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009) (declining to incorporate the Second Amendment against the states until the Supreme Court does so), *and* *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d. Cir. 2009) (same).

60. On September 30, 2009, the Supreme Court granted certiorari in a parallel case that was argued with *National Rifle Ass'n* in the Seventh Circuit, which also presents the question of whether the Second Amendment is incorporated against the states. *McDonald v. City of Chicago*, *cert. granted*, 130 S. Ct. 48 (U.S. Sept. 30, 2009) (No. 08-1521). The legal arguments for each set of plaintiffs are distinct. The NRA simply seeks to have the Supreme Court overturn Chicago's de facto handgun ban. Petition for Writ of Certiorari, at i, 5, *Nat'l Rifle Ass'n v. City of Chicago*, 2009 WL 1556563 (No. 08-1497), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/06/certpetitionchicago.pdf>.

McDonald's argument encompasses *National Rifle Ass'n* but is much broader; not only does it seek to overturn Chicago's de facto handgun ban, it also challenges, under *Heller*'s rule incorporating the Second Amendment, Chicago's ordinances that require pre-registration of guns before purchase and the annual re-registration of all guns, and which make it impossible to re-register any gun if its registration lapses. Petition for Writ of Certiorari at 5, *McDonald v. City of Chicago*, 2009 WL 1640363 (No. 08-1521), available at [http://www.chicagoguncase.com/wp-content/uploads/2009/06/mcdonald\\_cert\\_petition1.pdf](http://www.chicagoguncase.com/wp-content/uploads/2009/06/mcdonald_cert_petition1.pdf).

successfully argued *Heller* making the case for incorporation<sup>61</sup> with the support of thirty-three states;<sup>62</sup> meanwhile, the Second and Ninth Circuit's cases wait for their own resolution.<sup>63</sup> Based on the Supreme Court's own prior precedent in incorporation cases, incorporation of the Second Amendment seems likely.<sup>64</sup> First, the only reason the Second and Seventh

---

In addition, McDonald also asks the Court to take the unprecedented step of overturning the *Slaughter-House Cases* and give effect to the Fourteenth Amendment's long-dormant Privileges or Immunities Clause, which would effectively incorporate the entire Bill of Rights against the states. *Id.* at 22 (“[R]eversal is also commanded by adherence to the text, purpose, and original public meaning of the Fourteenth Amendment’s Privileges or Immunities Clause. The almost meaningless construction given this provision in *Slaughter-House* was wrong the day it was decided and today stands indefensible.”). *See generally* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”); The *Slaughter-House Cases*, 83 U.S. 36, 76–77 (1873) (holding that the Privileges or Immunities Clause guarantees no substantive rights). However, at oral arguments held shortly before this Comment went to press, the Court did not appear sympathetic to the Privileges or Immunities Clause argument, though it did signal that it thought the Second Amendment was nonetheless incorporated against the states. *See* Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/2010/03/analysis-2d-amendment-extension-likely/> (March 2, 2010, 11:26 EST) (“The dominant sentiment on the Court was to extend the Amendment beyond the federal level, based on the 14th Amendment’s guarantee of ‘due process,’ since doing so through [the Privileges or Immunities Clause] would raise too many questions about what other rights might emerge.”).

61. In an odd case of legal déjà vu, Otis McDonald, a private citizen challenging Chicago’s de facto handgun ban, is represented by Alan Gura, the attorney who successfully argued *Heller*, while the NRA’s counsel to its challenge to Chicago’s ban is its longtime counsel Stephen Halbrook. Gura and Halbrook once sparred over the legal strategies to be used in the case that eventually became *Heller*, with Halbrook and the NRA even filing a competing lawsuit to *Heller* that was thrown out of the D.C. district court for a lack of standing. DOHERTY, *supra* note 10, at 63. The two lawyers ultimately allied on the *Heller* case: while Gura was lead counsel, Halbrook authored an influential NRA-backed amicus brief on behalf of Congress that was endorsed by 250 representatives, 55 senators, and then-Vice President Dick Cheney. *Id.* at 84. Post-*Heller*, Gura and Halbrook argued the consolidated *National Rifle Ass’n* case together before the Seventh Circuit. Transcript of Oral Argument at 1, *Nat’l Rifle Ass’n v. Chicago*, 567 F.3d 856 (7th Cir. 2009), 2009 WL 1556531.

62. Brief for State of Texas et al. as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 2009 WL 1970185 (No. 08-1521), available at [http://www.chicagocase.com/wp-content/uploads/2009/07/texas\\_states\\_cert\\_stage.pdf](http://www.chicagocase.com/wp-content/uploads/2009/07/texas_states_cert_stage.pdf).

63. *See* Petition for Writ of Certiorari, *Maloney v. Rice*, 2009 WL 1863992 (No. 08-1592), <http://homepages.nyu.edu/~jmm257/cert-petition-w-appendix.pdf>. On September 24, 2009, the Ninth Circuit issued an order vacating a scheduled en banc hearing in *Nordyke* pending the Supreme Court’s disposition of *McDonald*, *National Rifle Ass’n*, and *Maloney*. *Nordyke v. King*, No. 07-15763 (9th Cir. Sept. 24, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/09/9th-CA-Nordyke-order-9-24-09.pdf>.

64. Beginning with the First Amendment guarantee of freedom of speech in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the Supreme Court has incorporated the lion’s share of the first eight amendments of the Bill of Rights against the states because of their fundamental nature. *See, e.g.*, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (incorporating Fifth Amendment protection against self-incrimination against the states); *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (incorporating Sixth Amendment guarantee of the assistance of counsel in criminal cases against the states); *Robinson v. California*, 370 U.S. 660, 667



Circuits declined to incorporate the Second Amendment was because of the Supreme Court's instruction that the circuits follow current Supreme Court precedent, even if doing so puts them in apparent conflict with a new Supreme Court decision, until the Court clarifies the issue.<sup>65</sup> In both the Seventh and Second Circuit cases, the circuits followed this instruction with respect to *Heller*;<sup>66</sup> these circuits are likely upholding the status quo because it is the status quo, not necessarily because the argument against incorporation is stronger. Second, both the Seventh and Second Circuit decisions appear to ignore prior Supreme Court decisions on incorporation generally,<sup>67</sup> where the Ninth Circuit's decision paid heed to them.<sup>68</sup>

---

(1962) (incorporating Eighth Amendment protection against cruel and unusual punishments against the states); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating Fourth Amendment protection against unreasonable searches and seizures against the states); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (incorporating First Amendment prohibition of establishments of religion against the states); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (incorporating First Amendment guarantee of freedom of the press against the states). Only two provisions of the first eight amendments have been explicitly held to not be incorporated against the states. See *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (declining to incorporate the Seventh Amendment's guarantee of a right to a jury trial in civil cases against the states); *Hurtado v. California*, 110 U.S. 516, 535 (1884) (declining to incorporate the Fifth Amendment requirement of indictment by grand jury against the states). The incorporation status of the rarely asserted Third Amendment is an open question, but what precedent there is suggests that it is also incorporated. See *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (incorporating Third Amendment prohibition against quartering of soldiers in private property against the states). For a fuller examination of incorporation, see ROTUNDA & NOWAK, *supra* note 36, § 15.6(b) (containing a comprehensive list of cases incorporating provisions of the Bill of Rights against the states).

65. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

66. *Nat'l Rifle Ass'n*, 567 F.3d at 857; *Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009).

67. The decisions relied on by the Seventh Circuit, *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), see *Nat'l Rifle Ass'n*, 567 F.3d at 858, all predate the Supreme Court's modern incorporation jurisprudence by at least thirty years. See cases cited *supra* note 64. In particular, Judge Easterbrook says that in *Heller* the Supreme Court said that “*Presser* and *Miller* ‘reaffirmed [*Cruikshank*’s holding] that the Second Amendment applies only to the Federal Government.”” *Nat'l Rifle Ass'n*, 567 F.3d at 858 (quoting District of Columbia v. *Heller*, 128 S. Ct. 2783, 2813 n.23 (2008)). However, in the immediately preceding sentence of that same *Heller* footnote, Justice Scalia wrote, “With respect to *Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.” *Heller*, 128 S. Ct. at 2813 n. 23. For its part, the Second Circuit panel in *Maloney*, which included recently sworn in Supreme Court Justice Sonia Sotomayor, applied the “rational-basis” test to the law being challenged under the Second Amendment, 554 F.3d at 59, which the decision in *Heller* explicitly precludes. See *Heller*, 128 S. Ct. at 2817–18 n.27; see also *supra* Part II.A.

68. Judge O’Scannlain of the Ninth Circuit engaged in a far longer and more detailed

### C. *Incorporated Rights Require Effective Due Process of Law*

A constitutional right which has been incorporated against the states requires that the procedural due process guaranteed by the Fourteenth Amendment be given before the right can be limited or circumscribed by law or regulation;<sup>69</sup> the constitutional right to keep and bear arms advanced in *Heller*, if incorporated, would be no different. The core of procedural due process, from an administrative law standpoint, is the opportunity to be heard.<sup>70</sup> At the very least, an incorporated Second Amendment will require states and the federal government to have robust due process protections and a basic level of procedural fairness in their firearms regulation and permitting schemes.<sup>71</sup> The sort of arbitrary and capricious regulatory activity at issue in *Heller*,<sup>72</sup> which is still quite common where guns are

---

analysis of the incorporation doctrine that examined prior Supreme Court precedent on the subject of incorporation before concluding that the Second Amendment was incorporated. *Nordyke v. King*, 563 F.3d 439, 445–57 (9th Cir. 2009).

69. “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

70. “The fundamental requisite of due process of law is the opportunity to be heard.” The hearing must be “at a meaningful time and in a meaningful manner.” In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed [action], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

*Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (citations omitted). The specific procedural entitlements envisioned by the Court in *Goldberg* include an unbiased tribunal, a notice of the proposed action and the legal grounds asserted for it, an opportunity for the person affected to present reasons why the action should not take place, the right of the person affected to call witnesses and know the evidence used against him, the right to a decision based only on evidence documented in the hearing’s record, the right to have counsel present, the right to have a record maintained, the obligation of the agency to present a statement of reasons explaining its decision, the right to public attendance at the hearing, and the right to judicial review of the agency action. Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1279–95 (1975).

71. As two administrative law experts write, “All politics may be local—and much of administrative law is practiced at the state and local level—but that does not relieve the state government of [the] basic obligation to provide a fair process for adjudicatory determinations, including articulating ‘ascertainable standards’ prior to making adjudicatory determinations.” ANDREW F. POPPER & GWENDOLYN M. MCKEE, *ADMINISTRATIVE LAW* 557 (1st ed. 2009); see also *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964) (“The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.”).

72. As described by one of the plaintiffs in the case that eventually became *Heller*, when he attempted to register a handgun in the District of Columbia in June 2007 before the decision,

He found out he had to bring the unregistered firearm to the police station where the registration office was. Who is going to do such an insane thing? he wondered. [Recall that the law challenged in *Heller* essentially criminalized all handgun possession in D.C.] He was told that if he was stopped, he should just tell the officer he was bringing the gun in to be registered. But when he said he wanted to register a

heavily regulated, is going to come under increased scrutiny by the courts.

Although critics argue otherwise, police protection does not provide sufficient due process to obviate the need for specific due process in firearms permitting for self-defense.<sup>73</sup> Despite the fact that the common motto of police forces nationwide is “to serve and protect,” courts in the United States uniformly hold that state officials, including law-enforcement officials, have no legally enforceable constitutional duty of care to protect citizens as a matter of administrative law.<sup>74</sup> Particularly salient to the *Heller* decision striking down District of Columbia gun laws are two cases from the District of Columbia—*Morgan v. District of Columbia*<sup>75</sup> and *Warren v. District of Columbia*<sup>76</sup>—where the D.C. Metropolitan Police Department was held immune from tort liability for failure to respond to calls from citizens who were in imminent danger. In *Warren*, the victims of a savage home invasion in 1975 (six months before the D.C. handgun ban went into effect)<sup>77</sup> sued the city for failing to protect them.<sup>78</sup> The D.C.

---

pistol, not a legal long gun, the clerk literally snatched the form from his hand. Would she be willing to write down that she was refusing to let him even fill out the form? Palmer asked. The woman on duty refused. He was given no explanation. One woman he was talking to, he recalls, flipped her badge around so he couldn't even get her name.

DOHERTY, *supra* note 10, at 67–68.

73. In his dissent in *Heller*, Justice Breyer makes this argument when he says that “the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, [moves] any such right even further away from the heart of the amendment’s more basic protective ends.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2866 (2008) (Breyer, J., dissenting).

74. See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 196–202 (1989) (holding, in the context of social services protection, that a person has no affirmative constitutional right to government protection unless a “special relationship” is established by specific state assurances of protection); *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 768 (2005) (holding that the police department could not be held civilly liable under 42 U.S.C. § 1983 for failure to enforce a restraining order that resulted in three murders). For state applications of the rule, see, for example, *Pinder v. Johnson*, 54 F.3d 1169, 1179 (4th Cir. 1995) (holding that 42 U.S.C. § 1983 does not create an exception to immunity if state officers are sued in federal court); *Davidson v. City of Westminster*, 649 P.2d 894, 897–98 (Cal. 1982) (holding that police recognition of a suspect before an assault did not create a “special relationship” and thus police were entitled to immunity); *Kircher v. City of Jamestown*, 543 N.E.2d 443, 448 (N.Y. 1989) (holding that police department maintained immunity from suit by victim of crime because police had not given witnesses to crime any assurance of a response). *But see Calloway v. Kinkelaar*, 659 N.E.2d 1322, 1331 (Ill. 1995) (holding that immunity does not apply if a special duty is created by state statute or in cases of “willful or wanton misconduct” on the part of police officers).

75. 468 A.2d 1306, 1319 (D.C. 1983).

76. 444 A.2d 1, 8–9 (D.C. 1981) (en banc).

77. See *Heller*, 128 S. Ct. at 2816–17 (majority opinion) (explaining generally the effects of the handgun ban).

78. The facts of *Warren* are as grisly as they are illustrative: Around 6:00 a.m. in March 1975, a home shared by three women and the four-year-old daughter of one of the residents was burglarized by two men. The burglars entered the room of one of the women and raped her. Her screams attracted the attention of her housemates, who fled onto a

Court of Appeals explicitly held that “[t]he duty [of police officers] to provide public services is owed to the public at large, and, absent a special relationship between the police and an individual, no specific legal duty exists.”<sup>79</sup> *Morgan* involved a D.C. police officer—ironically, one of the few people who could *legally* carry a handgun before *Heller*<sup>80</sup>—who attacked his family and supervisors with his service weapon.<sup>81</sup> This case drew an even more direct response from the D.C. Court of Appeals: “[L]aw enforcement officials and, consequently, state governments generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct.”<sup>82</sup> The court’s fundamental rationale was the same as

---

neighbor’s roof and called D.C. police for help. Inexplicably, the dispatcher broadcasted this request for help as a non-urgent “Priority 2” call. Two officers arrived; one went to the front door, knocked, and seeing no one visible inside, left. The burglars were still inside and the housemates called police again. Again, the call was flagged as non-urgent, and despite the dispatcher’s assurance that police were on the way, no officers were dispatched. Believing the police were on the way, the housemates called down to their friend. This attracted the attention of the burglars, who quickly found the other two housemates. The burglars then abducted the three women at knifepoint and forced them to go back to the burglars’ apartment. For the next fourteen hours the burglars held the three women captive, robbed them, raped them, beat them, and forced them to commit sexual acts upon each other. *Warren*, 444 A.2d at 2.

79. *Id.* at 3.

80. D.C. Code § 7-2502.02(a)(4) (2001) (exempting D.C. Metropolitan Police officers from handgun registration requirements), *invalidated by Heller*, 128 S. Ct. at 2821–22.

81. *Morgan* was a D.C. police officer who threatened his wife with his legal service pistol, after which she fled with their children and informed *Morgan*’s commander, a police captain. *Morgan* himself had been a troublesome officer, with a history of derelictions of duty and lying to his superiors. After *Morgan*’s wife asked *Morgan*’s captain to “make him stay away from her,” *Morgan* and his wife agreed to separate. A few months later, *Morgan*’s wife again called the captain to find out when *Morgan* would be on duty so she could move into a new apartment without him finding out where she would be living. Nevertheless, three months later, *Morgan* broke into his wife’s new apartment, choked her unconscious, and forced her at gunpoint to drive to her parents’ house, where her children by *Morgan* were staying. *Morgan* then abducted the children at gunpoint, after which his wife and her parents called the police. *Morgan*’s superiors ordered him to surrender, which he offered to do at his in-laws. At the surrender he pulled his gun, shot his wife twice, shot and killed his father-in-law, wounded his son with a stray bullet, and shot his commanding lieutenant. *Morgan* was subsequently convicted of murder in the first degree and two counts of assault with intent to kill while armed. *Morgan v. District of Columbia*, 468 A.2d 1306, 1308–09 (D.C. 1983).

82. *Id.* at 1310. The court further reasoned,

[A] special relationship does not come into being simply because an individual requests assistance from the police. Otherwise, a police officer’s general duty to the public inevitably would narrow to a special duty to protect each and every person who files a complaint with the department and attaches a request for help. Under these circumstances, the no-liability rule is particularly salutary: individual citizens are in no position to direct the discretion of police officers whose primary responsibilities must be focused broadly in attending to the safety of the public at large. A plaintiff, in short, “cannot unilaterally call into existence a special relationship.”

*Id.* at 1313 (citations omitted). It seems not even a frantic 911 call can overcome this immunity.

in *Warren*: “[T]he duty to prevent crime is a general duty owed to the public and, therefore, unenforceable by any one individual.”<sup>83</sup> As one amicus brief submitted to the Supreme Court in *Heller* grimly noted, “it is accurate to state that the law is similar in all 50 states: the police have no duty to protect you, and it is almost impossible to construct a fact pattern that will trigger liability when the police fail to protect citizens.”<sup>84</sup> Since police protection is not guaranteed by right or by due process, it is no substitute for a right to keep and bear arms and the due process that follows such a right.

### III. ADJUDICATORY STANDARDS, DUE PROCESS, AND FIREARMS REGULATIONS AFTER *HELLER*

As noted above, courts applying *Heller* will likely be applying heightened scrutiny to gun regulations, scrutiny that will apply to both federal regulations through the Administrative Procedure Act<sup>85</sup> and state regulations through the Fourteenth Amendment.<sup>86</sup> Most of the key challenges to firearm regulations will come in regulatory adjudications, particularly permitting and licensing challenges posed by aggrieved firearms owners seeking to challenge the denial of permits or licenses.<sup>87</sup> The stricter judicial scrutiny of restrictions on the right to keep and bear arms that *Heller* anticipates will manifest in administrative practice in two ways: by elevating the right to keep and bear arms from a property interest to a liberty interest and by requiring courts to take a more skeptical view of

---

83. *Id.* at 1311.

84. Brief for Buckeye Firearms Found. LLC et al. as Amici Curiae Supporting Respondent at 38, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 383532.

85. The Supreme Court’s constitutional power to apply strict scrutiny to federal regulatory agencies, grounded in the Fifth Amendment’s requirement of due process of law, *see* U.S. CONST. amend. V, is reflected in the Administrative Procedure Act, *see* 5 U.S.C. § 706(2)(b) (2006), which allows federal courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity.”

86. The Fourteenth Amendment gives Supreme Court decisions applying strict scrutiny power over state regulatory agencies. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963) (applying the strict scrutiny test to state agency and holding that a denial of unemployment benefits to a woman who refused to work on Saturdays for religious reasons violated the incorporated Free Exercise Clause of the First Amendment).

87. The administrative rulemaking process will not pose nearly so much of a challenge, as legislatures usually make the decisions on what to regulate and the agencies follow them closely. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FED. FIREARMS REGULATIONS REFERENCE GUIDE 228–42 (2005), <http://permanent.access.gpo.gov/lps41631/2005/p53004.pdf> (cross-referencing federal gun-control laws in the *U.S. Code* with their counterpart regulations in the *Code of Federal Regulations* and industry circulars, including many *Code of Federal Regulations* sections taken verbatim from the *U.S. Code*). Consequently, it is not discussed in this Comment.

the evidence used to justify restrictions on firearms.

A. *Liberty Interests, Property Interests, and the “Arbitrary and Capricious” Standard*

Administrative adjudications, under the Due Process Clause, deal with two kinds of interests: liberty interests and property interests. Liberty interests, as defined by the Supreme Court, include “those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men,” which are protected by federal constitutional law.<sup>88</sup> In contrast, property interests are created by sources independent of the Constitution, chiefly state law.<sup>89</sup> While officially coequal, judges and lawyers have found in practice that liberty interests generally receive broader protections than property rights do.<sup>90</sup> An object being regulated may be a property interest, but a person being regulated has a liberty interest, and liberty interests receive greater consideration.<sup>91</sup> In determining what process is due to protect liberty and property interests from governmental intrusion, courts use a balancing test weighing three factors: (1) the private interest affected,

---

88. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) (“[T]he right to keep and bear arms is deeply rooted in this Nation’s history and tradition. . . . The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is . . . necessary to the Anglo–American conception of ordered liberty that we have inherited.” (internal quotation marks omitted)).

89. *Roth*, 408 U.S. at 577 (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”); *see also Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (“A person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.”).

90. *See Ingraham v. Wright*, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting) (“When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual’s interest in freedom from bodily restraint and punishment has occurred.”); Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 *TOURO L. REV.* 273, 315–16 (2009) (stating that the Supreme Court’s due process jurisprudence implies “a hierarchy that generally values liberty interests above mere property interests,” and that the right of the poor to welfare benefits is consequently a liberty interest with a greater effect on the *Mathews* balancing test than a property interest).

91. This is not to suggest that all firearms interests are liberty interests. Permits to sell firearms as a business are considered a property interest. *Spinelli v. City of New York*, 597 F.3d 160, 168–69 (2d Cir. 2009). However, the *Mathews* balancing test, *see infra* note 92 and accompanying text, still applies in such cases, and courts will reverse state actions that fail the test. *Spinelli*, 597 F.3d at 172 (holding that suspending a gun-shop owner’s license and seizing the weapons while providing inadequate notice and delaying a hearing for fifty-eight days violated the owner’s property interest).

(2) the government interest affected, and (3) the risk of erroneous deprivation of due process in the procedures used versus the value of other procedures or additional safeguards.<sup>92</sup>

*Heller's* incorporation of the right to keep and bear arms as a liberty interest instead of a property interest has a quiet but definite influence on this calculus.<sup>93</sup> Already, federal courts are balking at enforcing laws that deprive accused felons of their Second Amendment rights while not requiring a particularized finding of danger. In two cases arising under a new federal law denying any person accused of possessing child pornography the legal ability to possess a firearm,<sup>94</sup> two federal district courts refused to enforce such provisions absent a particularized showing that the defendants posed a threat to the community.<sup>95</sup> In both of these cases, the judges cited the *Mathews* balancing test and the importance of procedural due process in their decisions.<sup>96</sup>

Allowing firearms regulators too much discretion in regulating the liberty interest is likely an infringement of due process, and legislators should be wary of doing so. Concealed-carry weapon (CCW) permitting schemes, which allow a person holding a permit to carry a weapon concealed from public view on their person, are relevant examples. Dating

---

92. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

93. “[W]hatever else [the Second Amendment] 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.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). This understanding is percolating down to lower courts, even in criminal cases. *See United States v. Arzberger*, 592 F. Supp. 2d 590, 602 (S.D.N.Y. 2008) (“To the extent . . . that the Second Amendment creates an individual right to possess a firearm unrelated to any military purpose, it also establishes a protectible liberty interest.”); *see also* Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 *HASTINGS L.J.* 1245, 1263 (2009) (“These cases suggest that, as an enumerated right, the right to possess firearms is not something that can be withdrawn at a legislative whim. Rather, it is sufficiently important to trigger individualized due process protections . . .”).

94. 18 U.S.C. § 3142 (c)(1)(B)(viii) (2006) (conditioning pretrial release of a person accused of certain offenses against a minor victim on that person “refrain[ing] from possessing a firearm, destructive device, or other dangerous weapon”).

95. *See United States v. Kennedy*, 593 F. Supp. 2d 1221, 1231 n.4 (W.D. Wash. 2008) (“If the government’s position in this case is sustained, this constitutional right would be taken away not because of a conviction, but merely because a person was charged. . . . Certainly no particularized need has been established in this case that the Defendant should [be] prohibited from possessing a firearm.”); *Arzberger*, 592 F. Supp. 2d at 603 (“[A]n accused [cannot] be required to surrender his . . . right to possess a firearm without [an] opportunity to contest whether such a condition is reasonably necessary in his case to secure the safety of the community. Because the Amendments do not permit an individualized determination, they are unconstitutional on their face.”); *see also* Denning & Reynolds, *supra* note 93, at 1263 (“One suspects that the nexus between child pornography possession and firearms crimes is likely to be slight; certainly these two cases do not suggest otherwise.”).

96. *See Kennedy*, 593 F. Supp. 2d at 1229; *Arzberger*, 592 F. Supp. 2d at 602.

back to the earliest days of America,<sup>97</sup> concealed-carry laws have never been immune from arbitrary application and enforcement.<sup>98</sup> Whether issuing more of these permits reduces crime is a matter of academic debate,<sup>99</sup> but they are increasingly popular among state legislatures. Only two states now forbid all concealed carry.<sup>100</sup> Twelve states issue permits on a “may issue” basis, where discretion to issue a permit is left to law enforcement.<sup>101</sup> Thirty-four states issue concealed-carry permits on a “shall issue” basis, where law enforcement officers have no discretion in issuing permits,<sup>102</sup> and two states require no permit at all.<sup>103</sup> The Supreme Court

---

97. The primary purposes of early prohibitions on concealed carry were to keep black slaves away from weapons and to end the practice of dueling. CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC* 9, 127–28 (1999).

98. See CLAYTON E. CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* 141 (1994) (noting that juries in concealed weapons cases were given instructions allowing them to find persons accused of concealed carrying not guilty “if the defendant successfully proved his good character and motives”).

99. See COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *FIREARMS AND VIOLENCE* 150 (2005) [hereinafter *FIREARMS AND VIOLENCE*] (“No link between right-to-carry laws and changes in crime is apparent in the raw data . . . it is only once numerous covariates are included that the negative results in the early data emerge.”). This was the only part of the report that any member of the National Academies Review Committee dissented from; Professor James Q. Wilson noted that “with only a few exceptions, the studies cited . . . do not show that the passage of [right-to-carry] laws drives the crime rates up . . . . The direct evidence that such shooting sprees occur is nonexistent. Indeed, the [exception paper] shows that there was a ‘statistically significant downward shift in the trend’ of the murder rate.” *Id.* at 270; see also JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* 94 (1998) (concluding that nondiscretionary “shall issue” concealed-carry permit schemes had the greatest effect on reducing crime, and that racial minorities and women benefit the most from such permitting schemes). *But see* EVALUATING GUN POLICY 324 (Jens Ludwig & Phillip J. Cook eds., 2003) (concluding that the correlation observed by Lott and his coauthors cannot definitively show a causal relationship due to the unreliability of the data available).

100. See 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4), (a)(10) (West 2008) (prohibiting the carrying of concealed weapons within one’s vehicle or person in public unless meeting the exemptions); WIS. STAT. ANN. § 941.23 (West 2005) (prohibiting any person except a peace officer from carrying a concealed and dangerous weapon).

101. In “may issue” states, law enforcement officials may deny permits to a person at their own discretion based on various statutory criteria. See, e.g., CAL. PENAL CODE §§ 12050–12054, 12590 (West 2008) (listing various penal provisions limiting the issuance of permits).

102. In “shall issue” states, law enforcement officials must issue concealed-carry permits; they have no discretion to deny permits to any person who meets the defined statutory criteria. See, e.g., GA. CODE ANN. §§ 16-11-126 to 16-11-130 (2007) (stating that when no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license, the blank license shall be returned directly to a judge who will have sixty days from the date of the initial application to issue the license); OHIO REV. CODE ANN. §§ 2923.11–2923.24 (LexisNexis 2006) (prohibiting issuance of a license only when negative information is found against the applicant).

103. See, e.g., ALASKA STAT. § 11.61.220(a) (2008) (allowing concealed carry without application for permit but listing rules of conduct when a concealed weapon must be removed or revealed); VT. STAT. ANN. tit. 13, §§ 4004, 4016 (1998) (listing only restrictions of certain places or behavior that would be a violation of concealed-carry laws).



implied in *Heller* that a permitting scheme for handguns was permissible as long as it was not arbitrarily or capriciously applied.<sup>104</sup> Although this may seem an easy standard to meet, “may issue” CCW permit schemes appear inherently arbitrary and capricious. For example, New York City’s application of the state’s handgun permit law,<sup>105</sup> in practice, is so labyrinthine that only wealthy or politically connected citizens can get handgun licenses,<sup>106</sup> while the city routinely denies handgun licenses to taxi drivers because it claims they do not carry enough cash to be an attractive target for robbers.<sup>107</sup> California, also a “may issue” state, gives its counties such broad discretion in CCW permitting that county sheriffs even have the power to effectively revoke previously issued CCW permits.<sup>108</sup> This kind of discretion on the part of local officials to grant or deny CCW permits infringes on the Second Amendment liberty interest of firearms owners that *Heller* recognizes and is unlikely to survive the renewed due process scrutiny that *Heller* portends and administrative law has long recognized as essential.<sup>109</sup> Overbroad discretion in the regulation of a liberty interest will not hold up in court, especially when the liberty interest comes from an

---

104. Cf. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2819 (2008) (stating that the licensing requirement will not be addressed because respondent conceded that a licensing scheme is permissible as long as it is not enforced in an arbitrary and capricious manner, thus relief is found if a license is issued to respondent).

105. See N.Y. PENAL LAW § 400.00 (McKinney 2008) (allowing handgun licenses if the applicant is, among other things, of “good moral character,” “no good cause exists for the denial of the license,” and “proper cause” exists showing a need for a license).

106. See Colum Lynch, *Elite in NYC are Packing Heat*, BOSTON GLOBE, Jan. 8, 1993, at 3 (identifying, among other New York City handgun license holders, *New York Times* publisher Arthur Ochs Sulzberger, prominent gun-control advocate Laurence Rockefeller, *National Review* founder William F. Buckley, actors Bill Cosby and Joan Rivers, real estate developer Donald Trump, and radio “shock jock” Howard Stern).

107. See Jeffrey R. Snyder, *Fighting Back: Crime, Self Defense, and the Right to Carry a Handgun* (CATO Policy Analysis No. 284, 1997), <https://www.cato.org/pubs/pas/pa-284.html> (noting that one state based its decision on the fact that carrying less than \$2,000 in cash does not make taxi drivers a target, despite the profession’s high risk of robbery).

108. “[Orange County, California Sheriff Sandra] Hutchens’ new policy requires that to get a concealed-firearm permit, applicants must prove there is a legitimate threat to their safety and agree to undergo possible psychological, polygraph or medical testing.” Stuart Pfeifer, *Tighter Policy on Concealed Weapons in O.C.*, L.A. TIMES, Aug. 12, 2008, at B4. Describing her new standards, “Hutchens explained that she will issue the permits ‘to persons of good and upstanding character who possess credible, significant and substantiated cause to fear for their safety[,]’” criteria which are inherently subjective. *Id.* Noting strong statistical evidence that more-liberal concealed-carry weapons (CCW) permitting has led to a decrease in crime, one critic reports Hutchens is now encountering resistance from Orange County’s 1,100 CCW permit holders (out of a population of three million residents), “including the 442 who have been sent letters saying that they have to justify keeping the permit they were issued by the previous sheriff. ‘There’s so much important stuff going on with the department, I didn’t expect there to be so much feedback on this,’ she is quoted as saying.” Posting of Bob Owens to Pajamas Media, <http://pajamasmedia.com/blog/concealed-carry-permits-go-poof-in-california/> (Nov. 19, 2009, 12:30 EST).

109. See *supra* note 92 and accompanying text.

incorporated provision of the Bill of Rights and the Court applies heightened scrutiny.<sup>110</sup> Indeed, the District of Columbia has already repealed a series of post-*Heller* handgun regulations aimed at restricting the models, types, features, and even colors of handguns D.C. residents can register rather than face yet another lawsuit.<sup>111</sup>

*B. Judicial Review of Firearms Regulation and Supporting Evidence Under the APA*

While state regulations of firearms are guided by varied state administrative procedure laws and rules, subject only to federal constitutional scrutiny if they violate the Fourteenth Amendment,<sup>112</sup> the future of federal firearms regulations post-*Heller* also requires consideration of the role of the federal government in regulating gun manufacturers and dealers.<sup>113</sup> The Fifth Amendment explicitly bars the federal government from taking life, liberty, or property without due process of law.<sup>114</sup> The main federal agency responsible for the regulation of firearms, the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE),<sup>115</sup> like most federal agencies, is subject to judicial review of its actions under the Administrative Procedure Act (APA) as a means of guaranteeing Fifth Amendment due process.<sup>116</sup> BATFE permit systems are a form of adjudication, and the BATFE uses informal adjudication in hearings concerning the required federal firearms licenses (FFLs) that all gun dealers are required to have.<sup>117</sup> The APA,

---

110. Depending on the outcome of *McDonald*, discussed *supra* in note 60, a test case with non-felon plaintiffs challenging state "may issue" CCW permitting laws under *Heller* appears a logical next step.

111. See Tim Craig, *D.C. Expands List of Allowed Guns to Avert Lawsuit*, WASH. POST, June 20, 2009, [http://www.washingtonpost.com/wp-dyn/content/article/2009/06/19/AR2009061901822\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/06/19/AR2009061901822_pf.html). In addition, D.C. initially only allowed residents to register revolvers and not semiautomatic pistols. That ban was also lifted in September 2008 in response to public and congressional pressure. *Id.*

112. See *supra* note 86.

113. See generally 18 U.S.C. § 922 (2006) (defining offenses related to the sale of firearms that are shipped, transported, or received in interstate commerce, including, inter alia, lists of prohibited purchasers, limits on the sale of fully automatic weapons and certain types of ammunitions, background-check requirements, and dealer record-keeping requirements).

114. U.S. CONST. amend. V.

115. *Heller* does not apply to explosives. See *United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009).

116. See 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

117. See 18 U.S.C. § 923 (2006) (establishing federal firearms license (FFL) permitting scheme that applies to all importers, manufacturers, and dealers in firearms and ammunition); *Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE): Reforming Licensing and Enforcement Authorities: Hearing Before the Subcomm. on Crime,*

however, still sets “minimum requirements” for informal adjudication,<sup>118</sup> and although ex parte communications between parties and hearing officers are allowed, an agency must still preserve a written record that provides a sufficient basis for judicial review of the agency action.<sup>119</sup> Additional requirements for informal adjudication may arise under the Due Process Clause.<sup>120</sup> But in informal adjudications, if a decision is not based on facts contained in the evidentiary record, an adversely affected party must receive an opportunity to appeal and rebut the finding.<sup>121</sup> Unless the agency statute explicitly precludes judicial review, or the law gives the agency complete discretion, the agency’s actions are subject to judicial review.<sup>122</sup> BATFE’s authorizing statutes do neither.<sup>123</sup> Additionally, so long as the BATFE’s actions are final, they are reviewable by courts.<sup>124</sup>

Under the APA, courts review agency actions that are alleged to be “arbitrary, capricious, [or] an abuse of discretion;”<sup>125</sup> “contrary to constitutional right, power, privilege, or immunity;”<sup>126</sup> “unsupported by substantial evidence;” or “unwarranted by the facts.”<sup>127</sup> As a result of this explicit linkage in the APA between the “arbitrary and capricious” review used in administrative law, scrutiny of regulations affecting “rights, powers, privileges and immunities” protected by constitutional law, and the

---

*Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 106th Cong. 11–12 (2006), available at <http://ftp.resource.org/gpo.gov/hearings/109h/26765.pdf> (statement of Audrey Stucko, Deputy Assistant Director, Enforcement Programs and Services, BATFE) (stating that FFL revocation hearings are conducted under informal procedures which are more amenable to unrepresented license holders, and that BATFE hearing officers are trained to give unrepresented license holders meaningful opportunity to participate in the hearing).

118. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (“the minimal requirements for [informal adjudication] are set forth in the APA, 5 U.S.C. § 555”). Among these rights are the right of an affected party to appear before the agency, for affected parties to be represented by counsel, 5 U.S.C. § 555(a) (2006), and if the permit sought is denied, prompt notice of the denial and a written statement of reasons for the denial, 5 U.S.C. § 555(e).

119. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (holding that an administrative record composed of “‘post hoc’ rationalizations” for agency action is “an inadequate basis for review”).

120. Cf. *Pension Benefit Guar. Corp.*, 496 U.S. at 655–56 (“A failure to provide [protections beyond the minimum of § 555] where the Due Process Clause itself does not require them (which has not been asserted [in this case]) is therefore not unlawful.”) (emphasis added). Such due process requirements are discussed in Part II.C, *supra*.

121. 5 U.S.C. § 556(e).

122. *Id.* § 701(a).

123. See 28 U.S.C. § 599A (2006) (leaving out an explicit preclusion of judicial review); 28 U.S.C. § 599A(b) (authorizing that BATFE is responsible for investigating “criminal and regulatory violations of the Federal firearms, explosives, arson, alcohol, and tobacco smuggling laws,” yet not stating that the BATFE’s actions are solely within its discretion).

124. 5 U.S.C. § 704.

125. *Id.* § 706(2)(A).

126. *Id.* § 706(2)(B).

127. *Id.* § 706(2)(E)–(F).

rules of evidence, federal courts clearly have the power to overturn federal agency action regulating firearms under the rules established in *Heller*.<sup>128</sup> If the agency action does not fall into one of the defined exceptions in *Heller* itself,<sup>129</sup> then its constitutionality will be put to the test.

The strongest challenges to gun regulations will arise when agency actions are supported by questionable facts or evidence, particularly as the APA recognizes that a lack of supporting evidence can be fatal to a regulation.<sup>130</sup> As gun-control laws themselves generally rest upon statistics claiming a causal relationship between guns and social ills, courts can use the rules of evidence, particularly those regarding expert evidence, to weigh the value and credibility of those statistics.<sup>131</sup> In doing so, gun regulations after *Heller* may reignite a long-simmering debate in administrative law over how closely the rules of evidence used by agencies like BATFE should follow the rules used by courts.

The defining case governing expert evidence in the federal courts is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>132</sup> Under the *Daubert* standard, expert testimony is judged by four factors. First, can the expert's theory be, or has it been, tested?<sup>133</sup> Second, has the expert's theory been subjected to peer review?<sup>134</sup> Third, if a particular technique has been used in arriving at a theory, what (if any) error rate does it have?<sup>135</sup> Finally, has the theory been generally accepted within the scientific community?<sup>136</sup> The *Daubert* Court noted that this four-part test is flexible and that no one factor is dispositive; the court must focus "solely on the principles and methodology, not on the conclusions they generate," and the expert testimony must be supplemented by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof . . . ."<sup>137</sup> The Court in *Daubert* established that the role of the federal district judge in cases of expert evidence is that of a gatekeeper, with the

---

128. See *supra* Part II.B.

129. To wit, bans on possession by felons and the mentally ill, carrying in "sensitive places" such as government buildings, conditions and qualifications on the sale of arms, and a limitation of the right to arms "in common use" are all permissible under the Second Amendment. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008); *supra* Part I.B.

130. 5 U.S.C. § 706 (2)(E)–(F).

131. See FED. R. EVID. 702 (allowing testimony by expert witnesses "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact at issue"); FED. R. EVID. 705 ("The expert may . . . be required to disclose the underlying facts or data on cross-examination.").

132. 509 U.S. 579 (1993) (granting certiorari in order to resolve deep divides among federal courts concerning the proper standard for admitting expert testimony).

133. *Id.* at 593.

134. *Id.*

135. *Id.* at 594.

136. *Id.*

137. *Id.* at 594–96.

power to exclude expert evidence that fails the *Daubert* test on grounds of relevancy.<sup>138</sup> The Supreme Court, in later cases, made two other holdings that further clarify the rules regarding expert evidence. First, it explicitly allowed courts to “conclude that there is simply too great an analytical gap between the data and the opinion proffered” and consequently exclude the proffered evidence.<sup>139</sup> Second, the Court emphasized that the *Daubert* standard and the “gatekeeping” function of federal judges applied to all instances of expert testimony, including testimony from fields not traditionally considered scientific per se, such as engineering.<sup>140</sup>

Does the *Daubert* standard have relevance in administrative adjudication? Academic commentators are divided,<sup>141</sup> and the general principle requiring judicial deference to agencies under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* remains.<sup>142</sup> Yet Congress directly addressed the rules of evidence agencies must follow in their adjudications in the APA,<sup>143</sup> and the Supreme Court has noted that all

---

138. *Id.* at 597; *see also id.* at 591 n.9 (“In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.”); FED. R. EVID. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

139. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (further noting that “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert”).

140. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (holding that the purpose of the *Daubert* requirement “is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”).

141. *Compare* Claire R. Kelly, *The Dangers of Daubert Creep in the Regulatory Realm*, 14 J.L. & POL’Y 165, 209 (2006) (“[*Daubert*] lacks any administrative law grounding. It is ill-suited to apply across the board to all agencies, it is likely to be used in a rhetorical and meaningless way, and it is likely to be overused, morphed, and stretched to fit any conceivable situation.”), *with* J. Tavener Holland, Comment, *Regulatory Daubert: A Panacea for the Endangered Species Act’s “Best Available Science” Mandate?*, 39 MCGEORGE L. REV. 299, 326 (2008) (“Regulatory *Daubert* has much to offer . . . . By instituting a new framework for judicial review of the methodologies behind agency science, regulatory *Daubert* will help agencies effect a needed separation between policy and science. This will result in a lower risk of substantive bias, greater accountability, and greater transparency.”), *and* Alan Charles Raul & Julie Zampa Dwyer, “Regulatory *Daubert*”: A Proposal to Enhance Judicial Review of Agency Science by Incorporating *Daubert Principles into Administrative Law*, 66 LAW & CONTEMP. PROBS. 7, 8 (2003) (“*Daubert* principles should [be used] under the APA because these principles are consistent with the APA requirement that agencies engage in reasoned decisionmaking, would assure better documentation of agencies’ scientific decisions, and would enhance the rigor and predictability of judicial review of agency action based on scientific evidence.”).

142. 467 U.S. 837, 842–43 (1984) (requiring courts to defer to agency interpretations of federal statutes if (1) the statutes are ambiguous or silent on the issue in question and (2) if the agency’s interpretation is a permissible construction of the statute).

143. *See* 5 U.S.C. § 556(d) (2006) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence

regulatory action under the APA must be supported by “substantial evidence” based on the record as a whole, including contradictory evidence contained in the record.<sup>144</sup> As a matter of substantive law, federal trial courts can and do exclude evidence in criminal firearms cases that is not supported by substantial evidence or underlying data under the *Daubert* standard.<sup>145</sup> Given that federal courts exclude unsupported evidence in constitutional cases as well,<sup>146</sup> it is likely that they can and will apply *Daubert* and exclude unsupported evidence in administrative firearms cases arising under the Second Amendment’s interpretation in *Heller*. If the prevailing *Daubert* rules used by courts are imposed upon administrative agencies like the BATFE as well,<sup>147</sup> gun regulations facing *Heller* challenges will face the added burden of demonstrating that they are based on objective facts and that those facts demonstrate a causal relationship, not simply a correlation, between firearms possession and social ills and between firearms regulation and social benefit.<sup>148</sup>

---

may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”).

144. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

145. To give one example, federal judges have actively excluded expert evidence and conclusions of firearms examiners, which were unsupported under the *Daubert* test. See, e.g., *United States v. Diaz*, No. CR 05-00167 WHA, 2007 U.S. Dist. LEXIS 13152, at \*35 (N.D. Cal. 2007) (forbidding firearms examiner from testifying that a ballistics match permits “the exclusion of all other guns” as possible sources of shell casings fired in a crime); *United States v. Montiero*, 407 F. Supp. 2d 351, 355 (D. Mass. 2006) (coming to the same conclusion as the *Diaz* court).

146. See, e.g., *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 808 (D. Neb. 2004), *rev’d on other grounds sub nom. Gonzalez v. Carhart*, 550 U.S. 124, 168 (2007) (concluding that substantial evidence in the record did not support congressional fact findings that a banned abortion procedure was never necessary for the preservation of the health of the woman).

147. Two commentators have noted that the “relevance and reliability” standard in *Daubert* bears a striking similarity to the “hard look” review standard elaborated by the Supreme Court in a decision requiring agencies to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” a decision which would provide a firm basis for bringing *Daubert* into administrative law. Raul & Dwyer, *supra* note 141, at 22–23 (quoting *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). And they point out that in *Daubert* itself, the Court approvingly cited a passage from a book that links good science and good regulatory decisionmaking, which it would not have done “if it had not been comfortable with the notion that the new good-science mandate announced in *Daubert* could be extended by analogy to administrative law and judicial review of agency science.” See *Daubert*, 509 U.S. 579, 593 (1993) (citing SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS* 61–76 (1990)); see also Raul & Dwyer, *supra* note 141, at 24.

148. But see Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1092–93 (2009) (“To the extent that Second Amendment litigation prompts deeper and empirically driven evaluation of firearms regulation, it will come with gun control in a systematically defensive posture. We have little confidence that this one-sided drag on

Justifying regulation with empirical, causal evidence is one of the main ways firearms regulators can avoid having their regulations overturned for being arbitrary, yet many firearms regulations seem to lack such supporting evidence. The basic link relied upon by firearms regulators, that more guns cause more homicides and suicides, is actually very weak. A comprehensive critical literature review conducted by the National Academy of Sciences dealing with links between firearms possession and crime, after examining 253 journal articles, ninety-nine books, forty-three government reports, and eighty gun-control measures, concluded that “existing research studies[,] . . . because of the limitations on existing data and methods, do not credibly demonstrate a causal relationship between the ownership of firearms and the causes or prevention of criminal violence or suicide.”<sup>149</sup> The link between firearms possession and suicide is particularly suspect. One well-cited study published in the *New England Journal of Medicine* reported that handguns accounted for 83% of all firearms used in suicide attempts.<sup>150</sup> However, the National Academy review dealing with links between firearms possession and suicide found that although there is a strong *correlation* between owning a firearm and an elevated risk of suicide, there is no evidence of *causation*—no proof that an increase in firearms ownership causes an increase in suicides.<sup>151</sup> After a comprehensive review of more than twenty studies, some demonstrating a direct causal relation and some not, the authors were forced to conclude that although there was a positive correlation between gun ownership and suicide, “the causal relation remains unclear.”<sup>152</sup> Regulators seeking to justify their firearms regulation policy would do well to seek out evidence of causation, not merely correlation, between firearms and the social ills they seek to prevent.

---

policy innovation can produce a net benefit.”).

149. FIREARMS AND VIOLENCE, *supra* note 99, at 6. The review panel further concluded that the only reliable data that could show a causal relationship between firearms and violence had to come from comprehensive, individual-level studies linking firearms and violence, surveys which as of 2004 did not exist. *Id.*

150. See JERVIS ANDERSON, GUNS IN AMERICAN LIFE 76 (1984).

151. See FIREARMS AND VIOLENCE, *supra* note 99, at 153. Indeed, this review found four possibilities that each explain the correlation: (1) a direct causal relationship between firearms ownership and risk of suicide; (2) a complete lack of any causation at all; (3) a reverse causal relationship where people contemplating suicide actively seek out firearms; and (4) unmeasured and confounding “third factors” that correlate with both firearms ownership and suicide, such as a lack of public social services that leads to both increased neighborhood crime rates and a lack of available mental health treatment. *Id.*

152. *Id.* at 192.

## CONCLUSION

Through its decision in *District of Columbia v. Heller*, the Supreme Court signaled that the Second Amendment protects an individual right to keep and bear arms, and that the right is sufficiently fundamental to be worthy of incorporation. Incorporation portends a higher level of scrutiny for firearms regulations under the Due Process Clauses, both procedurally by guarding against arbitrary and capricious regulatory action and substantively by ensuring that regulations are based on solid empirical evidence that demonstrates a causal link between regulation and social benefit.

*Heller* is not the end of the world for gun control; indeed, the majority opinion says as much.<sup>153</sup> *Heller* does signal, however, that gun regulators must now approach the right to keep and bear arms with a renewed commitment to constitutionally mandated due process.<sup>154</sup> The purpose of requiring gun regulations to pass heightened scrutiny is so that judicial review will be as effective in its protection of the Second Amendment as it has been for all of the other amendments of the Bill of Rights.<sup>155</sup>

The Framers of the Bill of Rights, while certainly not able to predict the future, understood that the need of free citizens and human beings to defend their lives by lethal force is a tragic but inevitable fact of life in a world run and populated not by angels, but by men.<sup>156</sup> *Heller* ultimately stands only for that position. The essential right to bear arms in defense of life must be respected by those responsible for the administration of firearms regulation and conscientiously defended by the Judicial Branch. If and when it is protected as such, prudent regulation of firearms will still be possible. Congress, state legislatures, and local governments—and the

---

153. See *supra* Part I.B.

154. See Denning & Reynolds, *supra* note 93, at 1266 (“[A]n important consequence of *Heller*’s individual right holding [is] the normalization of firearms possession. . . . [F]irearms possession is now something contemplated by the Constitution—something not deviant, but normal, with the burden shifting from those who would possess firearms to those who would deny their possession.”).

155. See Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1161 (2009) (“Undoing political mischief aimed at subverting constitutional rights is the very business of the federal courts. . . . The courts’ duty is to come back, time and again, and challenge every harebrained legislative device contrived to deny Americans their constitutional rights.”). But see Amanda C. Dupree, Comment, *A Shot Heard ’Round the District: The District of Columbia Circuit Puts a Bullet in the Collective Right Theory of the Second Amendment*, 16 AM. U. J. GENDER SOC. POL’Y & L. 413, 436 (2008) (concluding that the right to keep and bear arms should be subject to a “reasonableness” review instead of a form of heightened scrutiny).

156. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (“If men were angels, no government would be necessary.”).



agencies that serve them—are and should remain free to restrict the keeping and bearing of arms so long as these restrictions are consistent with the individual right the Second Amendment guarantees, and are clearly supported by evidence and not emotion. However, as *Heller*'s example demonstrates,<sup>157</sup> regulators who treat the keeping and bearing of arms as unimportant, or the right of self-defense as worth less than some “greater good,” will seal the doom of the very laws they aim to uphold.

---

157. See *supra* note 9 and accompanying text.