COME AND TAKE IT: THE STATUS OF TEXAS HANDGUN LEGISLATION AFTER *DISTRICT OF COLUMBIA V. HELLER*

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I. INTRODUCTION

"Come and Take It." The motto has been a rallying cry for Texas independence and sovereignty since 1835.[1] As Mexican armed forces threatened to reclaim a cannon that had been given to the colonists of Gonzales to defend themselves from Native Americans, over one hundred Texas revolutionaries formed a resistance and preemptively attacked the Mexican contingent in order to retain their cannon.[2] The Mexican demands for its surrender prompted the colonists to create a flag with a picture of the cannon and the inscription "Come and Take It."[3] The flag represented not only an intimidating warning to those who threatened their preferred method for self-defense, but also a symbol of defiance for a people desirous of autonomy and self-governance.[4]

Over 150 years later, this succinct motto remains the quintessential paradigm for those opposed to comprehensive firearm regulations. While the depiction on the modern version of the flag replaces the cannon with an assault rifle, the spirit of the message endures.[5]

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[1] *See* Thomas Ricks Lindley, *Gonzales "Come and Take It" Cannon, in* THE HANDBOOK OF TEXAS ONLINE (2008), http://www.tshaonline.org/handbook/online/articles/GG/qvg1.html.

[2] *See* Stephen L. Hardin, *Battle of Gonzales, in* THE HANDBOOK OF TEXAS ONLINE (2008), http://www.tshaonline.org/handbook/online/articles/GG/qeg3.html. It is widely believed that this skirmish was the first battle in the Texas Revolution. *See* Lindley, *supra* note 1.

[3] Lindley, *supra* note 1; *see also* Part V (Appendix) (digital reproduction of the 1835 flag).

[4] *See id.*

[5] The modern edition of the "Come and Take It" flag employed by guns-rights advocates depicts an assault rifle as opposed to the 1835 cannon. *See* Part V (Appendix); s*ee also* Todd J. Gilman, *Rejection of Ban Triggers New Debate*, DALLAS MORNING NEWS, June 27, 2008, at A1 (photograph accompanying article); David C. Treibs, Battle Flags, Etc.,

However, despite this often flagrant and hostile defiance of governmental regulation of gun ownership, the certainty of this conviction has been anything but settled. Though the text of the United States Constitution appears unequivocally to safeguard individualized gun rights, the country did not have a direct and comprehensive interpretation of the scope of the Second Amendment until 2008.[6] In *District of Columbia v. Heller*, the Supreme Court finally determined that the Second Amendment confers, at a minimum, an individual right to possess arms within one's home for the purpose of self-defense.[7]

Notwithstanding the historical importance and media attention surrounding this landmark constitutional decision, in many ways the public is left with even more questions than before. For instance: What types of firearms are protected by the Second Amendment?[8] What limitations does the Second Amendment impose on handgun possession and ownership?[9] What is the appropriate standard of review?[10]

These questions merely represent a nascent sampling of the significant constitutional inquiries raised by the *Heller* decision that will undoubtedly be raised in subsequent litigation. Perhaps the most significant question left open by the Court's decision concerns the effect of the Second Amendment on state and local gun control laws. While extensive federal legislation is devoted to firearm regulation, the vast majority of statutes affecting the

http://www.comeandtakeit.com/txhist.html#bmg (last visited Nov. 22, 2008) (illustration on website).

[6] U.S. CONST. amend. II ("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*.") (emphasis added); *see also* District of Columbia v. Heller, 128 S. Ct. 2783, 2816 (2008) (stating that it is not true that "'for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.' For most of our history the question did not present itself.").

[7] *See Heller*, 128 S. Ct. at 2821–22.

[8] *See id.* at 2816 (finding that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes) (clarifying the holding of *United States v. Miller*, 307 U.S. 174 (1939)).

[9] *See id.* at 2816–17 & n.26 (identifying a non-exhaustive list of presumptively lawful regulatory measures).

[10] *See id.* at 2816–18 & n.27 (stating that the District's ban would fail constitutional muster under any standard of scrutiny and that it would not be prudent to explicate a standard in this first in-depth examination of the Second Amendment).

everyday use and possession of handguns exist at the state and local level.[11] Therefore, the existence and enforcement of state and local statutes are the most vulnerable to attack in future constitutional challenges. While Justice Scalia acknowledged in the majority opinion that existing precedent unequivocally declared that the Second Amendment does not apply to the states, he also implicitly questioned the continued validity of that line of precedent.[12] Nevertheless, he specifically refused to address that issue because the question was not certified to the Court.[13] Thus, amidst the currently ambiguous and unsettled contours of the Second Amendment, legislators, law enforcement, attorneys, judges, and individual citizens are left questioning whether and how this decision will affect their individual liberty interests.

This Note addresses the extent to which incorporation of the Second Amendment could affect the myriad Texas statutes affecting handguns. Again, the Court did not directly address the issue of incorporation.[14] But, because so many handgun regulations are promulgated, enforced, and apply to individuals at the state and local level, a prospective analysis is not only highly relevant, but serves as a prelude to future constitutional challenges.[15] Although not a comprehensively exhaustive analysis, this Note specifically focuses on *Heller's* potential implications on the Texas handgun statutes that tend to affect the ordinary Texas citizen on a daily basis. Part II begins with a brief history of Second Amendment cases leading up to the *Heller*

[11] *Compare* Legal Community Against Violence—Federal Summary, http://www.lcav.org/content/Federallawsummary.asp (last visited Oct. 14, 2008), *with* Legal Community Against Violence—State Summary, http://www.lcav.org/content/state_local.asp (last visited Oct. 14, 2008) (clicking on an individual state within the map will bring up a copious list of all state firearm regulations).

[12] *Heller*, 128 S. Ct. at 2813 & n.23 (noting that in previous Second Amendment incorporation cases, all decided before the twentieth century, the Court held that the Second Amendment did not apply against the states, but also did not involve any Fourteenth Amendment inquiry). *See* Miller v. Texas, 153 U.S. 535, 538 (1894); Presser v. Illinois, 116 U.S. 252, 265 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875).

[13] The question presented, as framed by the Court in *Heller* was: "Whether the following provisions-D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?" District of Columbia v. Heller,128 S. Ct. 645, 645 (2007) (granting certiorari).

[14] *See Heller*, 128 S. Ct. at 2813 & n.23.

[15] *See supra* note 11 regarding the comparison between federal and state handgun legislation.

opinion and the Supreme Court's disposition in *District of Columbia v. Heller*. Part III is an exposition of existing Texas handgun statutes and a discussion of how they could be affected if the Court subsequently incorporates the Second Amendment against the states. Finally, Part IV concludes the Note.

II. HISTORY OF DISTRICT OF *COLUMBIA V. HELLER*

A. Pre-Heller Caselaw

The Second Amendment provides that "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."[16] Despite the *Heller* Court's declaration that the Second Amendment confers a fundamental individual liberty, the existing Supreme Court interpretive precedent did not anticipate the majority's conclusion.[17] Rather, the existing precedent is sparse and has been routinely characterized as opaque and inscrutable.[18]

The first case involving the Second Amendment was decided nearly ninety years after its ratification.[19] However, in *United States v. Cruickshank*, the Court did not provide any practical guidance regarding the scope or meaning of the Amendment.[20] Instead, the Court simply stated that the Second Amendment has no other effect than to restrict the powers of the national government.[21] Likewise, in *Presser v. Illinois* and *Miller v. Texas*, the Court reaffirmed that the Second Amendment is only a limitation upon the power of the national government and does not apply to the states.[22] However, the Court failed to expressly construe the substance or scope of the Amendment.[23] Rather, the only discussion relating to the Second Amendment in the earliest Supreme Court cases concerned whether

[16] U.S. CONST. amend II.

[17] *See Heller*, 128 S. Ct. at 2821–22.

[18] *See* Brian L. Frye, *The Peculiar Story of the* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48, 49–50 (2008).

[19] United States v. Cruikshank, 92 U.S. 542, 553 (1875).

[20] *See id.*

[21] *Id.*

[22] *See* 116 U.S. 252, 265 (1886); 153 U.S. 535, 538 (1894).

[23] *See generally Miller*, 153 U.S. 535; *Presser*, 116 U.S. 252. *See Cruikshank*, 92 U.S. at 553.

or not the Amendment is incorporated against the states.[24] Regarding incorporation, consistent with other cases construing the Bill of Rights during the late nineteenth century, the Court resisted applying the Bill of Rights against the states.[25]

The Court did not address the substance of the Second Amendment until 1939 in *United States v. Miller*.[26] In that case, even though the defendants failed to make an appearance at oral argument or submit a brief to the Court, Justice McReynolds held that the Second Amendment does not guarantee the right to possess a sawed-off shotgun in contravention of the National Firearms Act of 1934.[27]

However, the Court's opinion in *Miller* has been the origin of debate and confusion regarding interpretation of the Second Amendment. Courts and commentators have described its holding as conclusory and unintelligible.[28] Many commentators have limited the weight of the *Miller* decision to the facts presented.[29] Others have interpreted it as a mere limitation on the categories of weapons protected by the Second Amendment.[30] Thus, the *Miller* Court effectively failed to provide any substantive or interpretive guidance. Nevertheless, it stood as the preeminent Second Amendment authority for over sixty years until *Heller*.[31]

B. Post-Miller Interpretive Framework

Because of the historically meager and inarticulate Supreme Court guidance, courts' and commentators' theories regarding the proper

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[24] *See generally Miller*, 153 U.S. 535; *Presser*, 116 U.S. 252. *See Cruikshank*, 92 U.S. at 553.

[25] United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001).

[26] 307 U.S. 174, 178 (1939).

[27] *See id.*; *see also* Frye, *supra* note 18, at 66–67.

[28] *See* Frye, *supra* note 18, at 49–50; David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 665 (2000). Even the D.C. Circuit similarly commented that there is "no unequivocal precedent that dictates the outcome of this case" and that "*Miller* is most notable for what it omits." Parker v. District of Columbia, 478 F.3d 370, 391, 393 (D.C. Cir. 2007).

[29] *See Parker*, 478 F.3d at 393–94. Indeed, this is the position taken by the *Heller* majority. District of Columbia v. Heller, 128 S. Ct. 2783, 2814–17 (2008).

[30] *See* Frye, *supra* note 18, at 77–81.

[31] *See id.* at 49–50.

interpretation of the Second Amendment flourished. Essentially all cases involving firearm regulations since *Miller* have been analyzed pursuant to a framework embracing three distinct Second Amendment interpretations.[32]

The "states' rights" or "collective rights" model expressly rejects the notion of an individual right to bear arms; rather, it recognizes the right of states to arm a militia.[33] While there are slight doctrinal variations, the essence of this position is that the Second Amendment only confers to states the right to assemble a militia and does not protect the private possession of a weapon by an individual.[34] This view has been adopted by four federal circuits and numerous commentators.[35]

The "sophisticated collective rights" model recognizes a limited right for individuals to bear arms.[36] However under this perspective, an individual's right to bear arms can only be exercised by militia-members participating in organized militia activities.[37] Therefore, individuals are permitted to keep arms only to the extent that they are members of the militia, and even then, only when the government does not provide the requisite firearms necessary for that service.[38] Therefore, according to this model, the Second Amendment confers some species of an individual right, but it is extremely narrow.[39] This view has been adopted by five federal circuit courts, but has not been as widely adopted by scholars.[40]

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[32] *See, e.g.*, United States v. Emerson, 270 F.3d 203, 218 (5th Cir. 2001).

[33] *Id.*

[34] *Id.* at 218–19.

[35] *See* Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999); Hickman v. Block, 81 F.3d 98, 99 (9th Cir. 1996); Love v. Pepersack, 47 F.3d 120, 122 (4th Cir. 1995); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976). Note also that the District of Columbia, Illinois, Massachusetts, Minnesota, Nevada, Ohio, and Utah high courts have all adopted this model, as well as New York, North Carolina, and Texas appellate courts. *See Parker*, 478 F.3d at 380 & n.6. For a list of scholarly work adopting this model, see Silveira v. Lockyear, 328 F.3d 567, 583–85 (9th Cir. 2003) and *Emerson*, 270 F.3d at 218 n.9.

[36] *See Emerson*, 270 F.3d at 219.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See* United States v. Wright, 117 F.3d 1265, 1271–72 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977); Cases v. United States, 131 F.2d 916, 923 (1st Cir. 1942). Note however, that this interpretation apparently has not been as widely adopted

The final paradigm postulates that the Second Amendment confers an individual right to keep and bear arms; thus, subscribers deem the Second Amendment to confer an individual, fundamental right to keep and bear arms for private use irrespective of militia service.[41] While this approach has enjoyed increased support from commentators in recent years, in terms of judicial adoption, it is the least accepted model.[42] However, the Fifth Circuit was the trendsetter in adopting this model in *United States v. Emerson*.[43]

In *Emerson*, the defendant was subject to a temporary injunction arising out of a divorce in which his wife alleged that he posed a threat to her safety.[44] He was subsequently indicted for unlawfully possessing a Berretta pistol while subject to that temporary injunction and therefore violated 18 U.S.C. §922(g)(8).[45] At trial, the district court granted Emerson's motion to dismiss the indictment as a violation of his Second Amendment rights.[46] Though the Fifth Circuit ultimately reversed the district court's ruling, it nevertheless affirmatively held that the Second Amendment protects an individual right to keep and bear firearms.[47] Thus, although federal

by state courts or commentators. *See* Parker v. District of Columbia, 478 F.3d 370, 379 & n.3 (D.C. Cir. 2007); *Emerson*, 270 F.3d at 219–20 & n.11.

[41] *See Parker*, 478 F.3d at 379; *Emerson*, 270 F.3d at 220.

[42] *Emerson*, 270 F.3d at 220. However, despite an apparent reluctance at the federal level to adopt this model, it had been adopted by the Kentucky, Louisiana, Montana, Washington, and West Virginia high courts and by Colorado and Tennessee appellate courts. *Parker*, 478 F.3d at 380 & n.6. Similarly, it has enjoyed ever-increasing endorsement by scholars in recent decades. *See Emerson*, 270 F.3d at 220 & n.12; *see also* Printz v. United States 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) ("[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."). In fact, even the well-known constitutional scholar Laurence Tribe has adopted this model despite his earlier endorsement of the collective rights position. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640 (1989).

[43] 270 F.3d at 264–65. When it was decided in 2001, it was the only circuit to adopt this model. *See id.* at 220; *Parker*, 478 F.3d at 380.

[44] 270 F.3d at 210–11.

[45] *Id.* at 211–12. 18 U.S.C. § 922(g) generally provides that it is unlawful for any person who is subject to a court order that restrains such person from threatening an intimate partner of such person to transport or possess any firearm or ammunition in interstate commerce. *See* 18 U.S.C. § 922(g)(8) (2000).

[46] United States v. Emerson, 46 F. Supp. 2d 598, 614 (N.D. Tex. 1999).

[47] United States v. Emerson, 270 F.3d 203, 264–65 (5th Cir. 2001). The court stated:

judiciary's adoption of the individual rights model is of relatively recent origin, it has been the law of the Fifth Circuit and therefore the law in Texas since 2001.[48]

Thus, prior to Heller's challenge of the District's handgun restrictions, there had been no authoritative analysis of the Second Amendment by the Supreme Court. Furthermore, despite *Emerson*'s holding in the Fifth Circuit that the Second Amendment conferred an individual right (subject to limited and narrow exceptions), there was little federal authority in support of the individual rights interpretation.[49]

C. District of Columbia v. Heller

1. Background

Heller involved a challenge to the District of Columbia's handgun regulations brought by a special police officer who was denied a registration certificate for a handgun that he wished to keep at home.[50] Heller asserted that the combination of several D.C. regulations effectively created a wholesale prohibition on handgun possession within one's home.[51] The District generally prohibits the registration of handguns for applications made after 1976, yet concomitantly criminalizes the carrying of an unregistered firearm.[52] In addition, no person may carry a handgun in the District without a license.[53] However, the Chief of Police will only

> Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.

Id. at 261.

[48] Note however that the petition for certiorari was denied by the Supreme Court. Emerson v. United States, 536 U.S. 907, 907 (2002).

[49] *See* discussion *supra* note 42.

[50] District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008). Note that while the Respondent was permitted to carry a handgun while on duty at the Federal Judicial Center, the District effectively denied him the opportunity to possess a handgun in his home. *Id.*

[51] *See id.*

[52] *See* D.C. CODE ANN. §§ 7-2502.02(a)(4), § 7-2502.01(a) (LexisNexis 2001).

[53] *Id.* § 22-4504(a).

issue such licenses for one-year periods so long as certain criteria are met.[54] Furthermore, for those who lawfully own a firearm, subject to minor exceptions, those firearms must generally be unloaded and disassembled or bound by a trigger lock or similar device.[55] As a result, Heller challenged the regulations on Second Amendment grounds because the regulations functionally prohibited the carrying of a firearm within one's home without a license and even still, the trigger-lock requirement prohibited the use of functional firearms within the home.[56]

2. Intermediate Dispositions

The District Court dismissed Heller's complaint.[57] The court held that Heller's Second Amendment challenge must fail because the Second Amendment does not provide an individual right to bear arms separate and apart from militia use.[58] The court based its rationale on the overwhelming existing federal precedent and commentary that suggested that no such right exists.[59]

On appeal however, the D.C. Circuit reversed the District Court's decision.[60] Against the great weight of legal and academic authority,[61] the Court held that the Second Amendment protects an individual right to possess firearms and that any requirement that firearms kept within the

[54] *Id.* § 22-4506. Note that the D.C. licensure statute requires not only that the applicant be suitable, but requires the applicant to specifically allege that he has good reason to fear injury to his person or property and has other proper reason for carrying a pistol. *See* Jordan v. District of Columbia, 362 A.2d 114, 117 n.9 (D.C. 1976).

[55] *Heller*, 128 S. Ct. at 2788; *see also* D.C. CODE ANN. § 7-2507.02.

[56] *Heller*, 128 S. Ct. at 2788.

[57] Parker v. District of Columbia, 311 F. Supp. 2d 103, 109 (D.D.C. 2004). Note that the original suit was filed by Respondent Heller along with five additional residents of the District of Columbia. *Id.* at 103. Heller was the only plaintiff who applied for a permit to possess a gun in his home and had his application rejected. *Id.* The other five plaintiffs had not yet applied for a permit. *Id.* As a result, the other five plaintiffs were eventually dismissed by the Court of Appeals because the Court found that they lacked standing to assert their claim. Parker v. District of Columbia, 478 F.3d 370, 375–78 (D.C. Cir. 2007).

[58] *Parker*, 311 F. Supp. 2d at 109.

[59] *Id.* at 109–10.

[60] *Parker*, 478 F.3d at 401.

[61] *See* discussion *supra* Part II.B.

home remain non-functional, even when necessary in self-defense, violates that right.[62]

3. The Supreme Court Opinion

Nearly 220 years after ratification, the Supreme Court granted certiorari and finally set out to address and thoroughly interpret the Second Amendment.[63] Justice Scalia, writing for the five-person majority, declared that the Second Amendment protects an individual's right to possess a firearm unconnected with militia service and the right to use firearms for traditionally lawful purposes, including self-defense within the home.[64] The Court's lengthy textual scrutiny of the Amendment, combined with historical, drafting, and commentary analyses and clarification of existing Supreme Court precedent, came to the conclusion that the Second Amendment grants citizens the individual right to bear arms.[65] Therefore, the Court conclusively held that the District's functional ban on handgun possession in the home violated the Second Amendment.[66]

D. The Heller Aftermath

Despite the Court's largely unprecedented enumeration of this novel fundamental liberty and the subsequent fervent public interest, the *Heller* decision might be most important for the questions it failed to answer.[67]

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[62] *Parker*, 478 F.3d at 395, 399–401.

[63] While the Supreme Court most recently had the opportunity to define the scope of the Second Amendment in 1939 in *United States v. Miller*, commentators and courts have been stupefied by the ambiguity of that opinion. District of Columbia v. Heller, 128 S. Ct. 2783, 2815 n.24 (2008). Furthermore, to the extent that the *Miller* Court endorsed a particular interpretation, it made a decision without briefing or an appearance at oral argument by the defendant. *Id.* at 2814–15; *see also* Frye, *supra* note 18, at 65–67.

[64] *See Heller*, 128 S. Ct. at 2806, 2817–18, 2821–22.

[65] *See id.* at 2788–822.

[66] *Id.* at 2821–22.

[67] The Court concluded, after its thorough examination, that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment." *Id.* at 2816. Furthermore, the Court says that it should be unsurprising that this issue, significant as it may be, has remained unresolved for such a long period of time. *Id.* The interpretational delay associated with the Second Amendment is consistent with other Bill of Rights guarantees. *Id.* Thus, despite the flagrant void of interpretational elucidation, the Court maintains that the reason for such delay is because the question was never presented. *Id.* For a list of articles in the popular press about

For instance, the Court clarified its official interpretation of *Miller* by saying that Second Amendment protection of the right to bear arms only extends to certain types of weapons that were "in common use at the time."[68] Thus, according to the *Heller* majority, *Miller* did not interpret the scope of the Second Amendment; rather the Court explained that *Miller* represents an important and valid limitation on the newly defined Second Amendment liberty.[69] Nevertheless, the scope of the limitation on permissibly protected weapons remains uncertain. The Court interpreted *Miller* to say only that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[70] The Court said that "such a limitation is fairly supported by the historical tradition of prohibiting carrying of 'dangerous and unusual weapons,'" even if this means that the weapons that would be most effective for use in a militia are banned.[71] Thus, while we can assume that short-barreled shotguns and M-16 rifles would not be protected, a wide array of firearms may or may not fall within the parameters established by *Miller* as interpreted by this Court.[72]

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the case, see, for example, Robert Barnes, *Justices To Rule on D.C. Gun Ban*, WASH. POST, Nov. 21, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/20/AR2007112000893.html; Linda Greenhouse, *Supreme Court Agrees To Hear Gun Control Case*, N.Y. TIMES, Nov. 20, 2007, *available at* http://www.nytimes.com/2007/11/20/washington/20cnd-scotus.html; Linda Greenhouse, *Justices To Decide on Right To Keep Handgun*, N.Y. TIMES, Nov. 20, 2007, *available at* http://www.nytimes.com/2007/11/21/us/21scotus.html; *Guns and the Constitution: Is the Second Amendment an individual, or collective, right?* WALL ST. J., Nov. 24, 2007, *available at* http://opinionjournal.com/weekend/hottopic/?id=110010902; *Supreme Court Will Decide Challenge to District of Columbia Handgun Ban*, Nov. 21, 2007, http://www.foxnews.com/story/0,2933,312338,00.html.

[68] *Heller*, 128 S. Ct. at 2815, 2817.

[69] *Id.*

[70] *Id.* at 2815–16.

[71] *Id.* at 2817 (citing English v. State, 35 Tex. 473, 476 (1871)). The Court suggests that high-powered rifles would not be permissible because the Second Amendment contemplated a militia composed of capable citizens who would bring the sorts of lawful weapons that they possessed at home to militia duty. *Id.*

[72] Despite *Miller's* seemingly clear prohibition on individual possession of certain high-powered, military-grade weapons, many still contend that *Miller* stands for the proposition that the Second Amendment grants them a right to possess any weapon that has a military use. *See* Frye, *supra* note 18, at 78–82.

Furthermore, although the Court says that like most fundamental rights, the scope of the Second Amendment is not unlimited, it fails to specify and define those limitations.[73] While it fails to undertake a full exposition of limitations on the Second Amendment, it says that nothing should cast doubt on the longstanding prohibitions on: the possession of firearms by felons and the mentally ill, the carrying of firearms in "sensitive places" such as schools and government buildings, or regulations imposing conditions or qualifications on the commercial sale of arms.[74] However, the Court qualifies this statement by saying that these regulatory measures are only presumptively lawful and that this list is merely representative of, and not an exhaustive enumeration of, permissible regulations.[75] Thus, legislators and judges are left with little guidance as to how the exercise of this right can be constitutionally narrowed.

The Court also fails to identify specifically the standard under which regulations involving firearms run afoul of the right now guaranteed by the Second Amendment. Rather than specifically announcing a constitutional standard to serve as a guide for legislators to make policy decisions regarding handguns, the majority simply concludes that because the handgun is the quintessential self-defense weapon and its use is entrenched in our society, under any standard applied to enumerated constitutional rights, banning handguns would fail constitutional muster.[76] Dissenting, Justice Breyer proposed clarification of the scope of the right by applying an interest-balancing inquiry that asks "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[77] However, without specific guidance, the majority quickly rejects this proposed standard as unfounded and criticizes any standard that permits unelected judges to assess whether such a right is useful and justifiable.[78]

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[73] *See Heller*, 128 S. Ct. at 2816.

[74] *See id.* at 2816–17.

[75] *Id.* at 2817 n.26.

[76] *Id.* at 2817–18.

[77] *Id.* at 2852 (Breyer, J., dissenting).

[78] *Id.* at 2821. Despite the Court's acknowledgment that this topic is rife with polarized policy opinions, the Court discards the import of these considerations in light of their originalist interpretation. *Id.* at 2822. Yet, the author wonders how legislators are to address and utilize the "variety of tools [available] for combating [this] problem" completely divorced from consideration of those very policy issues. *Id.*

Yet perhaps the most vexing issue for legislators, law enforcement, attorneys, judges, and individuals is whether the Court's decision is binding on the states.[79] While the Court did not have to answer the specific incorporation question because the District of Columbia is not a state, and therefore the Bill of Rights applies to it directly,[80] the vast majority of firearm regulations exist at the state and local level.[81] In *Heller*, the majority notes that in *United States v. Cruikshank*, the nineteenth-century Court held that the Second Amendment did not apply to the states and that subsequent cases affirmed this holding.[82] However, all of these decisions came before the Court adopted the doctrine of selective incorporation whereby individual liberties guaranteed by the Bill of Rights were applied to the states through the Fourteenth Amendment; thus their continued precedential validity is suspect.[83] As a result, despite the majority

[79] This public interest is evidenced by the vast number of *amici* briefs filed by interested parties, particularly the briefs authored by states and those involved in the law enforcement process. *See generally* Brief for the State of Texas et al. as Amici Curiae in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No.07-290) (on behalf of thirty-one states); Brief for New York et al. as Amici Curiae in Support of Petitioners, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (07-290) on behalf of four states); Brief for Amicus Curiae the President Pro Tempore of the Senate of Pennsylvania, Joseph B. Scarnati, III, in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No.07-290); Brief of the City of Chicago and the Board of Education of the City of Chicago as Amici Curiae in Support of Petitioners, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No.07-290); Amici Curiae Brief of District Attorneys in Support of Petitioners, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No.07-290); Brief of Amici Curiae Major American Cities, et al., District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No.07-290); Brief of the International Law Enforcement Educators and Trainers Association (ILEETA), et al., as Amici Curiae in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No.07-290).

[80] *See* O'Donoghue v. United States, 289 U.S. 516, 541–42 (1933).

[81] While there are several comprehensive federal firearm regulation schemes, including The Protection of Lawful Commerce in Arms Act and Child Safety Lock Act of 2005 (beginning at 15 U.S.C. § 7901), the Gun Control Act of 1968 (beginning at 18 U.S.C. § 921 and as amended by the Brady Handgun Violence Prevention Act of 1993), and particularly the National Firearms Act of 1934 (beginning at 26 U.S.C. § 5801), among others, the vast majority of regulations involving possession, use, and sale of firearms exist at the state and local level. *See supra* note 11. While the federal government clearly possesses the power to preempt this field, it has acquiesced regulatory power to local constituencies. U.S. CONST. art. VI, § 2.

[82] *Heller*, 128 S. Ct. at 2813 n.23; 92 U.S. 542 (1876); *see also* Miller v. Texas, 153 U.S. 535, 538 (1894); Presser v. Illinois, 116 U.S. 252, 265 (1886).

[83] *See Heller*, 128 S. Ct. at 2813 n.23; *see also* Emerson v. United States, 270 F.3d 203, 221 n.13 (5th Cir. 2001).

appearing to signal that the individual right to possess a handgun in the home for self-defense is a fundamental right, they specifically chose not decide whether that right is applicable to the states; instead the Court opted to postpone addressing that and other issues only when they are specifically presented for argument.[84]

III. POTENTIAL CONSEQUENCES OF INCORPORATION ON TEXAS STATUTES

Given the fact that the Court specifically declined to address the issue of incorporation, analysis of the decision's effect on Texas law might be nothing more than mere speculation.[85] However, considering the likelihood that the Court will incorporate this newly-found individual right in light of modern incorporation analysis, and the probability that many handgun statutes will be challenged given the pro-firearm environment in Texas, forecasting *Heller's* effect on existing Texas handgun law is particularly relevant and timely for both the legislature, judges, attorneys, and the citizens of Texas.

Additionally, at the outset, note that the Court's decision in *Heller* is very narrow. The Court only held that an individual has the right to possess a handgun within one's home for the purpose of immediate self-defense.[86] Furthermore, the Court prospectively endorsed a tempered approach to expounding the full meaning and scope of the Second Amendment.[87] Therefore, extrapolating *Heller* to the myriad handgun issues that result from Texas' handgun legislation cannot be a precise exposition. But, the majority's opinion provided a sufficient foundation with which we can reason confidently which of the Texas provisions are permissive and which will likely succumb to constitutional challenge.

A. Texas Constitution

The Texas Constitution states that "every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the

[84] *See Heller*, 128 S. Ct. at 2821.

[85] *Id.*

[86] *Id.* at 2821–22.

[87] *See id.* at 2821.

Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."[88]

As a preliminary matter, the underlying premise of the Texas Constitution and the Court's reasoning in *Heller* appear to coincide: both permit the individual bearing of arms for defense.[89] Thus, the Texas Constitution explicitly guarantees what the United States Constitution has been interpreted to guarantee in *Heller*. Nevertheless, a key distinction between the text of each liberty exists. Texas explicitly permits the regulation of arms so long as those regulations are premised on a "view to prevent crime" while the Second Amendment facially reads that the right "shall not be infringed."[90]

The Texas Supreme Court has interpreted the Texas Constitutional provision to permit limitations on the bearing of arms in certain situations.[91] Under a comparative constitutional analysis, this guarantee in the Texas

[88] Tex. Const. art. I, § 23.

[89] It is explicit in the text of the Texas Constitution, and the *Heller* Court determined that the Second Amendment was originally understood to protect the right to self-defense. *Heller*, 128 S. Ct. at 2821–22.

[90] Tex. Const. art. I, § 23; U.S. CONST. amend. II.

[91] *See* State v. Duke, 42 Tex. 455, 458–59 (1874) (interpreting former Article I, § 13 of the Texas Constitution); English v. State, 35 Tex. 473, 478–81 (1872). Since this watershed pronouncement, many other Texas courts have had the opportunity to corroborate this interpretation. *See, e.g.*, Wilson v. State, 44 S.W.3d 602, 604–05 (Tex. App.—Fort worth 2001, pet. ref'd) (rejecting a constitutional challenge to a state law criminalizing the possession of a firearm by a felon); Ford v. State, 868 S.W.2d 875, 878 (Tex. App.—Houston [14th Dist.] 1993, writ ref'd) (rejecting a constitutional challenge to a statute prohibiting possession of short-barreled firearms); Masters v. State, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985) (rejecting a constitutional challenge to a statute prohibiting the unlawful carrying of a weapon); Shepperd v. State, 586 S.W.2d 500, 502 (Tex. Crim. App. 1979) (rejecting constitutional challenge to a law banning possession of a firearm by a felon); McGuire v. State, 537 S.W.2d 26, 28–29 (Tex. Crim. App. 1976) (rejecting constitutional challenge to a law banning possession of a firearm by a felon); Collins v. State, 501 S.W.2d 876, 877–78 (Tex. Crim. App. 1973) (rejecting a constitutional challenge to a statute prohibiting the unlawful possession of a pistol); Webb v. State, 439 S.W.2d 342, 344 (Tex. Crim. App. 1969) (rejecting a constitutional challenge to a law prohibiting the possession of a handgun after a felony conviction for a crime of violence); Morrison v. State, 339 S.W.2d 529, 532 (Tex. Crim. App. 1960) (rejecting a constitutional challenge to a statute banning the possession of a machine gun).

Constitution would only be invalid insofar as it affords lesser protection than the United States Constitution.[92]

Under the United States Constitution, *Heller* declared that the Second Amendment confers the individual right to keep a handgun in one's home for self-defense purposes.[93] However, despite the absolute language within the text of the Amendment, the Court also superficially acknowledged that the right is not absolute and that certain prohibitions, including: prohibiting possession by felons and the mentally ill, forbidding the carrying of firearms in "sensitive places" such as schools and government buildings, and imposing conditions on the commercial sales of handguns, are permissible limitations.[94] Thus, the prohibition of certain activities under the Texas Constitution, particularly those "having a view to prevent crime," is likely to be coextensive with the interpretation adopted by the Court in *Heller*. Therefore, it does not appear that Texas' interpretation of its constitutional guarantee would contravene the understanding of the Second Amendment as understood by *Heller*.

However, note that the *Heller* Court only listed a presumptively lawful list of regulations.[95] As the Court decides more nuanced cases regarding these issues, the limitations permitted by the Texas Constitution and caselaw naturally will have to conform to the limits deemed permissible by the Supreme Court in those situations. Additionally, while prevention of crime is likely an underlying rationale of many of the limitations espoused by the *Heller* Court, the Court could distinguish between those regulations enacted "with a view to prevent crime" and those premised on other legitimate policy justifications.[96]

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[92] States are free to read their own constitutions more broadly than the Supreme Court reads the Federal Constitution. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982). In fact, the Texas Supreme Court has determined that the Texas Bill of Rights affords greater protections than those guaranteed by the United States Constitution. LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986).

[93] *See Heller*, 128 S. Ct. at 2822.

[94] *See id.* at 2816–17 & n.26.

[95] *Id.*

[96] *See* discussion *supra* note 78. Despite this Court's unwillingness to consider the policy implications regarding their decision, that does not foreclose a future Court's support of persuasive policy arguments that are unrelated to the prevention of crime or self-defense. *See Heller*, 128 S. Ct. at 2822.

B. State Preemption

1. Municipalities

Texas statutorily has prevented municipal and local governments from enacting their own regulations regarding the "transfer, private ownership, keeping, transportation, licensing, or registration of firearms, ammunition, or firearm supplies."[97] This state-level preemption poses no relevant constitutional issue with respect to the Second Amendment. However, this preemptive statute also contains a variety of exceptions in which a municipality may be permitted to regulate firearms under another law.[98] Thus, a constitutional issue may arise to the extent that one of these exceptions applies.

The first exception actually empowers municipalities to "require residents or public employees to be armed for personal or national defense, law enforcement, or another lawful purpose."[99] While some may find this power troublesome from a policy perspective, rather than limiting an individual's right to possess a handgun, this provision, if utilized, actually

[97] Tex. Loc. Gov't Code Ann. § 229.001(a) (Vernon 2008). While there is no existing caselaw interpreting this provision or its predecessors, several Attorney General Opinions have been issued regarding specific applications not relevant to this discussion. *See* Op. Tex. Att'y Gen. Nos. DM-364 (1995), DM-71 (1991). Note however that a few states, such as Illinois, do not have state-level preemption and thus local governments have complete autonomy when crafting handgun regulations. *See* BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, 2007 BRADY CAMPAIGN STATE SCORECARD 4 (2008), http://www.stategunlaws.org/xshare/pdf/scorecard/2007/2007_state_scorecard.pdf. Nevertheless, many of these local ordinances already have been challenged by interest groups, namely the National Rifle Association. *See* Complaint for Declaratory Judgment and Injunctive Relief, Doe v. S.F. Hous. Auth., No. 08-CV-3112 (N.D. Cal. June 26, 2008), http://www.nraila.org/pdfs/sfha.pdf; Complaint for Declaratory Judgment and Injunctive Relief, *NRA v. City of Chicago*, No. 08-CV-3697 (N.D. Ill. June 27, 2008), http://www.nraila.org/media/PDFs/chicago.pdf; Complaint for Declaratory Judgment and Injunctive Relief, *NRA v. City of Evanston*, No. 08-CV-3693 (N.D. Ill. June 27, 2008), http://www.nraila.org/media/PDFs/evanston.pdf; Complaint for Declaratory Judgment and Injunctive Relief, *NRA v. Village of Oak Park*, No. 08-CV-3696 (N.D. Ill. June 27, 2008), http://www.nraila.org/media/PDFs/oakpark.pdf; Complaint for Declaratory Judgment and Injunctive Relief, *NRA v. Village of Morton Grove*, No. 08-CV-3694 (N.D. Ill. June 27, 2008), http://www.nraila.org/media/PDFs/morton.pdf. It is likely these controversies will commence the debate over incorporation.

[98] Tex. Loc. Gov't Code Ann. § 229.001(b) (Vernon 2008).

[99] *Id.* § 229.001(b)(1).

may promote the bearing of arms. Thus, in light of *Heller*, it seemingly would suffer no constitutional infirmity.

Texas also permits municipalities to "regulate the carrying of a firearm by a person other than a person licensed to carry a concealed handgun under [Texas law], at a: (A)public park; (B)public meeting of a municipality, county, or other governmental body; (C)political rally, parade or official political meeting; or (D)nonfirearms-related school, college, or professional athletic event."[100] While the *Heller* Court's decision only applies to the carrying of a handgun within one's home for self-defense, if the Court subsequently found that the Second Amendment also extends protection to the right of an individual to transport a handgun, seemingly these prohibitions also would be constitutional as falling within the "sensitive places" presumptively permissible limitation.[101] While the Court addressed this issue in dicta and only listed schools and government buildings as being "sensitive places," the permissible limitation power granted to municipalities by the state would seemingly all be reasonable restrictions.[102] Nevertheless, public parks and political rallies are not explicitly within the Court's presumptive list.[103] Additionally, distinguishing between government buildings and schools is important, as mentioned in the opinion, and publicly-held governmental meetings and school-sponsored athletic events.[104] Thus, while the regulatory permission granted by the Texas statute appears permissive, tracking the contours of the Court's permissible handgun location restrictions in future decisions is important.

The statute contains another exception that also conceivably may comply with the Court's understanding of the Second Amendment. This provision permits a municipality to regulate the use of firearms "in the case of an insurrection, riot, or natural disaster if the municipality finds the

[100] *Id.* § 229.001(b)(6). Note however, that this exception does not apply if the firearm is in or is carried to or from an area designated for use in a lawful hunting, fishing, or other sporting event and the firearm is of the type commonly used in the activity. *Id.* § 229.001(c). With respect to the regulation of concealed weapons in public parks, the Attorney General has declared that municipalities are prohibited from regulating the carrying of concealed handguns in city parks by persons who have been properly licensed. Op. Tex. Att'y Gen. No. DM-364 (1995).

[101] *See Heller*, 128 S. Ct. at 2817, 2822.

[102] *See id.* at 2816–17 & n.26.

[103] *See id.* at 2817.

[104] *Id.*; Tex. Loc. Gov't Code Ann. § 229.001(b)(6) (Vernon 2008).

regulations necessary to protect public health and safety."[105] While such a regulation is not implicated by the Court's list of presumptively lawful regulatory measures, considering that such an exception would be triggered only in a rare crisis situation and given the strong policy arguments favoring temporary, localized control, such a restriction appears to be permissible.[106]

However, the statute also contains a potentially troubling exception that permits municipalities to regulate the discharge of firearms within the limits of the municipality.[107] Overzealous exercise of this power by a municipality may raise constitutional issues analogous to those encountered with the District of Columbia statutes that functionally prohibited the use of a handgun within one's home for self-defense.[108] Without separately analyzing each individual municipality's handgun regulations, it will necessarily become very important for local government leaders to keep abreast of future Supreme Court cases involving the scope of permissive limitations to determine whether ordinances that regulate the use of firearms within the municipality are constitutional.[109]

[105] Tex. Loc. Gov't Code Ann. § 229.001(b)(4) (Vernon 2008).

[106] *Heller*, 128 S. Ct. at 2816–17, & n.26.

[107] Tex. Loc. Gov't Code Ann. § 229.001(b)(2) (Vernon 2008). *See also id.* § 342.003(a)(8) (Vernon 2005) (permitting the governing body of a municipality to prohibit or otherwise regulate the use of firearms and thus potentially giving municipalities the power to unconstitutionally regulate the use of firearms). Note also that the statute contains an additional exception the application of which does not appear relevant to this discussion. *Id.* § 229.001(b)(3) (Vernon 2008).

[108] For instance, D.C. Code § 7-2507.02, as challenged by respondent, functionally prohibited the use of a handgun within one's house even if used in self-defense. *Heller*, 128 S. Ct. at 2788. Now that the Court has determined that the use of a handgun within one's home for self-defense is a fundamental individual right, analogous municipal ordinances prohibiting or functionally prohibiting the discharge of a firearm within one's home inside the limits of a municipality would be presumptively unconstitutional. *Id.* at 2822. After *Heller* was decided, the District of Columbia subsequently passed an emergency amendment to comply with the Court's decision which narrowly permits the use of a handgun for self-defense. *See* D.C. Bill 17-866, Firearms Control Emergency Amendment Act of 2008, § 2(c), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/07/final-dc-gun-law-7-16-08.pdf.

[109] *See* discussion *supra* note 97 regarding existing challenges to city and municipal gun control ordinances initiated subsequent to *Heller*.

2. County Authority

Texas also has a parallel preemptive statute that applies at the county level. It prohibits a county's commissioner's court from regulating the transfer, ownership, possession, or transportation of firearms or to require the registration of firearms.[110] But, Texas also permits the commissioners courts, in the interest of public safety, to prohibit or otherwise regulate the discharge of firearms on lots that are "10 acres or smaller and are located in the unincorporated area of the county in a subdivision."[111] While such an exception is not per se unconstitutional under *Heller*, as with the exception allowing municipalities to regulate the discharge of handguns within the limits of the municipality, any regulation prohibiting the discharge of firearms may fail constitutional muster.[112]

The Local Government Code also permits the county-level prohibition of possessing a firearm in any county building that houses a justice court, county court, county court at law, or district court, or in any office used by these courts, without the court's written authorization or without complying with any written regulation of the court.[113] Again, though not central to its substantive holding, the Court's discussion of limitations would suggest that these restrictions are presumptively permissible.[114]

Additionally, the Attorney General has opined that because no state law limits a county's police power over its parks, governing bodies of counties may prohibit concealed handgun license holders from carrying concealed handguns in parks under county jurisdiction.[115] Again, while the Court made no express mention of parks in its discussion of permissive limitations, the possibility remains that the Court would eventually consider a park a "sensitive place" worthy of permitting handgun prohibitions.[116] It

[110] Tex. Loc. Gov't Code Ann. § 235.022 (Vernon 2005).

[111] *Id.*

[112] *See id.* § 229.001(b)(2) (Vernon 2008); *see also* discussion *supra* note 109.

[113] Tex. Loc. Gov't Code Ann. § 291.010(c) (Vernon 2005).

[114] District of Columbia v. Heller, 128 S. Ct. at 2816–17 & n. 26 (2008).

[115] *See* Op. Tex. Att'y Gen. DM-364 (1995). Note that the Attorney General's opinion was premised on an analysis of Tex. Local Gov't Code § 331.007 and did not include an analysis of § 235.023. *Id.* Note also that the Attorney General applied a similar analysis to a transit authority's power to prohibit concealed handgun licensees from carrying handguns on a vehicle used to provide public transportation. *Id.* For a discussion regarding *Heller's* application to concealed handgun licensing, see Part III.D.

[116] *Heller*, 128 S. Ct. at 2816–17 & n.26.

is also important to note that the Attorney General applied a similar analysis to a transit authority's power to prohibit concealed handgun licensees from carrying handguns on a vehicle used to provide public transportation.[117] Thus all things considered, the constitutionality of such a prohibition will likely depend on public safety and policy arguments which the Court expressly declined to address in its first true exposition of the right.[118] Therefore, while these restrictions are probably permissible since they apply to seemingly "sensitive places," any county wishing to exercise such power should proceed with caution and continue to seek guidance from the federal judiciary as to particularized applications.[119]

C. Prohibitions on Possession of Handguns

1. Unlawful Carrying of Weapons

Texas generally prohibits the intentional, knowing, or reckless carrying of a handgun, illegal knife, or club on or about a person if the person is not on his own premises or a premises under that person's control, or if the person is not inside or directly en route to a motor vehicle that is owned by the person or under the person's control.[120] Specifically with respect to motor vehicles, Texas prohibits the intentional, knowing, or reckless carrying of a handgun on or about the person in a motor vehicle in which the handgun is in plain view, or the person is engaged in criminal activity other than a Class C traffic misdemeanor, is prohibited by law from possessing a firearm, or is a member of a criminal street gang.[121] "Premises" is defined as real property or a recreational vehicle used as living quarters.[122]

As a general matter, the statute appears to comport wholly with the Court's decision in *Heller*. The statute exempts a person possessing a handgun on the person's own premise from its prohibitory scope.[123] This

[117] *See* Op. Tex. Att'y Gen. DM-364 (1995).

[118] *See Heller*, 128 S. Ct. at 2822.

[119] *See id.* at 2817.

[120] Tex. Penal Code Ann. § 46.02(a) (Vernon 2003 & Supp. 2008).

[121] *Id.* § 46.02(a–1).

[122] *Id.* § 46.02(a–2).

[123] *See id.* § 46.02(a)(1).

aligns directly with *Heller's* holding that a person has a fundamental right to possess a handgun in his or her home for purposes of self-defense.[124]

Additionally, the statute proceeds to except possession of a handgun within one's motor vehicle so long as such possession is lawful, concealed, and not part of a criminal scheme.[125] While this protection goes beyond the narrow right elucidated by *Heller*, it appears to align with the underpinning rationale of the Court's decision. The so-called Texas "traveling exception" historically has been premised on the right of individuals to protect themselves on public highways.[126] Thus, as a general matter, because the Second Amendment confers an individual right premised on self-defense, it seems plausible that permitting an individual to possess a handgun within his car seems reasonable.[127] However, it remains to be seen whether the existing restrictions on traveling with arms will remain constitutional. While rural expeditions may have posed imminent peril to early twentieth century Texan travelers, such risks have been diminished greatly in light of today's urban sprawl, modern communications, and highly trained law enforcement.[128] Therefore, even though the *Heller* Court was reluctant to consider the policy effects of their decision, the unique hazards posed by allowing the transportation of firearms undeniably have the potential to pose complex policy-based conflicts in the future.[129]

Moreover, Texas also has a wholesale exemption statute which excepts from the scope of Texas Penal Code section 46.02 possession of a handgun by a person on his own premise, engaging in hunting, fishing, or other sporting activity while on the immediate premise where the activity is

[124] *Heller*, 128 S. Ct. at 2822.

[125] *See* Tex. Penal Code Ann. § 46.02(a–1) (Vernon 2003 & Supp. 2008).

[126] Moosani v. State, 914 S.W.2d 569, 574 (Tex. Crim. App. 1995) (en banc). *See also* Christian v. State, 105 Tex. Crim. 562, 563, 289 S.W. 54, 54 (1926) (stating that the defendant "carried a pistol for protection from molestation on the road"); Matocha v. State, 890 S.W.2d 144, 146 n.3 (Tex. App.—Texarkana 1994, writ ref'd) (stating that the traveling exception was initiated because of "roving bands of renegades molesting travelers" on the road); Maxwell v. State, 38 Tex. 170, 171 (1873) (explaining that "the act prohibiting the carrying of deadly weapons was not intended to prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense"). *See generally* Jack Skaggs, *Have Gun, Will Travel: The Hopelessly Confusing Journey of the Traveling Exception to the Unlawful Carrying Weapons Statute*, 57 BAYLOR L. REV. 507 (2005).

[127] *See Heller*, 128 S. Ct. at 2822.

[128] *See* discussion *supra* note 126.

[129] *See Heller*, 128 S. Ct. at 2821–22.

conducted, or while en route to that activity, traveling, or carrying a valid concealed handgun issued pursuant to Subchapter H, Chapter 411 of the Texas Government Code.[130] Thus, evidencing the pro-handgun policy of the state, this progressive legislation secures the right to possess and carry a gun within one's home and therefore closely aligns with *Heller's* conclusion.

2. Possession Restrictions

Texas prohibits the intentional, knowing, or reckless possession of certain weapons, including firearms: (1) on the physical premises of a school or educational institution, any grounds or building on which an activity sponsored by a school or educational institution is being conducted, or in a passenger transportation vehicle of a school or educational institution, (2) the premises of a polling place on the day of an election or while early voting is in progress, (3) premises of any government court or offices utilized by the court, (4) the premises of a racetrack, (5) in the secured area of an airport, or (6) within 1,000 feet of premises the location of which is designated by the Texas Department of Criminal Justice as a place of execution on a day that a sentence of death is set to be imposed.[131]

Consistent with the Court's dicta, prohibiting a gun on the physical premises of a school or educational institution likely would be permissible

[130] Tex. Penal Code Ann. § 46.15(b) (Vernon 2003 & Supp. 2008). Note that as passed by the 2007 Texas Legislature, the amendments to § 46.15(b) were passed in three separate and slightly different forms. *See* Act of May 23, 2007, 80th Leg., R.S., ch. 647, § 1, sec. 46.15(b), 2007 Tex. Gen. Laws 1222, 1222; Act of May 23, 2007, 80th Leg., R.S., ch. 693, § 2, sec. 46.15(b), 2007 Tex. Gen. Laws 1318, 1318; Act of May 23, 2007, 80th Leg., R.S., ch. 1048, § 3, sec. 46.15(b), 2007 Tex. Gen. Laws 3628, 3628. Note also that the Court presumed that colonial Americans understood the Second Amendment to protect their ancient rights to have firearms for not just self-defense, but hunting as well. *See Heller*, 128 S. Ct. at 2801.

[131] *See* Tex. Penal Code Ann. § 46.03(a) (Vernon Supp. 2008). Note also that the term "firearm" as used in § 46.03 has been defined as "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use" and therefore is inclusive of handguns. *Id.* § 46.01(3); *see also* Freeman v. State, Nos. 05-01-01758-CR, 05-01-01759-CR, 2002 WL 31312010 at *2 (Tex. App.—Dallas Oct. 16, 2002, no pet.) (not designated for publication) (finding that a 9mm gun constituted a "firearm" within the definition of § 46.01(3)). Importantly, note that a valid concealed handgun license is not a defense to prosecution for a violation of § 46.03(a). Tex. Penal Code Ann. § 46.03(f) (Vernon Supp. 2008).

as those would appear to be "sensitive place[s]."[132] However, the Texas statute extends this prohibition to possession of a handgun on any grounds or building in which an activity sponsored by a school or educational institution is being conducted, or a passenger vehicle of a school or educational institution unless the school has otherwise granted for written authorization.[133] The limited Texas case law interpreting this provision has gone so far as to prohibit a teacher from possessing a pistol at his own home during a school-sponsored entertainment event involving his pupils despite his substantiated belief that he would be attacked during the event.[134] Certainly, given the *Heller* Court's concern for self-defense and its pronouncement of a fundamental right to possess a handgun in one's own home for self-defense, the continued validity of this application of the statute is doubtful.[135]

In addition, the intersection of *Heller* and the possession restrictions in Texas Penal Code section 46.03(a)(1) directly catapults college dormitories to the forefront of debate. While *Heller* deems it a fundamental right to possess a gun within one's home for self-defense, this statute presumptively prohibits the possession of a handgun on the premises of any college-owned dormitory.[136] While there may be some legally significant disputes as to whether *Heller* applies only to homes or to temporary student residences or whether the policy reasons for prohibiting firearms on campuses are justifiable, there may be some legally significant disputes as to whether

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[132] *See* Tex. Penal Code Ann. § 46.03(a)(1) (Vernon Supp. 2008); *Heller*, 128 S. Ct. at 2817.

[133] Tex. Penal Code Ann. § 46.03(a)(1) (Vernon Supp. 2008).

[134] *See* Alexander v. State, 11 S.W. 628, 629 (Tex. Civ. App. 1889) (interpreting what is now Texas Penal Code § 46.03(a)(1)).

[135] *Heller*, 128 S. Ct. at 2822.

[136] *Id.*; Tex. Penal Code Ann. § 46.03(a)(1) (Vernon Supp. 2008). Possession of a weapon currently is prohibited in dormitories on most Texas university campuses. *See, e.g.*, UNIV. OF TEX. DIV. OF HOUSING AND FOOD SERV., RESIDENCE HALLS HANDBOOK (2008), *available at* http://www.utexas.edu/student/housing/index.php?site=2&scode=0&id=337; BAYLOR UNIV. CAMPUS LIVING & LEARNING, GUIDE TO COMMUNITY LIVING (2008), *available at* http://www.baylor.edu/cll/index.php?id=47813; SMU RESIDENCE LIFE & STUDENT LIVING, RESIDENT EDITION 2008–09 STUDENT HANDBOOK 209 (2008), *available at* http://smu.edu/housing/commstand.asp#Weapons; TEX. TECH UNIV. DIV. OF STUDENT AFFAIRS, UNIV. STUDENT HOUSING, HOSPITALITY SERVS. 32 (2008), *available at* http://www.depts.ttu.edu/housing/resources/contract-guide_08.pdf; TEX. A&M UNIV. DEP'T OF RESIDENCE LIFE, RESIDENCE HALL HANDBOOK 2008–09 32 (2008), *available at* http://reslife.tamu.edu/download/publications/handbook.pdf.

Heller applies only to homes or to temporary student residences or whether the policy reasons for prohibiting firearms on campuses are justifiable, the Court's decision has inevitably opened the door to attack this statute. Thus, even though the majority of applications of this statute would be constitutional, many educational institutions may be left with the difficult responsibility, and perhaps liability, of balancing justifiable policy decisions regarding student safety and an individual's right to possess a handgun for self-defense until there is further clarification on this issue.

Likewise, the statute's prohibition of firearms on the premises of any government court or office utilized by the court would also appear to fall within the ambit of presumptively permissible possession limitations per *Heller*.[137] In fact, a legitimate reading of *Heller* would suggest that this limitation could be extended beyond the doors of courts to any government building.[138]

However, the other statutory possessory prohibitions, such as on the premises of a polling place, racetrack, secured area of an airport, or within 1000 feet of the location of a place of execution, are not covered by the Court's cursory list.[139] While it is fairly safe to say that these are all "sensitive places" worthy of additional protection, a conclusive understanding is only possible after a case-by-case review. However, given the fact that the Court's list was unequivocally not exhaustive, it doesn't foreclose the inclusion of other statutory possession prohibitions at locations deemed to be "sensitive."[140]

Finally, there are three additional possession restrictions of import. First, the statute imposes a Class A misdemeanor for a concealed handgun licensee to intentionally fail to conceal the handgun.[141] While the constitutionality of concealed handgun licensing was certainly not addressed in *Heller*, even assuming that the right to carry a concealed handgun is fundamental, regardless of the level of scrutiny applied, it would not appear as though such a restriction would be constitutionally unreasonable due to the compelling interest in public safety.[142] Secondly,

[137] Tex. Penal Code Ann. § 46.03(a)(3); *Heller*, 128 S. Ct. at 2816–17 & n.26.

[138] *Heller*, 128 S. Ct. at 2817.

[139] Tex. Penal Code Ann. § 46.03(a)(2), (4)–(6); *Heller*, 128 S. Ct. at 2816–17 & n.26.

[140] *Heller*, 128 S. Ct. at 2817 n.26.

[141] Tex. Penal Code Ann. § 46.035(a).

[142] *See* discussion *infra* Part III.D; *see also Heller*, 128 S. Ct. at 2817–18.

Texas prohibits the carrying of a handgun, concealed or not, if the license holder is intoxicated.[143] Though it would probably be unreasonable to analogize an intoxicated person to a mentally ill person (identified by the Court to have a diminished right to possess a firearm), the impaired cognitive state of an inebriated individual conjures the same concerns for public safety and thus would presumably be constitutional.[144] Finally, Texas criminalizes the intentional or knowing display of a firearm in a public place in a manner calculated to alarm.[145] While this is not a possession restriction per se, it represents a limitation on what can be done when a firearm is in one's possession. Again, while the Court did not address possession of handguns in public places, it did endorse, in dicta, forbidding the carrying of firearms in sensitive places.[146] Even if a "public place," as used in the Texas statute, is not considered a "sensitive place" by the Court, it would appear presumptively reasonable that the legislature could prevent subjugating innocent individuals in a public place from undue and intentionally-induced fear caused by a person openly displaying a firearm.[147] Thus, it would seem that all of these regulations would pass constitutional muster.

3. Location Restrictions

Heller only directly addressed the possession of a firearm within an individual's home when used for self-defense.[148] However, the Court, without examination, presumptively approved of regulations forbidding the carrying of firearms in sensitive places, such as schools or government buildings.[149]

Texas absolutely prohibits a concealed handgun licensee from intentionally, knowingly, or recklessly carrying a handgun on or about his or her person on the premises of: (1) a business that has a liquor license if the business derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption, (2) on the

[143] Tex. Penal Code Ann. § 46.035(d).

[144] *Heller*, 128 S. Ct. at 2816–17.

[145] Tex. Penal Code Ann. § 42.01(a)(8).

[146] *Heller*, 128 S. Ct. at 2816–17.

[147] Tex. Penal Code Ann. § 42.01(a)(8).

[148] *Heller*, 128 S. Ct. at 2821–22.

[149] *Id.* at 2816–17. Note, however, that this list is not exhaustive. *Id.* at 2817 n.26.

premises where a high school, collegiate, or professional sporting event or interscholastic event is taking place, or (3) on the premises of a correctional facility.[150] Even if statutory notice is not given pursuant to Texas Penal Code section 30.06, Penal Code section 46.035 prohibits the possession of a handgun by a license holder on the premises of: (1) a nursing home or hospital, (2) an amusement park, (3) on the premise of a church, synagogue, or other established place of religious worship, or (4) at any meeting of a governmental entity.[151]

It is implicit from the Court's "sensitive places" dicta that preservation of public safety is sufficiently compelling to prohibit weapons at certain public places because of the attendant degree of risk to the public.[152] Many of the places where weapons are statutorily prohibited by the aforementioned statutes may be derived from such legitimate policy concerns. Thus, they may be "sensitive places" worthy of constitutional exception.[153] However, the constitutionality of each specific regulation within the statutes will necessarily turn on the Court's future individualized interpretation of "sensitive places."[154]

However, it is also important to distinguish the Court's generalized and broad dicta from the specifics of the Texas location statutes. While the Court would seemingly acquiesce to prohibitions at schools in general, the Texas statute prohibits possession at high school and college sporting events.[155] While we might assume that "schools," as used by the Court, might include colleges and universities due to the many high-profile and deadly attacks at college campuses, it is not clear whether that protection would extend to institutions of higher learning or whether the term

[150] Tex. Penal Code Ann. § 46.035(b)(1)–(3), (i).

[151] *Id.* §§ 46.035(b)(4)–(6),(c), (i), 30.06(b), (c)(3).

[152] *Heller*, 128 S. Ct. at 2816–17; *see also* discussion *supra* Part III.C.2.

[153] *Heller*, 128 S. Ct. at 2816–17.

[154] *Id.*

[155] *Id.*; Tex. Penal Code Ann. § 46.035(b)(2). However, note that at least one Texas school district has recently adopted a policy that permits teachers to carry concealed weapons on campus. *See* Angela K. Brown, *Texas Students Pack Bookbags; Teachers Pack Heat*, FORT WORTH STAR TELEGRAM, Aug. 26, 2008, at *1, *available at* http://abcnews.go.com/US/wireStory?id=5654373. The school district's guidelines will undoubtedly spur additional public debate and constitutional challenges.

"schools" would include school-sponsored sporting events.[156] Additionally, though the Court suggests that prohibitions on the possession of firearms at government buildings are permissible, that is not necessarily the same as possession of a firearm at a government meeting.[157] Therefore, although it seems reasonable to assume that Texas' location restrictions are presumptively constitutional based on a preliminary reading of *Heller's* dicta, it is also very important to recognize that the presumptively lawful regulatory measures listed in *Heller* were not critically analyzed by the Court and that the proscriptions listed in the Texas statutes are far more particularized.[158] Thus, it is important to continue to be attentive to the constitutionally significant nuances of future decisions regarding the presumptively lawful regulations of "sensitive places."

Finally, Texas also permits public or private employers to enjoin licensed concealed handgun holders from possession of firearms on the premises of their business so long as there is sufficient statutorily prescribed notice.[159] While possession at "sensitive places" of employment would presumptively be prohibited by the Court, as that term will be defined in the future, the Second Amendment's status as an individual right may again call into question the validity of this blanket right to enjoin.[160] Just as employees do not leave their other constitutional rights at their employer's front door, subject to further clarification by the Court, they would not appear to lose their individual right to possess a handgun while at work if the Court were to extend the Second Amendment's scope beyond the walls of their home. Again, all we can glean with certainty from *Heller* is that an individual has a right to possess a handgun within his home for the purpose of self-defense.[161] However, given the individual character of

[156] *Heller*, 128 S. Ct. at 2816–17. In light of the high-profile and tragic shootings at college campuses, including at the University of Texas in 1966 and more recently at Virginia Tech University in 2007, inclusion of public colleges would appear justifiable. However, as the Court continues to define the scope of the right bestowed by the Second Amendment, the intricacies of the Texas statute may take it out of its purview and thus be unconstitutional. *See also* discussion *supra* Part III.C.2.

[157] *Heller*, 128 S. Ct. at 2816–17.

[158] *Id.*

[159] Tex. Gov't Code Ann. § 411.203 (Vernon 2003); 37 Tex. Admin. Code § 6.5 (2008) (Tex. Dep't of Pub. Safety, License To Carry Handguns).

[160] *Heller*, 128 S. Ct. at 2816–17.

[161] *Id.* at 2821–22.

the right, like other fundamental liberties, it is unlikely that it will be so narrowly constrained in the future.[162]

Nonetheless, it is important to take notice of a few potential constitutional issues regarding these regulations. First, the statute provides a defense against prosecution if the actor, at the time of the offense, displayed the handgun under circumstances in which the actor would have been justified in the use of deadly force pursuant to Texas Penal Code Chapter 9.[163] While a thorough analysis of the criminal justification defense is beyond the scope of this Note, such a defense would seem not only permissive, but justified by the Court's decision. In fact, the statute would appear validated since the essence of the Court's opinion turned on the need for self-defense.[164] However, wholesale adoption of this defense as constitutional is currently premature since the Court has not extended this protection beyond one's home.[165]

Secondly, it is important to note that concealed handgun licensees can be liable for criminal trespass if they carry a handgun on the property of another without effective consent or failed to leave after receiving notice that possession of a handgun on that property without notice is prohibited.[166] The statute then specifically defines "written notice."[167] Again, in order to assess the constitutionality of this provision, it will be important to determine whether the Court extends protection beyond the home.[168] But assuming that it does, the constitutionality of this regulation will necessarily entail a balancing of one's right to exercise a fundamental liberty to carry a handgun and a property owner's right to exercise autonomy over his land and prevent others from exercising that right for their own safety.[169]

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[162] Note again that the Court's opinion did not purport to be an exhaustive analysis of all of the issues inherent to their interpretation. *Id.* at 2821. It is almost certain that cases will continue to come to the Court as they define the limits of this right. *See id.*

[163] Tex. Penal Code Ann. § 46.035(h) (Vernon Supp. 2008).

[164] *See Heller*, 128 S. Ct. at 2801, 2821–22.

[165] *Id.* at 2821–22.

[166] Tex. Penal Code Ann. § 30.06(a).

[167] *Id.* § 30.06(c)(3).

[168] *See Heller*, 128 S. Ct. at 2821–22.

[169] Note also that the Texas Legislature has provided for a plethora of other location limitations pertinent to specific environments. *See, e.g.*, Tex. Penal Code Ann. § 38.11(d)(2) (secure correctional facility or detention facility); Tex. Health & Safety Code Ann. § 247.065

D. Concealed Handgun Licensing

1. Prefatory Caveat

Perhaps the most prominent Texas firearm regulation is the concealed handgun licensing requirement. Given the proliferation of concealed handgun licensing requirements in Texas and other states, the participation of ardent handgun rights supporters in public debate, and the fact that the Court has declared the Second Amendment to confer an individual right, the parameters of which they specifically refused to clarify, it is inevitable that such licensing requirements will be challenged.[170] Thus, an analysis of Texas' concealed handgun licensing statute is prudent.

However, to properly analyze these regulations in light of the Court's decision, it is imperative to make certain threshold observations. First, *Heller* only concerned the narrow issue of possession of a handgun within one's home for self-defense; it did not concern one's right to carry a handgun outside of the home.[171] Thus, analysis of a regulatory scheme permitting the transportation of handguns necessarily involves a liberal extension of the Court's opinion. Second, it is important to note that the District of Columbia's licensing regulations are fundamentally different from Texas' licensing statutes.[172] Heller challenged the District's licensing requirements insofar as they prohibited the carrying of a firearm within the home without a license.[173] However, the Texas statutes do not prohibit

(Vernon 2001) (assisted living facilities); Tex. Alco. Bev. Code Ann. §§ 11.61(b), 61.71(f) (Vernon Supp. 2008) (permitting revocation of liquor license); Tex. Parks & Wild. Code Ann. §§ 62.081, 82.712, 82.722, 82.732, 82.762, 283.022 (Vernon 2002) (certain state-owned lands); 25 Tex. Admin. Code § 4048.505 (2008) (Dep't of Health Servs., Standard of Care) (chemical dependency treatment services facilities); 40 Tex. Admin. Code § 746.3707 (2008) (Dep't of Fam. & Protective Servs., Minimum Standards for Child Care Centers) (child care centers).

[170] *Heller*, 128 S. Ct. at 2821–22. Note that if the Supreme Court were to declare that the right to possess a concealed handgun is a fundamental right, it would represent a radical departure from Texas' understanding of that statutorily-created right. Texas courts have deemed the ability to receive a permit to carry a concealed weapon to be a privilege, not a right. *See* Tex. Dep't of Pub. Safety v. Tune, 977 S.W.2d 650, 653 (Tex. App.—Fort Worth 1998, pet. granted), *aff'd on other grounds*, Tune v. Tex. Dep't of Pub. Safety, 23 S.W.3d 358 (Tex. 2000) (analogizing a concealed handgun permit to that of a liquor permit or driver's license).

[171] *Heller*, 128 S. Ct. at 2821–22.

[172] *Compare* D.C. CODE § 22-4506 (2001) ("may" issue statute), *with* Tex. Gov't Code Ann. § 411.177 (Vernon 2005) ("shall" issue statute); *see* discussion *infra* Part III.D.2.

[173] *Heller*, 128 S. Ct. at 2788; *see* D.C. CODE § 22-4504(a) (2001).

unlicensed possession of a gun within one's home.[174] Finally, in *Heller*, the Court assumed, based on Heller's concession at oral argument, that if they invalidated the ban such that Heller would be permitted to register his handgun, he would be able obtain a license and that the District's licensing provisions are permissible.[175] Therefore, the Court did not pass on: (1) whether the Second Amendment protection extends to possession of a gun outside the home, (2) whether licensing is permissible, and if so, (3) what constitutes a constitutional licensing requirement.[176]

2. The Texas Concealed Handgun Licensing Statute

Texas has adopted a "shall issue" licensing requirement; that is law enforcement officials must issue a concealed handgun license if the applicant meets certain qualifications.[177] Contrasted with the subjective "may issue" licensing statute adopted by the District of Columbia and its relatively simple licensing requirements,[178] Texas has a relatively thorough list of requirements that must be fulfilled before a license can be issued.[179] The constitutionality of each regulation is analyzed separately below.

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[174] *See* Tex. Penal Code Ann. §§ 46.03–.035.

[175] *Heller*, 128 S. Ct. at 2819. Note however, that the Court did not specifically hold that the District of Columbia's licensing requirements were constitutional. Instead, they relied on the District's assertion that he could obtain a license, assuming that he is not otherwise disqualified, to which Heller conceded that the licensing provisions do not pose a constitutional problem as long as they are not applied in an arbitrary or capricious manner. *Id.* The Court, therefore, did not pass on whether the Second Amendment protection extends to possession of a gun outside the home, whether licensing is permissible, and if so, what constitutes a constitutional licensing requirement.

[176] *See id.*

[177] Tex. Gov't Code Ann. § 411.177 (Vernon 2005).

[178] The District permits the Chief of Police to issue a one-year license to carry a concealed pistol so long as the applicant: (1) meets certain residency requirements, (2) has good reason to fear injury to his or her person or property or any other proper reason for carrying a pistol, and (3) that he or she is a suitable person to be so licensed. D.C. CODE § 22-4506 (2001). The District has strictly required applicants to specifically allege the basis for their fear of injury so that the Chief of Police can make an informed decision regarding whether a license may be issued. *See* Jordan v. District of Columbia, 362 A.2d 114, 116 (D.C. 1976). The *Heller* Court superficially interpreted the third requirement to mean that the applicant cannot qualify if he is a felon or insane consistent with their presumptively permissible limitations. *Heller*, 128 S. Ct. at 2816–17.

[179] Keep in mind the distinction between the requirements to obtain a license, as in Tex. Gov't Code § 411.172 and D.C. CODE § 22-4506, and the permissible locations where a permitee can possess a concealed handgun, as in Tex. Penal Code Ann. §§ 46.03–.035 and D.C. CODE § 22-

3. Presumptively Constitutional Regulations

Among the requirements that would appear to be presumptively reasonable based on the *Heller* majority's opinion would be that the applicant: (1) has not been convicted of a felony,[180] (2) has not been charged with a felony under information or indictment,[181] (3) is not a fugitive from justice for a felony,[182] (4) has not, within the ten years preceding the date of application, been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony,[183] and (5) is not incapable of exercising sound judgment with respect to the proper use and storage of a handgun.[184] All of these prerequisites are reasonably within the domain of the presumptively constitutional limitations endorsed by the *Heller* Court.[185]

4504. Both permit issuance of a license, either under a "shall issue" or "may issue" scheme, but Texas only places restrictions on concealed handgun possession outside the home. Tex. Penal Code Ann. §§ 46.03–.035 (Vernon Supp. 2008). The D.C. licensing provision, as construed by the Court, did not even permit the carrying of a handgun within one's home without a license. *Heller*, 128 S. Ct. at 2788; D.C. CODE § 22-4504.

[180] Tex. Gov't Code Ann. § 411.172(a)(3).

[181] *Id.* § 411.172(a)(4).

[182] *Id.* § 411.172(a)(5).

[183] *Id.* § 411.172(a)(14).

[184] *Id.* § 411.172(a)(7). The statute goes on to define a person incapable of exercising sound judgment with respect to the proper use and storage of a handgun as (1) having been diagnosed by a licensed physician as suffering from a psychiatric disorder of condition that causes to is likely to cause substantial impairment in judgment, mood, perception, impulse control, or intellectual ability, (2) suffering from a psychiatric disorder described in Subdivision (1) that is in remission but is reasonably likely to redevelop at a future time or required continuous medical treatment to avoid redevelopment, (3) has been diagnosed by a licensed physician or declared by a court to be incompetent to manage the person's own affairs, or (4) has entered in a criminal proceeding a plea of not guilty by reason of insanity. *Id.* § 411.172(d). This is evidenced by (1) involuntary psychiatric hospitalization in the preceding five-year period, (2) psychiatric hospitalization in the preceding two-year period, (3) in-patient or residential substance abuse treatment in the preceding five-year period, (4) diagnosis in the preceding five-year period by a licensed physician that the person is dependent on alcohol, a controlled substance, or a similar substance, or diagnosis at any time by a licensed physician that the person suffers or has suffered from a psychiatric disorder or condition consisting of or relating to schizophrenia or delusional disorder, bipolar disorder, chronic dementia, whether caused by illness, brain defect, or brain injury, dissociative identity disorder, or intermittent explosive disorder. *Id.* § 411.172(e).

[185] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 & n.26 (2008) (permitting the prohibition of possession of firearms to felons and the mentally ill).

4. Facially Neutral and Therefore Apparently Constitutional Regulations

While perhaps not exactly falling within the imprecise limitations proffered by the Court, it would appear likely that requirements such as not being a chemically dependent person[186] or that the applicant not make any material misrepresentation or fail to disclose any material fact in the license application[187] would also be justifiable regulations. Furthermore, facially neutral residency requirements that permit Texas and non-Texan residents to register their guns in the state would also likely be constitutional.[188] Because there is nothing to indicate that those mandatory affirmations are substantially burdensome and considering a handgun's potential for violent use, the statutory authorization of data compilation for law enforcement and public protection purposes seems justifiable.

Texas also qualifies licensure on an applicant's not currently being subject to a court's protective order or a restraining order affecting the spousal relationship, other than a restraining order solely affecting property interests.[189] While the Court did not even implicitly address such a legislative provision, it is quite possible that such a provision would withstand challenge because of the tangible risk of an attack by a person that a court has deemed to be a physical threat, especially if that person is subsequently issued a permit for a concealed handgun.[190]

In addition, Texas requires that an applicant: (1) not be charged with the commission of a Class A or Class B misdemeanor or an offense under Texas Penal Code section 42.01 for disorderly conduct,[191] (2) not be a

[186] Tex. Gov't Code Ann. § 411.172(a)(6), (e)(4).

[187] *Id.* § 411.172(a)(15).

[188] *Id.* §§ 411.172(a)(1), 411.173(a).

[189] *Id.* § 411.172(a)(13).

[190] Note also the analogous federal provision in 18 U.S.C. § 922(g)(8) (2006). The Fifth Circuit found that Texas' procedures for issuing protective orders arising out of divorce are sufficiently particularized so as to not contravene the Second Amendment. *See* Emerson v. United States, 270 F.3d 203, 261–63 (5th Cir. 2001); *see also* discussion *supra* Part II.B.

[191] Tex. Gov't. Code Ann. § 411.172(a)(4). Note that while some offenses under Texas Penal Code § 42.01 involving firearms have a rational nexus to preventing handgun-related violence, other offenses involving disorderly conduct may pose difficult constitutional questions as they are not per se related to a justifiable reason for prohibiting the possession of a handgun. *Compare* Tex. Penal Code Ann. § 42.01(a)(7), (8), (9) (Vernon Supp. 2008), *with* Tex. Penal Code Ann. § 42.01(a)(3), (10), (11).

fugitive from justice for a Class A or Class B misdemeanor,[192] (3) not be, in the five years preceding the date of application, convicted of a Class A or Class B misdemeanor or an offense under Texas Penal Code section 42.01 for disorderly conduct,[193] and (4) not be an individual who has been convicted two times within the ten-year period preceding the date on which the person applies for a license of an offense of the grade of Class B misdemeanor or greater that involves the use of alcohol or a controlled substances as a statutory element of the offense.[194] While the Court appears to endorse prohibitions on felons, it is unclear whether it would approve of prohibitions for those that have committed particularly heinous misdemeanors.[195] With respect to these specific exceptions, each appears to bear a rational relationship to the goal of preventing handgun violence. Furthermore, the Court specifically said that its cursory analysis of permissive regulations is not exhaustive.[196] However, it remains unclear whether these specific bars to issuance of a license will pass constitutional muster.

Finally, with respect to the facially benign licensing requirements, there are four fairly simple yet potentially troublesome requirements. First, the Government Code requires an applicant to be at least twenty-one years of age[197] unless the applicant is at least eighteen years old and meets certain other requirements.[198] While there are likely persuasive, objective reasons for prohibiting persons under eighteen or twenty-one from possessing a concealed handgun, it remains questionable whether such an arbitrary prerequisite would withstand constitutional scrutiny. The *Heller* majority was unwavering in their pronouncement that the Second Amendment confers an individual, fundamental right and that such a pronouncement will necessarily take certain, and even well-supported, "policy choices off

[192] Tex. Gov't. Code Ann. § 411.172(a)(5).

[193] *Id.* § 411.172(a)(8); *see also* discussion *supra* note 191.

[194] Tex. Gov't. Code Ann § 411.172(c).

[195] District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 & n.26 (2008).

[196] *Id.* at 2817.

[197] Tex. Gov't Code Ann. § 411.172(a)(2).

[198] *Id.* § 411.172(g). The first two exceptions concern an individual who is or was honorably discharged from the military. *Id.* If an applicant meets all of the requirements of section 411.172(a), except for the minimum age requirement required by federal law to purchase a handgun, then they will be eligible to apply for a concealed handgun license. *Id.* § 411.172(g)(3).

the table."[199] Thus, if such age restrictions are challenged, despite the fact that there may be substantiated policy justifications for such a restriction, the Court's position on that issue is indeterminable.[200]

Second, the Texas Government Code requirement that a concealed license holder be fully qualified to purchase a handgun under applicable state and federal law is not undeniably constitutional without an analysis of those specific state and federal laws.[201] For a more detailed discussion of federal and state qualifications with respect to licensing capacity and background checks, see Part III.E.1, *infra*.

Third, the state also requires that an applicant obtain a handgun proficiency certificate, which can only be obtained after completing a handgun proficiency course consisting of classroom and range aptitude testing.[202] Again, such a requirement would appear to be permissible if not encouraged because of the substantial risk posed to the public in allowing persons to freely transport concealed handguns. However, no other fundamental liberty prefaces the exercise of that right on completion of a mandatory training course and determination of proficiency. While a state may impose a marriage licensing requirement, so long as it is not a direct and substantial barrier to exercising one's right to marry, it presumptively cannot force couples to seek counseling and be adjudged fit to marry before permitting exercise of that right.[203] Thus, again, despite the Court's

[199] *Heller*, 128 S. Ct. at 2822.

[200] Note however that with respect to the fundamental right to marry, the Supreme Court has held that impediments that are both direct and substantial will be subject to strict scrutiny. Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978). However, the Court has failed to answer whether or not minimum ages required to obtain a certificate to marry are constitutional. Thus, analogizing to this situation, it is possible that the Court would have to address the issue of age directly before truly clarifying this issue even if a "direct and substantial" test is subsequently announced. While a minimum ten hour course may directly and substantially interfere with the right to apply for a license, the reasons for mandating such training would seem paramount and therefore permissible. Tex. Gov't Code Ann. § 411.188.

[201] Tex. Gov't Code Ann. § 411.172(a)(9).

[202] *Id.* §§ 411.174(a)(7), .188, .189.

[203] *See Zablocki*, 434 U.S. at 386; Tex. Fam. Code Ann. § 2.013(a) (Vernon Supp. 2008) ("Each person applying for a marriage license is *encouraged* to attend a premarital education course of at least four hours during the year preceding the date of the application for the license.") (emphasis added). Note also that in Texas, obtaining a marriage license is not a compulsory requirement to exercising one's right to marry. *See* McClendon v. Brown, 63 S.W.2d 746, 749

apparent unwillingness to consider the policy implications of their decision, if such a challenge were raised, it would undoubtedly lead to a fervent public debate.[204]

Finally, Texas imposes a nonrefundable application and license fee of one hundred and forty dollars.[205] Again, if we analogize to an application for marriage, charging a fee is not necessarily an unconstitutional barrier to exercising a fundamental right because the existence of a fee is presumptively not a direct and substantial obstacle to the exercise of that right.[206]

But, to the extent that it applies to indigent applicants, it could be unconstitutional.[207] Thus, requiring a licensing and application fee immediately casts suspicion on whether mandating payment of that fee imposes a direct and substantial burden on exercising that right.[208] While the Texas Government Code contains a provision that reduces the fee by fifty percent for impoverished or senior applicants, seventy dollars may still represent an impenetrable barrier to exercising that right to many applicants.[209] Thus, while none of the four aforementioned requirements are glaringly impermissible, each necessitates something that could

(Tex. Civ. App. 1933, writ dism'd for want of jurisdiction); Chapman v. Chapman, 32 S.W. 564, 565 (Tex. Civ. App. 1895, writ ref'd n.r.e.).

[204] *See Heller*, 128 S. Ct. at 2822.

[205] Tex. Gov't Code Ann. § 411.174(a)(6). Note also that in order to renew one's license, they must complete a continuing education course on handgun proficiency, obtain a certificate, and pay a renewal fee of $70 every four to five years. Tex. Gov't Code Ann. § 411.189; 37 Tex. Admin. Code § 6.15 (2008) (Tex. Dep't of Pub. Safety, License to Carry Handguns).

[206] *See Zablocki*, 434 U.S. at 386; *see also* Op. Tex. Att'y Gen. No. V-951 (1949) (permitting a county clerk to collect a minimal fee for issuance of a certificate for marriage).

[207] *See* Boddie v. Connecticut, 401 U.S. 371, 382 (1971) (citing Griffin v. Illinois, 351 U.S. 12). Observe that while this case concerned a state-imposed fee on receiving a divorce, the Court understood that as a restraint on one's ability to marry another person and thus an unconstitutional direct and substantial burden on marriage. *Id.*; *see also* Op. Tex. Att'y Gen. No. DM-384 (1996) (opining that requiring a marriage applicant to swear that he/she does not owe child support unconstitutionally impinges on the right to marriage).

[208] Note again that not only has the Court not announced that the right to carry a concealed handgun is a fundamental right, to the extent that it might be a fundamental right, the "direct and substantial burden" test announced by *Zablocki* has not been endorsed by the Supreme Court to apply to concealed handgun licensing. Nevertheless, it serves as a comparable test to that which could be adopted by the Court if considered. *See supra* note 200.

[209] TEX. GOV'T CODE ANN. § 411.194; TEX. GOV'T CODE ANN. § 411.195; *see Boddie*, 401 U.S. at 382.

conceivably be considered unconstitutional if the Court declares the right to carry a concealed handgun to be a fundamental liberty.

5. Presumptively Unconstitutional Regulations

Nevertheless, although the majority of the Texas concealed handgun licensing statute appears to prescribe presumptively valid restrictions on handgun licensure, there are some registration requirements that would likely be found unconstitutional in light of *Heller*. First—and perhaps most at risk for constitutional infirmity—are the requirements that the applicant not be: (1) finally determined to be delinquent in making child support payments administered or collected by the Attorney General, (2) finally determined to be delinquent in the payment of a tax or other money collected by the comptroller, the tax collector of a political subdivision of the state, or any agency or subdivision of the state, and (3) finally determined to be in default on a loan made under Chapter 57 of the Texas Education Code.[210] Despite the presumed well-intentioned policies behind these provisions, implying that licensure of a concealed handgun, if found to be a fundamental right, represents a liberty that can only be exercised by morally upright persons without financial deficiencies is ripe for a successful constitutional challenge.

In *Zablocki v. Redhail*, the Supreme Court held a Wisconsin statute unconstitutional that directly and substantially prohibited persons from marrying if they were delinquent in their child support payments and their children were wards of the state.[211] The Court held that notwithstanding the state's compelling objectives of collecting delinquent child support accounts, the statute effectively prevented persons from exercising their fundamental right to marry by those who are unable to meet their financial obligations.[212] Thus, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[213]

With regard to the Texas statute, it is extremely unlikely that the state's interest would be sufficiently important so as to directly interfere with the

[210] TEX. GOV'T CODE ANN. § 411.172(a)(10)–(12).

[211] *Zablocki*, 434 U.S. at 375–77.

[212] *Id.* at 386–87.

[213] *Id.* at 388.

exercise of a potentially fundamental right. Because the restriction imposed in *Zablocki* is so similar to the one appearing in the Texas statute, if the Court were to find that the right to carry a concealed handgun is a constitutional guarantee, then—by analogy—this regulation would assuredly be an unconstitutional infringement on the exercise of that liberty.[214] While the other statutory proscriptions concerning tax delinquency and loan default are not directly comparable—based on a reasonable reading of *Zablocki*—they too would likely also be both under- and over-inclusive restrictions on a potentially fundamental right and therefore unconstitutional.[215]

E. Sales of Firearms

1. Background Checks

Federal law generally requires that licensed firearm dealers conduct a background check on all prospective firearm purchasers.[216] This mandatory requirement is intended to ensure that certain prohibited classes of individuals are not allowed to purchase firearms, such as felons, fugitives, and "mental defectives."[217] However, federal law does not require that individual sellers conduct background checks.[218]

In Texas, concealed handgun license holders are exempt from the background check requirement.[219] According to the Bureau of Alcohol, Tobacco, Firearms and Explosives, a Texas issued concealed handgun license qualifies as an alternative to the Brady background check requirement.[220] However, all firearm transfers by licensed dealers in Texas

[214] *See* TEX. GOV'T CODE ANN. § 411.172(a)(10); *see also Zablocki*, 434 U.S. at 375–77.

[215] *See* TEX. GOV'T CODE ANN. § 411.172(a)(11)–(12); *see also Zablocki*, 434 U.S. at 388–90.

[216] *See* 18 U.S.C. § 922(s) (2006).

[217] *Id.* § 922(s)(3)(B), (t) (incorporating the National Instant Criminal Background Check System via the Brady Handgun Violence Prevention Act). Note that the majority of these excluded classes correspond to the "longstanding prohibitions" presumptively deemed lawful by the Court. District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

[218] *See* 18 U.S.C. § 922(s).

[219] BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, PERMANENT BRADY PERMIT CHART 1 (2008), *available at* http://www.atf.treas.gov/firearms/bradylaw/permit_chart.htm.

[220] *Id.*

to individuals without concealed handgun permits are processed through the FBI.[221] This is because the Brady Act permits states to choose between conducting their own background checks, requiring the search of multiple databases, or outsourcing the task to the FBI.[222] Thus, as a general matter, to the extent that the background checks screen out and prohibit possession by felons and the mentally ill, then according to *Heller*, they appear to be presumptively constitutional.[223]

In addition to the class of prohibited purchasers at the federal level, Texas also prohibits the acquisition of a firearm by a person who has previously been convicted of a felony and is in possession of a firearm before the fifth anniversary of his or her release from confinement following the previous conviction or at any location other than the premises where the person lives.[224] This statute actually appears to expand the protection afforded to convicted criminals by the Court's dicta in *Heller*. According to the Court, forbidding possession of handguns to felons is presumptively lawful.[225] The Texas statute appears to grant amnesty to non-recidivist convicted felons five years after conviction by permitting them to possess a handgun within their home.[226] Therefore, unless the Court subsequently finds that permitting a felon to ever lawfully possess a handgun after conviction is an impermissible threat to the public, it is actually more generous to convicted felons.

Furthermore, Texas also criminalizes the possession of firearms by persons convicted of assault-related offenses within five years of their release after conviction under Texas Penal Code section 22.01.[227] While prohibiting the possession of deadly weapons by those with a predisposition for violence certainly appears rational from a policy perspective, it is debatable whether it is a valid restriction pursuant to *Heller* because a conviction under section 22.01 generally results in a misdemeanor unless committed against particularly vulnerable persons.[228] While the Court

[221] U.S. DEP'T OF JUSTICE, SURVEY OF STATE PROCEDURES RELATED TO FIREARM SALES, 2005 60 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ssprfs05.pdf.

[222] *See* 18 U.S.C. § 922(s); *see also* U.S. DEP'T OF JUSTICE, *supra* note 221.

[223] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

[224] TEX. PENAL CODE ANN. § 46.04(a) (Vernon Supp. 2008).

[225] *See Heller*, 128 S. Ct. at 2816–17.

[226] TEX. PENAL CODE ANN. § 46.04(a).

[227] *Id.* § 46.04(b).

[228] *See id.* § 22.01(b)–(c).

clearly contemplated prohibiting possession by felons, it is unclear whether they would extend the prohibition to certain misdemeanor offenses.[229]

Texas also prohibits the possession of a firearm by any person subject to an order issued by section 6.504 or Chapter 85 of the Texas Family Code (regarding protective orders) or article 17.292 of the Code of Criminal Procedure (protective orders for victims of sexual assault).[230] The Fifth Circuit in *Emerson* suggested that protective orders issued in a divorce proceeding, after notice and a hearing, do not violate the Second Amendment.[231] However, despite the compelling policy justifications for limiting possession by persons subject to such orders, such a provision was clearly outside the ambit of the Court's decision in *Heller,* and it is difficult to conclusively ascertain whether this regulation is permissible under the Second Amendment.

2. Dealer Regulations

The Court also suggested that laws imposing conditions and qualifications on the commercial sale of firearms would also be permissible.[232] While Texas does not license firearm dealers directly, dealers are required under the Brady Act to conduct background checks on prospective purchasers without concealed handgun licenses at the time of sale.[233] Dealers are required to post specific warnings regarding the safe storage of firearms.[234] Additionally, pawnbrokers may not display a pistol for sale in a storefront window or sidewalk display case or depict in an advertisement a weapon in such a way that the advertisement may be viewed from a street.[235] Also, while Texas permits gun sales at establishments that sell alcoholic beverages, any sales or offers can only be

[229] *Heller*, 128 S. Ct. at 2816–17 & n.26.

[230] *See* TEX. PENAL CODE ANN. § 46.04(c).

[231] *See* Emerson v. United States, 270 F.3d 203, 261–263 (5th Cir. 2001).

[232] *Heller*, 128 S. Ct. at 2816–17.

[233] *See* U.S. DEP'T OF JUSTICE, *supra* note 221; 18 U.S.C. § 922(s) (2006); *see also* discussion *supra* notes 219–22.

[234] *See* TEX. PENAL CODE ANN. § 46.13(g). Specifically, the statute requires the posting of a conspicuous sign in block letters not less than one inch in height that reads: "IT IS UNLAWFUL TO STORE, TRANSPORT, OR ABANDON AN UNSECURED FIREARM IN A PLACE WHERE CHILDREN ARE LIKELY TO BE AND CAN OBTAIN ACCESS TO THE FIREARM." *Id.*

[235] *See* TEX. FIN. CODE ANN. § 371.179(1) (Vernon 2006).

effectuated as long as alcoholic beverages are not being displayed or sold in any area where firearms are readily accessible or can be viewed and the firearms are only accessible by the entity offering the arms for sale.[236] During the show, all alcoholic beverage sales and complimentary offers must be suspended.[237] Under an objective reading of *Heller*, it would appear as though these conditions on the commercial sale of arms would not only be reasonable, but may exemplify a representative sampling of permissive qualifications.[238] Again, while the Court gives little guidance as to the permissive scope of commercial sale regulations, it is conceivable that the Texas Legislature could even supplement the existing regulations within the parameters of the Second Amendment.

While federal law prohibits firearms dealers from selling or delivering handguns or ammunition for handguns to any person the dealer knows or has reasonable cause to believe is under the age of twenty-one, Texas law dictates that dealers may not sell a handgun to a person under eighteen years of age unless a parent gives effective consent.[239] While purchasing a gun is not equivalent to possessing a gun within one's home, it nevertheless implicates constitutional issues with respect to exercising that right.[240] And even though the law regularly imposes arbitrary age restrictions with respect to certain activities or privileges, the level of scrutiny applied exponentially increases with respect to fundamental rights. Thus, it is disputable whether imposing an age-based direct and substantial restriction on the exercise of the right conferred by the Second Amendment is constitutional.[241]

However, though most fundamental liberties are not subject to legitimate, policy-based age limitations, the right to marry is constitutionally subject to age-based restrictions.[242] While Texas' affirmative defense allowing parents or guardians to give written consent to

[236] 16 TEX. ADMIN. CODE § 36.1(b) (2008) (Tex. Alco. Bev. Comm'n).

[237] *Id.* § 36.1(a)(1).

[238] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

[239] 18 U.S.C. § 922(b)(1) (2006); TEX. PENAL CODE ANN. § 46.06(a)(2), (c).

[240] *See Heller*, 128 S. Ct. at 2822.

[241] For a recent, *Heller*-influenced discussion of the propriety of disparate age-based restrictions on the purchase of firearms at the federal level, see United States v. Bledsoe, Criminal No. SA-08-CR-13(2)-XR, 2008 WL 3538717, at *2–7 (W.D. Tex. Aug. 8, 2008)

[242] *See* TEX. FAM. CODE ANN. § 2.102(a) (Vernon Supp. 2008) (creating an effectively minimum age for marriage, even with parental consent, at sixteen years of age).

allow their child to purchase a gun without respect to the child's age is likely to save it from constitutional infirmity, it nonetheless poses an interesting issue with respect to capacity to effectively exercise a fundamental right.[243]

3. Private or Secondary Sales

While mandatory background checks only apply to licensed dealers and purchasers without a concealed handgun license, Texas also has generally applicable firearm sale prohibitions.[244] The Texas Penal Code prohibits the sale, rental, leasing, loaning, or giving of a handgun to any person: (1) knowing that the person to whom the handgun is to be delivered intends to use it unlawfully or in the commission of an unlawful act,[245] (2) is younger than eighteen years old,[246] (3) is intoxicated,[247] (4) is within five years of the release of that person from committing a felony,[248] or (5) is subject to an active protective order.[249] It is an affirmative defense to a charge under Texas Penal Code section 46.06(a)(2) if the transfer was to a minor whose parent or legal guardian had given written permission or consented to the sale or transfer.[250] As previously mentioned, each of these restrictions appears to constitute a permissive condition on the commercial sale of firearms.[251] However, an interested person cannot be assured of their constitutionality until specifically addressed by the Supreme Court.

F. Child Access Prevention

The *Heller* Court demonstrated apprehension about letting persons with immature decision-making abilities possess firearms by presumptively declaring that the mentally ill should not be entrusted with handguns.[252]

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[243] *See* TEX. PENAL CODE ANN. § 46.06(c).

[244] *See* U.S. DEP'T OF JUSTICE, *supra* note 221; 18 U.S.C. § 922(s); BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *supra* note 219.

[245] TEX. PENAL CODE ANN. § 46.06(a)(1).

[246] *Id.* § 46.06(a)(2); *see* discussion *supra* Part III.E.2.

[247] TEX. PENAL CODE ANN. § 46.06(a)(3); *see* discussion *supra* Part III.C.2.

[248] TEX. PENAL CODE ANN. § 46.06(a)(4); *see* discussion *supra* Part III.E.1.

[249] *See* TEX. PENAL. CODE ANN. § 46.06(a)(6).

[250] *See id.* § 46.06(c).

[251] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 & n.26 (2008).

[252] *Id.* at 2816–17.

While it would be irrational to directly compare children to those deemed "mentally ill," children are also deemed by the law to suffer from diminished mental capacity.[253] Therefore, to the extent that the Court deems it permissible to restrict handgun possession of the mentally ill because of their diminished mental capacity, then by extension, it would seem reasonable for the Court to declare that the Second Amendment does not confer upon children an absolute right to bear arms.[254] Thus, if children are not vested with an unadulterated right to possess handguns, then by analogy, statutes restricting their access to handguns would seem to be presumptively reasonable.[255]

Texas law, however, generally preserves the right of minors to access and use firearms. While it is a crime for a person, with criminal negligence, to allow a child under seventeen years of age to gain access to a readily dischargeable firearm, the statute provides an affirmative defense if the child's access to the firearm was supervised by a person older than eighteen and was for hunting, sporting, or consisted of a lawful defense by the child of people or property.[256] Permitting a child, even with the "disability of diminished capacity," to use a gun for self-defense appears to strike at the heart of the Court's decision in *Heller*.[257] Additionally, though a child under eighteen is generally not permitted to purchase a handgun, parental consent will authorize a dealer to sell a firearm to a minor.[258] Therefore, it is quite possible that Texas currently affords greater protections to minors to access and possess handguns than would be permitted by the Second Amendment under a reasonable reading of *Heller*.[259]

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[253] *See* TEX. FAM. CODE ANN. § 101.003(a) (Vernon 2002); *see also* Wheeler v. Ahrenbeak, 54 Tex. 535, 538 (1881); Wells v. Hardy, 21 Tex. Civ. App. 454, 456, 51 S.W. 503, 504 (1899, writ ref'd).

[254] *See Heller*, 128 S .Ct. at 2816–17.

[255] For purposes of this discussion, we will assume, based on the *Heller* dicta, that the Second Amendment does not bestow the same handgun rights upon children. As a result, there is greater latitude to regulate handguns with respect to child access. *See also* discussion *supra* Part III.E.2.

[256] *See* TEX. PENAL CODE ANN. § 46.13(b)–(c) (Vernon 2003).

[257] *See Heller*, 128 S. Ct. at 2822.

[258] TEX. PENAL CODE ANN. § 46.06(a), (c).

[259] Again, it is important to emphasize that the Court did not even remotely address child access to firearms. However, a good faith argument can be made that the Court would condone reasonable restrictions on child possession of handguns. Furthermore, due to many of the safety-related policy justifications for limiting minors' access to handguns, it is probable that the Second

However, there is potentially one access prevention measure that may be amenable to constitutional attack. In Texas, persons under twenty-one years of age generally cannot apply for a license to carry a concealed handgun.[260] Because of the proliferation of concealed handgun applications and the increasing momentum to afford additional protection to concealed handgun owners, this may represent the most significant age-based restriction on handguns.[261] Although it is still debatable whether the Court would extend the outer limits of the Second Amendment to include concealed possession of a handgun outside the home, if it did, it is feasible that this threshold age prerequisite could be deemed altogether arbitrary and unconstitutional.[262] Alternatively, it is possible that public policy could dictate at least lowering the twenty-one year age requirement.[263]

Accordingly, if we are to analyze the permissive scope of child access restrictions with the understanding that it is probable that the full scope of *Heller* doesn't extend to children, there are ample opportunities for the state to impose additional restrictions on child access. While Texas may preserve a more liberal policy that affords greater rights to minors, that policy is still subject to revision.[264] As long as Texas' restrictions comport with the limits prescribed by the United States Constitution, they will pass muster.[265] Thus, for those who believe that Texas' statutes protecting children from gun-related injuries are deficient, *Heller* presumably does not foreclose the opportunity to continue advocating their concerns before the Texas Legislature.[266] For instance, advocates may seize upon deficiencies

Amendment doesn't fully extend to children and whatever right children may enjoy would likely be fairly limited. *See supra* note 254; *See also* discussion *supra* Part III.E.2.

[260] TEX. GOV'T CODE ANN. § 411.172(a)(2) (Vernon Supp. 2008).

[261] *See* discussion *supra* Part III.D.

[262] *See* discussion *supra* Part III.D.4.

[263] While a person can generally gain access to a firearm if they are at least seventeen years old and purchase a firearm when they are eighteen, prohibiting that person from obtaining a concealed handgun license until they are twenty-one may very well be unnecessarily arbitrary and therefore unconstitutional. *See* TEX. PENAL CODE ANN. §§ 46.13(b)–(c), 46.06(a), (c); TEX. GOV'T CODE ANN. § 411.172(a)(2).

[264] *See* discussion *supra* note 92.

[265] *See id.*

[266] *See, e.g.*, http://www.millionmommarch.org/aboutus/ (proclaiming that all children have the right to grow up in environments free from the threat of gun violence); http://www.texansforgunsafety.org/ (urging the use of gun locks and other child-restrictions to

in Texas statutes related to child-safety locks,[267] childproofing handguns, safety standards, or juvenile sales.[268]

Additionally, it is important to reiterate that Texas' statutes prohibiting the possession of firearms at schools and educational institutions comply with the *Heller* Court's list of presumptively permissible regulations.[269] However, as discussed *supra*, the statutes do not exhaustively proscribe possession of handguns or other weapons in places where children are particularly susceptible to the risks posed from handguns.[270] Thus, there appear to be additional opportunities for child protection advocates to lobby for additional and more particularized location- and possession-based regulations.

IV. CONCLUSION

While there is no doubt that *Heller* constitutes the single-most influential pronouncement in Second Amendment jurisprudence, in many ways, it merely opened a Pandora's Box of uncertainty. As a result, the focus of this Note may be little more than mere conjecture and surmise. Nevertheless, though it would appear that most of the existing restrictions promulgated by the Texas Legislature are constitutional and that there is perhaps even room for additional legislation,[271] other regulations appear to be clearly predisposed for invalidation. Given the likelihood of incorporation and reasonable inferences from the Court's opinion, there are

prevent teen suicide and accidental gun injuries inflicted by children with ready access to loaded firearms within the home).

[267] Note however, that certain applications of statutes imposing trigger-lock or disassembly requirements may suffer constitutional infirmity insofar as their application creates a functional prohibition on the use of firearms within the home for self-defense. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2788, 2821–22 (2008) (construing former D.C. Code § 7-2507.02, which was subsequently amended by D.C. Bill 17-866, Firearms Control Emergency Amendment Act of 2008, § 2(c), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/07/final-dc-gun-law-7-16-08.pdf).

[268] *See* BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, *supra* note 97, at 11.

[269] *See* discussion *supra* Part III.C.2–3; *Heller*, 128 S. Ct. at 2816–17.

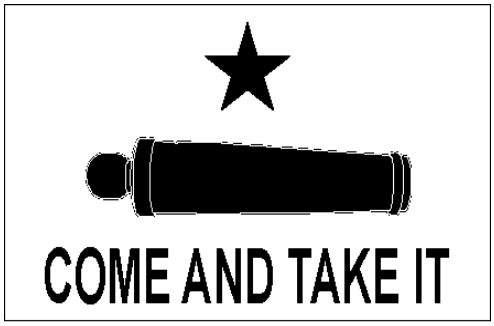
[270] *See* discussion *supra* Part III.C.2–3.

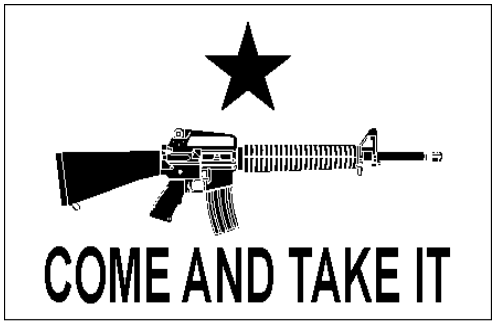
[271] For instance, Texas does not regulate assault weapons, ballistic fingerprinting, child-safety locks, gun dealers, large capacity ammunition magazines, purchase licensing, limitations on concealed handgun purchases or bulk purchases, local gun registration, "Saturday Night Specials," waiting periods, or universal background checks. *See* BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, *supra* note 97, at 11.

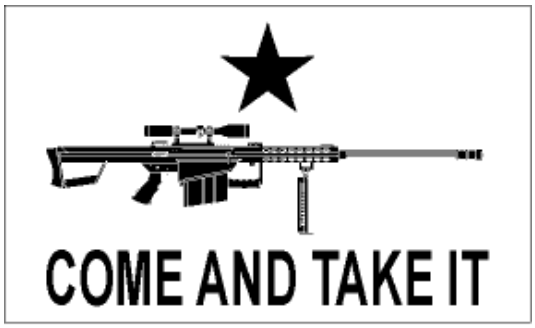
certain to be many challenges to Texas' handgun regulatory scheme. After all, firearm ownership and possession has been engrained in Texas' culture and heritage as an implicit fundamental liberty since the arrival of the first colonial settlers. Therefore, let the litigation ensue, because if the government wants to proscribe Texan's gun rights, they're going to have to "Come and Take It."

V. APPENDIX

The following depictions demonstrate the evolution of the "Come and Take It" flag from the original 1835 edition to its proposed replacements as advocated by modern gun rights enthusiasts.[272]







[272] *See, e.g.*, David C. Treibs, Battle Flags, Etc., http://www.comeandtakeit.com (last visited Nov. 22, 2008) (in order, the original 1835 representation, the mid-1990s version depicting a Colt AR-15/M-16, and the 2002 edition portraying a .50 BMG rifle).