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The Second Amendment Burden: Arming Courts with a Workable Standard for Reviewing Gun Safety Legislation

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THE SECOND AMENDMENT BURDEN: ARMING COURTS WITH A WORKABLE STANDARD FOR REVIEWING GUN SAFETY LEGISLATION

MELANIE KALMANSON*

ABSTRACT

Two controversial topics; one framework. Jurisprudence surrounding the Second Amendment to the U.S. Constitution lacks a workable standard under which courts are to review gun control legislation. This Note presents an intersectional argument whereby the abortion “undue burden” framework is applied to Second Amendment legislation. Through this approach of applying the abortion framework to gun control legislation, like those recently proposed or discussed, this Note argues that these provisions would likely be constitutional. Though abortion is at the center of this discussion, this Note does not aim to contribute to discourse concerning reproductive rights and accepts prima facie the current-standing framework.

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I. INTRODUCTION

The right to bear arms and the right to choose to have an abortion are both guaranteed to all Americans by the U.S. Constitution,¹ despite generally having starkly different constituencies—the former

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1. See U.S. CONST. amends. II, XIV.

being conservative men² and the latter being young or minority women.³ While abortion numbers in the United States seem to be decreasing,⁴ mass gun violence is increasing.⁵

“There are more guns owned by civilians in the United States than any other country.”⁶ In 2013, there were 112 guns for every 100 Americans, totaling 357,000,000 guns in the United States.⁷ On average, there are 12,000 firearm homicides in America each year; add

2. See LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 157 (1st ed. 2014); David T. Hardy, *Gun Owners, Gun Legislation, and Compromise*, 31 T.M. COOLEY L. REV. 33, 46-47 (2014); Jeffrey M. Jones, *Men, Married, Southerners Most Likely to Be Gun Owners*, GALLUP (Feb. 1, 2013), <http://www.gallup.com/poll/160223/men-married-southerners-likely-gun-owners.aspx> [<https://perma.cc/38XU-QJVG>]; Rich Morin, *The Demographics and Politics of Gun-Owning Households*, PEW RES. CTR. (July 15, 2014), <http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/> [<https://perma.cc/GEP7-9AVB>].

3. E.g., Zoe Dutton, *Abortion's Racial Gap*, THE ATLANTIC (Sept. 22, 2014), <http://www.theatlantic.com/health/archive/2014/09/abortions-racial-gap/380251/> [<https://perma.cc/HSK9-PZ5C>]. But see MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 7 (2015) (discussing the “German measles outbreak [that] reframed abortion . . . as a procedure sought by respectable, white, middle-class women”). Note, however, this does not mean that conservative women do not seek abortions.

4. Dutton, *supra* note 3.

5. See *Guns in the US: The Statistics Behind the Violence*, BBC (Jan. 5, 2016), <http://www.bbc.com/news/world-us-canada-34996604> [<https://perma.cc/4JBA-ZA4U>] [hereinafter *Guns in the US*] (reporting “372 mass shootings in the US in 2015”). A mass shooting is defined as “[four] or more shot and/or killed in a single event . . . , not including the shooter.” *Main Page*, GUN VIOLENCE ARCHIVE, http://www.shootingtracker.com/Main_Page [<https://perma.cc/W8SS-BFRZ>] (last visited Sept. 9, 2016) (FBI derived definition); see also BLACK’S LAW DICTIONARY 1176 (10th ed., 2014 Thompson Reuters) (defining “mass murder” as “[a] murderous act or series of acts by which a criminal kills many victims at or near the same time”). But see, e.g., Max Ehrenfreund, *We’ve Had a Massive Decline in Gun Violence in the United States. Here’s Why.*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/03/weve-had-a-massive-decline-in-gun-violence-in-the-united-states-heres-why/> [<https://perma.cc/Y5KA-RC9M>] (“Premeditated mass shootings in public places are happening more often . . .”).

6. Ray Sanchez, *Death and Guns in the USA: The Story in Six Graphs*, CNN (Oct. 3, 2015, 9:01 PM), <http://www.cnn.com/2015/10/03/us/gun-deaths-united-states/> [<https://perma.cc/WAL2-UAR3>].

7. Christopher Ingraham, *There Are Now More Guns Than People in the United States*, WASH. POST (Oct. 5, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm_term=.3b85d339b395 [<https://perma.cc/T6HK-7HEE>]; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock/?intcmp=home_pop (last visited Sept. 9, 2016) (reporting population of 317,773,895 as of December 31, 2013). This updated ratio was calculated by: 357,000,000/318,000,000. This was a significant increase from 2007. ANTHONY WALSH & CRAIG HEMMENS, INTRODUCTION TO CRIMINOLOGY 384 (3d ed., 2014); Sanchez, *supra* note 6. In 2011, forty-seven percent of Americans reported having a gun in their home, the highest rate since 1993. Jaime Fuller, *It’s Been 20 Years Since the Brady Bill Passed. Here Are 11 Ways Gun Politics Have Changed.*, WASH. POST (Feb. 28, 2014, 12:30 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/02/28/its-been-20-years-since-the-brady-law-passed-how-have-gun-politics-changed/> [<https://perma.cc/2DGV-HATZ>] (citing *U.S. Gun Households, 1991-2011*, GALLUP POLL (Oct. 2011)); see TRIBE & MATZ, *supra* note 2, at 157.

to that approximately 19,000 suicides per year using guns.⁸ In 2012, the number of gun murders per capita in the United States was approximately thirty times that in the United Kingdom—a country with strict gun control laws.⁹ In 2015, at least 13,286 people were killed and 26,819 injured by guns in the United States.¹⁰ In 2016, at least 15,078 people were killed and 30,615 injured by guns in the United States.¹¹ Of these people, 3,801 minors were killed or injured by firearms.¹² Yet, despite these statistics, firearm proponents urge American lawmakers to allow civilians unfettered access to firearms under the Second Amendment of the U.S. Constitution.¹³

In 2011, 16.9 abortions were performed per 1,000 women of childbearing age, accounting for 1,100,000 abortions in the United States that year.¹⁴ In 2012, there were 699,202 “legal induced abortions” reported to the Centers for Disease Control and Prevention—a significant decrease from the 2011 number.¹⁵ In 2013, that number dropped to 664,435—a decrease of five percent.¹⁶ The pro-life movement pushes lawmakers and lay people to view abortion as murder,¹⁷ notwithstanding the U.S. Supreme Court’s 1973 declaration that Americans, specifically women, have a fundamental right to choose to abort a pregnancy until the point of viability.¹⁸ Where gun control is lacking any controlling standard, abortion jurisprudence applies the standard that States cannot impose any restriction that imposes an undue burden on a woman seeking an abortion.¹⁹

8. TRIBE & MATZ, *supra* note 2, at 157. In 2010, an additional 338,000 nonfatal crimes were committed with guns. *Id.*

9. *Guns in the US*, *supra* note 5; see WALSH & HEMMENS, *supra* note 7, at 384.

10. *Guns in the US*, *supra* note 5.

11. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, <http://www.gunviolencearchive.org/past-tolls> [<https://perma.cc/SRA4-ZVYP>].

12. *Id.* (3,128 teens between 12 and 17 years of age + 673 children between 0 and 11 years of age).

13. See *infra* notes 115-16.

14. Dutton, *supra* note 3.

15. *Data and Statistics: Abortion*, CTNS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1.htm?s_cid=ss6624a1_w [<https://perma.cc/J2TH-59W5>].

16. *Id.*

17. This view comes from viewing the fetus as a life that is ended when a pregnancy is aborted. *E.g.*, Paige Comstock Cunningham, *Is Abortion a Women’s Issue? Pro-Life*, 5 UPDATE ON LAW RELATED EDUC. 6, 9 (1981) (arguing that biological evidence establishes that a fetus is a life); Jean Rosenbluth, *Abortion as Murder: Why Should Women Get Off? Using Scare Tactics to Preserve Choice*, 66 S. CAL. L. REV. 1237, 1247 (1993).

18. *Roe v. Wade*, 410 U.S. 113 (1973); see *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Viability is “the point at which a fetus could potentially live outside the mother’s womb without medical aid.” ZIEGLER, *supra* note 3, at 11. This point has not been specifically defined by the medical community.

19. *Carhart*, 550 U.S. at 146 (applying the “undue burden” framework from *Casey*); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

While abortion and gun control divide the country politically, this Note argues that the relationship between the two is constitutionally instructive. The U.S. Supreme Court's Second Amendment jurisprudence is in flux and provides little guidance to courts reviewing gun control legislation. In response, this Note argues that the "undue burden" test—the cornerstone of the U.S. Supreme Court's abortion jurisprudence—intuits a reasonable approach to reviewing gun safety legislation. Part II describes the current-standing abortion framework, contextualizing the three most significant U.S. Supreme Court rulings, including its most recent in 2016,²⁰ to develop and explain the standard being cross-applied here. Part III defines the current-standing gun control framework transpiring from the Second Amendment of the U.S. Constitution, legislation, and statutory provisions. Part IV merges the two frameworks, contending that the "undue burden" framework is an immediate and workable solution to the lack of guidance and structure in Second Amendment jurisprudence at a time where gun control is at the forefront. Part V concludes, urging courts to borrow from abortion jurisprudence for a workable standard to apply in reviewing much-needed legislation regulating firearms in the United States.

II. CURRENT ABORTION FRAMEWORK

To apply the current abortion structure elsewhere, as this Note does, its function and background must generally be understood.²¹ This Part discusses the Court's recognition of the right to choose to terminate a pregnancy and the Court's progression towards the current-standing 'undue burden' standard. Starting with *Roe v. Wade* in 1973, which is viewed as the beginning of modern polarization on the abortion debate,²² the Court established that the right to have an abortion is a fundamental right guaranteed by the Fourteenth Amendment of the U.S. Constitution.²³ Contrary to popular belief, however, there was a long history of abortion contention before *Roe v. Wade*.²⁴ Though the contentions are characterized differently today, abortion "had drawn attention to fundamental questions about the rights of women, the boundaries of medical authority, and the proper

20. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

21. For more in-depth conversation on the "undue burden" standard from the U.S. Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, see Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291 (2009); Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915 (2010); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

22. See ZIEGLER, *supra* note 3, at 9.

23. *Roe*, 410 U.S. at 113.

24. ZIEGLER, *supra* note 3, at 9.

definition of personhood” even before *Roe* was listed on the Court’s docket.²⁵ *Roe* arose as a response to “efforts to secure constitutional protection for reproductive rights.”²⁶

Section A of this Part explains the milestone *Roe v. Wade* opinion. Section B then contextualizes the *Planned Parenthood of Southeastern Pennsylvania v. Casey* case in the wake of reactions to *Roe* and explains the current precedent that *Casey* established for abortion review, analyzes the Court’s most recent decision on abortion in *Whole Woman’s Health v. Hellerstedt*²⁷ and how it contributed to the “undue burden” standard, and explains how the “undue burden” logic underlies several topics outside of abortion, providing background and support for the argument herein that the “undue burden” framework is capable of intersectional application.

A. *Roe v. Wade: Establishing the Fundamental Right to Choose*

In 1973, the U.S. Supreme Court reviewed the constitutionality of two Texas statutes that criminalized abortion and a Georgia statute that required a woman to obtain approval from a medical panel before receiving an abortion.²⁸ Plaintiff, Jane Roe, was a single woman who “was unable to get a ‘legal’ abortion . . . because her life did not appear to be threatened by . . . her pregnancy.”²⁹ James Hubert Hallford, a physician who was arrested under the Texas statute for providing abortions, intervened in the action,³⁰ claiming the statutes were too vague and provided too little guidance to abortion providers who were required to determine when providing an abortion would be legal.³¹ John and Mary Doe, plaintiffs in a companion complaint, filed suit on behalf of themselves and all similarly situated couples who experience fertility difficulties and may find themselves needing an abortion.³² Interpreting the Article III standing doctrine,³³ the Court determined that jurisdiction was proper for the Roes’ and Does’ appeal because pregnancy presented a different circumstance than other injuries at law that justified an exception, or alteration, to the injury in fact standing requirement—a limited time period and likelihood of repetition to the same person.³⁴ In other words, because the

25. *Id.* For further discussion of the pre-*Roe* abortion debate and history, see generally *id.* at Introduction.

26. *Id.* at 9.

27. 136 S. Ct. 2292 (2016).

28. *Roe*, 410 U.S. at 113, 117-18; ZIEGLER, *supra* note 3, at 11.

29. *Roe*, 410 U.S. at 120.

30. *Id.* at 120-21.

31. *Id.* The Court dismissed Hallford’s complaint in intervention. *Id.* at 127.

32. *Id.* at 121.

33. See U.S. CONST. art. III.

34. *Roe*, 410 U.S. at 125, 127-29.

Roes and/or Does could have become pregnant again and pregnancy is naturally limited to nine months, which may be insufficient to fully litigate a claim, the Court accepted that the injury, which originally brought rise to the lawsuit, was technically no longer present.³⁵

Upon review, grounding its decision in the long-standing “guarantee of personal privacy”³⁶ from the Fourteenth Amendment’s Due Process Clause, the *Roe* Court established that a woman has a fundamental right to “deci[de] whether or not to terminate her pregnancy.”³⁷ The Court explained that when a state denies this choice to a woman, it imposes great detriment upon her, including maternal difficulties, “[p]sychological harm,” distress from an unwanted child, the “stigma of unwed motherhood,” etc.³⁸ Despite recognizing this right as fundamental, though, the Court reserved related state interests, declining to make the right to an abortion absolute.³⁹

Here arises the trimester framework that was established in *Roe* and used to review abortion legislation thereafter. Applying strict scrutiny,⁴⁰ the Court recognized the State’s “interests in safeguarding health, in maintaining medical standards, and in protecting potential life.”⁴¹ The Court determined that the State’s “important and legitimate interest” in the mother’s health begins at the end of the first trimester; therefore, the State must leave the decision to abort a pregnancy to a woman and her physician during the first trimester before this point.⁴² In the second trimester, once the State’s interests have ripened, the State may regulate abortions “to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”⁴³ Then, upon fetal viability,⁴⁴ the State has an “important and legitimate interest in potential life” and can regulate abortions to protect fetal life, “except when [abortion] is necessary to

35. *See id.* at 128.

36. *Id.* at 152-53 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, 460, 463-65 (1972); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

37. *Id.* at 153.

38. *Id.*; *accord id.* at 162-63. *Cf.* Siegel, *supra* note 21, at 1714-19, 1726 (explaining that this protective argument for the mother’s well-being became a strategy to further the elimination of abortion).

39. *Roe*, 410 U.S. at 153-55 (citations omitted).

40. *Id.* at 155-56 (citations omitted); *see also* *Roe v. Wade* (1973), LEGAL INFO. INST., CORNELL U. L. SCH., https://www.law.cornell.edu/wex/roe_v_wade_1973 (last visited Sept. 9, 2016) (“[G]overnment regulation of abortions must meet strict scrutiny in judicial review.”).

41. *Roe*, 410 U.S. at 154.

42. *Id.* at 163.

43. *Id.*; *see* ZIEGLER, *supra* note 3, at 11.

44. *See* Cunningham, *supra* note 17.

preserve the life or health of the mother.”⁴⁵ Establishing this trimester framework and using it to review the statutes *sub judice*, the *Roe* Court invalidated the Texas statutes.⁴⁶ *Roe*’s trimester framework served as the abortion structure for almost twenty years.

B. Precedential “Undue Burden” Framework

Despite some predictions, abortion was not a settled issue in the wake of *Roe*.⁴⁷ As abortion discourse and legislation progressed after *Roe*, the competing interests involved in the abortion conversation became clearer. These interests contextualize the Court’s plurality decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁸ nineteen years after *Roe*, and the majority decision in *Whole Woman’s Health v. Hellerstedt*,⁴⁹ twenty-four years after *Casey*. This Section discusses these decisions which developed the “undue burden” standard to where it is today.

1. Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Casey*, the U.S. Supreme Court reviewed five provisions of the Pennsylvania Abortion Control Act of 1982:⁵⁰ (1) informed consent,⁵¹ (2) parental consent,⁵² (3) spousal consent,⁵³ (4) medical emergency exception,⁵⁴ and (5) clinic reporting requirements.⁵⁵ The provisions reviewed in *Casey* reflect the pro-life incrementalist strategy that

45. *Roe*, 410 U.S. at 163-64.

46. *Id.* at 164-65.

47. See generally ZIEGLER, *supra* note 3 (discussing the development of abortion politics after *Roe*).

48. 505 U.S. 833, 844 (1992).

49. 136 S. Ct. 2292 (2016).

50. *Casey*, 505 U.S. at 844.

51. This provision required a woman to “give her informed consent prior to the abortion procedure” after receiving “certain information at least 24 hours before the [procedure].” *Id.* at 844; accord 18 PA. CONS. STAT. § 3205 (1990); see also Siegel, *supra* note 21, at 1712 (explaining how informed consent was an invention by incrementalists). The Court upheld this as constitutional so long as the information provided is “truthful [and] nonmisleading.” *Casey*, 505 U.S. at 882-87.

52. This provision required a minor to obtain the informed consent of a parent or judicial bypass to seek an abortion. *Casey*, 505 U.S. at 844.

53. This provision required “married wom[e]n seeking an abortion [to] sign a statement indicating that [they] notified [their] husband of [the] intended abortion.” *Id.*

54. This provision excused compliance with the preceding provisions in case of a “medical emergency.” *Id.* “Medical emergency” was defined in 18 PA. CONS. STAT. § 3203 (1990) as a “condition which, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.” *Casey*, 505 U.S. at 879. This provision was upheld as constitutional. *Id.* at 880.

55. These provisions required abortion-providing facilities to report certain information. *Id.* at 844.

emerged after *Roe*.⁵⁶ Once *Roe* established that women must have the choice to have an abortion,⁵⁷ pro-life incrementalism sought to sidestep *Roe* by enacting restrictions that would further complicate a woman's access to abortion without restricting abortion altogether.⁵⁸ Proponents of this strategy believed that with enough cumulative success from incremental provisions restricting access to abortion, the pro-life movement could accomplish its overall mission of eliminating abortion and thereby undermine the Court's holding in *Roe*.⁵⁹ "Incrementalists' focus on middle-ground restrictions stemmed from a belief that the pro-life movement had to achieve something concrete in order to remain a viable political force."⁶⁰

Primarily resting on *stare decisis* to safeguard the Court's legitimacy, the *Casey* Court affirmed the "essential holding" of *Roe v. Wade*⁶¹ that a woman's right to choose to have an abortion is fundamental under the Fourteenth Amendment's guarantee of personal liberty interests.⁶² The *Casey* Court then overturned the procedural aspect of *Roe*, namely the trimester framework, and, relying on scientific advances, presented a new standard for reviewing restrictive abortion legislation.⁶³ The *Casey* Court (1) determined that *Roe*'s trimester framework was too rigid and "undervalue[d] the State's interest in the potential [fetal] life" and (2) created the "undue burden" framework.⁶⁴

Under this new standard, "[o]nly where state regulation imposes an undue burden on a woman's ability to make th[e] decision [to have an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause [of the Fourteenth Amendment]."⁶⁵ Thus, an abortion-restrictive statute is valid so long as it does not create such an undue burden. Applying this framework and upholding most of the provisions under review, the Court as-

56. See ZIEGLER, *supra* note 3, at 62-71 (discussing the incrementalist strategy and its development).

57. *Id.* at 185.

58. *Id.* at 58; Siegel, *supra* note 38, at 1708-09.

59. ZIEGLER, *supra* note 3, at 59. The Supreme Court's decision in *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007), was seen as an incrementalist victory. Siegel, *supra* note 21, at 1708. *But cf. id.* at 1710.

60. ZIEGLER, *supra* note 3, at 59. Though, they received flak from the movement's absolutists who would settle for nothing less than an absolute ban on abortion. *Id.* at 59, 78-84.

61. *E.g.*, *Gonzales*, 550 U.S. at 169 (Ginsburg, J., dissenting).

62. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846-47, 856-66, 870 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); see U.S. CONST. amend. XIV, § 1. Although the *Roe* Court did not preclude founding this right in the Ninth Amendment, the *Casey* Court followed the *Roe* decision in relying on the Due Process Clause of the Fourteenth Amendment as the source of this right. *Casey*, 505 U.S. at 847.

63. *Casey*, 505 U.S. at 860, 873, 876.

64. *Id.* at 875-76.

65. *Id.* at 874.

sumed the duty of protecting a woman by “justifying abortion restrictions on the basis of the physical or psychological harms supposedly produced by the procedure.”⁶⁶ This opinion undermined the absolutism of *Roe*, creating an opportunity for legislatures to limit the way in which abortions are accessed and conducted.⁶⁷ Nevertheless, *Casey*’s “undue burden” framework provides the current standard of review for abortion legislation.⁶⁸

Rather than focusing on whether a state has justifiably infringed upon a constitutional right, the “undue burden” standard focuses on whether a statute effectuates a substantial infringement,⁶⁹ seemingly gleaned from a principle that restrictions are acceptable so long as the right may still be accessed.⁷⁰ Regardless of either side’s view on the validity of this framework for abortion, the “undue burden” framework lends guidance and a sense of uniformity to abortion jurisprudence and has for almost twenty-five years. Arguably, the standard lends discretion to the court applying it because it is vaguely defined and allows courts to tailor individual analyses to specific facts.⁷¹ Nevertheless, the framework provides at least a roadmap to courts for reviewing statutes affecting women’s access to abortion.

2. Whole Woman’s Health v. Hellerstedt

In 2016, the U.S. Supreme Court decided the newest case in the abortion narrative, *Whole Woman’s Health v. Hellerstedt*.⁷² The *Hellerstedt* Court reviewed Texas House Bill 2 (“HB2”) that, if upheld, would have caused more than seventy-five percent of abortion clinics

66. Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 232 (2013) (explaining that this argument of harm to the woman receiving an abortion has been adopted and furthered by the modern pro-life feminist perspective). *But see Gonzales*, 550 U.S. at 169-91 (Ginsburg, J., dissenting) (disputing strongly the argument that women need to be externally informed for the decision to have an abortion to psychologically affect them); *Roe*, 410 U.S. at 153 (stating, instead, that the psychological harm arises when a woman is denied access to an abortion).

67. *See Rosenbluth*, *supra* note 17, at 1241.

68. *See generally, e.g., Gonzales*, 550 U.S. 124 (applying *Casey*’s “undue burden” framework).

69. Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 870 (1993).

70. *But cf. id.* at 872 (“[T]he potential roots of the ‘undue burden’ standard, remain to be unearthed . . .”).

71. *E.g., id.* at 878; Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2027, 2039 (1994). This was the basis of Justice Scalia’s dissent in *Casey*. *See, e.g., Brownstein, supra* note 69, at 875-78.

72. 136 S. Ct. 2292 (2016). For more information, see generally Lyle Denniston, *Court to Rule on Abortion Clinic Restrictions*, SCOTUSBLOG (Nov. 13, 2015, 2:32 PM), <http://www.scotusblog.com/2015/11/court-to-rule-on-abortion-clinic-restrictions/> [<https://perma.cc/T9BZ-BCV3>].

in the State of Texas to close,⁷³ leaving only seven abortion clinics in all of Texas.⁷⁴ Before HB2, Texas had over forty operational abortion clinics.⁷⁵

Before the U.S. Supreme Court decided *Hellerstedt*, scholars debated the alternative routes the Court may take in addressing the issues presented. Some theorized that abortion returning to the Court's docket would allow the Court to completely overturn the fundamental holding in *Roe*, eliminating the right to choose to have an abortion.⁷⁶ The Court overturning *Roe* seemed completely unlikely considering the Court's prior emphasis on *stare decisis*⁷⁷ and recent decisions indicating an interest in following popular opinion and the trend of society.⁷⁸ Though abortion is polarized and a large part of the population would prefer the elimination of abortion, some large groups strongly oppose the elimination of abortion as a legal right and would accuse the Court of a blatant injustice if it were to take away a long-standing right. Others speculated that the Court would leave intact the right but overturn, or alter, *Casey*'s "undue burden" standard. As expressed by Justice Scalia's dissent in *Casey*,⁷⁹ there was ambiguity in the Court's definition of an "undue burden" that allowed for clarification in *Hellerstedt*.⁸⁰

In fact, the Court did neither and explicitly applied the *Casey* standard, "decid[ing] whether [the statutes at issue] violate[d] the Federal Constitution *as interpreted in Casey*."⁸¹ The Court stated

73. Petition for a Writ of Certiorari at 1-2, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

74. *Hellerstedt*, 136 S. Ct. at 2301 (2016) (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 680 (W.D. Tex. 2014)); see Denniston, *supra* note 72; Adam Liptak, *Supreme Court to Hear Texas Abortion Law Case*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/us/politics/supreme-court-accepts-texas-abortion-law-case.html> [<https://perma.cc/QU3Z-4HUS>].

75. *Hellerstedt*, 136 S. Ct. at 2301.

76. Marcia Coyle, *Whole Woman's Health v. Hellerstedt: What the Supreme Court is Decided in the Most Important Abortion Ruling in Decades (Updated)*, PBS: INDEPENDENT LENS (June 9, 2016), <http://www.pbs.org/independentlens/blog/whole-womans-health-vs-hellerstedt-what-the-supreme-court-is-deciding-in-most-important-abortion-ruling-in-decades/>; Christian Farias & Laura Bassett, *Supreme Court Hears Historic Case That Could Seal Fate of Roe v. Wade*, HUFFINGTON POST (Mar. 2, 2016, 11:37 AM), https://www.huffingtonpost.com/entry/supreme-court-abortion-rights_us_56d6f857e4b0871f60ed48e6 [<https://perma.cc/2DM5-QXQJ>].

77. See *supra* note 62 and accompanying text.

78. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (finding that the right to marriage is fundamental and cannot be denied to same-sex couples).

79. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 987-93 (1992) (Scalia, J., dissenting).

80. See Denniston, *supra* note 72; Mary Ziegler, *The Supreme Court's Texas Abortion Ruling Reignites a Battle Over Facts*, WASH. POST (June 28, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/06/28/the-supreme-courts-texas-abortion-ruling-reignites-a-battle-over-facts/> [<https://perma.cc/3TFH-KZCC>].

81. *Hellerstedt*, 136 S. Ct. at 2300 (emphasis added).

that “[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”⁸² A close reading of the *Hellerstedt* opinion seems to indicate, at the least: (1) a minimization of deference to the legislature in “undue burden” review;⁸³ (2) an increase in the breadth of effects that may be considered in an “undue burden” analysis, such as the effect on clinics and physicians which translates to an effect on patients;⁸⁴ and (3) a shift towards *Roe*’s focus on the physician-patient relationship and viewing abortion as a medical procedure similar to others like childbirth or colonoscopies.⁸⁵ Ultimately, the Court struck down HB2 as unconstitutional under *Casey*’s “undue burden” framework.⁸⁶

The doctrinal significance of the *Hellerstedt* opinion is ambiguous. On one hand, Professor Mary Ziegler argues that the *Hellerstedt* opinion contributed rigor to the “undue burden” standard.⁸⁷ Until *Hellerstedt*, “the court almost never found anything to be unduly burdensome.”⁸⁸ Following *Hellerstedt*, which “perfectly captures the spirit of *Casey*” by not completely satisfying anyone, Ziegler argues: “Those on both sides will have to pull together extensive, persuasive and often expensive trial evidence about the effect and purpose of an abortion regulation.”⁸⁹ Ziegler predicts “that we have not seen the last of battles about the medical, scientific and sociological evidence about abortion, both inside and outside of court.”⁹⁰ Nevertheless, Ziegler contends that *Hellerstedt* helped clarify what courts may consider when conducting an “undue burden” analysis.⁹¹

To the contrary, discounting the significance of *Hellerstedt*, Professor Kevin Walsh, for example, argues that *Hellerstedt* was “a doctrinally insignificant but ideologically ominous case in a transitional Term.”⁹² Walsh argues that the opinion brought “proportionality review” to the “undue burden” analysis while allowing the opinions and political views of Justices to overpower the law.⁹³ Indicating that the

82. *Id.* at 2309.

83. *Id.* at 2310.

84. *Id.* at 2312.

85. *Id.* at 2315.

86. *Id.* at 2298-99.

87. Ziegler, *supra* note 80.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Kevin Walsh, *Symposium: The Constitutional Law of Abortion After Whole Woman’s Health—What Comes Next?*, SCOTUSBLOG (June 28, 2016, 10:56 AM), <http://www.scotusblog.com/2016/06/symposium-the-constitutional-law-of-abortion-after-whole-womans-health-what-comes-next/> [<https://perma.cc/G56V-FPRA>].

93. *Id.*

“undue burden” analysis, in fact, was not changed or developed by *Hellerstedt*, Walsh states that the opinion likely reflects “judicial selectivity about which facts matter and why.”⁹⁴ Even amid the disagreement of the significance of *Hellerstedt* for defining an “undue burden” in abortion regulation, it is clear that *Casey*’s standard remains controlling.

3. “Undue Burden” Standard Within Abortion

Where the “undue burden” standard falls within standard constitutional doctrine is difficult to discern. Doctrinally, the “undue burden” standard is a function of strict scrutiny because it is used to review legislation affecting the *fundamental right* to access an abortion, which spawns from the fundamental right to privacy guaranteed by the Due Process Clause of the Fourteenth Amendment.⁹⁵ However, in application, the “undue burden” standard vacillates between intermediate and strict scrutiny. Before *Hellerstedt*, the only law that the U.S. Supreme Court invalidated by applying the “undue burden” standard was the spousal consent provision reviewed in *Casey*.⁹⁶ The four other provisions at issue in *Casey* and the Partial-Birth Abortion Act, which the Court reviewed in *Gonzales v. Carhart*,⁹⁷ were upheld as constitutional under this standard, indicating something less than strict scrutiny because these laws would likely have been stricken under a rigid strict-scrutiny analysis.⁹⁸

In *Hellerstedt*, the Court seemingly heightened the rigidity of the “undue burden” standard, or gave it more teeth, by invalidating Texas’s HB2 in its entirety under the “undue burden” standard.⁹⁹ The Court clearly indicated that the appropriate review of abortion legislation is more rigorous than rational basis review, which is “applicable where, for example, economic legislation is at issue.”¹⁰⁰ To this effect, Justice Thomas states in his dissent:

94. *Id.*

95. *See* *Washington v. Glucksberg*, 521 US 702, 762-64 (1997).

96. *See* Ziegler, *supra* note 80.

97. 550 U.S. 124 (2007).

98. *See* Ziegler, *supra* note 80.

99. *See id.*; Mary Ziegler, *Symposium: The Court Once Again Makes the “Undue Burden” Test a Referendum on the Facts*, SCOTUSBLOG (June 27, 2016, 2:34 PM), <http://www.scotusblog.com/2016/06/symposium-the-court-once-again-makes-the-undue-burden-test-a-referendum-on-the-facts/> [<https://perma.cc/D22V-NSML>].

100. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

The majority's undue-burden test looks far less like our post-*Casey* precedents and far *more like the strict-scrutiny standard that Casey rejected*, under which only the most compelling rationales justified restrictions on abortion. One searches the majority opinion in vain for any acknowledgement of the "premise central" to *Casey's* rejection of strict scrutiny: "that the government has a *legitimate and substantial* interest in preserving and promoting fetal life" from conception, not just in regulating medical procedures.¹⁰¹

Signaling something less than strict scrutiny, though, Justice Breyer's majority states the Court's holding: "We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes."¹⁰² Referring to the "legitimate" interests recognized in *Roe* and the "valid" interests discussed in *Casey*, it seems that even with the added rigor, "undue burden" is practically something less than strict scrutiny.

Due to the invasiveness, privacy, intimacy, and health implications of an abortion procedure, the undue burden standard may not be appropriate for the abortion context, as it may exclude consideration of several of these concerns that were emphasized in *Roe*. Regardless, the Court did not use its recent opportunity in *Hellerstedt* to overturn or change the governing abortion framework. And, the standard's underlying logic translates well to other individual constitutional contexts, such as the Second Amendment. The next Part explains the presence that firearms currently hold in America and the legal frameworks within which they are protected and regulated.

III. FIREARMS CURRENTLY IN THE UNITED STATES

Ten years before *Roe*, firearms were brought to the forefront of political discussion when John F. Kennedy was assassinated in Dallas, Texas.¹⁰³ One author argued that this was the turning point at which politics began to focus on the weapon as the problem rather than the individual committing the crime.¹⁰⁴ Whatever the cause, America has become increasingly polarized on both abortion and gun control for the past fifty years.

"[C]rime, particularly crime involving drugs and guns, is a pervasive, nationwide problem . . ."¹⁰⁵ Second Amendment restrictions are an ongoing nationwide debate and were at the forefront of discussion

101. *Id.* at 2326 (Thomas, J., dissenting) (emphasis added) (citation omitted) (quoting *Gonzales*, 550 U.S. at 145).

102. *Id.* at 2300 (majority opinion).

103. ROBERT J. KUKLA, GUN CONTROL 19-20 (1973).

104. *Id.* at 20-21.

105. 18 U.S.C. § 922(q)(1)(A) (2012).

during the 2016 presidential election.¹⁰⁶ Conservative political candidates promised to broaden citizens' rights to access firearms¹⁰⁷ while liberal candidates prioritized increasing regulations on gun ownership under the Second Amendment.¹⁰⁸ This Part canvasses the constitutional framework that provides the fundamental right to bear arms, explains current (federal and state) statutory controls on accessing firearms, and describes the gun-related violence that has shaken America in recent years. Seemingly, pioneers of the discussion are minimally limited in possible arguments because no standing framework exists under which gun safety legislation is reviewed. Thus, defining the Second Amendment and its protections is the rhetorical focus, rather than what restrictions should be allowed within established boundaries.

A. *Second Amendment of the U.S. Constitution*

The Second Amendment of the U.S. Constitution states:

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.¹⁰⁹

Unlike the right to abortion, which is a liberty interest found within the unenumerated rights of protected "liberty" within the Due Process Clause,¹¹⁰ the right to bear arms is enumerated within the Bill of Rights.¹¹¹ Firearms are used for a myriad of purposes in the United States, including self-defense,¹¹² recreation,¹¹³ and law enforcement.¹¹⁴

106. See Justin McCarthy, *Quarter of U.S. Voters Say Candidate Must Share View on Guns*, GALLUP (Oct. 19, 2015), http://www.gallup.com/poll/186248/quarter-voters-say-candidate-share-view-guns.aspx?g_source=gun%20violence&g_medium=search&g_campaign=tiles [<https://perma.cc/CPU9-V6FY>] (reporting that fifty-four percent of Americans say that gun control is at least one issue that affect their presidential vote).

107. See *Gun Control*, ON THE ISSUES, http://www.ontheissues.org/Gun_Control.htm [<https://perma.cc/Q4CP-MXFF>].

108. See *id.*

109. U.S. CONST. amend. II.

110. See *generally* *Roe v. Wade*, 410 U.S. 113 (1973) (grounding the right to abortion in the Due Process Clause of the Fourteenth Amendment).

111. U.S. CONST. amend. II.

112. *Cf.* KUKLA, *supra* note 103, at 438 (using offensive and illustrious language to express the self-defense purpose of handguns).

113. *Id.* at 18-19 (arguing that the general ability to use guns recreationally is part of what demarcated America from England).

114. See, e.g., Fla. Stat. § 790.051 (2017) (exempting law enforcement officers from "the licensing and penal provisions" for gun ownership and use while acting "within the scope or course of their official duties"); see also, Amanda Sakuma, *Taser vs. Gun: Why Police Choose Deadly Force Despite Non-Lethal Options*, NBC NEWS (Sept. 29, 2016, 7:16 AM), <http://www.nbcnews.com/news/us-news/taser-vs-gun-why-police-choose-deadly-force-despite-non-n656461> [<https://perma.cc/LU9R-R8JC>] (discussing the training of law enforcement officers on the use of firearms in dangerous situations rather than other non-

Conservatives, embodied by the National Rifle Association (“NRA”),¹¹⁵ argue that Americans are constitutionally entitled to privately own firearms in any form and that the government cannot restrict that Second Amendment right whatsoever.¹¹⁶ Liberals are more inclined to enact legislation that provides infrastructure to control its adverse effects on American society.¹¹⁷

Like abortion, the Second Amendment has several times been contemplated by the U.S. Supreme Court. In *District of Columbia v. Heller*,¹¹⁸ the U.S. Supreme Court determined that the Second Amendment is an individual federal right, rather than focused only on “ensur[ing] the effectiveness of the [national] military,” as the text may suggest.¹¹⁹ *Heller* was the first time that the Court invalidated a federal firearms statute under the Second Amendment,¹²⁰ and, it established that “the right to possess a handgun in the home for the purpose of self-defense” is included in the Second Amendment’s protections.¹²¹

Then, in *McDonald v. Chicago*, the U.S. Supreme Court selectively incorporated the Second Amendment to the Due Process Clause of the Fourteenth Amendment, extending the Amendment’s protections to the States, thus requiring State regulations to conform to federal constitutional standards.¹²² Despite the seemingly straight-forward doctrine from *Heller* and *McDonald*, it is anything but clear how the U.S. Supreme Court will review Second Amendment legislation in the future.¹²³ The *McDonald* decision signaled to the states that the

lethal weapons); Law Enforcement Officers Safety Act of 2004, Pub. L. No. 108-277, 118 Stat. 865 (codified as amended at 18 U.S.C. §§ 926B-926C (2012)) (authorizing qualified police officers and qualified retired officers certified in any state to carry a concealed firearm in any jurisdiction in the United States even where doing so conflicts with local laws).

115. See *A Brief History of the NRA*, NAT’L RIFLE ASS’N, <https://home.nra.org/about-the-nra/> [<https://perma.cc/WM7X-SRYE>]; see also Hardy, *supra* note 2, at 48 (stating that the NRA relies primarily on funding from its members to operate); *id.* at 48-49 (discussing how the media affects the NRA’s membership recruiting and lobbying efforts). See generally KUKLA, *supra* note 103 (edited by the then-President of the NRA).

116. ALEX ALVAREZ & RONET BACHMAN, *VIOLENCE: THE ENDURING PROBLEM* 61 (2d ed. 2012).

117. Cf. KUKLA, *supra* note 103, at 21.

118. 554 U.S. 570 (2008) (striking down D.C.’s handgun ban), *overruling* *United States v. Miller*, 307 U.S. 174 (1939). *But cf.* Nelson Lund, *Heller and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335, 336-39 (2009).

119. *Second Amendment*, LEGAL INFO. INST., CORNELL U. L. SCH., https://www.law.cornell.edu/wex/second_amendment [<https://perma.cc/79P5-L46D>]; accord Lund, *supra* note 118, at 336.

120. *E.g.*, TRIBE & MATZ, *supra* note 2, at 155; Lund, *supra* note 118, at 335.

121. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (striking down Chicago’s handgun ban); accord Lund, *supra* note 118, at 336.

122. *McDonald*, 561 U.S. at 750. As a matter of safety, gun control is generally a matter of state jurisdiction under the Tenth Amendment of the U.S. Constitution. See U.S. CONST. amend. X.

123. Cf. Lund, *supra* note 118, at 339-40 (explaining the irreconcilability between *Miller*, 307 U.S. 174, and *Heller*, 554 U.S. 570). See generally Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431 (2008).

U.S. Supreme Court viewed narrowly what is allowable as gun control legislation.¹²⁴ “*Heller* and *McDonald* now anchor an evolving body of constitutional law that safeguards gun rights.”¹²⁵

B. Current Statutory Controls

Despite the Court’s reluctance to uphold Second Amendment restrictions,¹²⁶ firearm regulations remain within state and federal legislation.¹²⁷ First, federal firearm legislation is limited to areas of federal jurisdiction within the U.S. Constitution,¹²⁸ such as interstate commerce.¹²⁹ Federal firearm restrictions seem to be an attempt by Congress to supplement state efforts since Congress found that “States, localities, and school systems find it almost impossible to handle gun-related crime by themselves”¹³⁰ This Section summarizes current federal and state statutory gun controls.

1. Federal Legislation

The Brady Handgun Violence Prevention Act of 1993 (the “Brady Act”) was the most expansive federal gun control legislation.¹³¹ The Brady Act “require[d, among other provisions,] federally licensed firearms dealers [] to perform background checks” on persons seeking to purchase a firearm to ensure the purchase is legal.¹³² The Brady Act established the National Instant Criminal Background Check System (“NICS”) to conduct the required background checks when one purchases a firearm.¹³³ Current federal statutes, though, allow firearm purchases to proceed anyway if the background check process is not complete, or has not raised any warning, after three days.¹³⁴ In other words, if a required background check takes more than three days for any reason, the requirement is nullified, and the purchase proceeds without the results. This three-day release is

124. See *TRIBE & MATZ*, *supra* note 2, at 155. See generally *McDonald*, 561 U.S. 742.

125. *TRIBE & MATZ*, *supra* note 2, at 155.

126. See generally *id.*

127. See, e.g., *infra* notes 142-49 and accompanying text.

128. See U.S. CONST. art. I, § 8.

129. See 18 U.S.C. § 922(e), (g)-(i), (k), (n), (q)(B)-(D), (G), (I) (2012); *id.* § 924 (establishing, among others, punishment for involving firearms related to felonies in interstate commerce); see also U.S. CONST. art. 1 § 8, cl. 3.

130. 18 U.S.C. § 922(q)(1)(H) (2012).

131. *Federal Law on Background Checks*, LAW CTR. TO PREVENT GUN VIOLENCE (citing 18 U.S.C. § 922), <http://smartgunlaws.org/federal-law-on-background-checks/> (last visited Sept. 9, 2016).

132. *Id.*

133. For more on the NICS process, see *id.*

134. *Id.* (citing 18 U.S.C. § 922(t)(1)); U.S. DEPT OF JUSTICE, SURVEY OF STATE PROCEDURES RELATED TO FIREARM SALES, 2005 (Nov. 2006), <https://www.bjs.gov/content/pub/pdf/ssprfs05.pdf> [<https://perma.cc/VY57-LHUA>].

known as a “default proceed.”¹³⁵ The NICS, with the “default proceed,” still exists as the entity that conducts background checks for firearm purchases when required. But, not only does this requirement have a narrow time-frame, it does not encompass all gun sales in the United States. The NICS only applies to licensed firearm sellers, excusing approximately forty percent of gun purchases from this screening requirement,¹³⁶ including purchases made at gun shows.¹³⁷ Thus, federal background checks are conducted when they take less than three days on qualifying purchases.

Also limiting the Brady Act’s reach, the Act applied only to handguns. In 1989, the Bureau of Alcohol, Tobacco, Firearms, and Explosives identified forty-three types of assault weapons, which were not affected by the Brady Act.¹³⁸ Assault weapons are semiautomatic, meaning once the trigger is depressed and the gun fires, a new bullet is automatically reloaded.¹³⁹ Though assault weapons account for a small part of the entire population of guns in America, they are ubiquitous among mass shooters.¹⁴⁰ In 1994, the Assault Weapons Ban (“AWB”) was enacted to ban nineteen types of assault weapons.¹⁴¹ In September 2004, the new Congress, which had been strongly lobbied by the NRA, allowed the AWB to expire, so civilians could once again access assault weapons.¹⁴²

Further, federal firearm restrictions prohibit certain individuals from possessing firearms. These individuals are listed in 18 U.S.C. § 922(d) and include those who have been charged with or convicted of a felo-

135. *Id.*

136. *Id.* (citing *Closing Illegal Gun Markets: Extending Criminal Background Checks to All Gun Sales*, EDUC. FUND TO STOP GUN VIOLENCE (May 2002)).

137. See WHITE HOUSE, FACT SHEET: NEW EXECUTIVE ACTIONS TO REDUCE GUN VIOLENCE AND MAKE OUR COMMUNITIES SAFER (Jan. 4, 2016) [hereinafter EXECUTIVE ORDER FACT SHEET], <https://www.whitehouse.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our> [<https://perma.cc/3Y6B-EPRA>] (re-interpreting the NICS requirement to include purchases made at gun shows).

138. Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL’Y REV. 488, 492 (1992). An “assault weapon” is “any of various automatic or semiautomatic firearms.” *Assault Weapon*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/assault%20weapon> [<https://perma.cc/2AWP-GXR6>].

139. Abrams, *supra* note 138, at 491.

140. See *id.* at 496; Lois Beckett, *The Assault Weapon Myth*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/14/sunday-review/the-assault-weapon-myth.html> [<https://perma.cc/98UJ-Q69D>]; Larry Buchanan, et al., *How They Got Their Guns*, N.Y. TIMES (Nov. 7, 2017), <http://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html> [<https://perma.cc/7DWP-DKSC>]; see also Abrams, *supra* note 138, at 494 (citing Jim Stewart & Andrew Alexander, *Assault Weapons Muscling in on the Front Lines of Crime*, ATLANTA J. & CONST., at A1 (May 21, 1989) (discussing a 1989 report that found that an assault weapon is twenty times more likely to be used in a crime than a conventional weapon)); *id.* at 495-96.

141. ALVAREZ & BACHMAN, *supra* note 116, at 60-61.

142. *Id.* at 61.

ny,¹⁴³ are fugitives from justice,¹⁴⁴ are using or addicted to illegal substances,¹⁴⁵ or have been determined mentally incapacitated.¹⁴⁶ The same statute further reflects a significant concern for perpetrators of domestic violence and restricts anyone who is restrained by the court from “harassing, stalking, or threatening [his or her] intimate partner . . . or child”¹⁴⁷ or who has been convicted of any domestic violence crime.¹⁴⁸ Other statutory concerns include tampering with a weapon or the sale/transfer of stolen weapons.¹⁴⁹ Federal statutes are bound by congressional jurisdictional limits emanating from the Constitution, leaving a majority of gun control issues within the prerogative of states’ police powers.¹⁵⁰ Thus, states individually enact legislation governing firearms in their jurisdiction. Nationwide state legislation is outlined in Subsection 3 below after President Obama’s 2016 Executive Order relating to firearms is explained in Section 2 below.

2. 2016 Executive Order

The lack of interpretation of the Second Amendment and resulting absence of applicable framework leaves a wide-range of gaps to be filled by any governmental branch. Recognizing the prevalence of gun violence in the United States and a glaring need for reform in gun control, President Obama released a relevant Executive Order in early 2016.¹⁵¹ The Executive Order, by reinterpreting current legislation, attempted to improve the NICS background process by extending the time in which background checks are processed, expanding the scope of the background requirement, and hiring over 200 additional “examiners and other staff to help process these background checks.”¹⁵² Similarly, the Executive Order provides that funding will be provided for additional law enforcement officers to enforce gun laws.¹⁵³ Further, the Order directs governmental departments to conduct or endorse research on gun safety and related technology.¹⁵⁴ President Obama’s Executive Order—whether a constitutional use of power or

143. 18 U.S.C. § 922(d)(1) (2012).

144. *Id.* § 922(d)(2).

145. *Id.* § 922(d)(3).

146. *Id.* § 922(d)(4).

147. *Id.* § 922(d)(8).

148. *Id.* § 922(d)(9) (restricting those who have been convicted of domestic violence misdemeanors). Those convicted of a felony related to domestic violence would be restricted under § 922(d)(1).

149. *See id.* § 922(i), (k), (m), (p).

150. *See* U.S. CONST. amend. X.

151. EXECUTIVE ORDER FACT SHEET, *supra* note 137.

152. *Id.*

153. *Id.*

154. *Id.*

not¹⁵⁵—further demonstrates the vacuum of Second Amendment guidance from jurisprudence, leaving the legislative and executive branches to individually fill in gaps as they see fit, taking into consideration interests of their constituents and interest groups.

3. *State Legislation*

With respect to gun control, each state acts as a sovereign entity in crafting legislation, so gun control legislation varies significantly between states.¹⁵⁶ “State gun laws fill enormous gaps that exist in our nation’s federal laws, and help to reduce gun violence and keep citizens safe.”¹⁵⁷ In 2015, California was the state with the “strongest gun reform measures in the country,” followed by Connecticut, Delaware, Maryland, Massachusetts, New Jersey, and New York, respectively.¹⁵⁸ Those on the other end of the spectrum with the least amount of gun control legislation were Arizona, Alaska, Kansas, Mississippi, and Wyoming.¹⁵⁹ In 2016, California was again ranked first in gun safety, followed by Connecticut, New Jersey, Massachusetts, Maryland, New York, and Hawaii, respectively.¹⁶⁰

A state’s rank in protective measures, which considers the amount of state gun control legislation, seems to be reflected in their respective gun violence rates.¹⁶¹ For example, in 2015, California and Connecticut ranked forty-two and forty-seven, respectively, in “Gun Death Rate Rank,” and Mississippi and Wyoming ranked three and

155. See Motion for Summary Judgment, *Klayman v. Obama*, No. 9:16-cv-80087-DMM (S.D. Fla. Feb. 3, 2016), <http://www.freedomwatchusa.org/pdf/160203-MotionforSummaryJudgmentASFILED.pdf> [<https://perma.cc/5S7E-C6LC>].

156. E.g., *2013 State Scorecard*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/2013-state-scorecard?gclid=CMicjKmogcoCFYcWHwod5HQDOQ> (last visited Sept. 9, 2016).

157. *Id.*

158. Press Release, Brady Campaign to Prevent Gun Violence, One Year After Newtown, States Lead the Way on Gun Violence Prevention According to New Analysis of State Gun Laws (Dec. 9, 2013), <http://www.bradycampaign.org/inthenews/one-year-after-newtown-states-lead-the-way-on-gun-violence-prevention-according-to-new> [<https://perma.cc/PEE3-MYSY>]; *accord* LAW CTR. TO PREVENT GUN VIOLENCE, 2015 GUN LAW STATE SCORECARD (2015), <http://gunlawscorecard.org/> (last visited Sept. 9, 2016).

159. Press Release, Brady Campaign to Prevent Gun Violence, *supra* note 158; LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 158.

160. *2016 Gun Law State Scorecard*, GUN LAW SCORECARD, <http://gunlawscorecard.org/> [<https://perma.cc/UVD4-H7WH>].

161. Press Release, Brady Campaign to Prevent Gun Violence, *supra* note 158 (“[M]any of [these States] also have some of the highest gun death rates in the country.”); LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 158; see *Guns in America Town Hall with Obama Transcript (Full Text)*, CNN (Jan. 7, 2016, 11:00 PM) [hereinafter *Guns in America Transcript*], <http://www.cnn.com/2016/01/07/politics/transcript-obama-town-hall-guns-in-america/> [<https://perma.cc/S62X-GCT8>] (“[I]f you look at where are the areas with the highest gun ownership, those are the places . . . where the crime rate hasn’t dropped down that much. And the places where there’s pretty stiff restrictions on gun ownership, . . . the crime has dropped really quickly.”).

seven, respectively.¹⁶² In 2016, California ranked forty-three and Connecticut ranked forty-six. Massachusetts ranked last (fifty).¹⁶³ These states will guide the legislation summary in this discussion to describe the most protective and least restrictive examples in the country.

California, the most proactive state in the nation on gun control, seems to have built upon federal restrictions to ensure that the most protective means are in place. For example, although the federal AWB expired in 2004, California bans civilians completely from possessing, selling, or obtaining any assault weapon.¹⁶⁴ California also imposes further implications for illegal possession of firearms whereby illegal firearms—considered a public nuisance—are confiscated and destroyed.¹⁶⁵ California is an example of a state using its Tenth Amendment police powers to safeguard its citizens from firearms beyond the protections provided by federal laws.¹⁶⁶

By contrast, Wyoming has an individualized constitutional provision that is broader than the U.S. Constitution, which provides:

The right of citizens to bear arms *in defense of themselves* and of the state shall not be denied.¹⁶⁷

Wyoming does not require that purchasers possess a permit or license to obtain a firearm, and sellers err on the side of granting the purchase.¹⁶⁸ There is no state law prohibiting the possession of machine guns, or assault weapons.¹⁶⁹ Thus, federal restrictions seem to act as the outermost limits on the sale and possession of firearms in

162. LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 158.

163. *2016 Gun Law State Scorecard*, *supra* note 160.

164. CAL. PENAL CODE § 30515 (Deering 2015), Note § 12 (“It is the purpose of this act to effectively achieve the Legislature’s intent to prohibit all assault weapons.”); CAL. PENAL CODE §§ 30600-15 (Deering 2015); *Assault Weapons in California*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/assault-weapons-in-california/> [<https://perma.cc/8MSP-Z2K8>]; see CAL. PENAL CODE §§ 30510, 30515 (Deering 2015) (defining further “assault weapon”); Jones & Frosch, *infra* note 279. There is an exception to the California assault weapon ban for law enforcement agencies, when necessary. See CAL. PENAL CODE § 30630 (Deering 2015).

165. *Assault Weapons in California*, *supra* note 164 (citing CAL. PENAL CODE §§ 30800(a), (c) (Deering 2015)).

166. See U.S. CONST. amend. X; CAL. PENAL CODE § 30505(a) (Deering 2015).

167. WYO. CONST. art. 1, § 24 (emphasis added); *Wyoming State Profile*, NRA-ILA (Nov. 12, 2014) (emphasis added), <https://www.nraila.org/gun-laws/state-gun-laws/wyoming/>.

168. *Wyoming Gun Laws*, NRA-ILA (Apr. 13, 2017), <https://www.nraila.org/gun-laws/state-gun-laws/wyoming/> [<https://perma.cc/QK72-YAAQ?type=image>].

169. *Id.* In fact, Wyoming lawmakers have even sought to oust federal restrictions on assault weapons. See Charlie Spiering, *Wyoming Lawmakers Propose Bill to Nullify New Federal Gun Laws*, WASH. EXAMINER (Jan. 10, 2013, 12:00 AM), <http://www.washingtonexaminer.com/wyoming-lawmakers-propose-bill-to-nullify-new-federal-gun-laws/article/2518133> [<https://perma.cc/5REF-KYM6>].

Wyoming.¹⁷⁰ In other words, Wyoming does not further affect firearms in the state, deferring to federal restrictions for the ceiling of restriction.¹⁷¹

C. Recent Gun Violence in the United States

Regrettably, shootings have become all-too-familiar in American life. Random acts of violence have taken many American lives in recent years. This Section details a few, significant public shootings in recent years to highlight the effect firearms have on modern U.S. society.

Just one example of a seemingly non-pointed, or random, shooting was in October of 2017 when Stephen Paddock, sixty-four years old, “rained a rapid-fire barrage on an outdoor concert festival” in Las Vegas, Nevada, from his hotel room on the 34th floor of a nearby hotel.¹⁷² The attack left at least 59 dead and 527 others injured, making it the deadliest mass shooting in modern U.S. history.¹⁷³ Five years earlier, in June 2012, James Holmes, twenty years-old, ambushed a movie theater in Aurora, Colorado, during a midnight showing of the newly released *The Dark Knight Rises*.¹⁷⁴ He was suited in armor and wearing a mask.¹⁷⁵ Twelve were fatally wounded in the sudden mass shooting.¹⁷⁶

School shootings seem to be a particular gun violence issue that both terrifies Americans and polarizes the gun debate. “[T]he number of school killings in the U.S. between 2000 and 2010 was one less than the number in dozens of other countries combined,” including Canada, China, England, France, India, Israel, Japan, Russia, Thailand, and Yemen.¹⁷⁷ One of the most significant in recent times was December 14, 2012, when the country was shaken by a shooting that

170. See *Wyoming Gun Laws*, *supra* note 167. But see Spiering, *supra* note 169 (explaining Wyoming lawmakers’ pushback on federal firearm restrictions).

171. *Wyoming Gun Laws*, *supra* note 167.

172. *Multiple Weapons Found in Las Vegas Gunman’s Hotel Room*, N.Y. TIMES (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/us/las-vegas-shooting.html?_r=0 [<https://perma.cc/YD97-4LLE>].

173. *Id.*; *Las Vegas Shooting: What We Know*, CNN (Oct. 3, 2017), <http://www.cnn.com/2017/10/02/us/las-vegas-shooting-what-we-know/index.html> [<https://perma.cc/BGB7-DTKY>].

174. *E.g.*, TRIBE & MATZ, *supra* note 2, at 154.

175. *E.g., id.*

176. *E.g., id.*

177. Justin McCarthy, *Three in 10 U.S. Parents Worry About Child’s Safety at School*, GALLUP (Aug. 25, 2015), http://www.gallup.com/poll/184853/three-parents-worry-child-safety-school.aspx?g_source=gun%20violence&g_medium=search&g_campaign=tiles [<https://perma.cc/LL29-BG9T>]; Simone Foxman, *How School Killings in the US Stack Up Against 36 Other Countries Put Together*, QUARTZ (Dec. 14, 2012), <http://qz.com/37015/how-school-killings-in-the-us-stack-up-against-36-other-countries-put-together/> [<https://perma.cc/728Q-7J7G>]; *accord Guns in the US*, *supra* note 5 (reporting sixty-four school shootings in 2015 alone).

invaded what is supposed to be one of the safest and most innocent places in everyday life: an elementary school.¹⁷⁸ Adam Lanza, a twenty-year-old, took his mother's semi-automatic rifles to Sandy Hook Elementary School in Newtown, Connecticut, and opened fire.¹⁷⁹ Twenty children and six adult staff members lost their lives on that day.¹⁸⁰ In addition to the Sandy Hook massacre, there have been multiple shootings at U.S. colleges and universities in recent years, including Florida State University in 2014 (three wounded and shooter killed)¹⁸¹ and Virginia Tech in 2007 (thirty-three deaths including the shooter and twenty-three wounded).¹⁸² With the rise in violence and resulting fear in American schools, school shootings are now a real concern for school officials.¹⁸³ This sampling of information on recent school shootings in the United States shows that guns are a real threat to schools and a relied upon instrument for attackers. And, more significantly, the prevalence of gun violence in schools is disturbing U.S. education systems.

Just after the Sandy Hook tragedy, thirty-three percent of U.S. parents were concerned for their child's safety at school.¹⁸⁴ In 2015, twenty-nine percent of U.S. parents retained that fear.¹⁸⁵ The shooting seemed to spark the most recent, polarized iteration of America's gun debate.¹⁸⁶ Gun rights activists, spearheaded by the NRA, responded with a push for increased guns in schools.¹⁸⁷ They argue that

178. WALSH & HEMMENS, *supra* note 7, at 373.

179. *Id.*

180. *Id.* This does not include the shooter's mother who he shot in her bed before the attack and the shooter himself who committed suicide when police arrived at the school. *Id.*

181. *E.g.*, Sean Rossman, *Shooting at Strozier Library Stuns Florida State*, TALLAHASSEE DEMOCRAT (Nov. 21, 2014, 10:15 AM), <http://www.tallahassee.com/story/news/local/fsu-news/2014/11/20/shooting-strozier-library-stuns-florida-state/70040320/> [<https://perma.cc/UV6U-P3ZQ>]. Note that this technically falls outside of the definition of "mass shooting." See *supra* note 5.

182. Christine Hauser & Anahad O'Conner, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html> [<https://perma.cc/9JQP-W6W7>].

183. In late 2015, school officials in Los Angeles received a threat and, in an abundance of caution, closed the entire district until the threat could be investigated and cleared. Alex Dobuzinskis & Dan Whitcomb, *Gun and Bomb Attack Threat Closes Los Angeles Schools in Likely Hoax*, REUTERS (Dec. 15, 2015, 6:09 PM), <http://www.reuters.com/article/us-los-angeles-threat-idUSKBN0TY1YR20151215> [<https://perma.cc/2CBF-S7C9>]; see Greg Botelho, *One Threat to L.A. and New York School Districts, Two Very Different Responses*, CNN (Dec. 15, 2015, 4:21 PM), <http://www.cnn.com/2015/12/15/us/la-new-york-school-threats/> [<https://perma.cc/4QG8-R46L>] (discussing a similar threat in New York).

184. McCarthy, *supra* note 177.

185. *Id.*

186. TRIBE & MATZ, *supra* note 2, at 156-58; WALSH & HEMMENS, *supra* note 7, at 384; McCarthy, *supra* note 177; see Press Release, Brady Campaign to Prevent Gun Violence, *supra* note 158.

187. See Christina Wilkie, *NRA School Safety Report Recommends Arming Teachers, Loosening Gun Laws (UPDATE)*, HUFFINGTON POST: POL. (Apr. 2, 2013, 1:33 PM),

increasing the amount of firearms will lessen the amount of violence due to the equality of power on both sides of an attack.¹⁸⁸ By their logic, if teachers (or other school authorities)¹⁸⁹ are armed, then school shootings are less likely to occur because shooters will know they will be met with reciprocal power.¹⁹⁰ On the other side, proponents of increased gun control argue that further restricting access to firearms will lessen the prevalence of senseless violence in America because such restrictions will help ensure that only responsible carriers are allowed to handle such deadly weapons. Or, they counter the gun rights activists' proposal by suggesting that an increased likelihood of injuries or deaths will follow from the increased presence of firearms in schools.¹⁹¹

Similar to the political polarization that resulted from the Sandy Hook attack, shootings seem to have taken the tenor of political statements. In late 2015, Robert Dear attacked a Planned Parenthood clinic in Colorado Springs, Colorado.¹⁹² Three were killed, including one Colorado Springs police officer, and several others were injured.¹⁹³ After a several-hour stand-off with police, Dear was finally apprehended by police and interrogated.¹⁹⁴ During questioning, Dear "mentioned 'baby parts' . . . [and] expressed anti-abortion and anti-government views."¹⁹⁵ Though Dear's motive has not been confirmed

http://www.huffingtonpost.com/2013/04/02/nra-school-safety-report_n_2999968.html
[<https://perma.cc/ZZ4T-KRSP>].

188. See, e.g., Eugene Scott, *Trump: Armed Teachers Could Have Stopped Oregon Massacre*, CNN (Oct. 4, 2015, 9:20 AM), <http://www.cnn.com/2015/10/03/politics/donald-trump-oregon-shooting-armed-teachers/> [<https://perma.cc/X3JR-JFSX>].

189. See Ashley Fantz, *NRA Clarifies Its Stance on Arming Schools*, CNN (Dec. 27, 2012, 5:03 PM), <http://www.cnn.com/2012/12/27/us/nra-president-interview/> [<https://perma.cc/3BUH-Q2ZT>] (discussing the various, opposing views).

190. A flaw in this argument is that a large amount of attackers are not deterred by a fear of firearms, as they have suicidal intentions. See, e.g., Scott A. Bonn, *The Suicide-Mass Murder Connection: A Growing Epidemic*, PSYCHOL. TODAY: WICKED DEEDS (Mar. 30, 2015), <https://www.psychologytoday.com/blog/wicked-deeds/201503/the-suicide-mass-murder-connection-growing-epidemic> [<https://perma.cc/ULQ2-TNQC>]; Adam Lankford, Opinion, *What Drives Suicidal Mass Killers*, N.Y. TIMES (Dec. 17, 2012), http://www.nytimes.com/2012/12/18/opinion/what-drives-suicidal-mass-killers.html?_r=0 [<https://perma.cc/XT3M-QV5W>].

191. Fantz, *supra* note 189.

192. Kevin Conlon et al., *Source: Suspect Spoke of 'Baby Parts' After Planned Parenthood Shooting*, CNN (Nov. 29, 2015, 1:23 PM), <http://www.cnn.com/2015/11/28/us/colorado-planned-parenthood-shooting/> [<https://perma.cc/CL6N-CDAB>]. The shooter's background included domestic violence accusations, reasonably raising questions as to how he obtained his firearm. *Id.*

193. *Id.*; Ben Markus, *Suspect in Colorado Planned Parenthood Shooting Appears in Court*, NPR (Nov. 30, 2015, 5:19 PM), <http://www.npr.org/2015/11/30/457907203/suspect-in-colorado-planned-parenthood-shooting-appears-in-court> [<https://perma.cc/3M7Y-9P6N>].

194. See Conlon et al., *supra* note 192.

195. *Id.*

by authorities,¹⁹⁶ the U.S. Attorney General and the President of Planned Parenthood characterized the shooting as a “crime against women.”¹⁹⁷

In mid-2016, Omar Mateen, a former security guard, opened fire in an Orlando nightclub most frequented by homosexual patrons.¹⁹⁸ Mateen used a nine-millimeter semi-automatic handgun and a .223-caliber assault-style rifle, killing forty-nine and wounding at least fifty more.¹⁹⁹ “Mateen bought the guns he used in the massacre . . . a few days before the assault. He did not need a security guard’s license to buy them.”²⁰⁰ Mateen’s father remembered Mateen being “angered by the sight of two men kissing during a trip to Miami.”²⁰¹ The Pulse shooting was the deadliest mass shooting in U.S. history at the time.²⁰²

In July 2016, the execution of Dallas police officers came as a political response to racial tension between police officers and citizens.²⁰³ Micah Johnson, expressly angry at “white people” and “white [police] officers,” used a rifle from an elevated position to execute police officers in the streets of Dallas during a peaceful protest following the death of two black citizens by white police officers.²⁰⁴ The Dallas shooting produced the deadliest day for law enforcement since September 11, 2001—two records of lethality by firearms broken in the United States in a matter of one month.²⁰⁵

Guns being at the center of political debates now heighten the concern of firearms being used to make a statement. “For the crazed gunman, . . . the question is how to prevent such carnage Answering that question requires a close examination of the system of laws that govern gun ownership, particularly limits on who can pur-

196. See Markus, *supra* note 193.

197. Conlon et al., *supra* note 192.

198. Rene Stutzman, *Orlando Gunman: ‘He Was an Expert Marksman,’ Says His Former Gun Range Instructor*, ORLANDO SENTINEL (June 22, 2016, 5:24 PM), <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/omar-mateen/os-orlando-shooting-mateen-gun-range-scores-20160622-story.html> [https://perma.cc/RP8M-LVLD].

199. *Id.*

200. *Id.*

201. Maya Rhodan, *What We Know About Pulse Nightclub, Site of the Deadly Orlando Shooting*, TIME (June 12, 2016), <http://time.com/4365362/pulse-night-orlando-shooting/> [https://perma.cc/6MCL-7GVC].

202. *Deadliest Mass Shootings in U.S. History Fast Facts*, CNN (June 13, 2016, 8:27 AM), <http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/>.

203. Faith Karimi, Catherine E. Shoichet & Ralph Ellis, *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (July 9, 2016, 1:37 AM), <http://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests/> [https://perma.cc/MKR7-XWUV].

204. Nicole Gaouette & Steve Visser, *Dallas Police Shooter a Reclusive Army Reservist*, CNN (July 11, 2016, 2:59 PM), <http://www.cnn.com/2016/07/08/us/micah-xavier-johnson-dallas-shooter/> [https://perma.cc/HT2D-E2AT]; Karimi, Shoichet & Ellis, *supra* note 203.

205. Karimi, Shoichet & Ellis, *supra* note 203.

chase guns and how much firepower they can obtain.”²⁰⁶ The attacks by Dear, Mateen, and Johnson show that guns are the weapons of choice for “domestic terrorists” seeking to make political statements in the United States.

IV. CONVERGING THE TWO: APPLYING THE UNDUE BURDEN STANDARD TO SECOND AMENDMENT RIGHTS

“The possession of a handgun greatly increases the possibility that you or someone you love will be killed with or as a result of that weapon.”²⁰⁷ Most of the weapons used in recent mass shootings were purchased legally and involved NICS background processing.²⁰⁸ At least eight of those shooters had criminal backgrounds or mental health histories that slipped through current controls, allowing their purchases to go through.²⁰⁹ This Part converges the arguments and reasoning surrounding gun control and abortion restrictions, demonstrating that the differences between the two areas are slighter than they initially appear, and the framework from the latter may tremendously aid in reviewing legislation on the former. This Part, framed by the “undue burden” analysis from *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹⁰ and *Whole Woman’s Health v. Hellerstedt*,²¹¹ applies the “undue burden” standard to progressive gun control legislation, contending that such provisions—inquiring into the purchaser’s mental health, eliminating the “default proceed,” and reinstating a ban on assault weapons—could pass constitutional muster under this framework.

Opponents of gun control argue that proponents are too idealistic to realize that any legitimate restrictions will only create an environment where the only gun owners are those whom the laws seek to prohibit from owning firearms.²¹² This is because those who should not own guns would be the ones willing to defy the legislation, or break the law, and wrongly retain their firearms.²¹³ Regardless of partisan controversy, the facts underlying recent gun violence in the United States show the insufficiency of current gun control laws.²¹⁴

206. TRIBE & MATZ, *supra* note 2, at 155.

207. J. George Edwards, *Commentary: Murder and Gun Control*, 18 WAYNE L. REV. 1335, 1335 (1972).

208. *See* Buchanan, et al., *supra* note 140.

209. *Id.*; *see generally* EXECUTIVE ORDER FACT SHEET, *supra* note 137.

210. 505 U.S. 833 (1992).

211. 136 S. Ct. 2292 (2016).

212. *See* KUKLA, *supra* note 103, at 437-44; *see also* *Guns in America Transcript*, *supra* note 161 (“[O]ftentimes, the NRA will . . . say, see, these things don’t work.”).

213. *See* KUKLA, *supra* note 103, at 437-44.

214. *Cf.* 2013 *State Scorecard*, *supra* note 157 (“[M]any of the states with the strongest gun laws also have the lowest gun death rates.”).

Aside from the narrowly construed Supreme Court Second Amendment jurisprudence, there is little guidance as to how Second Amendment violations are reviewed.²¹⁵ In other words, courts are in need of a workable standard for reviewing gun control legislation, especially in the wake of recent gun violence in the United States.

Considering the political influence of the legislative and executive branches, the judiciary—a theoretically politics-free branch—seems to be the appropriate avenue for instituting guidance in Second Amendment review. Turning to the abortion framework for guidance, the “undue burden” standard may be imperfect, but, it will undoubtedly help to provide a needed infrastructure to review gun control legislation under the Second Amendment, which is presently glaringly absent from case law.

Introducing its *Roe v. Wade* opinion, the Court stated:

One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.²¹⁶

In other words, abortion is a very personal and political topic. Note, though, how easily this entire statement can be transposed to gun control by exchanging just the last term in the Court’s statement, i.e. “. . . conclusions about gun control.” “As with other controversial issues such as abortion and affirmative action, opinions about gun control are almost always passionately held and in diametric opposition.”²¹⁷ Both issues, though privately guided by emotion and diverse personal views,²¹⁸ have constitutional overtones that invoke various degrees of governmental interests and allowable restrictions.²¹⁹

Despite appealing to opposing partisanship and rarely sharing conversation, the right to abortion and the right to bear arms are

215. See TRIBE & MATZ, *supra* note 2, at 155 (“[T]he Court declined to offer guidance on how Second Amendment analysis works when a gun regulation is challenged in court.”); *2nd Amendment Jurisprudence in a Post-Heller America*, PARENTS AGAINST GUN VIOLENCE (Aug. 18, 2014), <http://www.parentsagainstgunviolence.com/2nd-amendment-jurisprudence-in-a-post-heller-america/> [https://perma.cc/62W7-CZMD].

216. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

217. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 57 (1992).

218. Hardy, *supra* note 2, at 46-47 (quoting Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37 (1976), reprinted in LEE NISBET, *THE GUN CONTROL DEBATE* 73-74 (2d ed. 2001) (labeling the gun debate as a “cultural war”). Cf. THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 47 (2012).

219. See *Roe*, 410 U.S. at 116-17.

substantially similar in their existence and controlling framework.²²⁰ Both are fundamental within the U.S. Constitution.²²¹ Both are “individual” rights, meaning they belong to the individual seeking to exercise them;²²² yet, both rights affect others surrounding the one exercising the right.²²³ Feminists and abortion activists may disagree and argue that abortion is a decision solely between the woman and her physician. But, there is an argument that, at least in some situations where others are privy to information about the woman’s decision, others are affected by abortions. For gun control, the connection is much simpler, as the victim and a countless number of those close to the victim are affected when a firearm is discharged unlawfully. In fact, the general public is affected by gun control laws—whether broadened or narrowed—at least to the extent that they affect the society in which they live.²²⁴

Proponents of firearm deregulation hold beliefs that mirror the pro-life incrementalism strategy.²²⁵ Supporters of an unrestricted Second Amendment fear that each gun control law that passes is a step towards a total ban on their cherished weapons. David Hardy argues that their fear of any gun-control measures is reasonable because “[t]hey have heard opponents describe their purpose to eliminate handgun ownership, with any lesser measures simply a means to that end.”²²⁶ So, Hardy argues, “opposition even to modest restrictions is both logical and natural.”²²⁷ Yet, on the abortion side of the same coin, pro-lifers (whom likely intermingle with gun proponents, if not individually, then systemically as they may identify with

220. See *McDonald v. Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring) (saying that the framework controlling controversial issues is much less contended than the existence of such rights by American people).

221. U.S. CONST. amend. II; *Roe*, 410 U.S. 113. Thus, both are reviewed under strict scrutiny, of which the “undue burden” standard is a corollary. See Brownstein, *supra* note 69, at 880.

222. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992).

223. See *Casey*, 505 U.S. at 896-98.

224. Press Release, Brady Campaign to Prevent Gun Violence, *supra* note 158; see e.g., Tom Dart, *Open Carry of Handguns in Texas: Fear for Some But ‘Everybody Else Is Packing’*, THE GUARDIAN (Jan. 1, 2016, 10:46 AM), <http://www.theguardian.com/us-news/2016/jan/01/texas-open-carry-handguns-law-public-places-businesses> [<https://perma.cc/LJC3-W7RE>] (discussing the antiquated atmosphere open-carry gun control legislation would create); Jim Turner, *Florida’s Campus-Carry Bill Likely Holstered*, NEWS SERVICE OF FLA. (Jan. 21, 2016), <http://www.wufl.org/news/2016/01/21/floridas-campus-carry-bill-likely-holstered/> [<https://perma.cc/Q57A-HDHL>] (stating that open-carry legislation is being considered in Florida).

225. See Hardy, *supra* note 2, at 49-50; *supra* notes 57-60 and accompanying text. See generally Hardy, *supra* note 2.

226. Hardy, *supra* note 2, at 49-50.

227. *Id.* at 50; see also *Data and Statistics: Abortion*, *supra* note 15.

the same political party) use this exact strategy that they harshly reject for gun control to restrict abortion rights.²²⁸

Applying the argument that the Second Amendment should be completely unrestricted to abortion results in this: The right to have an abortion is a fundamental right that cannot be denied to any U.S. citizen. A fetus is not considered a “person” within the language of the U.S. Constitution and, therefore, does not hold any constitutional right, including life.²²⁹ Thus, a woman has the right to abort her pregnancy up until the point that the fetus is born. Of course, we know that conservatives would repulse at this argument; instead, they would prefer that the right to an abortion be eliminated.²³⁰ And, the right to choose to have an abortion is more restricted than that logic suggests due to a state’s interests related to this fundamental right that the Court has recognized.

For as long as the *Casey* framework stands in the abortion context, a state has recognized interests in restricting abortion up until a certain point. That point has been demarcated as when “state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”²³¹ To that end, this discussion is not meant to affect abortion jurisprudence, as the argument herein does not aim to suggest *or* discourage any change in abortion framework. For discussion purposes, this Note accepts and applies the standing abortion precedent.

A. *Providing What the Second Amendment Is Missing*

Second Amendment precedent “nowhere says or implies that the government is forbidden to place any restrictions at all on protected weapons.”²³² A look at Second Amendment jurisprudence, gun safety statutes, and policy concerns illuminates an absence of direction for courts reviewing gun control legislation,²³³ which is undeniably impending. This Note’s solution of borrowing from abortion and applying the “undue burden” framework to gun control is helpful for several reasons.

Establishing a sort of infrastructure in which Second Amendment jurisprudence can develop will provide uniformity and consistency

228. *Supra* notes 57-60 and accompanying text.

229. *See* *Roe v. Wade*, 410 U.S. 113, 116-17 (1973); ZIEGLER, *supra* note 3, at 11.

230. *See* SKOCPOL & WILLIAMSON, *supra* note 218, at 58 (“Whereas a 58% majority of all Americans approve of the decision of the Supreme Court to establish a ‘Constitutional right for women to obtain legal abortions in this country,’ only 40% of Tea Partiers approve of that court decision and 53% consider it a ‘bad thing.’”); ZIEGLER, *supra* note 3, at 58 (stating that the real goal of the pro-life movement is “a total, constitutional ban on abortion”).

231. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

232. Lund, *supra* note 118, at 341.

233. *Id.* (“Nor does *Miller* say what restrictions might be permissible.”).

within the case law. This is practically important for several reasons.²³⁴ For one, uniformity is a long-standing concern of the U.S. Supreme Court.²³⁵ Likewise, with the evolution of jurisprudence within a consistent standard, courts may look to other jurisdictions or forums that have applied the “undue burden” test to analogize in determining the validity of a statute *sub judice*. In other words, consistency will create coherence and guidance in the Second Amendment arena.

Further, although abortion claims the “undue burden” framework as its own unique standard, the principles underlying this framework are not novel to the Court. We see similar reasoning and resulting standards in other areas of constitutional analysis that are much more established and developed than abortion or gun control. For example, in freedom of association (First Amendment) jurisprudence, under *Boy Scouts of America v. Dale*,²³⁶ the Court asks whether the entrant proposes a substantial obstacle to the expressive institution achieving its message.²³⁷ Applying this “abortion framework” to gun control results in a symbiotic relationship between the two arenas. By developing Second Amendment “undue burden” case law, the framework and its inter-workings will be more illuminated, which will further guide abortion jurisprudence. Guided by “[t]he conventional understanding of fundamental rights in constitutional law” and how legislation affecting them must be analyzed,²³⁸ this Part proceeds through the application of the “undue burden” standard to gun safety legislation.

B. State's Interests

“[I]t makes sense to do everything we can to keep guns out of the hands of people who would try to do others harm or to do themselves harm.”²³⁹ Following an “undue burden” analysis, the Court must first

234. See Brownstein, *supra* note 69, at 870.

235. E.g., *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1575, 1578 (2008).

236. 530 U.S. 640 (2000).

237. *Id.* at 683-84; see also Brownstein, *supra* note 69, at 872 (“[T]he ‘undue burden’ standard of the *Casey* plurality is reflected in one form or another throughout the fundamental rights case law of the past forty years.”); Valeria J. Pacer, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 301-02 (1995) (discussing other contexts in which the “undue burden” logic is seen in constitutional jurisprudence, such as *San Antonio v. Rodriguez*, 411 U.S. 1 (1973), and *Zablocki v. Redhail*, 434 U.S. 374 (1978)). Cf. Jon S. Lerner, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363 (1995) (applying the “undue burden” standard to home schooling); Winston Peters, *Application of the Undue Burden Test to Mass Transportation: Parallel or Pitfall*, 34 HASTINGS L.J. 491 (1982) (discussing “undue burden” within mass transportation).

238. Brownstein, *supra* note 69, at 867.

239. *Guns in America Transcript*, *supra* note 161.

review and determine that a state has legitimate and compelling interests to protect in regulating the right. In *Casey*, the Court discussed the external implications of abortion, despite being an individual right:

It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.²⁴⁰

Note the parallel between this analysis and gun control, where the impact reverberates well past the gun bearer. If the state has an interest in protecting the life of the fetus once it reaches a certain point in the pregnancy,²⁴¹ then the state surely has an interest in protecting the lives of adults and children living in U.S. society.²⁴² Intuitively, the latter interest is stronger than the former as the constituents are "persons" protected by the U.S. Constitution, whereas an unborn fetus is not.²⁴³

One may argue that the termination of a fetus is sure for every abortion, whereas restricting gun control is attempting to limit a speculative injury. But the mere capability of each firearm and the prevalence of gun violence in the United States, especially recently, indicates that this injury is not so speculative. Each American has felt the harm caused by firearms, whether personally or through the threat that permeates modern-day America.²⁴⁴ This societal fear, as well as the decrease in Americans' safety, caused by unrestricted or irresponsible firearm ownership is fodder for a legitimate state concern and justifies regulation.

C. Burdening the Right

Once the Court is comfortable that the state has a sufficient interest to protect, it must determine whether the regulation *sub judice* creates an "undue burden" on one trying to access or exercise his or her constitutional right.²⁴⁵ "Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for [its legitimate interests] are permitted, if they are not a substantial obstacle to the" fundamental right they

240. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

241. *See generally id.*; *Roe v. Wade*, 410 U.S. 113 (1973).

242. *Cf. TRIBE & MATZ*, *supra* note 2, at 155-56.

243. *Roe*, 410 U.S. at 133-34; *see* U.S. CONST. amend. XIV, § 1.

244. *See* EXECUTIVE ORDER FACT SHEET, *supra* note 137.

245. *See* Brownstein, *supra* note 69, at 881-82.

are regulating.²⁴⁶ Applying this structure from abortion law to gun control provides insight into the logical inconsistency embedded within conservative rhetoric between the two topics. This Section juxtaposes the abortion provisions reviewed in *Casey* to recently suggested gun control provisions within the *Casey* “undue burden” framework and its application.²⁴⁷

1. *Further Inquiry into Purchaser’s Mental Health*

More and more, Americans are blaming the mental health system instead of easy access to guns for the violence in today’s American society.²⁴⁸ But, “it is the combination of mental illness and the availability of guns that is the real problem.”²⁴⁹ Several high profile shooters in recent years (including, but not limited to: James Holmes of Aurora, Colorado (July 2012),²⁵⁰ Adam Lanza of Sandy Hook (December, 2012),²⁵¹ Seung-Hui Cho of Virginia Tech University (April 2007),²⁵² and Aaron Alexis of the Washington Navy Yard (September 2013)²⁵³ had histories of mental health issues before they attacked.²⁵⁴ Due to this correlation, there is strong support for increasing the depth of pre-firearm purchase background checks to include the purchaser’s mental health.²⁵⁵

246. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

247. Note that this argument (applying the “undue burden” framework to gun control laws) can be applied to other gun control proposals just the same. *See, e.g.*, Abrams, *supra* note 138, at 499-500 (suggesting a burden shift to allow assault weapons once justified by their proponents); Edwards, *supra* note 207, at 1338 (suggesting federal registration requirements of all firearms and arguing that piecemeal state regulations are ineffective). Edwards’s first suggestion of only allowing handguns for governmental purposes would likely be *per se* unconstitutional under *District of Columbia v. Heller*, 554 U.S. 570 (2008), which overruled *United States v. Miller*, 307 U.S. 174 (1939). For the registration requirement, though, you could compare this to the reporting provision in *Casey* that the Court upheld.

248. Lydia Saad, *Americans Fault Mental Health System Most for Gun Violence*, GALLUP (Sept. 20, 2013), <http://www.gallup.com/poll/164507/americans-fault-mental-health-system-gun-violence.aspx> [<https://perma.cc/H2FQ-SPPY>].

249. WALSH & HEMMENS, *supra* note 7, at 384.

250. Steven Almasy et al., *James Holmes Sentenced to Life in Prison for Colorado Movie Theater Murders*, CNN (Aug. 8, 2015, 8:37 AM), <http://www.cnn.com/2015/08/07/us/james-holmes-movie-theater-shooting-jury/> [<https://perma.cc/KMJ8-YRG9>] (reporting that Holmes claimed an insanity defense).

251. WALSH & HEMMENS, *supra* note 7, at 373.

252. *Virginia Tech Shootings Fast Facts*, CNN (Apr. 3, 2017 12:03 PM), <http://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts/> [<https://perma.cc/724Z-3ENK>].

253. Barbara Starr, Catherine E. Shoichet & Pamela Brown, *12 Victims Slain in Navy Yard Shooting Rampage; Dead Suspect ID’d*, CNN (Sept. 16, 2013, 10:34 PM), <http://www.cnn.com/2013/09/16/us/dc-navy-yard-gunshots/> [<https://perma.cc/HZE4-667E>]; Saad, *supra* note 248.

254. WALSH & HEMMENS, *supra* note 7, at 384.

255. *See Guns in America Transcript*, *supra* note 161 (“[I]f we can combine gun safety with sensible background checks and some other steps, we’re not going to eliminate gun violence, but we will lessen it.”). This increased control is supported by eighty-four percent

Reviewing the informed consent provision, the *Casey* Court found that a woman's guilt or regret and her assumed resulting mental health from receiving an abortion was a legitimate state interest that could be protected through abortion restrictions.²⁵⁶ In doing so, the Court found the informed consent provision, requiring women to receive physician-provided information regarding the abortion procedure before the procedure, to be constitutional.²⁵⁷ The only condition upon this holding was that the information provided by a physician or clinic must be scientifically reliable, with deference to the legislature on scientific reliability.²⁵⁸ But Justice Ginsburg argued, in her *Gonzales v. Carhart* dissent referencing *Casey*,²⁵⁹ that women are not as ignorant as the Court assumed and would self-impose the appropriate psychological ramifications without reinforcement from legislature-prescribed information.²⁶⁰

In the gun control context, a state protects society at large, rather than the mental health of the applicant, from the applicant's possible mental health afflictions with increased background checks into the purchaser's mental health.²⁶¹ Contrary to abortion, the mental deficiency of an applicant for the purchase of a firearm *does* affect others. In fact, the number of others affected is seemingly innumerable, depending upon the gunman's target, and, the others affected are also entitled to full constitutional protection for which a state is responsible. Thus, a state's interest in protecting society from incompetent gun owners appears larger than—or certainly as great as—a state's interest in protecting an unborn fetus or a woman from regret.

This is not to say that all mentally ill individuals are dangerous or that they should be denied constitutional protections and privileges. Instead, to protect the lives and well-being of its citizens, a state has an interest in requiring mental health screenings before one may

of the members of the National Rifle Association. See WALSH & HEMMENS, *supra* note 7, at 384; see also *supra* notes 115-16 and accompanying text.

256. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852-53 (1992). For further discussion on this, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

257. *Casey*, 505 U.S. at 878.

258. *Id.* at 907-08.

259. The dissent disputed the Court's holding that upheld an absolute ban on partial-birth abortion and argued that a medical necessity provision was required to allow such procedures when necessary for the mother's health; and, such necessity provision was supported by medical evidence in the District Court's record. *Gonzales v. Carhart*, 550 U.S. 124, 171, 178-79 (2007) (Ginsburg, J., dissenting); *id.* at 182-83 (citing *Casey*, 505 U.S. at 850; *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)) (contending further that the majority's reliance on morality to ban the procedure was misguided and undermined long-standing precedent that morality is irrelevant when reviewing the constitutionality of legislation).

260. *Id.* at 171-74, 184-85; see Siegel, *supra* note 21, at 1732-33 (discussing this aspect of the *Carhart* Majority's decision); *id.* at 1734-35 (discussing Ginsburg's dissent).

261. See EXECUTIVE ORDER FACT SHEET, *supra* note 137.

purchase a firearm. This argument is not meant to suggest that any history of mental illness or mental health treatment should disqualify an individual from purchasing a firearm. Stability, even with a history of mental illness, could be shown through treatment or medication upon such screening. Such restrictions and specifications would be left to the state legislatures. Nevertheless, the state is entitled to scientifically reliable information regarding the applicant's mental health and criminal background before allowing the applicant to purchase a firearm.

2. *Eliminating the "Default Proceed"*

Combine the few current gun control provisions and you end up with this: a cloudy personal history delays the NICS background check; once seventy-two hours have passed, the "default proceed" takes effect and excuses the purchaser from the background requirement.²⁶² The purchaser, whose background is now unknown or, at the most, partially known to the seller, walks away with a legal firearm despite a possible history that would have prevented the purchase, had the background check run its course.²⁶³ Hence, the elimination of the "default proceed" seems to be the obvious next step in increasing safety in firearm ownership. Primarily, similar to the *Casey* Court's discussion supporting its "undue burden" framework, the background check requirement under the Brady Act is no more than a "structural mechanism by which the State" ensures the safe administration of firearms.²⁶⁴

First, conducting the background check does not require permission or dependence upon any relative of the applicant. In *Casey*, the Court found that abortion restrictions requiring the consent of the woman's spouse seeking an abortion were unconstitutional due to the pressure they would create on the woman to involve him in her decision.²⁶⁵ The *Casey* Court upheld the parental consent provision—requiring consent from the parents of a minor seeking an abortion—because there was a judicial bypass option where the minor could avoid getting her parents' consent.²⁶⁶ Requiring a background check before one can purchase a firearm does not require the purchaser to

262. 18 U.S.C. § 922(t)(1) (2012).

263. See EXECUTIVE ORDER FACT SHEET, *supra* note 137 ("Many of these crimes were committed by people who never should have been able to purchase a gun in the first place."). Cf. *Guns in America Transcript*, *supra* note 161 ("[T]here are a whole bunch of folks who are less responsible . . . who don't have to [go through a background check and that] doesn't make much sense."). This lack of background checks could also have to do with excluded purchases. See *id.*

264. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

265. *Id.* at 893-98.

266. *Id.* at 899.

involve any private third-party in their decision to purchase a firearm. Thus, the background check requirement is valid under the *Casey* reasoning regarding the parental and spousal consent provisions.

Second, purchasing a gun should be done with forethought and responsibility. So, a twenty-four hour waiting period before purchasing a gun would not unduly impair one's right to bear arms. "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision."²⁶⁷ In any situation that a person purchases a gun and needs the gun immediately, there is likely concern of an impulsive and dangerous thought process that could intrude upon others' constitutional and human right to life.²⁶⁸ Likewise, any planned attack is detrimental to society, as we have seen in the recent past.²⁶⁹ Extending the time that it takes for one to obtain a firearm, or throwing off their 'plan' by a day or two is anything *but* detrimental to both the safety of society and the purchaser's criminal record. Likewise, the *Casey* Court found that a twenty-four hour waiting period for seeking an abortion was not an "undue burden" and was therefore constitutional because the abortion could be conducted the next day just the same.²⁷⁰

If, for some reason, a situation required immediate and violent action, police and governmental authorities are in place to serve those purposes. Admittedly, there is a glaring counter-factual scenario to the police solution—where a home invasion presents imminent danger that cannot be curbed by police action due to the delay required to call police and for police to arrive.²⁷¹ As such, *Heller* estab-

267. *Id.* at 885.

268. *Id.* at 885-86; see Abrams, *supra* note 138, at 496 (explaining the usefulness of a "cooling off period"); TRIBE & MATZ, *supra* note 2, at 157 ("Nonetheless, law and policy can play a vital role in regulating which people have access to the firepower that can transform evil impulses into bouts of carnage."); see also U.S. CONST. amend. XIV; American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17, http://www.nesri.org/sites/default/files/American_Declaration_of_the_Rights_and_Duties_of_Man.pdf [<https://perma.cc/A5ST-W494>] (Ninth International Conference of American States).

269. See MARCUS FELSON & MARY ECKERT, CRIME AND EVERYDAY LIFE 46 (5th ed. 2016). Cf. Edwards, *supra* note 207, at 1336 ("Most murder in real life comes from a compound of anger, passion, intoxication, and accident—mixed in varying portions. . . . The quarrels that most frequently trigger murders might well result in nothing more than bloody noses or a lot of noise if there were not present a deadly weapon—handy and loaded.").

270. *Casey*, 505 U.S. at 885-86.

271. *Guns in America Transcript*, *supra* note 161. *But see* Edwards, *supra* note 207, at 1336 ("Reaching for a gun is the most dangerous possible gesture when one is confronted by an armed felon."); *id.* at 1337 ("[T]he mythology of murder has occasioned the purchasing of arms by all too many people as a means of self-defense when in fact such measures greatly increase the hazard to them and their loved ones.").

lished that the Second Amendment entitles one to protect himself with a firearm in his home.²⁷² Nevertheless, this situation would only exist without a firearm (for those who wish to have one) for the generally minimal period of time between the beginning of the NICS process and the end. Lawmakers have explicitly accepted that previous felons, or others statutorily restricted from firearm access, may be unable to defend themselves with firearms by restricting their rights.

Even seventy-two hours (the three-day cut-off established by the “default proceed”) would not be an undue burden to one’s Second Amendment rights under the same reasoning, as one’s health and daily function is not affected by the additional wait-period for receiving a purchased firearm;²⁷³ and a state’s interest in ensuring the safety and stability of the gun purchaser is compelling. In fact, California requires a minimum ten-day, or 240-hour, waiting period before any sale or transfer of a firearm.²⁷⁴ In the abortion context, the difference between one and three days, not to mention ten, may be more burdensome on the right-holder, as travel may be a hindrance,²⁷⁵ medical needs may be exacerbated by the increased wait-period,²⁷⁶ or other time-sensitive needs may be delayed. Even with concerns of immediacy in the abortion context, seventy-two hour waiting periods are on the books in some states. So, the lack of medical sensitivity or potential psychological harm—accepting *prima facie* the Court’s argument in *Casey* and *Carhart*—in firearm purchases indicates that increasing the wait-period by eliminating the “default proceed” is not an undue burden on one’s fundamental right to bear arms and is therefore constitutional.

Further, those who are most likely to be affected by the increased wait-period are those who the state has a heightened interest in investigating before allowing them to obtain a firearm. “In fact, the FBI has found that a purchaser whose NICS check takes longer than [twenty-four] hours to complete is [twenty] times more likely to be a prohibited purchaser than other applicants.”²⁷⁷ Applying *Casey* here, “[a] particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the [people] in

272. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

273. *Casey*, 505 U.S. at 885 (“[A] 24-hour delay does not create any appreciable health risk.”).

274. CAL. PENAL CODE §§ 26815, 27540, 28220 (Deering 2015); *California State Law Summary*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/california-state-law-summary/> (last updated Oct. 29, 2015); *Waiting Periods in California*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/waiting-periods-in-california/> [<https://perma.cc/U968-M3BS>].

275. *Casey*, 505 U.S. at 885-86.

276. *Id.* at 885; *supra* note 54.

277. *Federal Law on Background Checks*, *supra* note 132.

that group.”²⁷⁸ Therefore, that those with messier backgrounds have to wait longer to purchase a firearm does not necessitate a substantial obstacle or undue burden. Such a finding would be contrapositive to the purpose of the background requirement: to keep those with a history that would indicate improper firearm use from owning firearms to further the state’s interest in keeping America safe.

3. *Reinstating a Ban on Assault Weapons*

Had the AWB existed at the time, the following shootings (and others) could have been avoided or, at least, minimized: Aurora, Colorado (July 2012), Sandy Hook (December 2012), San Bernardino (December 2015).²⁷⁹ So, Legislators’ concerns when the AWB was first enacted in 1994 have not been remedied, and assault weapons continue to heighten the danger and fatality of gun violence in the United States.

Reinstating a ban on assault weapons would also not place an undue burden on one’s Second Amendment rights because the individual purpose of the Second Amendment—self-defense—can be served adequately without assault weapons.²⁸⁰ Assault weapons are military-style firearms that are designed to aid in combat with their rapid reloading capabilities. Any justified, individual use of a firearm in American civilization should not require such type of weapon.

V. CONCLUSION

Murder is the most feared violent crime in America.²⁸¹ Yet the murder rhetoric and how to eliminate its effect on U.S. society is misguided.²⁸² The rights enumerated within the Second Amendment and the right established within the Fourteenth Amendment by the U.S. Supreme Court in *Roe* are more similar than their opposing proponents and discussion portray. Borrowing the “undue burden” framework from abortion lends guidance to the constitutionality of gun regulations aimed to protect and preserve American society. An

278. *Casey*, 505 U.S. at 887.

279. See Buchanan, *supra* note 140 (listing the weapons used in each shooting); Ashby Jones & Dan Frosch, *Rifles Used in San Bernardino Shooting Illegal Under State Law*, WALL STREET J. (Dec. 3, 2015, 10:51 PM), <http://www.wsj.com/articles/rifles-used-in-san-bernardino-shooting-illegal-under-state-law-1449201057> [<https://perma.cc/U6F6-TK24>]; Dean Reynolds, *Assault Weapon is Common Denominator in Mass Shootings*, CBS NEWS (Dec. 4, 2015, 7:48 PM), <http://www.cbsnews.com/news/san-bernardino-shooting-assault-weapon-is-common-denominator-in-mass-shootings/> [<https://perma.cc/84QH-SXHV>].

280. Cf. Lund, *supra* note 118, at 341 (arguing that Second Amendment precedent does not “foreclose” the government from banning specific weapons).

281. WALSH & HEMMENS, *supra* note 7, at 374.

282. There is no argument whether discharging a gun towards innocent people is murder. Cf. Rosenbluth, *supra* note 17, at 1247 (“[K]illing innocent human life is murder.”).

immediate solution to the lack of guidance for reviewing legislation affecting one's Second Amendment rights, as presented herein, is to apply the "undue burden" framework from *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Whether this test is perfect is irrelevant, as it will provide guidance, consistency, and some uniformity to Second Amendment analyses. A perfect standard is likely impossible, but starting with an established standard that proves to be transferrable and analogous is a step toward building discussion, jurisprudence, and thereby gun safety in America.

