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THE SECOND AMENDMENT UNDER A GOVERNMENT LANDLORD: IS THERE A RIGHT TO KEEP AND BEAR LEGAL FIREARMS IN PUBLIC HOUSING?

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INTRODUCTION

There is substantial controversy over the status and scope of the Second Amendment to the United States Constitution, otherwise known as the "right to bear arms."[1] While it is clear there is no absolute right to gun ownership, what rights Americans do have, to possess firearms in their homes or elsewhere, is not entirely settled. This constitutional quagmire is a source of heated debate between gun control advocates and gun rights supporters.

The 2008 United States Supreme Court decision in *District of Columbia v. Heller*[2] shed light on the status of gun ownership in America, articulating a federal individual right to bear arms unconnected to militia participation.[3] Further illuminating the rights of gun owners in the United States, the subsequent 2010 decision in *McDonald v. Chicago*[4] answered the open question of whether the Second Amendment is incorporated to the states: The Court held "that the Second Amendment right is fully

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[1] U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

[2] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[3] *Id.* at 2797.

[4] McDonald v. Chicago, 130 S. Ct. 3020 (2010).

applicable to the States."[5] However, despite the outcome in *McDonald*, firearm regulation will remain an issue of controversy and the focus of much litigation.

The question of gun ownership becomes further clouded in the context of conventional public housing. Public housing consists of government-owned housing facilities, which shelter low- and very low-income tenants at significantly reduced rents.[6] Taxpayers support public housing at a cost of $11 billion annually.[7] Funds appropriated to the United States Department of Housing and Urban Development ("HUD"), a Cabinet-level federal agency, are formulaically allocated to local public housing authorities ("PHAs") to establish, maintain, and operate public housing developments.[8] In public housing, the government is the landlord.

There are strong bases both for and against permitting legal firearm possession in public housing. Statistical and anecdotal evidence of high incidences of gun-related violent crime in housing projects supports prohibition of all firearms in public housing. Constituents' stereotyping all public housing as dangerous and dilapidated also favors public housing firearm bans.[9] For many Americans, the term "project" conjures up thoughts of places like Chicago's violent drug-ridden Cabrini-Green and the now-demolished Robert Taylor Homes—stories of tenants sleeping in bathtubs for fear of stray bullets, images of tightly-packed high-rise buildings overrun by gangs, and tales of lawless places where poor minorities are isolated from society.[10]

[5] *Id.* at 3026.

[6] *See* 42 U.S.C. § 1437a (2006 & Supp. II).

[7] CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: AN OVERVIEW OF FEDERAL SUPPORT FOR HOUSING 6 (2009), *available at* http://www.cbo.gov/ftpdocs/105xx/doc10525/11-03-HousingPrograms.pdf.

[8] *See id.*

[9] *See* Harold R. Holzman et al., *Revisiting the Relationship Between Crime and Architectural Design: An Analysis of Data from HUD's 1994 Survey of Public Housing Residents*, CITYSCAPE: J. POL'Y DEV. & RESEARCH, Feb. 1996, at 107, 121 ("[P]ublic housing highrises may not be as criminogenic as the conventional wisdom would lead one to believe."); Susan Mayer & Christopher Jencks, Editorial, *War on Poverty: No Apologies, Please*, N.Y. TIMES, Nov. 9, 1995, at A29.

[10] *See* Mayer & Jencks, *supra* note 9; *cf.* Madeline Howard, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER L. & JUST. 97, 99 (2007) ("[G]overnmental housing policy should go further towards promoting the integration of low-income housing into the larger community.").

While this picture of public housing is not baseless, it is far from a true cross-section of public housing developments nationwide.[11] Over two million Americans live in public housing,[12] the majority being law-abiding citizens working to better their positions in life.[13] Very few public housing developments are high-rises, let alone high-rises containing thousands of units like the aforementioned Chicago facilities.[14] There is truth in the common perception that poor minorities, particularly women with young children, populate public housing, but public housing also supports a significant number of low-income elderly and disabled persons, as well as nonminority families.[15] Nonetheless, there are still serious concerns about gun violence in public housing developments, inducing many PHAs to ban or restrict all firearm ownership.[16] However, after *Heller*, there are persuasive constitutional arguments that the law-abiding citizens in these developments should be permitted to legally possess firearms for defense of hearth and home, despite government ownership of the units.

This Article examines the right to bear arms under a residential government landlord, collecting legal scholarship and decisional law as a guide for future litigation efforts and public housing policy in the aftermath of *Heller* and *McDonald*. Part I overviews public housing in the United States. Part II concisely presents the Second Amendment, focusing on the holding in *Heller* and discusses incorporation under *McDonald*. Part III

[11] *See* 42 U.S.C. § 11901 (2006) (stating congressional findings regarding drugs and drug-related crime in public housing); JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 6 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-541.pdf; Holzman et al., *supra* note 9; Norm Parish, *Public Housing Study: Negative Stereotypes Fail To Hold Up*, ST. LOUIS POST-DISPATCH, Apr. 14, 2002, at B5.

[12] CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO PUBLIC HOUSING 1 (2008) [hereinafter PUBLIC HOUSING POLICY], *available at* http://www.cbpp.org/files/policybasics-housing.pdf.

[13] *See, e.g.*, Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 288 (2002) ("There are enormous numbers of poor minority people trapped in desperate economic circumstances who do not resort to criminal behavior and violence.").

[14] PUBLIC HOUSING POLICY, *supra* note 12.

[15] MCKINNON, *supra* note 11, at 7; Howard, *supra* note 10, at 97 ("Families headed by single women of color now predominate in subsidized housing."); Michael A. Stegman, *The Fall and Rise of Public Housing*, REGULATION, Summer 2002, at 64, 68.

[16] *See infra* Part I.B.

discusses the state of the law leading up through *Heller*, as well as HUD policies and congressional inclinations regarding firearms in public housing. Part IV explores the post-*Heller* constitutionality of firearms in public housing. This Part considers potential outcomes after *McDonald*, including the validity of a federal laws, the application of state laws, and challenges based on incorporation, as well as contemplating issues relevant to the right of armed self-defense. Although inconclusive as to the constitutionality of banning legal firearms in public housing, this Article lays the framework for analyzing the constitutionality of such prohibitions.

The focus is solely federally-subsidized, state-owned public housing developments—often referenced as "conventional" or "traditional" public housing—where the government serves as landlord. While arguably germane, public university dormitories, military lodgings, prisons, and Indian housing are beyond the scope of this Article.[17]

I. PUBLIC HOUSING IN THE UNITED STATES

Public housing does not account for a substantial portion of housing in the United States. Nationwide, there is an inventory of only 1.16 million units located in fourteen thousand developments.[18] Nonetheless, public housing is a key component of federal affordable housing policy. Federally authorized and state created, public housing is implemented and run by local governmental entities known as PHAs. There are more than three thousand PHAs in the United States, sheltering more than one million households in public housing.[19] The following Section overviews public housing and describes the gun-related violence that has been the impetus for public housing firearm bans.

[17] School dormitories, military lodgings, and prisons are forms of government housing incidental to an overriding pedagogical, militaristic, or penological interest, respectively. HUD-administered Indian programs provide low-income housing funds directly to tribal sovereigns but principally recognize the right of tribal self-governance. *See* 25 U.S.C. § 4101(7) (2006 & Supp. II).

[18] PUBLIC HOUSING POLICY, *supra* note 12, at 1, 6.

[19] *See id.* at 2, 5 (approximating 3100 PHAs and 1.04 million households); U.S. Dep't of Hous. & Urban Dev., HUD's Public Housing Program, http://www.hud.gov/renting/phprog.cfm (last visited Nov. 21, 2010) (approximating 3300 PHAs and 1.2 million households).

A. An Overview of Public Housing

The Housing Act of 1937[20] created public housing as part of "the first large-scale low-income housing program established by the federal government."[21] The program was a direct result of the Great Depression and President Franklin Delano Roosevelt's New Deal legislation.[22] At the federal level, public housing programs are presently under HUD authority.[23]

HUD administers a diverse range of housing initiatives nationwide, public housing being only one of many different affordable housing and urban development programs.[24] A combination of HUD programs provide federal funding to regional and local PHAs, making possible the opportunity for low- and very low-income families[25] to live in affordable and decent housing.[26] PHAs are the entities ultimately responsible for operating public housing developments, in addition to administering rental assistance programs for private housing. One such program is called Housing Choice Vouchers ("HCV"), formerly known as Section 8, which provides portable rental assistance for families to choose their own housing.[27] The principal difference between public housing and rental assistance programs is that "public housing is housing for low-income persons that is actually government-owned," whereas HCV and

[20] United States Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.).

[21] BARRY G. JACOBS, HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW § 2:1 (2010).

[22] *Id.* § 1:3.

[23] *See* U.S. Dep't of Hous. & Urban Dev., *supra* note 19.

[24] *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., PROGRAMS OF HUD: MAJOR MORTGAGE, GRANT, ASSISTANCE, AND REGULATORY PROGRAMS (2006), *available at* www.huduser.org/resources/hudprgs/ProgOfHUD06.pdf.

[25] "The term 'low-income families' means those families whose incomes do not exceed 80 per centum of the median income for the area . . . . The term 'very low-income families' means low-income families whose incomes do not exceed 50 per centum of the median family income for the area . . . ." 42 U.S.C. § 1437a(b)(2) (2006 & Supp. II). "Families" includes both single persons and families with children. *Id.* § 1437a(b)(3).

[26] *See* 42 U.S.C. § 1437(a)(4) (2006).

[27] *See id.* §§ 1437f, 3535(d); 24 C.F.R. § 982.1 (2010); U.S. Dep't of Hous. & Urban Dev., Housing Choice Vouchers Fact Sheet, http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm (last visited Nov. 21, 2010) ("The housing choice voucher program is the federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market.").

project-based rental assistance merely subsidizes privately-owned housing.[28] Simply, only tenants in public housing live under a governmental landlord.

1. Public Housing Financing, Ownership, and Management

As an arm of the federal government, HUD oversees public housing programs. However, HUD does not directly own or control the facilities because "the Federal Government cannot through its direct action alone provide for the housing of every American citizen, or even a majority of its citizens."[29] Rather, the federal government seeks "to remedy unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families . . . [and] to address the shortage of housing affordable to low-income families" by assisting states and political subdivisions of states financially and administratively.[30] HUD utilizes local PHAs to establish and operate publicly owned housing; formula-based grants directly finance capital and operating expenses.[31]

PHAs are created under state law specifically to provide affordable housing for the financially disadvantaged and are defined as "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing."[32] HUD provides PHAs with technical and professional assistance in various aspects of planning, development, and management; primary control of public housing rests with the individual county and municipal PHAs where housing facilities are located.[33] The federal goal is to vest PHAs with "the maximum amount of

[28] JACOBS, *supra* note 21, § 2:3.

[29] 42 U.S.C. § 1437(a)(2).

[30] *Id.* § 1437(a)(1)(A)–(B).

[31] *See id.* § 1437g; 24 C.F.R. § 990.100. Formula-based grants are essentially allocations of funds based on a mathematical formula that considers a number of factors and expenses.

[32] 42 U.S.C. § 1437a(b)(6)(A); *see, e.g.*, ARIZ. REV. STAT. ANN. § 36-1404 (2010) (authorizing every city, town, and county to create a housing authority); FLA. STAT. ANN. §§ 421.04, .08 (West 2010) (creating a housing authority in every city).

[33] *See* U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK app. III (2003), *available at* http://www.hud.gov/offices/pih/programs/ph/rhiip/phgb_app3.pdf (documenting individual PHAs' management policies); U.S. Dep't of Hous. & Urban Dev., *supra* note 19.

responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public."[34]

PHAs are responsible for day-to-day operation and management of public housing developments. Functions include assuring lease compliance, periodically reexamining tenant income eligibility, and terminating leases or evicting tenants.[35] PHAs are obligated to provide public housing that is in "decent, safe and sanitary condition."[36] This standard applies solely to the physical condition of the property, including the building exterior, dwelling units, and health conditions, but it does not contemplate aesthetics or on-site violence.[37] Federal law does require, however, PHAs to design a crime prevention plan in conjunction with local law enforcement.[38]

There is an eligible income range for public housing, limiting occupancy to low- and very low-income families.[39] Federal mandate requires that PHAs provide housing to those persons most in need, using a target percentage, while implementing "polic[ies] designed to provide for deconcentration of poverty and income-mixing."[40] Essentially, tenant selection policies "must balance certain goals, taking into account individual needs for low-income housing while preserving the overall purpose of creating socially and financially sound projects that provide a decent home and a suitable living environment for the tenants and promote economic and social diversity."[41]

These policies must be spelled out in PHA plans that are submitted to HUD for review and approval.[42] The plans follow certain requirements and guidelines laid out in statutes and regulations, but PHAs are entrusted with the discretion to craft policies appropriate to each entity's objectives, goals,

[34] 42 U.S.C. § 1437(a)(1)(C).

[35] *See* U.S. Dep't of Hous. & Urban Dev., *supra* note 19.

[36] 24 C.F.R. § 966.4(e)(1).

[37] *See id.* § 902.23; JACOBS, *supra* note 21, § 2:118.

[38] *See* 42 U.S.C. § 1437c-1(d)(14) (2006 & Supp. II).

[39] *See id.* § 1437a(a)(1); 24 C.F.R. § 960.201 (providing that at the time of initial occupancy only low-income families may be admitted to public housing). *But see* 42 U.S.C. § 1437a(a)(5); 24 C.F.R. § 960.503 (providing limited basis for admission of over-income families).

[40] 42 U.S.C. § 1437n(a)(3)(B)(i) (2006); 24 C.F.R. § 903.2.

[41] JACOBS, *supra* note 21, § 2:31.

[42] *See* 42 U.S.C. § 1437c-1.

demographics, and unique concerns.[43] HUD has no hand in discretionary policy choices or day-to-day operations and may only disapprove a plan if it fails to comply with statutory requirements.[44]

Although there is a close link with the federal government, PHAs act under color of state law.[45] Therefore, as "state-created, federally-funded, locally-administered" entities, PHAs are "constrained to conduct their operations within the limits of the due process clause of the [F]ourteenth [A]mendment."[46] Essentially, although PHAs stand as residential landlords, they are first and foremost the government.[47]

2. Public Housing Structures and Residents

Public housing developments have unique structural and demographic elements. Physically, public housing facilities range from detached single-family units to large multifamily developments.[48] Only one-third of public housing tenants live in buildings with fifty or more units.[49] Most structures were built between 1950 and 1989, with the median falling nearly half a century ago; however, most buildings are in good physical condition.[50] The vast majority of these buildings are located in metropolitan areas, with two-thirds of tenants in city centers.[51] Less than one-third of public housing tenants report

[43] *See id.*

[44] *See id.* § 1437c-1(i)(3).

[45] *See, e.g.*, Kunkler v. Fort Lauderdale Hous. Auth., 764 F. Supp. 171, 174 (S.D. Fla. 1991).

[46] Caulder v. Durham Hous. Auth., 433 F.2d 998, 1002–03 (4th Cir. 1970) (citations omitted) (comparing public housing evictions to termination of welfare benefits); *accord* Ark. Op. Att'y Gen. No. 94-093, 1994 Ark. AG LEXIS 352, at *2, *10–13 (Jul. 6, 1994).

[47] Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955) (stating that "[t]he government as landlord is still the government," in reference to public housing in the federally-governed District of Columbia).

[48] OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., CHARACTERISTICS OF HUD-ASSISTED RENTERS AND THEIR UNITS IN 2003, at 19 (2008) [hereinafter HUD RENTERS 2003], *available at* http://www.huduser.org/portal/publications/pdf/Hud_asst_renters_report_p1.pdf.

[49] *Id.*

[50] PUBLIC HOUSING POLICY, *supra* note 12, at 5; HUD RENTERS 2003, *supra* note 48.

[51] *See* HUD RENTERS 2003, *supra* note 48, at 20.

"bothersome" neighborhood crime, and in comparing their prior accommodations to those in public housing, most tenants report that public housing provides a better home in a better neighborhood.[52]

As for the residents who occupy these structures, there are certain types of individuals prohibited by federal law. Before admitting a tenant to occupancy, PHAs must screen out persons with a pattern of alcohol abuse,[53] those engaged in illegal drug use,[54] persons involved in drug-related criminal activity,[55] anyone convicted for manufacturing methamphetamine on federally-assisted housing premises,[56] and registered sex offenders.[57] Family members fitting within these categories must be excluded from the application or a prospective household will be denied admission.[58]

Of the over one million occupied units, racial composition is fairly evenly distributed. Approximately 52% percent of public housing residents are black, approximately 44% of residents are white; persons of Hispanic ethnicity comprise one-fifth of all residents.[59] There are residents of all ages, with approximately 42% of residents aged thirty-five to sixty-four years, and the remaining tenants evenly divided into groups aged under thirty-five years and over sixty-five years.[60] Approximately 64% of households have at least one family member who is elderly or disabled.[61] Female-headed families comprise 70% of the public housing population, but the majority of households have no single children under the age of eighteen.[62] Most tenants have some secondary education, although only 30% have earned a high

[52] *Id.* at 25, 27.

[53] 24 C.F.R. § 960.204(b) (2010).

[54] *Id.* § 960.204(a)(2).

[55] *Id.* § 960.204(a)(1).

[56] *Id.* § 960.204(a)(3).

[57] *Id.* § 960.204(a)(4).

[58] *Id.* § 960.203(c)(3)(i).

[59] HUD RENTERS 2003, *supra* note 48, at 8 (51.7% black; 43.8% white; 20.7% Hispanic of any race; 4.5% other races).

[60] *Id.* at 9 (29.5% under thirty-five years old; 42.5% aged thirty-five to sixty-four; 28.1% over age sixty-five).

[61] PUBLIC HOUSING POLICY, *supra* note 12, at 2–3.

[62] HUD RENTERS 2003, *supra* note 48, at 12–13.

school diploma or equivalency, and less than one-fifth of residents have any postsecondary education.[63] The median household income in 2006 was slightly less than $9,000.[64]

Under the lease, tenants "have the right to exclusive use and occupancy of the leased unit [as a private dwelling]."[65] Leases automatically renew and cannot be terminated except for certain violations or good cause.[66] These rules safeguard the lease, such that a property interest in continued tenancy arises under procedural due process;[67] however, there is no vested right in occupancy, nor an entitlement or fundamental right in public housing.[68] Although not necessarily correlated, there are many long-term residents in public housing. More than half of all tenants have been in their unit for at least four years, and approximately 16% of tenants have been in their unit for thirteen or more consecutive years.[69] Public housing has "bec[o]me long-term or permanent housing for [many] welfare families and others stuck at the bottom of the ladder."[70]

B. Firearm-Related Violence in Public Housing

Greater than one-third of American homes contain firearms.[71] Gun statistics establish that in 2006, there were at

[63] *Id.* (16.1% less than ninth grade; 36.6% ninth to twelth grade; 29.6% high school diploma or equivalency; 17.7% postsecondary education).

[64] PUBLIC HOUSING POLICY, *supra* note 12, at 2.

[65] 24 C.F.R. § 966.4(d)(1), (f) (2010).

[66] 42 U.S.C. § 1437d(l)(1), (5) (2006).

[67] Escalera v. N.Y. City Hous. Auth., 425 F.2d 853, 861 (2d Cir. 1970) ("The government cannot deprive a private citizen of his continued tenancy, without affording him adequate procedural safeguards even if public housing could be deemed to be a privilege." (citations omitted)). *But see* Perry v. Hous. Auth., 486 F. Supp. 498, 503 (D.S.C. 1980) (holding tenants cannot claim substantive due process violations because there is no constitutional right to adequate housing, even in public housing developments), *aff'd*, 664 F.2d 1210 (4th Cir. 1981).

[68] *See* Hassan v. Wright, 45 F.3d 1063, 1069 (7th Cir. 1995) ("There is no affirmative right to governmental aid, even where the absence of such aid means the loss of life, liberty or property interests that the government may not affirmatively deny." (citations omitted)).

[69] HUD RENTERS 2003, *supra* note 48, at 10 (45% in the unit zero to three years; 27.6% in the unit four to eight years; 11.6% in the unit nine to thirteen years; 15.8% in the unit longer than thirteen years).

[70] JACOBS, *supra* note 21, § 2:2.

[71] Brady Campaign To Prevent Gun Violence, Unintentional Shootings, http://www.bradycampaign.org/facts/gunviolence/gvunintentional (last visited Nov. 21, 2010) ("Thirty-three percent of U.S. households contain a gun." (citing PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, 2009 VALUES SURVEY: FINAL

least 642 unintentional firearm deaths in the United States, 12,791 firearm homicides, and 16,883 firearm suicides.[72] In 2008, two-thirds of all homicides were committed with firearms, and one-half of all murders were committed with handguns.[73] In nonhomicide offenses, firearms were used in 43.5% of all robberies[74] and 21.4% of all aggravated assaults.[75] These are national statistics.

Statistics on similar incidences occurring in public housing are generally unavailable. "[C]rime in public housing has yet to be routinely and systematically measured."[76] However, violence and victimization surveys reflect "higher [rates] in public housing compared to other contexts . . . attributed in part to drug use and sale."[77] Drugs impact crime in public housing by attracting non-residents to the facilities.[78]

TOPLINE 9 (2009), http://people-press.org/reports/questionnaires/513.pdf)); Sourcebook of Criminal Justice Statistics Online 1, tbl.2.60.2008 (2008), http://www.albany.edu/sourcebook/pdf/t2602008.pdf (reporting forty-two percent of Americans have a gun in their home).

[72] BRADY CTR. TO PREVENT GUN VIOLENCE, UNITED STATES FIREARM DEATHS BY AGE GROUP AND INTENT: 2006 (2009), *available at* http://www.bradycenter.org/xshare/pdf/facts/firearm-deaths-age-intent.pdf (last visited Nov. 21, 2010).

[73] *See* U.S. Dep't of Justice, Fed. Bureau of Investigation, Crime in the United States: 2005, Expanded Homicide Data tbl.10, http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_10.html (last visited Nov. 21, 2010).

[74] U.S. Dep't of Justice, Fed. Bureau of Investigation, Crime in the United States: 2008, Robbery tbl.3, http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/data/robberytable_03.html (last visited Nov. 21, 2010).

[75] U.S. Dep't of Justice, Fed. Bureau of Investigation, Crime in the United States: 2008, Aggravated Assault tbl., http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/data/agassaulttable.html (last visited Nov. 21, 2010).

[76] ROBERT A. HYATT & HAROLD R. HOLZMAN, U.S. DEP'T OF HOUS. & URBAN DEV., GUIDEBOOK FOR MEASURING CRIME IN PUBLIC HOUSING WITH GEOGRAPHIC INFORMATION SYSTEMS 5 (1999), *available at* http://www.huduser.org/Publications/doc/crimegis.doc.

[77] Jeffrey Fagan et al., *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. ON POVERTY L. & POL'Y 415, 416 (2006).

[78] *See, e.g.*, Press Release, Vice President Al Gore, Press Briefing by the Vice President, Secretary Henry Cisneros, Secretary Lloyd Bentsen, Attorney General Janet Reno, and Director of Drug Policy Lee Brown (Feb. 4, 1994), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=59790 ("[The] Connecticut Housing Authority reports . . . 85 percent of those arrested on public housing authority property do not live there." (internal quotation marks omitted)).

In 2000, HUD issued the first comprehensive report on firearm-related violence in PHA-owned developments.[79] The study made significant findings and determinations, many of which favor banning gun possession in public housing developments on public policy grounds.[80] As a general premise, the study states, "[t]here is a strong correlation between income and violent crime; thus the low-income population in public housing is especially vulnerable to gun violence."[81] The report estimates that persons living in government-subsidized housing are more than two times as likely to be victimized by gun violence than the rest of the population.[82]

HUD compiled statistics indicate that gunshots are a major crime problem and that twenty-two percent of public housing tenants feel unsafe in their project or neighborhood.[83] The study estimates that there are 200 unintentional firearm injuries annually in public housing.[84] Further, on average, there was one gun-related homicide per day "in 66 of the Nation's 100 largest public housing authorities" in 1998.[85] "[I]n a larger group of more than 550 housing authorities, there were an estimated 296 gun-related homicides in public housing authorities across the country in the first 6 months of 1999 alone."[86]

The study found no distinction between firearm violence in small metropolitan areas versus larger cities. "[R]esidents of public housing in metro areas of less than 500,000 residents have the same or higher rates of gun violence victimization as public housing residents in larger metro areas."[87] Further, a survey of public housing residents indicated there was "no [discernible]

[79] U.S. DEP'T OF HOUS. & URBAN DEV., IN THE CROSSFIRE: THE IMPACT OF GUN VIOLENCE ON PUBLIC HOUSING COMMUNITIES 29 (2000) [hereinafter IN THE CROSSFIRE], *available at* http://www.ncjrs.gov/pdffiles1/nij/181158.pdf.

[80] *See id.* at 2–3. *But see* Council of Large Pub. Hous. Auths., CLPHA Takes Aim at HUD Report on Gun Violence in Public Housing, http://web.archive.org/web/20060929004037/http://www.clpha.org/page.cfm?pageID=361 (last visited Nov. 21, 2010) ("Th[e] report [IN THE CROSSFIRE] is not a useful contribution because it relies on inadequate data and careless data analysis.").

[81] IN THE CROSSFIRE, *supra* note 79, at 14.

[82] *Id.* The rate of gun victimization reflected here is likely less than the actual rate because the statistics used did not include homicides. *Id.* at 40.

[83] *Id.* at 28.

[84] *Id.* at 20.

[85] *Id.* at 14.

[86] *Id.*

[87] *Id.* at 18.

direct relationship between the proportion of residents troubled by various types of crime and the size of the development."[88]

In response to the HUD report, a university criminologist stated, "the findings are not surprising: 'Housing projects tend to be hot spots.' The primary reason is economics . . . . 'There are still pockets of poverty in this nation, and where you find that and people without a stake in the community, you'll find some violence.' "[89] Unfortunately, the "high incidence of gun-related violence imposes a devastating number of deaths, as well as injuries and physical and psychic trauma," on those living in public housing developments.[90] In an effort to solve these problems, a number of PHAs have moved to prohibit and severely restrict firearm possession on-site.

II. THE SECOND AMENDMENT: A RIGHT TO KEEP AND BEAR ARMS

The Second Amendment to the United States Constitution reads, in its entirety: "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."[91] These twenty-seven words are the subject of much discussion in newspapers, periodicals, meeting halls, and courtrooms across the country, but the meaning and application still remains largely up for debate.

The United States Supreme Court rarely encounters the Second Amendment and revisited it for the first time in nearly seventy years when it struck down District of Columbia gun control laws in *Heller* in 2008. The Court held that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[92] Essentially, the Court held that there is an individual right to bear arms for self-defense unassociated with participation in a militia, a right that was recently incorporated to the states under *McDonald* in 2010. While the *Heller* decision

[88] Holzman et al., *supra* note 9, at 112.

[89] Gary Fields, *Gun Risk Double in Public Housing: HUD's Estimates on Crime Not Surprising, Analyst Says*, USA TODAY, Feb. 17, 2000, at 3A (quoting Mike Rustigan, San Francisco State University criminologist).

[90] IN THE CROSSFIRE, *supra* note 79, at 5.

[91] U.S. CONST. amend. II (emphasis added).

[92] District of Columbia v. Heller, 128 S. Ct. 2783, 2821–22 (2008) (emphasis omitted).

leaves many questions unanswered, the Court stated, "whatever else i[s] le[ft] to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[93]

A. District of Columbia v. Heller*: An Individual Right To Bear Arms*

The right to bear arms, as it is articulated in *Heller* directly and undeniably impacts the constitutionality of PHA-implemented firearm bans in public housing. The following Section concisely outlines the majority and dissenting opinions in this five to four United States Supreme Court decision.

1. *Heller* Majority Opinion

Framing the issue, the *Heller* Court considered "whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution."[94] The challenged statutes required residents to keep lawfully owned firearms unloaded, disassembled, or bound by a trigger lock when in the resident's home; lawful ownership extended only to long guns but not handguns, due to strict registration requirements.[95] The *Heller* majority unequivocally determined the statutes to be invalid as a functional ban on all handguns and firearms.[96] The Court ultimately held that Congress could not infringe upon an individual's right to legally bear firearms, unconnected to militia participation, in one's home for self-defense purposes.[97]

The Court came to this determination after a lengthy review of the language and history of the Second Amendment.[98] First considering the meaning of the text, the Court grammatically seperated the two parts of the clause. The Court determined the operative clause—"the right of the people to keep and bear Arms"[99]—"guarantee[s] the individual right to possess and carry

[93] *Id.* at 2821.
[94] *Id.* at 2787–88 (emphasis omitted).
[95] *Id.* at 2788.
[96] *Id.* at 2818.
[97] *Id.* at 2821–22.
[98] *See id*. 2788–822.
[99] U.S. CONST. amend. II.

weapons in case of confrontation."[100] And the prefatory clause—that is, "A well regulated Militia, being necessary to the security of a free State"[101]—"announces the purpose for which the right [to keep and bear arms] was codified: to prevent elimination of the militia."[102] When putting the textual elements together, the Court found "that they guarantee the individual right to possess and carry weapons in case of confrontation"[103] but not "for *any sort* of confrontation."[104] Essentially, the Second Amendment protects an individual, but not unlimited, right to bear arms.

Concluding an individual right exists, the Court then turned to handguns as a class of firearms.[105] The Court found handguns to be "the quintessential self-defense weapon," implicitly declaring handguns instrumental to the Second Amendment right because self-defense is a central tenet of Second Amendment jurisprudence.[106] The Court also determined that the need for self-defense is "most acute" in the protection of one's self, family, and home.[107] Therefore, a ban on handguns in the home would, "[u]nder any of the standards of scrutiny[,] . . . fail constitutional muster."[108]

The Court did not proceed further, declining to aver which level of scrutiny is applicable to Second Amendment challenges or to specify which other gun restrictions may be unconstitutional.[109] However, as general language of restriction, the Court noted, in dicta, that the right articulated should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[110]

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[100] *Heller*, 128 S. Ct. at 2789, 2797.
[101] U.S. CONST. amend. II.
[102] *Heller*, 128 S. Ct. at 2799, 2801.
[103] *Id.* at 2797.
[104] *Id.* at 2799.
[105] *Id.* at 2817.
[106] *See id.* at 2817–18.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 2821.
[110] *Id.* at 2816–17.

2. *Heller* Dissenting Opinions

Each of the two dissents in *Heller* focuses on a distinct issue. While it appears that the entire Court concurred as to some form of an individual right under the Second Amendment,[111] Justice Stevens considered the right applicable only in relation to a militia purpose.[112] Justice Breyer concluded the gun control law at issue was a reasonable burden on gun owners and a proportionate response to urban gun-related violence.[113]

In contrast to the *Heller* majority, Justice Stevens's dissent opined that "to keep" and "to bear" are not separate rights but one right "to have arms available and ready for military service, and to use them for military purposes when necessary."[114] The key to Justice Stevens's dissent is that the Second Amendment is limited to a strictly military application, not a private right of confrontation or self-defense.[115]

Justice Breyer's dissenting opinion noted agreement with Justice Stevens's conclusion, stating that while militia and self-defense interests are intertwined, "self-defense alone, detached from any militia-related objective, is not the [Second] Amendment's concern."[116] However, the key to Justice Breyer's dissent is an "interest-balancing" approach, weighing urban gun problems against the limited Second Amendment right to possess firearms.[117] The opinion concludes, that based on precedential First Amendment "intermediate scrutiny" jurisprudence, courts should defer to the judgment of the legislature.[118]

[111] *Id.* at 2797; *id.* at 2848 (Breyer, J., dissenting).
[112] *Id.* at 2822–23 (Stevens, J., dissenting).
[113] *See id.* at 2847–48 (Breyer, J., dissenting).
[114] *Id.* at 2830 (Stevens, J., dissenting).
[115] *See id.* at 2846.
[116] *Id.* at 2847 (Breyer, J., dissenting).
[117] *Id.* at 2852.
[118] *Id.* at 2860 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)) ("[T]his Court, in *First Amendment* cases applying intermediate scrutiny, has said that [the Court's] 'sole obligation' in reviewing a legislature's 'predictive judgments' is 'to assure that, in formulating its judgments,' the legislature 'has drawn reasonable inferences based on substantial evidence.' ").

B. McDonald v. Chicago*: Second Amendment Incorporation to the States*

Heller did not decide if the Second Amendment is incorporated to the states.[119] It was not necessary to consider incorporation because the District of Columbia is entirely under federal jurisdiction.[120] Incorporation is a legal theory that makes applicable to the states the provisions of the Bill of Rights through the Fourteenth Amendment.[121] There are two theories of incorporation: "total" and "selective."[122] These theories, as the names imply, either incorporate the Bill of Rights in toto or ad hoc, respectively.[123] The *Slaughter-House Cases*,[124] decided in 1873, rejected total incorporation under the Privileges and Immunities Clause and still stands as good law.[125] Modern jurisprudence is premised on the selective incorporation approach; prior to the *McDonald* decision, all but "the Second, the Third, the Grand Jury Clause of the Fifth, and the Seventh Amendments" had been incorporated to, and had become binding on, the states.[126] Before *McDonald*, the last time the Court considered the Second Amendment's application to the states was prior to modern incorporation jurisprudence.[127]

On June 28, 2010, the United States Supreme Court issued a concise ruling in *McDonald*, settling the question of Second

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[119] *Id.* at 2813 n.23 (majority opinion).

[120] *See id.*; *see also* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 10 (2010).

[121] 16A GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE, CONSTITUTIONAL LAW § 421 (2d ed. 2010).

[122] *Id.*

[123] *See id.*

[124] 83 U.S. 36 (1872).

[125] *See id.* at 77–79.

[126] DAVID H. GANS & DOUGLAS T. KENDALL, CONSTITUTIONAL ACCOUNTABILITY CTR., THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT 20 (2008), *available at* http://www.theusconstitution.org/upload/filelists/241_Gem_of_the_Constitution.pdf.

[127] District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008) ("With respect to [*United States v.*] *Cruikshank*'s [, 92 U.S. 542 (1875),] continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265 (1886) and *Miller v. Texas*, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government." (emphasis omitted)).

Amendment incorporation.[128] The question presented asked the Court to consider whether the Second Amendment right articulated in *Heller* is incorporated to the states under either the Due Process Clause or the Privileges and Immunities Clause of the Fourteenth Amendment.[129] In the narrow context of the Second Amendment, incorporation under either Due Process or Privileges and Immunities would have a similar net result, but the Court declined to reconsider the *Slaughter-House Cases* and the issue of incorporation under the Privileges and Immunities Clause.[130] Deciding the issue under the selective incorporation Due Process approach, the Court determined that the right articulated in *Heller* applies equally to the states because it is "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective."[131] Although the Court uses the word "fundamental," it is careful to note that the assurances in *Heller* limiting the right to bear arms are unaffected by incorporation: "incorporation does not imperil every law regulating firearms."[132] Given the individual rights reading in *Heller*, it was highly improbable that Second Amendment jurisprudence would not be incorporated to the states in *McDonald*.[133]

[128] *See* McDonald v. Chicago, 130 S. Ct. 3020 (2010).

[129] *Id.* ("Question Presented: Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.").

[130] *Id.* at 3030–31.

[131] *Id.* at 3050.

[132] *Id.* at 3047.

[133] *See* David A. Lieber, Comment, *The* Cruikshank *Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1083 (2005) ("In most instances where a constitutional right enjoys textual support, the Court's endorsement of the right as uniquely individual is both a necessary and sufficient condition for its incorporation."). Additionally, the states largely support incorporation of the Second Amendment. David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 130–31 ("In *McDonald*, with incorporation squarely before the Court, 38 states filed an amicus in favor of incorporation.").

III. LEGAL FIREARMS IN PUBLIC HOUSING: POLICY AND LAW

PHAs hold a legitimate and important governmental interest in the suppression of crime and violence in public housing.[134] PHAs represent not only a governmental interest in safety and general welfare but a proprietary ownership interest. To this end, PHAs are given wide berth in controlling public housing developments. Public housing tenants are regulated to a much higher degree than in a traditional landlord-tenant relationship—tenants are required to submit financial information for income certification, seek PHA approval for certain changes to household composition, and agree to transfer units upon PHA request.[135] In the First Amendment context, courts have permitted PHAs to interfere with tenants' rights of free association given circumstances related to crime and violence reduction, and "one-strike" evictions provide PHAs with a high degree of discretion over lease terminations.[136] Therefore, burdening individual rights in public housing is not immediately suspect given the regulatory state under which tenants live. However, there are limits. For instance, warrantless contraband sweeps were enjoined as a violation of tenants' Fourth Amendment rights.[137]

As for public housing residents possessing legal firearms within their units, there is no clear answer. There is no uniform legislation, policy, or decisive judicial ruling to settle the questions that arise. This Part outlines the present state of the law regarding guns in public housing. Federal housing policy is first considered, although neither HUD nor Congress has followed a clear path.

A. HUD's Position on Guns in Public Housing

At present, HUD does not have an official position either for or against tenant possession of legal firearms in public housing

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[134] Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001) (citing Rucker v. Davis, 237 F.3d 1113, 1116 (9th Cir. 2001)).

[135] 24 C.F.R. § 966.4(c) (2010).

[136] *See generally* Chavez v. Hous. Auth. of El Paso, 973 F.2d 1245 (5th Cir. 1992) (upholding eviction from public housing for failure to control guests in violation of lease); Herring v. Chi. Hous. Auth., No. 90 C 3797, 1995 WL 77305, at *1, *10 (N.D. Ill. Feb. 21, 1995) (upholding eviction of tenant who allegedly signed in three nonresidents who were members of an anti-Chicago Housing Authority protest group under false names).

[137] *See* Pratt v. Chi. Hous. Auth., 848 F. Supp. 792, 797 (N.D. Ill. 1994).

developments.[138] The sample public housing lease requires a tenant not to "display, use, or possess or allow members of Tenant's household or guests to display, use or possess any *illegal firearms*, (operable or inoperable) or other illegal weapons as defined by the laws and courts of the State of _____ anywhere on the property of PHA."[139] Unlike housing regulations, the sample lease is not codified and serves only as a resource for PHAs to consult. HUD regulations explicitly address pet ownership in public housing, but they do not address legal gun ownership.[140]

Fifteen years ago, HUD took a stronger stance on the issue of guns in public housing. In 1994, during the tenure of HUD Secretary Cisneros, the Clinton administration considered banning firearms from all federally-funded public housing—equivocating between prohibiting only handguns and an outright ban on all firearms—in an effort to reduce violent crime.[141] Secretary Cisneros said of the proposition, "there is no doubt that I feel that is the proper direction."[142] When announcing the plan, the Secretary proclaimed, "We have the authority." Although it is questionable that the federal Housing Act authorizes HUD to promulgate such a regulation. The Secretary also mentioned potential controversy over federal-versus-local enactment of a firearms ban.[143]

[138] *See* U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 189 (2003), *available at* http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf ("Optional provisions included in many PHA leases relate to a wide range of topics including for example: use or possession of weapons . . . in a PHA unit."); *see also* LEE WILLIAMS, CAESAR RODNEY INST., HUD: PUBLIC HOUSING GUN BANS A LOCAL DECISION 1–2 (2010), *available at* http://www.caesarrodney.org/pdfs/WHAlegalfolloPDF.pdf (" '[HUD] do[es not] have any policy that relates to [public housing firearms bans],' said Maria Bynum, spokesperson for HUD's regional office in Philadelphia . . . . Bynum explained that while HUD subsidizes public housing, and conducts limited inspections, they do not get involved, 'in day-to-day operations. [HUD is] not involved in that.' ").

[139] U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK app. 4, at 293 (2003) (emphasis added), *available at* http://www.hud.gov/offices/pih/programs/ph/rhiip/phgb_app4_7new.pdf.

[140] *See* 24 C.F.R. § 960.707 (2010).

[141] Scripps Howard, *U.S. Considers Ban on All Guns in Public Housing*, PLAIN DEALER (Cleveland), Feb. 5, 1994, at 12A.

[142] Susan Page, *Prez Eyes Gun Ban in Public Housing*, NEWSDAY, Feb. 5, 1994, at 11 (internal quotation marks omitted).

[143] *Id.*

Opponents of the proposed Clinton-Cisneros gun ban argued the plan would "skirt the constitutional guarantee of [the] right to bear arms . . . [because t]enants could still own guns but would have to sign a lease saying they could not possess the gun in their homes or on housing authority property."[144] In contrast, proponents of the ban, such as then-executive director of the National Association of Housing and Development Officials, stated the proposed ban simply "represents an attempt by the 'owner-manager of public housing development to try to ensure the safety and security of residents.' "[145] The proposed ban never came to fruition.

The later-published HUD study on firearm-related violence in public housing found a general decline in crime rates in public housing developments.[146] Even so, HUD determined firearm-related violence remained a prevalent problem because gun-related violence and victimization disproportionately impacts public housing residents.[147] HUD proposed a number of anti-crime and gun control initiatives but stopped short of suggesting banning guns from public housing.[148]

In 1999, around the time the HUD gun-violence study was released, the Clinton White House and HUD implemented "BuyBack America."[149] Under this now-defunct program,[150] HUD allocated $15 million to PHAs to partner with local law enforcement agencies to purchase guns for $50 per firearm; the goal of the program was to remove 300,000 guns from the

[144] Howard, *supra* note 141.

[145] *Id.* (the article incorrectly states the name of the organization as the "National Association of Housing and Development Agencies").

[146] IN THE CROSSFIRE, *supra* note 79, at 10.

[147] *See id.* at 8.

[148] *See id.* at 29–30. The recommendations advanced in the study include increased formula grants for anti-crime strategies, community gun safety initiatives, and crime prevention through environmental design. *Id.* at 30.

[149] Notice of Funding Availability; Public Housing Drug Elimination Program; Gun BuyBack Violence Reduction Initiative, 64 Fed. Reg. 60,080 (Nov. 3, 1999); Press Release, U.S. Dep't of Hous. & Urban Dev., President Clinton Announces Violence-Prevention Initiative To Buy Up to 300,000 Guns (Sept. 9, 1999), http://archives.hud.gov/news/1999/pr99-185.html.

[150] *See* NOFA for Public Housing Drug Elimination Program Gun BuyBack Violence Reduction Initiative; Notice of Amendment and Republication, 65 Fed. Reg. 5400 (Feb. 3, 2000) ("The Department will no longer approve PHA applications for further gun buyback violence reduction initiatives under this notice after the available matching funds have been awarded.").

streets.[151] Then-HUD Secretary Cuomo stated, in regard to the buyback program, "Guns kill and injure people every day in crimes, in accidents, and in suicides. Buying back guns will save lives and will help build strong partnerships between police and people in communities to work together to reduce gun violence."[152] The Clinton administration and Secretary Cuomo also threatened litigation against gun manufacturers, offering to support the nation's PHAs in a class-action suit designed to urge the production of safer firearms.[153]

Gun control initiatives and threatened litigation have not been prominent in HUD public housing policy since the Clinton administration. President Bush terminated BuyBack America,[154] and the Obama administration has not defined a public housing firearms policy, focusing instead on equality of civil rights and improved neighborhoods.[155]

B. Congressional Position on Guns in Public Housing

In 1994, the United States House of Representatives introduced House Bill 4062, entitled "Safe Public Housing Act."[156] The bill did not seek a per se firearms ban in public housing, but rather left the choice to residents. The law would have established a tenant referendum, allowing public housing residents to elect either to ban firearms from their development or to require firearm registration; these gun controls would have been later incorporated into tenant leases.[157] The proposal did not make it out of committee.

Contrarily, in 2009, the United States House of Representatives sought to permit unfettered legal firearm possession in public housing under House Bill 3045, entitled

[151] Press Release, U.S. Dep't of Hous. & Urban Dev., *supra* note 149.

[152] *Id.* (internal quotation marks omitted).

[153] David Stout & Richard Perez-Pena, *Housing Agencies To Sue Gun Makers*, N.Y. TIMES, Dec. 8, 1999, at A1.

[154] *See* Notice Terminating Funding Availability for Public Housing Drug Elimination Program Gun Buyback Violence Reduction Initiative, 66 Fed. Reg. 38,301 (July 23, 2001).

[155] *See, e.g.*, REMARKS AT A DISCUSSION ON URBAN AND METROPOLITAN POLICY, 2009 DAILY COMP. PRES. DOC 00562, at 3 (July 13, 2009); Change.gov., The Obama-Biden Plan, http://change.gov/agenda/urbanpolicy_agenda (last visited Nov. 21, 2010).

[156] Safe Public Housing Act, H.R. 4062, 103d Cong. (1994).

[157] *Id.* § 26(b)(1).

"Section 8 Voucher Reform Act of 2009."[158] An amendment agreed to in committee included the language: "Neither the Secretary of Housing and Urban Development, nor any public housing agency, nor any owner of federally assisted housing may establish any prohibition or restriction on the otherwise lawful possession or use of firearms in federally assisted housing."[159] This language encountered forceful public opposition from local governmental entities.[160] It appears there is insufficient support for this bill to pass into law.

This latter legislation demonstrates congressional acceptance of the individual rights reading of the Second Amendment presented in *Heller*.[161] Congressional support for gun rights is further exemplified by the number of Congresspersons who joined as amici supporting the Second Amendment in the *Heller* and *McDonald* cases. When *Heller* was before the Supreme Court, fifty-five Senators and two hundred and fifty Representatives urged the Court to strike down the gun control law as unconstitutional.[162] *McDonald* garnered similar support, adding two additional Senators and one Representative

[158] Section 8 Voucher Reform Act of 2009, H.R. 3045, 111th Cong.

[159] *Id.* § 578A.

[160] *See, e.g.*, Press Release, Mayor Greg Nickels, The Nation's Mayors Oppose Thune Amendment, Actions To Weaken Gun Safety Laws (July 20, 2009), http://usmayors.org/pressreleases/uploads/RELEASENICKELSONTHUNEGUNAMENDMENT72009.pdf ("[T]he gun lobby is . . . pushing members of Congress to offer amendments to legislation that will make it easier for criminals and others who shouldn't have access to guns . . . . [The amendment] would bar public housing authorities from restricting gun ownership among public housing residents, a practice that has been in place in some areas for a decade or more and has helped to make these projects safer places in which to live."); Mike Mentrek, *Cuyahoga Metropolitan Housing Authority Faults U.S. House Plan To Allow Guns in Public Housing*, CLEVELAND.COM (July 10, 2009, 9:17 PM), http://blog.cleveland.com/metro/2009/07/cuyahoga_metropolitan_housing.html (" 'This [proposal] goes opposite to everything we've tried to do in the past 10 or 15 years to regain control of public housing, to move crime and drugs away,' said George Phillips, executive director of [Cuyahoga Metropolitan Housing Authority]. 'It's short sighted . . . and I can't speak strongly enough about how absurd this is,' he said." (first alteration in original)).

[161] In final form, the text of section 512—Protecting Americans from Violent Crime—states that "Congress needs to weigh in on the new regulations to ensure that unelected bureaucrats and judges cannot again override the Second Amendment rights of law-abiding citizens." Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 512(a)(7), 123 Stat. 1734, 1765.

[162] Brief for 55 Members of United States Senate et al. as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

to *Heller*'s *amici* numbers.[163] Each of these briefs represented the largest number of Congresspersons to join together in a Supreme Court amicus brief.[164] At this time, there is substantial congressional support for individual rights under the Second Amendment, although no further legislation specifically targeting firearms in public housing has been introduced.

C. State of the Law

There is scant legal authority as to firearm possession in public housing. In what little case law and legal scholarship are available, there is no uniformity across the authorities, and state statutes plainly vary from one jurisdiction to the next. The following Section overviews firearm possession on government-owned property and in public housing as it stands today. The discussion encompasses relevant decisional law and legal scholarship both prior and immediately subsequent to *Heller*.

1. Government-Owned Buildings

Even though PHAs are state governmental actors entitled to regulate PHA-owned property,[165] there is a general dearth of caselaw analyzing the status of PHAs as property owners and managers, particularly with respect to the right to bear arms. As such, a review of weapons regulations involving other types of government-owned properties may lend valuable insight into the issue of guns in public housing. Both state and federal laws are useful in this regard.

As a general premise, the *Heller* Court took care to note that the individual right articulated in no way impugns "laws forbidding the carrying of firearms in sensitive places such as schools and *government buildings*."[166] The Court did not explain the rationale for permitting such gun laws to remain intact nor did it provide objective standards to evaluate what constitutes a "sensitive place." Nonetheless, implicit in this proclamation is

[163] Brief for Senator Kay Bailey Hutchison et al. as Amici Curiae Supporting Petitioners, McDonald v. City of Chicago, 130 S. Ct. 3020 (2009) (No. 08-1521).

[164] Kopel, *supra* note 133.

[165] *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 47–48 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

[166] *Heller*, 128 S. Ct. at 2817 (2008) (emphasis added).

the understanding that *Heller* does not affect jurisprudence upholding and rationalizing gun bans in government-owned buildings and properties.

On federal lands, a recently enacted law repealed prior regulations that prohibited firearm possession in national parks. Explaining the rationale for this change in the law, Congress stated that the now-repealed law had prevented "individuals complying with Federal and State laws from exercising the [S]econd [A]mendment rights of the individuals."[167] However, most other federal properties are still considered to be gun-free zones. Federal law criminalizes the possession of firearms in all federal buildings and courthouse facilities.[168] For instance, a post-*Heller* court upheld a handgun ban on property owned by the United States Postal Service, reasoning that "restrictions on guns stemmed from [the Postal Service's] constitutional authority as the property owner." Additionally, usage of the parking lot where the firearm was found made it "a place of regular government business, . . . fall[ing] under the 'sensitive places' exception recognized by *Heller*."[169] This ruling confirms that a government landowner may regulate its property as it sees fit and implies a broad application of the "sensitive places" concept.

Similarly, state and local governments prohibit firearm possession within governmental facilities and on government-owned property. A state government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated . . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."[170]

For instance, a 2004 Tennessee Attorney General opinion addresses the right of government landlords—not PHAs specifically—to regulate firearm possession on government-owned land.[171] The Tennessee Constitution has a right to bear

[167] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 512(a)(4), 123 Stat. 1734, 1765.

[168] 18 U.S.C. § 930 (2006 & Supp. II).

[169] United States v. Dorosan, 350 F. App'x 874, 875 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1714 (2010).

[170] *Adderley*, 385 U.S. at 47–48.

[171] Tenn. Op. Att'y Gen. No. 04-020, 2004 WL 367637, at *1 (Feb. 9, 2004) (citations omitted).

arms provision, but the state supreme court has recognized the legislative police power to regulate firearms.[172] The state has the authority to prohibit firearm possession on government-owned property, and "local governments have been granted the power [under state statute] to determine if they wish to allow weapons on their property."[173] Any regulation must be "guided by" and "restrained to" the state constitution and "bear some well defined relation to the prevention of crime."[174] Essentially, state and local governments have the right to regulate government-owned properties so long as the regulations are within constitutional bounds. By extension, PHAs, as local government actors, may regulate weapons on PHA-owned properties in an effort to prevent crime.

2. Legal Firearms in Public Housing

"In response to escalating violent crime, drugs and chaos within public housing, several housing authorities have looked to gun control as an antidote to violence and crime."[175] PHAs address gun control through "house rules" and lease provisions, but there is no standardization. Some leases do not address firearm possession at all, others prohibit only illegal firearm possession, some require permits or registration, and yet others ban outright the possession of *any* firearm or munitions.[176]

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[172] *See id.* at *1–2.

[173] *Id.* at *3.

[174] *Id.* at *2.

[175] Lloyd L. Hicks, *Guns in Public Housing: Constitutional Right or Prescription for Violence?*, 4 J. AFFORDABLE HOUSING & COMMUNITY DEV. 153, 153 (1995) (referencing PHAs in Chicago, Illinois; Portland, Maine; and Richmond, Virginia).

[176] *See, e.g.*, Bloomington Hous. Auth., Sample Public Housing Dwelling Lease 5, http://www.bhaindiana.net/pdfs/BHA_Lease11.pdf (last visited Nov. 21, 2010) (prohibiting firearm possession); Clinton Cnty. Hous. Auth., Public Housing Lease Agreement—Part I: Terms and Conditions 8, http://www.clintoncountyhousing.com/Lease.pdf (last visited Nov. 21, 2010) (prohibiting possession of illegal firearms); Cuyahoga Metro. Hous. Auth., Admissions and Continued Occupancy Policy 14, http://www.cmha.net/information/docs/acop.pdf (last visited Nov. 21, 2010) (prohibiting firearm possession); Hous. Auth. of the City of Kan. City, Kan., Part I—Residential Lease Agreement: Terms and Conditions 10, http://www.kckha.org/Graphics_Forms/frm-HM-50.pdf (last visited Nov. 21, 2010) (prohibiting firearm possession); Hous. Auth. of Murray, Ky., Public Housing Handbook 19, 35 http://www.phamurray.org/murray%20housing%20webpage/murray%20housing%20webpage/pictures/handbook.pdf (last visited Nov. 21, 2010) (prohibiting discharge of firearms); Hous. Auth. of Texarkana, Ark., Part I of the Residential Lease Agreement: Terms and Conditions, http://www.txkarhousing.info/sitebuildercontent/sitebuilderfiles/PARTIoftheRESIDENTIALLEASEAGREEMENT.doc (last visited

The law is unsettled when it comes to banning firearms through a public housing lease. PHAs even disagree as to the constitutionality of such bans. For instance, recently, one PHA in northeast Florida tried to disarm tenants, while another PHA from the same area of the state determined that the Constitution requires "for better or worse" that law-abiding residents be permitted to possess firearms.[177] As this Section will address, legislatures, courts, and state Attorneys General in various jurisdictions also reach differing conclusions as to the validity of public housing firearm bans.

a. Decisional Law

In 1990, public housing tenants in Richmond, Virginia brought suit against the local PHA.[178] Tenants claimed that a number of lease terms were "unreasonable" and in violation of a federal law explicitly prohibiting "unreasonable terms or conditions" in public housing leases.[179] One of the challenged lease terms prohibited possession of firearms and weapons.[180] After reviewing the lease, the court upheld as reasonable a generalized ban prohibiting public housing tenants from possessing any guns or firearms but also determined a prohibition on "weapon[s] of any type" to be unreasonably

Nov. 21, 2010) (prohibiting firearm possession); Littleton Hous. Auth., Application for Subsidized Housing Programs, General Guidelines (Effective 3-1-2010), http://www.littletongov.org/housing/files/LHAapp-2010-b.pdf (last visited Nov. 21, 2010) (prohibiting illegal use of firearms); New Brunswick Hous. Auth., New Brunswick Housing Authority Lease, http://www.newbrunswickhousing.org/public/lease.shtml (last visited Nov. 21, 2010) (prohibiting firearm possession without a valid "Firearm Purchaser Identification Card"); Norwalk Hous. Auth., Colonial Village House Rules & Regulations 2, http://www.norwalkha.org/UserFiles/File/Colonial%20Village%20Tenant%20Rules%20and%20Regulations.pdf (last visited Nov. 21, 2010) (prohibiting possession of firearms unless gun-owner has a state permit and has registered the firearm with the PHA); Quincy Hous. Auth., Part I of the Residential Lease Agreement: Terms and Conditions 5, http://quincyha.phanetwork.com/uploads/Site_1006/Federal%20Lease%20current.pdf (last visited Nov. 21, 2010) (prohibiting firearm possession).

[177] Jason Yurgartis, *Public Housing Ban on Guns Challenged*, NEWS-LEADER (Fla.), Oct. 22, 2009, *available at* http://www.fbnewsleader.com/articles/2009/10/22/news/00newsbanchallenged.txt (quoting Senior Vice President of the Jacksonville Housing Authority Fred McKinnies) (internal quotation marks omitted).

[178] *See* Richmond Tenants Org., Inc. v. Richmond Redevelopment & Hous. Auth., 751 F. Supp. 1204, 1205 (E.D. Va. 1990), *aff'd*, No. 91-2608, 1991 U.S. App. LEXIS 27694 (4th Cir. Nov. 8, 1991).

[179] *Id.* (citing 42 U.S.C. § 1437d(*l*)(2) (2006)).

[180] *Id.* at 1206.

overbroad.[181] The court found that the "elimination of guns and firearms from public housing is rationally calculated to reduce the crime and violence that plague public housing."[182] So holding, the court simply severed the overbroad portion from the lease.[183] Shortly following publication of the opinion, the Virginia Legislature passed a law barring public housing leases from conditioning tenancy on the prohibition or restriction of legal firearms.[184] Subsequently, at least one Virginia PHA declined to implement a firearm ban in public housing due to this statutory mandate.[185]

In 1993, Portland, Maine public housing tenants brought suit against their local PHA.[186] The tenants alleged a lease provision banning all possession or display of firearms on public housing premises was invalid and unenforceable.[187] The trial court upheld the ban as a "reasonable measure rationally related to advancing the health, safety and welfare of those residing in the PHA premises."[188] On appeal in 1995, the Maine Supreme Court vacated the trial court's decision on statutory grounds.[189] The state supreme court determined the PHA to be a political subdivision under state statute, subject to preemption in the field of firearm regulation.[190] Based on this determination, the court held invalid the lease provision banning firearm possession, without ever reaching the constitutional issue.[191] The court also

[181] *Id.* at 1206–07.

[182] *Id.* at 1206.

[183] *Id.* at 1207 (stating the reasonable post-severance lease provision should read: "To refrain from the use and/or possession on Management's property of guns, firearms (operable or inoperable), nunchucks, or similar instruments, blackjacks and explosive devices.").

[184] *See* 1991-720 Va. Adv. Legis. Serv. 1 (LexisNexis) (codified as VA. CODE ANN. § 55-248.9 (2010)). Subsequent to the lawsuit and legislation, the lease provision now prohibits only use and possession of illegal firearms. Richmond Redevelopment & Hous. Auth., Dwelling Lease 15 (Nov. 2004), http://www.rrha.org/html/public/samplelease.pdf.

[185] *See* Susie Stoughton, *Suffolk Backs Off Gun Ban Proposal Officials Will Send Letters of Apology to Residents of City Public Housing Units*, VA. PILOT & LEDGER-STAR, Sept. 26, 2001, at B5.

[186] Doe v. Portland Hous. Auth. (*Doe I*), No. CV-92-1408, 1993 Me. Super. LEXIS 359, at *1 (Me. Super. Ct. Dec. 29, 1993), *rev'd on statutory grounds*, 656 A.2d 1200 (Me. 1995).

[187] *Id.*

[188] *Id.* at *26.

[189] Doe v. Portland Hous. Auth. (*Doe II*), 656 A.2d 1200, 1201 (Me. 1995).

[190] *Id.* at 1203–04.

[191] *Id.* at 1201, 1203.

noted a recent amendment to the Maine Constitution designed to protect an individual right to bear arms and found that the legislative history of the preemption statute proved an intent to have uniform gun laws statewide.[192]

In 2004, a Michigan tenant, in a public housing facility for the elderly and disabled, brought suit against the PHA in Lincoln Park.[193] The tenant took issue with a lease provision banning all firearms from the entirety of the premises.[194] The court rejected the Second Amendment argument on the basis that the right is not incorporated to the states. The court also failed to find that the lease provision "shock[ed] the conscience" under general Fourteenth Amendment substantive due process.[195] Under the Michigan Constitution, the court stated the right to bear arms is neither absolute nor fundamental.[196] Based on this framework, the court determined that the "[r]estrictions on the right to possess weapons in the environment and circumstances described by [the PHA were] both in furtherance of a legitimate interest to protect its residents and a reasonable exercise of police power."[197] The court, finding it was not unreasonable to prohibit weapons in a facility catering to elderly and disabled individuals, also gave a measure of weight to the "specific environment."[198] The lease provision was ultimately held to be both reasonable and a minimal infringement on the tenant's rights.[199]

b. Attorney General Opinions

Pre-*Heller* advisory opinions of attorneys general out of Texas,[200] Arkansas,[201] and Oregon[202] specifically addressed the validity of public housing firearm bans in their respective jurisdictions. The 1988 Oregon opinion first determined that PHAs are governmental entities, separate from municipal

[192] *Id.* at 1203.

[193] Lincoln Park Hous. Comm'n v. Andrew, No. 244259, 2004 Mich. App. LEXIS 792, at *1 (Mich. Ct. App. Mar. 23, 2004).

[194] *See id.*

[195] *Id.* at *3–6.

[196] *See id.* at *7–9.

[197] *Id.* at *9–10.

[198] *See id.*

[199] *See id.* at *10.

[200] Tex. Op. Att'y Gen. No. DM-71, 1991 WL 527492, at *1 (Dec. 31, 1991).

[201] Ark. Op. Att'y Gen. No. 94-093, 1994 WL 410456, at *1 (July 6, 1994).

[202] 46 Or. Op. Att'y Gen. 122 No. 8196, 1988 WL 416272, at *1 (Sept. 12, 1988).

government, subject to the state constitution's right to bear arms provision.[203] As the state's constitutional guarantee explicitly protects the right to use arms for self-defense, the opinion concluded that a PHA cannot impose an absolute ban on common-use firearms.[204] The opinion further advised that a PHA may not provide off-site storage to circumvent the constitutional guarantee, but offered a number of alternative gun control solutions, including banning possession by minors, barring threatening gestures or illegal firearm discharge, and prohibiting possession of loaded firearms where there is no exigency of self-defense.[205]

The 1991 Texas opinion, first considering preemption, determined that PHAs are municipal subdivisions, not separate entities, and as such, are subject to the same rules as municipalities.[206] Texas state law precludes municipal regulation of firearm ownership.[207] Therefore, because of state preemption, Texas PHAs are not permitted to enact any form of firearm regulation in public housing developments.[208] The determination of legislative preemption foreclosed consideration of the state constitution's right to bear arms provision.[209]

The 1994 Arkansas opinion evaluated the constitutionality on a ban on the right to bear arms. The opinion concluded that no state statute would bar a lease provision banning firearms in public housing and that a poverty-based equal protection challenge would fail. The opinion was otherwise equivocal as to a ban under the constitutional right to bear arms.[210] The discussion indicated that a PHA is a state governmental actor not subject to the Second Amendment, and that although the equivalent state constitutional provision permitted reasonable

[203] *See id.* at *1–2.
[204] *See id.* at *4.
[205] *See id.* at *6–8.
[206] Tex. Op. Att'y Gen. No. DM-71, 1991 WL 527492, at *1.
[207] *See id.* at *3–4.
[208] *See id.*
[209] *See id.* at *3.
[210] Ark. Op. Att'y Gen. No. 94-093, 1994 WL 410456, at *4–5 (July 6, 1994). The opinion's equal protection analysis relies heavily on the trial court opinion in *Doe I*, a decision which was later vacated on state statutory grounds, never reaching the equal protection issue. *See id.* at *1, *4 (citing *Doe I*, No. CV-92-1408, 1993 Me. Super. LEXIS 359, at *1 (Me. Super. Ct. Dec. 29, 1993), *rev'd on statutory grounds*, 656 A.2d 1200 (Me. 1995)).

restrictions on the right to bear arms, given a lack of caselaw, it was not possible to accurately predict the judicial outcome if the lease provision were challenged.[211]

Additionally, there is a 2009 post-*Heller* Tennessee Attorney General's opinion that generally addressed the authority of a landlord to ban firearm possession by lease provisions. The opinion neither referenced *Heller* nor the distinction between a private and public landlord.[212] The opinion posited only that a landlord and a tenant may mutually agree to a lease provision prohibiting firearm possession within the leased unit, or the landlord may establish such a rule, provided the tenant is given notice of the rule prior to signing the lease.[213] Even a tenant holding a valid handgun permit would be bound by a lease term prohibiting firearm possession, so long as the tenant's waiver of the right to bear arms is not unconscionable or in violation of statute.[214]

c. Threatened Litigation

Subsequent to the *Heller* ruling, there was a scent of litigation specific to gun control in public housing, although no court has considered the merits. In California, the National Rifle Association ("NRA"), a gun-advocacy group, sued the San Francisco Housing Authority, contesting lease provisions that prohibited lawful possession of firearms and ammunition.[215] The parties settled without judicial intervention, agreeing that the PHA would not enforce the lease provisions banning *legal* firearm and ammunition possession within public housing units.[216] In Florida, an elderly man living in public housing owned by the Housing Authority of Fernandina Beach asserted a

[211] *See id.* at *5.

[212] *See generally* Tenn. Op. Att'y Gen. No. 09-170, 2009 WL 3666436 (Oct. 26, 2009). The Tennessee Uniform Landlord and Tenant Act does not explicitly exclude public housing developments from the provisions of the Act. *See* TENN. CODE ANN. § 66-28-102 (2010).

[213] Tenn. Op. Att'y Gen. No. 09-170, 2009 WL 3666436, at *2–3.

[214] *Id.* at *3. *But cf.* Holt v. Richmond Redevelopment & Hous. Auth., 266 F. Supp. 397, 401 (E.D. Va. 1966) (holding government benefits cannot be conditioned on waiver of constitutional rights).

[215] *See* Stipulation re Settlement and Dismissal of Defendants San Francisco Housing Authority and Henry Alvarez III Without Prejudice, Doe v. San Francisco Hous. Auth., No. CV-08-03112 TEH (N.D. Cal. 2009), *available at* http://volokh.com/files/sfpublichousingguns.pdf.

[216] *Id.* at 2–3.

violation of his constitutional rights based on a provision requiring tenants to "agree not to display, use or possess any firearms under penalty of eviction."[217] It appears this suit was dropped without public resolution. In Delaware, the NRA brought suit against the Wilmington Housing Authority, challenging lease provisions that ban firearms for self-defense use.[218] This suit, brought in 2010, has been stayed.[219] These threatened lawsuits do not establish any place in law but are significant to show that public housing firearm bans will be a point of contention in future gun control litigation.

IV. LEGAL FIREARMS IN PUBLIC HOUSING AFTER *HELLER* AND *MCDONALD*

A public housing tenant's unit is undeniably his or her family's *home*, albeit there are greater restrictions and regulations placed on tenants because they reside under a governmental landlord.[220] The question is whether, after *Heller* and *McDonald*, public housing tenants will have the right to possess legal firearms within their homes. This Part explores the validity of a federal law imposing a firearms ban, state law jurisprudence, and the potential challenges to public housing firearms bans under Due Process and Equal Protection given Second Amendment incorporation.

A. Validity of a Federal Law Affecting Guns in Public Housing

As noted, in 1994 Congress endeavored to pass a law that would have implemented a referendum among public housing tenants to self-regulate gun restrictions,[221] and in 2009, Congress sought to pass a law unequivocally permitting firearm possession

[217] Yurgartis, *supra* note 177.

[218] *Across the USA News from Every State*, USA TODAY (June 1, 2010), http://www.usatoday.com/NEWS/usaedition/2010-06-01-states01_ST_U.htm.

[219] Legal Community Against Violence, Post-*Heller* Litigation Summary 6 (Sept. 20, 2010), *available at* http://www.lcav.org/content/post-heller_summary.pdf (Doe v. Wilmington Hous. Auth., case no. 10-473, is "currently stayed").

[220] *See, e.g.*, 24 C.F.R. § 966.4 (2010) (listing the lease requirements for leases between the PHA and tenants); Emily Bazar, *Public Housing Kicks Smoking Habit*, USA TODAY (Apr. 4, 2007), http://www.usatoday.com/news/nation/2007-04-04-public-housing-smoking_N.htm ("If you live in public housing, your life is regulated." (quoting Vincent Curry, board member of National Fair Housing Alliance)).

[221] H.R. 4062, 103d Cong. (1994).

in public housing.[222] So far unsuccessful, Congress may soon enact a statute affecting firearms in public housing. It is also possible that, rather than enacting an explicit law, Congress will delegate authority to HUD to establish a public housing firearms policy. The question that arises is whether such a law or regulation, either permitting or banning firearms in public housing developments, would be valid.

The power to spend for the general welfare and the Commerce Clause of the Constitution grants broad authority to Congress to enact federal housing laws.[223] On occasion, federal housing law will preempt state or local law under the Supremacy Clause.[224] Federal law may preempt state law in one of three ways: an express statement, pervasive field occupation, or irreconcilable conflict between state and federal law.[225] Preemption under a federal statute requires congressional intent to preempt; preemption under a federal regulation requires that an agency have both the authority to act and the intent to preempt.[226] Although Congress has not demonstrated any intent to occupy the entire field, there are portions of federal housing law that have superseded or expressly preempted state law.[227] However, federal housing policy is designed such that Congress may "yield maximum possible autonomy to local housing authorities."[228]

Any public housing gun control law Congress enacts will be presumptively constitutional and applicable to public housing through the PHAs because of the expansive reach of federal housing law. Congress may enact a law within the province of federal housing law or use its spending power to attach conditions to receipt of federal funds to pursue broad housing

[222] H.R. 3045, 111th Cong. (2009).

[223] *See* U.S. CONST. art. I, § 8, cls. 1, 3; City of Cleveland v. United States, 323 U.S. 329, 333 (1945) (holding a federal housing law constitutional under the General Welfare Clause); Perry v. Hous. Auth., 486 F. Supp. 498, 501 (D.S.C. 1980) (holding a federal housing law constitutional under the Commerce Clause), *aff'd*, 664 F.2d 1210 (4th Cir. 1981).

[224] *See* U.S. CONST. art. VI, cl. 2.

[225] *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990).

[226] *See id.*; Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153–54 (1983) (citing United States v. Shimer, 367 U.S. 374, 381–82 (1961)).

[227] EJ Hurst II, Note, *Rules, Regs, and Removal: State Law, Foreseeability, and Fair Play in One Strike Terminations from Federally-Subsidized Public Housing*, 38 BRANDEIS L.J. 733, 745–46 (2000).

[228] *Id.* at 745.

policy objectives.[229] However, independent constitutional rights considerations may establish a bar to direct legislative mandate and conditional grants.[230]

The Second Amendment, as a direct restraint on Congress, may invalidate a firearm ban as an infringement or prevent the attachment of a similar condition. Furthermore, firearm regulation is an area traditionally left to the states as an exercise of state police power.[231] Congressional attempts to either permit or restrict firearms in public housing may be seen as an encroachment on the basic principles of federalism because each state constitution interprets the right to bear arms differently, even in the context of the Fourteenth Amendment.[232] However, if such a federal housing law or funding condition does not improperly encroach upon state police power or violate constitutional guarantees, it will preempt any state statute that presents an affirmative obstacle to the effective implementation of federal housing policy.[233]

Due to Second Amendment incorporation, Fourteenth Amendment protections may also establish an independent constitutional bar because Congress cannot induce the states to

[229] *See* Barnes v. Gorman, 536 U.S. 181, 186 (2002) (characterizing Spending Clause legislation in the nature of a contract); South Dakota v. Dole, 483 U.S. 203, 206–07 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' " (internal citations omitted)); James v. Valtierra, 402 U.S. 137, 140 (1971) (stating that while the Housing Act offers aid for low-income housing, there is no requirement for state and local governments to accept); Perry v. Hous. Auth., 486 F. Supp. 498, 500–01 (D.S.C. 1980) (stating that the Commerce Clause was a constitutional basis for the 1937 Housing Act), *aff'd*, 664 F.2d 1210 (4th Cir. 1981).

[230] *Dole*, 483 U.S. at 208.

[231] United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (explaining that criminal law enforcement and firearm regulation rests primarily with the states).

[232] *See* Printz v. United States, 521 U.S. 898, 918 (1997) ("It is incontestible [sic] that the Constitution established a system of 'dual sovereignty.' ").

[233] *See* Ross v. Broadway Towers, Inc., 228 S.W.3d 113, 124 (Tenn. Ct. App. 2006) ("[F]ederal public policy in providing subsidized housing that is safe and crime-free for all the tenants is paramount to any policy at issue in [the Tennessee Uniform Residential Landlord and Tenant Act]. . . . [A]pplication of [the state] statute is preempted by the federal regulations because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (quoting Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments, 890 A.2d 249, 255 (D.C. 2006))).

violate citizens' constitutional rights.[234] "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation."[235] Therefore, a federal law or condition banning firearm possession in public housing will be invalid if it mandates PHAs to violate the terms of the Fourteenth Amendment, as it incorporates the Second Amendment.

Conversely, a law or condition requiring PHAs to permit legal firearm possession could be validly enacted as a remedy to state violation of the Second Amendment right, as incorporated. In addition to the initial grants of power from which national housing laws arise, Congress has the power to prevent or remedy state constitutional violations under the Fourteenth Amendment's Enforcement Clause.[236] Congress has broad power to reach into areas of law otherwise traditionally reserved to the states under this clause.[237] The requirement for validity is congruence or proportionality of the means to the ends, given the evil presented; congressional remedies of this type are entitled to substantial deference against constitutional challenge.[238] Permitting firearm possession in the face of infringement on the right articulated in *Heller* seems to satisfy this standard. Even if a balance is struck between state and federal gun control, if PHAs nationwide impose strict firearm bans, Congress would have authority to remedy the infringement through a statute allowing firearm possession in public housing.

To date, Congress has been unsuccessful in enacting any law specifically purporting to regulate firearm possession in public housing developments.

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[234] *Dole*, 483 U.S. at 210 ("[T]he 'independent constitutional bar' limitation on the spending power . . . stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.").

[235] Saenz v. Roe, 526 U.S. 489, 508 (1999).

[236] *See* U.S. CONST. amend. XIV, § 5.

[237] City of Boerne v. Flores, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' " (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976))).

[238] *Id.* at 530, 536.

B. Second Amendment Incorporation and State Law

If the Second Amendment had not been incorporated under *McDonald*, state law would have remained much the same as before *Heller*. Under "right to bear arms" provisions, state court judges would have been at liberty to take cues from the *Heller* ruling but would not be required to do so.[239] However, under *McDonald*, state courts are required to consider if firearm bans—in state laws, local ordinances, and public housing leases—are valid under state statutory and constitutional law, as well as the Fourteenth Amendment. Generally, a court will first consider legislative preemption to avoid reaching the constitutional issue. When preemption is determined either not to be at issue or is not dispositive, the court will then turn to applicable state and federal constitutional provisions.

1. State Law Preemption

The legal status of PHAs varies from one state to the next. In some jurisdictions, PHAs are entities separate from the municipalities in which they are located; in other jurisdictions, PHAs are considered municipal subdivisions.[240] In jurisdictions where PHAs are treated like municipal subdivisions, they may be unequivocally preempted from imposing gun controls on public housing residents. A form of preemption adopted in many states is a limitation or prohibition on the ability of counties and municipalities to exercise "home-rule power" to enact firearm restrictions.[241] When a PHA is deemed to be part of a municipality that is prohibited from promulgating gun restrictions, then the PHA too is prohibited.[242] Although these municipal subdivision PHAs establish a firearms ban by rule and

[239] *See* People v. Flores, 86 Cal. Rptr. 3d 804, 806–09 (Cal. Ct. App. 2008); *see also* Davenport v. Garcia, 834 S.W.2d 4, 12–13 (Tex. 1992) ("[S]tate courts have increasingly looked to their own constitutions, rather than the Federal Constitution, in examining the extent of their citizens' liberties. . . . [T]he state court may examine its own constitution first to determine whether the right in question is protected. Within the context of such an analysis, a state court can benefit from the insights of well-reasoned and developed federal jurisprudence, but is not compelled to reach identical results.").

[240] *E.g.*, Tex. Op. Att'y Gen. No. DM-71, 1991 WL 527492, at *3 (Dec. 31, 1991); 46 Or. Op. Att'y Gen. 122 No. 8196, 1988 WL 416272, at *2 (Sept. 12, 1988).

[241] Kopel, *supra* note 133, at 123 ("Forty-six states now have limited or complete preemption of local firearms laws.").

[242] *See, e.g.*, *Doe II*, 656 A.2d 1200, 1204 (Me. 1995); Tex. Op. Att'y Gen. No. DM-71, 1991 WL 527492, at *3.

enforce it through a lease provision, such regulation is tantamount to a municipal firearms ordinance, premised on the legislative intent of the preemption statute.[243] As such, a lease provision banning firearms in public housing would be invalidated without reaching the constitutional issue. In contrast, if a PHA is an entity deemed to be separate from the municipality, it will fall outside state law prohibitions on local firearm regulations, unless otherwise specified by statute.[244]

2. State Constitutional Law

If a state statute does not preempt local gun regulation, then a PHA's firearm ban will be evaluated under the Fourteenth Amendment and the state's "right to bear arms" jurisprudence or, in the absence of such a constitutional provision, the state's decisional law.[245] Even given incorporation, state and local legislatures and state courts still have the authority to "experiment[ ] with reasonable firearms regulations" because, although incorporation "limits" state and local means to "devise solutions to social problems that suit local needs and values," incorporation "by no means eliminates" state and local police powers.[246] It is possible for a state court to follow the same analytical approach as the Supreme Court but reach a different result under a state constitutional provision that provides for a broader or distinctive right.[247]

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[243] *See, e.g.*, *Doe II*, 656 A.2d at 1201, 1204; Tex. Op. Att'y Gen. No. DM-71, 1991 WL 527492, at *3.

[244] *See, e.g.*, 46 Or. Op. Att'y Gen. 122 No. 8196, 1988 WL 416272, at *2.

[245] Forty-four states have a constitutional right to bear arms provision. ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. II, § 26; ARK. CONST. art. 2, § 5; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; GA. CONST. art. I, § I, ¶ VIII; HAW. CONST. art. I, § 17; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. CONST. BILL OF RIGHTS § 4; KY. CONST. § 1; LA. CONST. art. I, § 11; ME. CONST. art. I, § 16; MASS. CONST. pt. 1, art. XVII; MICH. CONST. art. I, § 6; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. I, art. 2-a; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.C. CONST. art. I, § 20; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 9; VA. CONST. art I, § 13; WASH. CONST. art. 1, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. 1, § 24.

[246] McDonald v. Chicago, 130 S. Ct. 3020, 3046 (2010) (internal quotation marks omitted) (citation omitted).

[247] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 420 (Conn. 2008).

"[S]tate constitutional doctrine on the right to bear arms is well developed and remarkably consistent across jurisdictions."[248] Most state courts reason that "the right to keep and bear arms is not an absolute right, but is one which is subject to the right of the people through their legislature to enact valid police regulations to promote the health, morals, safety and general welfare of the people."[249] The police power inheres to the state and is limited only by the Constitution.[250] On occasion, state courts have invalidated gun control laws as unconstitutional, but the vast majority of laws are upheld.[251] Before *McDonald*, some cases applied a standard that asks if the right is "materially burden[ed]" or if the purpose of the right is frustrated.[252]

However, before *McDonald*, most state courts, including those that held that an individual or fundamental right to bear arms exists under their state constitution, simply asked if a regulation was "reasonable."[253] The test asked if a regulation was a reasonable exercise of legislative power and was functionally equivalent to "rational basis" review, the lowest level of constitutional scrutiny.[254] To survive "rational basis," there need only be a rational relationship between the law at issue and the government interest advanced.[255] State courts routinely upheld strict gun control laws under a reasonableness inquiry, even when the state constitutional right to bear arms was deemed fundamental.[256]

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[248] Adam Winkler, *The Reasonable Right To Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 598 (2006).

[249] Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972); *accord* Arnold v. Cleveland, 616 N.E.2d 163, 171–72 (Ohio 1993).

[250] 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 3.1, at 467 (4th ed. 2007); Robert Dowlut, *Bearing Arms in State Bills of Rights, Judicial Interpretation, and Public Housing*, 5 ST. THOMAS L. REV. 203, 205 (1992).

[251] *See* Dowlut, *supra* note 250, at 206, 209.

[252] Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1458 (2009) (quoting Lacy v. State, 903 N.E.2d 486, 490 (Ind. Ct. App. 2009)).

[253] *See* Robertson v. City of Denver, 874 P.2d 325, 329–30 (Colo. 1994) (en banc) (citing collected cases from fifteen states); Volokh, *supra* note 252.

[254] *See Robertson*, 874 P.2d at 329.

[255] Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001).

[256] *See, e.g.*, Arnold v. Cleveland, 616 N.E.2d 163, 171, 173 (Ohio 1993) (upholding an assault weapons ban under state police power, despite finding a fundamental right to bear arms).

In support of public housing firearm bans, PHAs have a legitimate government interest in reducing gun-related crime and violence in government-owned housing.[257] Indeed, "[p]aramount among the legitimate governmental interests meriting infringements on individual rights is the state's need to protect the health and welfare of its citizens."[258] Thus, prohibiting firearm possession on PHA-owned property is a *reasonable* use of the state's police power to reduce guns and violence. Reasonableness requires little more than a nonarbitrary legislative pronouncement to survive constitutional review. Under the pre-*McDonald* reasonableness test, a public housing firearm ban would very likely be upheld. However, given Second Amendment incorporation, the reasonableness test will no longer be a proper analysis.

C. Constitutionality of Guns in Public Housing After Heller *and* McDonald

State courts are free to interpret state constitutional provisions to provide greater protection of a right but cannot reduce protections guaranteed by the Fourteenth Amendment.[259] Nor can a PHA, as a governmental entity, unlawfully infringe on the rights guaranteed by state and federal constitutional law. Therefore, because *McDonald* incorporates the Second Amendment to the states, the floor of the protected right is *Heller*'s individual right, inhering to law-abiding citizens, to possess legal handguns for purposes of home self-defense and confrontation.

Public housing developments are uniquely both government-owned buildings and citizen dwellings, thus producing an inherent conflict given the holding and dicta in *Heller*. *Heller*, as reiterated in *McDonald*, makes clear that gun bans in government buildings are not necessarily undone by its

[257] *See* Gibson v. State, 930 P.2d 1300, 1302 (Alaska Ct. App. 1997) (citing State v. Erickson, 574 P.2d 1, 21–22 (Alaska 1978); Ravin v. State, 537 P.2d 494, 501, 504 (Alaska 1975)).

[258] *Id.*

[259] City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) ("As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution." (citations omitted)).

holding.[260] A PHA is a property-owner and manager with authority to regulate its own, but "[t]he constitutionality of government regulation of its own property depends upon the character of the property at issue."[261]

Public housing firearm bans have not recently been challenged in a substantial manner, nor has a contemporary case reached the merits,[262] and available persuasive materials do not take into account *Heller*. The following Section explores the constitutionality of public housing firearm bans under both Due Process and Equal Protection, given Second Amendment incorporation. The lease is first considered as a contract, before dissecting the firearm ban as a local gun control law under constitutional scrutiny.

1. Lease-Based Challenges to Public Housing Firearm Bans

Many PHAs have taken action to ban all firearms, legal and illegal, in public housing developments.[263] The ban is typically implemented through a lease provision, codifying a PHA policy or rule.[264] A tenant's endorsement on the lease signifies the tenant's agreement to a provision prohibiting firearm possession. A lease is a contract, and where a contract is at issue there is, first and foremost, a voluntariness requirement. In the public housing

[260] McDonald v. Chicago, 130 S. Ct. 3020, 3047 (2010); District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008). Despite this understanding being found in dicta, " 'by the way' statements made by the Supreme Court resonate more forcefully than dicta from other sources," and is accorded significant weight. United States v. Miller, 604 F. Supp. 2d 1162, 1167 (W.D. Tenn. 2009) (citations omitted).

[261] Daniel v. City of Tampa, 38 F.3d 546, 549 (11th Cir. 1994) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983)); *accord* Iowa Op. Att'y Gen. No. 03-4-1, 2003 WL 22100958, at *5 (Apr. 7, 2003) ("[W]e have surveyed cases and opinions from other jurisdictions addressing preemption in the context of weapons regulation. The majority of courts addressing the narrow issue presented here—whether an express statutory preemption of firearms regulation by a municipality prohibits the municipality from regulating the possession of firearms on municipally-owned or controlled property—have recognized the inherent authority of a municipality to manage property which it owns or controls.").

[262] There is a case in Delaware challenging a public housing firearms ban, but the case is currently stayed. *See* LEGAL COMMUNITY AGAINST VIOLENCE, *supra* note 219.

[263] *See supra* note 176.

[264] Each PHA lays out its management policies in an Admissions and Continued Occupancy Policy. *See* U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDE BOOK app. III (2011), *available at* http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm (displaying the "Sample Admissions and Continued Occupancy Policy").

context, it is possible to argue that tenants have limited options for affordable housing and as such have no choice but to consent to the terms of the lease. A lease is not voidable, however, solely because of "[t]he impoverished circumstances and subsequent inequality of bargaining power of public housing tenants are not sufficient to render an agreement voidable."[265] A public housing lease will not be invalidated on voluntariness grounds.

Therefore, when contemplating the lease as a contract, there are two ways to consider the viability of such a lease provision after *Heller* and *McDonald*. The first way is under federal housing law, which prohibits PHA leases from containing unreasonable provisions.[266] The second is under the "doctrine of unconstitutional conditions," which holds unconstitutional the exchange of an enumerated right for a government benefit.[267]

a. Unreasonable Terms and Conditions

Federal law prohibits "unreasonable terms and conditions" in PHA leases, a phrase that is largely undefined.[268] In the previously discussed Richmond PHA case, which upheld a public housing firearms ban, the court gave serious consideration to the definition of "unreasonable" in the context of public housing leases.[269] As an issue of first impression, the court interpreted the prohibition "to require that lease terms be rationally related to a legitimate housing purpose."[270] The court further determined that "[i]n applying this test, the crucible of reasonableness will be defined by the particular problems and concerns confronting the local housing authority. Lease

[265] Jason S. Thaler, Note, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 FORDHAM L. REV. 1777, 1791 (1995); *see also* Dawson v. Milwaukee Hous. Auth., 930 F.2d 1283, 1284 (7th Cir. 1991) ("One could say that impecunious persons 'have no choice' but to accept the state's offer—although this colloquialism is embarrassed by the fact that more than 80% of poor persons live in private housing."). *But see* PUBLIC HOUSING POLICY, *supra* note 12 ("From 2001 to 2005, the number of unassisted low-income renter households whose housing costs exceed 50 percent of their income—a group the Department of Housing and Urban Development (HUD) categorizes as having 'severe housing cost burdens'—increased by more than 1 million, or 20 percent.").

[266] 42 U.S.C. § 1437d(*l*)(2) (2006).

[267] Thaler, *supra* note 265, at 1795.

[268] 42 U.S.C. § 1437d(*l*)(2).

[269] Richmond Tenants Org., Inc. v. Richmond Redevelopment & Hous. Auth., 751 F. Supp. 1204, 1205 (E.D. Va. 1990), *aff'd*, No. 91-2608, 1991 U.S. App. LEXIS 27694 (4th Cir. Nov. 8, 1991).

[270] *Id.*

provisions which are arbitrary and capricious, or excessively overbroad or under-inclusive, will be invalidated."[271] This test is essentially a "rational basis" consideration tailored to a particular PHA. Under this formulation, it would be reasonable for any PHA experiencing gun problems within its housing developments to include a lease provision banning all firearm possession.

However, most courts, when considering the validity of lease provisions challenged as "unreasonable," do not delve into the meaning of the word. For instance, the United States Supreme Court, in a footnote, concluded that lease provisions permitting one-strike evictions did not include unreasonable terms or conditions.[272] In another case, a strict no-trespass policy was determined to implicitly violate the prohibition on unreasonable terms and conditions because it would be "patently unreasonable to prohibit public housing tenants from entertaining guests."[273]

The implication is that courts are generally conclusory when evaluating the reasonableness of a lease term. While there is no uniform test to measure the unreasonableness of a lease provision, it appears that to be unreasonable, a lease term must be obviously arbitrary, discriminatory, or unduly oppressive. If a provision is otherwise constitutional, it is likely reasonable. Therefore, in the context of a firearm prohibition, the unreasonableness prohibition appears redundant to a constitutionality inquiry.

b. Doctrine of Unconstitutional Conditions

Whereas private landlord-tenant agreements provide freedom of contract and an opportunity for the parties to bargain, the lease between a public housing tenant and a PHA more closely mimics a contract of adhesion, where there is no opportunity to bargain terms.[274] A public housing lease retains a "take it or leave it" character because many terms are HUD-mandated and practicality requires standardization for efficiency both in tenant registration and lease enforcement.[275]

[271] *Id.* at 1205–06.
[272] *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 128, 134 n.5 (2002).
[273] Diggs v. Hous. Auth. of Frederick, 67 F. Supp. 2d 522, 531 (D. Md. 1999).
[274] *See* Thaler, *supra* note 265, at 1793.
[275] *See id.*

"Realistically, it must be acknowledged that the housing authority prescribes the terms of the lease and that the tenant does not negotiate with the authority . . . ."[276]

That said, under the doctrine of unconstitutional conditions, the government cannot require an individual to trade constitutional rights for public benefits.[277] The principal considerations under this doctrine are whether an enumerated right is invoked and whether the condition is germane to the government's interest.[278] The doctrinal principle finds that an unconstitutional condition exists when an unfair exchange occurs—namely, when a citizen trades an enumerated right to the government for a specific benefit.

When contemplating the constitutionality of a lease term that requires tenants to forgo their right to have handguns in their homes for purposes of self-defense—the Second Amendment right—in exchange for the privilege of living in publicly-owned government-subsidized housing, there are two possible outcomes. Either the condition fails constitutional muster or the government has merely declined to subsidize the right.

Unconstitutional conditions in public housing typically contemplate violations of core speech rights because even an indirect prohibition may have a chilling effect on speech.[279] For

[276] Vinson v. Greenburgh Hous. Auth., 29 A.D.2d 338, 341, 288 N.Y.S.2d 159, 163 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970). *But see* 24 C.F.R. § 966.3 (2010) (requiring PHAs to solicit current tenants' comments on proposed lease changes).

[277] Thaler, *supra* note 265, at 1795.

[278] *See* Palmer v. Valdez, 560 F.3d 965, 972 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1282 (2010) (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) and citing Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1460 (1989)).

[279] *See generally* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) ("Recognizing that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights, our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." (alteration in original) (citation omitted) (internal quotation marks omitted) (quoting Laird v. Tatum, 408, U.S. 1, 11 (1972)); Perry v. Sindermann, 408 U.S. 593, 597 (1972))); Holt v. Richmond Redevelopment & Hous. Auth., 266 F. Supp. 397 (E.D. Va. 1966) (granting an injunction restraining the PHA from proceeding to evict tenants to restrict the exercise of their First Amendment rights); Carrera v. Yepez, 6 S.W.3d 654 (Tex. App. 1999) (denying qualified immunity for a PHA director and a PHA supervisor for depriving tenants of their First Amendment rights).

instance, an unconstitutional condition was found when, by threatening eviction, a PHA effectively prohibited tenants from organizing.[280] The rationale was that "a tenant's continued occupancy in a public housing project cannot be conditioned upon the tenant's foregoing his Constitutional rights."[281] The previously noted 1988 Oregon Attorney General's opinion applied these principles in the context of firearms, unequivocally concluding that a PHA "may not require an otherwise-eligible individual to surrender rights under [the Oregon Constitution's right to bear arms provision] in order to obtain low-income housing."[282] Under this interpretation, tenants could not agree to waive their seemingly inalienable right to bear arms as a condition of public housing. There is no binding decisional law that speaks directly to this issue, but voiding the lease term as an unconstitutional condition may be the proper result.

Not all situations involving an exchange of a right for a governmental benefit are unconstitutional. While courts have indeed found unconstitutional conditions in many situations, there are many cases to the contrary. The outcome validating a firearms ban is premised on government denial of subsidization. This principle is exemplified in the context of abortion. A number of courts have upheld prohibitions on expending public funds to finance abortion counseling and procedures, reasoning that the government "is not required to subsidize the exercise of constitutional rights."[283] Similarly, denial of food stamps to striking union laborers was determined not to infringe on First Amendment rights because a legislative decision not to subsidize a fundamental right is not tantamount to infringement.[284]

In the realm of public housing, the HUD regulation permitting PHAs to require a prospective tenant to exclude an ineligible family member from occupancy for approval is analogous.[285] It is possible to interpret this requirement as exchanging free association and intimate familial rights for the

[280] *See Holt*, 266 F. Supp. at 401.

[281] *Id.* (citing Lawson v. Hous. Auth. of Milwaukee, 70 N.W.2d 605 (1955)).

[282] 46 Or. Op. Att'y Gen. 122 No. 8196, 1988 WL 416272, at *6 (Sept. 12, 1988).

[283] Ginny Kim, Note, *Unconstitutional Conditions: Is the Fourth Amendment for Sale in Public Housing?*, 33 AM. CRIM. L. REV. 165, 184 (1995) (citing Rust v. Sullivan, 500 U.S. 173 (1991)); *see* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

[284] *See* Lyng v. Int'l Union, 485 U.S. 360, 368 (1988).

[285] *See* 24 C.F.R. § 960.203(c)(3)(i) (2010).

benefit of public housing. The more reasonable interpretation is that the government will not subsidize the right to live with a felon or drug-abuser, which are typical bases for declining to admit an individual to public housing.

When this logic is applied to a lease provision banning legal firearms, it may be reasoned that the provision is constitutional because the government is simply not required to subsidize a home where the tenant can possess legal firearms for self-defense. Any financial hardship imposed on a public housing tenant can be analogized to that of striking union workers: The failure of the government to subsidize a nonfundamental privilege only imposes a financial constraint, but it does not prevent the individual from exercising the enumerated right. There is no exaction, but rather the government is simply declining to extend benefits while allocating scarce resources.[286] However, this analysis tends to presume that there is a prospective or current tenant challenging an existing ban. The analysis and result may be different where a new firearms ban is imposed on current tenants because the hardship of compliance is more significant and may be viewed as a penalty or an exaction. Ultimately, permitting the lease term to stand as a valid condition of occupancy based on a theory of nonsubsidization is as equally probable an outcome voiding the condition under the doctrine of unconstitutional conditions.

2. Constitutional Scrutiny of Local Firearms Regulations

Another way to analyze the validity of a lease-based firearm ban is to review the rule underlying the lease provision as if it were a local law. Some jurisdictions may have a local ordinance criminalizing firearms in public housing, which would be subject to a similar scrutiny analysis.[287] Initially, the same legislative preemption analysis as under state law applies.[288] Thereafter,

[286] *See Lyng*, 485 U.S. at 368 ("Strikers and their union would be much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right."); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593, 607–08 (1990).

[287] *See, e.g.*, AURORA, ILL., CODE OF ORDINANCES § 29-43(a)(12) (2010).

[288] *See supra* Part IV.B.1.

the Second Amendment right, as articulated in *Heller* and its progeny, is appropriately considered under traditional constitutional scrutiny.

"Scrutiny" describes a framework for evaluating a law or regulation under the Fourteenth Amendment. The highest level of scrutiny is "strict scrutiny," which burdens the government with proving the necessity of the challenged law. "Strict scrutiny" is generally the applicable test where a fundamental right or liberty interest is at stake.[289] Most other interests are subject to the lowest level of scrutiny, "rational basis," which presumes constitutionality. Between "strict scrutiny" and "rational basis" are the heightened standards of "intermediate scrutiny" and "undue burden."

The level of scrutiny to which gun control laws are subjected is directly related to the degree of infringement on the right and the extent of judicial deference due to legislative bodies. At minimum, the basis for any governmental infringement on an individual right is a rational relationship between the regulation at issue and the interest to be protected. Under any form of heightened scrutiny, the legislative basis for encroaching on a right must be more precise. The following discussion analyzes the constitutionality of a PHA rule banning all firearms in public housing under each of the varying tiers of scrutiny given Second Amendment incorporation.

a. Rational Basis

Almost all laws are subject to "rational basis" and almost all laws will survive challenge because there only needs to be a rational relationship between a legitimate government interest and the law or policy at issue.[290] Indeed, unsupported speculation is sufficient to uphold a law unless it can be proven irrational.[291] In *Heller*, the Court noted "rational basis" is inappropriate to evaluate an enumerated right. The Court further stated: "If all that was required to overcome the right to

[289] *See* Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 197, 242 (2009); Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006) ("All incorporated rights may be fundamental, but not all incorporated rights trigger strict scrutiny.").

[290] *See* Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001).

[291] *See id.*; United States v. Miller, 604 F. Supp. 2d 1162, 1169 (W.D. Tenn. 2009) (citing TriHealth, Inc. v. Bd. of Comm'rs, 430 F.3d 783, 790 (6th Cir. 2005)).

keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[292] That said, the Court indicated that even under a "rational basis" analysis, a home handgun ban would not be constitutional.[293] *Heller* has the effect of excluding "rational basis" as a potential standard by which to measure gun control laws, and as such, this standard will not be considered further.

b. Strict Scrutiny

The Bill of Rights, as incorporated to the states through the Fourteenth Amendment, encompasses the types of fundamental and liberty interests "strict scrutiny" is designed to protect. Under "strict scrutiny" analysis, the government's interest must be compelling and the means to achieve it must be narrowly tailored.[294] In considering whether a law or policy is narrowly tailored, a court will consider the breadth of the challenged law. Put differently, a court will determine if the burden placed on the right is the "least restrictive alternative" for realizing the governmental objective; the restriction may neither be over nor underinclusive.[295]

The *Heller* Court, in dicta, stated its ruling should not be construed to "cast doubt" on laws such as those prohibiting felons from possessing firearms.[296] It is dubious that policy-oriented gun laws, such as those referenced in *Heller*, would meet the narrow tailoring requirement of "strict scrutiny." For one, felon-in-possession laws are likely overbroad because there is no differentiation between violent and nonviolent offenders, as no threat from the individual is required.[297] Implicit in this analysis is the understanding that "strict scrutiny" is an improper basis for Second Amendment review, and by extension, "strict scrutiny" is not the proper basis to evaluate a public housing firearm ban.

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[292] District of Columbia v. Heller, 128 S. Ct. 2783, 2818 n.27 (2008).

[293] *Id.* at 2817–18.

[294] Reno v. Flores, 507 U.S. 292, 301–02 (1993).

[295] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 (2006).

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

[297] Mark Tushnet, *Permissible Gun Regulations After* Heller*: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1429 (2009).

c. Intermediate Scrutiny

While "strict scrutiny" applies when First Amendment rights central to democracy are threatened, a lesser degree of scrutiny, known as "intermediate scrutiny," applies to neutral restrictions that impose only incidental burdens.[298] This jurisprudence has potential application in the Second Amendment context, and it appears this is a standard some courts have begun looking toward in the wake of the *Heller* and *McDonald* decisions.[299]

The speculative relationship between a government interest and the means to achieve it that is permitted under "rational basis" review is not sufficient to satisfy "intermediate scrutiny"; nor is the narrow tailoring of "strict scrutiny" required. Rather, "intermediate scrutiny" demands "factual justification to connect th[e] [government's] rationale with the regulation in issue."[300] To survive challenge, a law must be substantially related to an important governmental interest without excessively burdening the right at stake.[301] Although this standard is easily stated, it is difficult to apply.

Concrete proof linking the government's regulation to the right burdened is an indispensible requirement, but the quantum of evidence necessary to establish a *substantial relation* under "intermediate scrutiny" is not a precise formulation. Justice Scalia once lamented that not only is there "no established criterion[,] . . . but [the Court] essentially appl[ies] [intermediate scrutiny] when it seems like a good idea to load the dice."[302] Nonetheless, this standard has the potential to adequately insulate the right to bear arms from government intrusion, while sanctioning the enforcement of important policy objectives, such as keeping firearms out of the hands of convicted felons.

PHAs have a right, by virtue of ownership and management responsibility, to regulate the premises of housing developments within their control.[303] However, the government as proprietor

[298] United States v. Miller, 604 F. Supp. 2d 1162, 1169 (W.D. Tenn. 2009); *see also* Klukowski, *supra* note 289, at 235–36.

[299] See LEGAL COMMUNITY AGAINST VIOLENCE, *supra* note 219, at 3.

[300] Erie v. Pap's A.M., 529 U.S. 277, 311 (2000) (Souter, J., concurring in part and dissenting in part).

[301] *Cf.* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213–14 (1997) (discussing intermediate scrutiny under the First Amendment).

[302] United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

[303] *Cf.* United States v. Dorosan, 350 F. App'x 874 (5th Cir. 2009) (upholding a firearms ban on U.S. Postal Service property), *cert. denied*, 130 S. Ct. 1714 (2010).

argument alone will not satisfy heightened scrutiny. Even in conjunction with an assertion of governmental police power as a basis for firearm regulation, "intermediate scrutiny" is not yet met. Unlike "rational basis" review, there must be evidence to support the burden on an individual right.

Under "intermediate scrutiny," when crime prevention is the motive, "a law need not solve the crime problem . . . . *Some* deterrence of serious criminal activity is more than enough."[304] For example, statistical and anecdotal evidence of high instances of gun related crime in public housing, supports a government interest in banning firearms. Evidence suggests gun-related violence is higher in public housing developments than in surrounding areas.[305] A survey of PHAs with gun bans currently in place could provide anecdotal evidence, speaking to the local conditions and positive results of a ban over time. For instance, the PHA in Cuyahoga County, Ohio, which has had a ban in place for over a decade, claims the majority of residents support the ban and alert police to firearms on the premises.[306] National statistics further indicate, in addition to intentional gun-related crime, firearms are responsible for a high number of accidental or unintentional firearm injuries and deaths.[307] However, "intermediate scrutiny" requires a nexus—evidence linking firearm bans to a reduction in gun-related violence, such as facts showing that where there are fewer legal guns, there are fewer gun-related deaths and crimes.[308]

Although it cannot be credibly claimed that there is no governmental interest in reducing crime and violence, particularly because public housing is government-owned, there is voluminous evidence rejecting the effectiveness of gun bans. For instance, the same Cuyahoga County PHA advocating the benefits of its long-standing gun ban stated that within a one to two month period, the police confiscated more than ten firearms from its developments.[309] While there are no comparative facts

[304] Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 179–80 (2002) (Rehnquist, J., dissenting) (emphasis added).

[305] *See* IN THE CROSSFIRE, *supra* note 79, at 14.

[306] Mentrek, *supra* note 160.

[307] IN THE CROSSFIRE, *supra* note 79, at 20.

[308] *See, e.g.*, Brady Campaign To Prevent Gun Violence, Guns in the Home: Overview, http://www.bradycampaign.org/facts/gunviolence/gunsinthehome (last visited Nov. 21, 2010).

[309] Mentrek, *supra* note 160.

indicating the number of guns in Cuyahoga public housing before the ban, it is plain that the all out prohibition may not be effective. Nor can public housing clearly be distinguished as posing a heightened risk; the Council of Large Public Housing Authorities discredited the HUD study establishing this fact.[310] Further, national statistics on the benefits of gun control differ substantially, and the correlation between gun control and firearm-related violence in public housing developments is, at best, tenuous.[311] In fact, "[m]any housing authorities claim that *non*-residents are responsible for most of the drug trafficking and violent crime in their facilities."[312] By all appearances, the evidence fails to establish the requisite substantial factual relationship. Even if gun-violence is a national problem, the facts do not prove that reducing the number of legal guns furthers the government interest in reducing firearm violence in public housing developments.[313] In sum, evidence speaking to the benefits of banning *legal* firearm possession in public housing is inconclusive.

Further, banning residents who are innocent of wrongdoing from possessing legal firearms in their homes denies a right that, if not fundamental, is of "supreme importance."[314] Denial of such an important individual right arguably has no substantial relationship to reducing illegal guns and, given the inconclusive evidence on the benefits of gun control, is seemingly ineffectual against criminal gun violence. Due to the tenuous factual basis supporting legal firearm bans, it is unlikely such a regulation would withstand "intermediate scrutiny."

d. Undue Burden

There is another tier of legal scrutiny that does not fit within the traditional fundamental rights structure. This standard seeks to determine if a regulation places an "undue burden" on the exercise of a right. A burden may be "undue" if it is

[310] *See* Council of Large Pub. Hous. Auths., *supra* note 80.

[311] Hicks, *supra* note 175, at 153–54.

[312] *Id.* at 154 (emphasis added).

[313] *Id.* at 153–54.

[314] *Cf.* Plyler v. Doe (*Plyler II*), 457 U.S. 202, 221, 223, 228 (1982) (using heightened scrutiny to invalidate a law requiring children of illegal aliens to pay tuition to attend public school; education is a nonfundamental right of great importance to the nation).

exceedingly severe or lacks a legitimate and rational justification.[315] The "undue burden" test developed in relation to abortion.[316]

Abortion may be the right most analogous to the right to bear arms. Abortion has never been defined as a "fundamental" right, and the Supreme Court has been clear that what right does exist is not unqualified.[317] Similarly, *Heller* is conspicuously silent as to fundamentality and is explicitly clear that the right to bear arms is not absolute.[318] In addition, both abortion and the right to self-defense inherent in the Second Amendment, implicate an entitlement to bodily integrity.

Further, the abortion right is considered sui generis because it is not easily "fitted into the conventional mosaic of constitutional analysis."[319] Abortion stands alone under the constitutional constructs because, ideology aside, the government has a significant interest in preventing the destruction of life, such that it rivals the protected individual privacy interest.[320] A parallel may be drawn to the right to bear arms: It is "*sui generis* in that it carries the inherent power to take life; firearms are unavoidably dangerous; guns can kill."[321] Abortion and gun control both implicate a dual governmental interest in protecting an individual liberty and preservation of human life.[322]

The "undue burden" test allows for government infringement on a protected interest, so long as it does not present a "substantial obstacle" to exercise of the right.[323] This standard of scrutiny is the most malleable.[324] Unlike the other levels of heightened scrutiny, "undue burden" does not require a quantum of evidence to support the law but rather a sufficiently forceful

[315] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 920 (1992) (Stevens, J., concurring in part and dissenting in part).

[316] *See id.* at 874 (majority opinion).

[317] *See id.* at 874–75 (citations omitted).

[318] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008).

[319] San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

[320] *See Casey*, 505 U.S. at 869.

[321] Klukowski, *supra* note 289, at 236–37 (emphasis added); *cf. Casey*, 505 U.S. at 852 ("Abortion is a unique act. It is an act fraught with consequences.").

[322] *See Casey*, 505 U.S. at 875–76 ("*Roe v. Wade* was express in its recognition of the State's 'important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life.' " (alterations in original) (quoting Roe v. Wade, 410 U.S. 113, 162 (1973))).

[323] *Id.* at 846, 877.

[324] *See* Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting); *Casey*, 505 U.S. at 930 (Blackmun, J., concurring in part and dissenting in part).

government interest in preservation of life.[325] The right can also be more narrowly defined under this standard, such as how a woman's right to abortion exists only up until fetal viability—there is a tipping point where the state's interest in preservation of life outweighs the individual liberty interest.[326]

Arguably, this standard is well-suited to uphold many policy-oriented gun control laws, such as prohibiting machinegun possession, banning weapons from sensitive places, or denying firearms to felons. Prohibitions on machineguns, which are unusually dangerous to human life, would not place a substantial obstacle in the way of a law-abiding individual's use of other firearms for home self-defense purposes. Prohibiting firearms in sensitive places would not unduly burden the right to home self-defense by excluding dangerous weapons from finite public spaces. Nor would there be an "undue burden" on felons, because the government interest is sufficiently forceful to prevent felons from possessing firearms until a time when their rights are restored or the risk to society is effectively reduced. [327] In this circumstance, there is a tipping point converse to that of abortion because the risk to human life decreases over time.

Nonetheless, a public housing firearm ban would likely fail under an "undue burden" analysis. The ban would prohibit law-abiding citizens from possessing legal firearms in their homes at all times, in a nontemporary situation. Such a ban would be "profoundly unfair in its application to particular individuals, or so restrictive as to nullify, destroy, or render nugatory the underlying right to bear arms."[328] There simply is no plausible argument to explain how a complete denial does not amount to a severe and substantial obstacle—an "undue burden"—on the exercise of the Second Amendment right. Further, the rationale underlying the "undue burden" test is arguably no more than an interest-balancing approach, which *Heller* explicitly rejects.[329]

[325] *Casey*, 505 U.S. at 869 (majority opinion).

[326] *See id.* at 846.

[327] *See, e.g.*, W. VA. CODE R. § 61-7-7 (2010) (permitting felons to petition for reinstatement of right to possess firearms); Britt v. State, 681 S.E.2d 320, 323 (N.C. 2009) (finding a felon-in-possession statute unconstitutional as applied to rehabilitated nonviolent felon).

[328] Winkler, *supra* note 248, at 609.

[329] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).

e. Sui Generis

There is an alternate application of the sui generis classification, unrelated to abortion and the "undue burden" test. In addition to being an appropriate descriptor for a unique right or interest, the phrase sui generis is also applicable to an object or factual scenario that is wholly unique, such as searches by drug-sniffing dogs and ownership of human tissue.[330] Application of a sui generis classification can serve to bolster important policy objectives.[331]

One court suggested PHAs are sui generis based on the amalgamation of governmental influence—federal, state, and municipal.[332] In the same vein, public housing developments are primed for a sui generis classification. Public housing developments are low-income residential facilities, which provide a governmental benefit categorized as a property right, under the management and operation of a federally-subsidized state government landlord.[333] There is no parity between public housing developments and any other type of facility given the affordable housing goals and government ownership of residential property. Even other HUD-subsidized housing projects are not an appropriate analog because they are privately-owned.[334] Based on these considerations, public housing developments are arguably sui generis.

Sui generis implies an exception from common law constitutional scrutiny. If viable, classifying public housing developments as sui generis would enable the courts to contemplate the complexities of public housing developments without influencing future Second Amendment jurisprudence. These complexities include, but are not limited to: (1) a governmental interest in preservation of the facilities as an affordable housing tool; (2) a landlord's right to control its own property; (3) the exertion of state police power to control crime;

[330] *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 409 (2005) (canine sniff by narcotics-detection dog); Moore v. Regents of Univ. of Cal., 793 P.2d 479, 489 (Cal. 1990) (human biologicals).

[331] *See Moore*, 793 P.2d at 489.

[332] Hous. Auth. of Asbury Park v. Richardson, 346 F. Supp. 1027, 1033 (D.N.J. 1972) (citations omitted).

[333] *See supra* Part I.A.

[334] *See* U.S. Dep't of Hous. & Urban Dev., Rental Assistance, http://portal.hud.gov/portal/page/portal/HUD/topics/rental_assistance (last visited Nov. 21, 2010).

(4) gun-related crime problems specific to public housing; (5) liberties inherent to residential premises; (6) and the property interest tenants have in occupancy as appended to automatic lease renewals. Generally, a sui generis classification is applied to uphold a policy-oriented law. Therefore, if applied to public housing, firearm bans would almost certainly be upheld based on a unique fact-based examination.

3. Equal Protection Challenges

There is also a potential Equal Protection challenge to public housing firearms bans under the Fourteenth Amendment or a parallel state provision. Equal Protection prohibits the government from treating similarly situated persons differently where a fundamental right or immutable characteristic is involved.[335] Cases involving a "suspect class" or a "fundamental right" invoke heightened scrutiny.[336] However, most government-created class distinctions do not touch upon immutable characteristics. For class distinctions that do not trigger "strict scrutiny" to be constitutional, the only requirements are a rational basis and the absence of arbitrary or invidious discrimination.[337]

At present, nonsuspect class distinctions exist in public housing. For instance, "low-income" is a valid government-created class distinction, which is used as the primary criterion for public housing occupancy.[338] Economic disadvantage or indigence does not, in and of itself, establish a "suspect class."[339] Nonetheless, when PHAs impose regulations, the concern is that, by virtue of living in government-owned or government-subsidized housing, residents are being treated differently than those persons similarly situated.

In challenging a firearms ban, public housing residents may assert a violation of Equal Protection, alleging discrimination premised on the right articulated in *Heller*, or a claim may be premised on a state right reflecting the same minimum

[335] 16B GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE, CONSTITUTIONAL LAW § 857 (2d ed. 2010).

[336] *Id.*

[337] *See* Hassan v. Wright, 45 F.3d 1063, 1068 (7th Cir. 1995) (citations omitted); Rasmussen v. Toia, 420 F. Supp. 757, 764 (S.D.N.Y. 1976); *see* 16B BLUM ET AL., *supra* note 335.

[338] *See supra* note 39 and accompanying text.

[339] *Hassan*, 45 F.3d at 1068.

protections. The challenge would be based on a showing that similarly situated people, such as families not residing in public housing, are not being denied the right to bear arms. Although poverty does not invoke a higher level of scrutiny under this analysis, and there is no fundamental right to government-subsidized housing, there may be a "fundamental right" to legal firearm possession for home self-defense, which does invoke heightened scrutiny.[340]

The low-income class distinction is not called upon to establish a "suspect class" but rather to show that because tenants cannot afford to live outside of public housing, they are being discriminated against in the exercise of a "fundamental right." If the courts decline to call the right to bear arms "fundamental," the argument fails, and the challenge is relegated to a "rational basis" review.[341] However, if the right is indeed "fundamental," heightened scrutiny applies, the analysis tending to track Due Process.[342] Given a "fundamental right" to bear arms, denying public housing residents the possession of legal firearms based on their inability to afford alternative housing is almost certainly enough to invalidate a gun ban under Equal Protection.[343]

Additionally, there is a potential basis for an Equal Protection challenge premised on law enforcement officers residing in public housing. HUD regulations explicitly provide for public housing occupancy by police officers to improve on-site security.[344] The regulation implies, but does not state, that these officers would be permitted to possess firearms in their units. The intent of the regulation would be ill-served if the officers are unarmed.[345] This scenario posits that all residents *except* police officer residents are prohibited from possessing firearms. If "rational basis" review is applied, there is clearly a rational relationship between permitting law enforcement officers to possess firearms and the legitimate government interest in

[340] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2803, 2806–11 (2008).

[341] *See* 16B BLUM ET AL., *supra* note 335.

[342] *See* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (indicating a convergence of Equal Protection and Due Process where a fundamental right is involved).

[343] *Cf. id.* ("The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs." (citing Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring))).

[344] 24 C.F.R. § 960.505(b) (2010).

[345] *See id.*

increasing safety within public housing developments. However, if the right to bear arms is considered "fundamental," similarly situated persons—*all* public housing residents—would be treated differently in exercise of their fundamental right to bear arms.[346] If the ban is otherwise valid, this argument will likely fail a fundamental rights based Equal Protection challenge because police officers may be distinguished as not being similarly situated to traditional low-income public housing tenants.

D. Legal Firearms in Public Housing: Additional Considerations

If a lease provision banning firearms is invalidated as an unconstitutional exercise of state or federal power, or if Congress enacts an applicable statute or authorizes a HUD regulation permitting gun possession, there are additional issues to consider. Although a complete ban would be invalid, PHAs would likely retain the authority to limit firearm types and to regulate on-site possession, so long as such restrictions do not impermissibly infringe on the right to bear arms. These restrictions, as well as eviction policies, which generally give PHAs discretion to evict for criminal activity, must be reevaluated in light of a constitutional right to use a firearm in defense of self and home.

1. Types of Firearms and Restrictions on Possession

Both federal and state statutes restrict the types of firearms that may be possessed and the individuals who may lawfully possess those firearms. It then reasonably follows that PHAs could limit certain aspects of gun ownership on public housing property, even if an outright ban is impermissible.[347] The issue is what types of firearms PHAs may prohibit and what restrictions on those firearms are valid.

a. Restricted Types of Firearms

The Supreme Court's holding in *United States v. Miller*[348] provides guidance as to the types of firearms public housing

[346] *Cf.* Wilson v. Cook Cnty., 914 N.E.2d 595, 606 (Ill. App. Ct. 2009) (explaining that, if there is no fundamental right, an assault weapons ban does not violate Equal Protection unless two assault weapons owners can show different treatment).

[347] *See, e.g.*, 18 U.S.C. § 922 (2006); FLA. STAT. §§ 790.25(2), .221 (2010).

[348] 307 U.S. 174 (1939).

tenants may possess. *Miller*, a case involving criminal interstate transportation of a short-barrel sawed-off shotgun, held that the Second Amendment does not protect firearms that do not bear "some reasonable relationship to the preservation or efficiency of a well regulated militia."[349] The *Heller* Court read *Miller* to mean that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."[350] In discussing the limitations on types of firearms, the *Heller* Court noted that there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' " but also made clear that handguns are the "quintessential [home] self-defense weapon."[351] Therefore, PHAs would not be permitted to ban handguns, but highly dangerous or unusual weapons, such as machineguns and short-barrel shotguns, may be properly excluded from public housing units through specific lease provisions without substantial debate.

b. Restrictions on Firearm Possession

As to permissible firearm restrictions and regulations unrelated to the type of weapon, *Heller* was careful to note that an individual rights reading of the Second Amendment does not abrogate gun control laws prohibiting persons such as felons and the mentally-ill from possessing firearms.[352] Subsequent to *Heller*, no federal court has held any of the federal prohibitions of this kind unconstitutional, drawing both on the dicta in *Heller* and the comparatively broad scope of the statute it struck down.[353] Therefore, a lease provision requiring tenants to register firearms with the PHA may be a permissibly narrow gun

[349] *Id*. at 178.

[350] District of Columbia v. Heller, 128 S. Ct. 2783, 2815–16 (2008).

[351] *Id.* at 2817–18.

[352] *Id.* at 2816–17.

[353] *See* United States v. Marzzarella, 595 F. Supp. 2d 596, 598 (W.D. Pa. 2009) ("[I]t appears that every court which has considered a Second Amendment challenge to 18 U.S.C. § 922, post-*Heller*, has upheld the statute as constitutional." (citing collected cases)), *aff'd*, 614 F.3d 85 (3d Cir. 2010). *But see* United States v. Gieswein, No. 08-6113, 2009 WL 2837433, at *3 n.2 (10th Cir. 2009) ("We share the concern, expressed in the *McCane* concurrence, that the *Heller* dictum may be in tension with the basis for its own holding, as felon dispossession laws may not have the longstanding historical basis ascribed to them by the Court." (citing United States v. McCane, 573 F.3d 1037, 1047–48 (2009) (Tymkovich, J., concurring))), *cert. denied*, 130 S. Ct. 1563 (2010).

regulation, presuming there is no arbitrary approval process.[354] Provisions preventing minors from possessing firearms and banning carriage of firearms in common areas are also presumptively constitutional.[355] Prohibitions on felons and substance-abusers should, in theory, not be required because such tenants are screened out, but prohibitions on possession by the mentally-ill may have particular significance in facilities which cater to the disabled. However, safe storage and trigger-lock provisions may be unconstitutional because, in practice, such rules hinder a law-abiding tenant's ability to engage in confrontation for purposes of immediate self-defense.[356] Restrictions must be viewed in light of the burden on the right to self-defense and in light of any existing distinctive state right.

2. Use of a Firearm in Self-Defense

The scope of the right articulated in *Heller*, and under a number of state constitutions, includes defense of one's home, which implicitly allows for the brandishing or discharge of a firearm during confrontation. However, some PHAs currently have leases prohibiting these very acts, without necessarily placing an outright ban on gun possession.[357] The constitutional question considers tenant eviction under such a lease term, after a tenant's legal, or allegedly legal, use of a firearm for self-defense purposes.[358] In this area, HUD regulations provide little guidance. Relevantly, the regulations contemplate eviction from public housing for persons or family members engaged in "criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents."[359]

[354] *See* McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 336 (2d Cir. 1981) (holding invalid a lease provision requiring advance registration and approval of overnight guests as an infringement on free association and privacy).

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

[356] *See id.* at 2864 (Breyer, J., dissenting).

[357] *See, e.g.*, Plattsburgh Hous. Auth., Dwelling Lease 12, http://www.phaplattsburgh.com/lease.pdf (last visited Nov. 21, 2010) (prohibiting "display[ing], discharg[ing] or threaten[ing] to display or discharge a firearm of any type"); City of Charlottesville, Rules of Occupancy, http://www.charlottesville.org/Index.aspx?page=721 (last visited Nov. 21, 2010) (prohibiting discharge of firearms).

[358] The scope of this Section focuses on public housing evictions for alleged criminal activity; for a general discussion of self-defense tort and criminal liability after *Heller*, see Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205 (2009).

[359] *See* 24 C.F.R. § 966.4(f)(12) (2010).

Discharge of a firearm, in the absence of self-defense, would clearly fall within this lease provision, allowing for a proper eviction. Given that gun-related crimes do occur in public housing developments, there is a possibility that tenants seeking to avoid rightful eviction will abuse the constitutional claim of armed self-defense.

The procedural due process afforded in public housing evictions only guarantees notice and the opportunity to be heard,[360] but it does not foreclose eviction for merely *alleged* criminal activity when that activity constitutes a lease violation.[361] When tenants assert self-defense as grounds for use or discharge of a firearm, it may be necessary for PHAs to forestall eviction proceedings until law enforcement completes an investigation of the event or a criminal conviction is sustained against the tenant. Very likely, eviction of a tenant claiming self-defense, without proof as to the illegitimacy of the claim, is an unconstitutional infringement on the right articulated in *Heller*.

Further, PHAs have a degree of discretion in evicting tenants because termination of occupancy is neither automatic nor mandatory, even where there is a clear lease violation.[362] Leaving this type of discretion in the hands of PHAs could raise the specter of arbitrariness or discrimination. Therefore, if legal firearm possession is permitted in public housing, and HUD declines to promulgate a relevant regulation, it would be prudent for PHAs to establish a lease provision related to self-defense use of legal firearms and a baseline for grievance and eviction proceedings under that lease term.

CONCLUSION

Gun control laws are now subject to the constraints of *Heller*'s strong individual rights interpretation of the Second Amendment, as incorporated to the states through *McDonald*. The right to armed home self-defense articulated in *Heller* now serves as the baseline for future state right to bear arms decisions. However, even though the Second Amendment is binding on the states, possession of legal firearms in public

[360] *See* Escalera v. N.Y. City Hous. Auth., 425 F.2d 853, 861–62 (2d Cir. 1970).

[361] *See* 24 C.F.R. § 5.861.

[362] Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments, 890 A.2d 249, 257 (D.C. 2006) (citing Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133–34 (2002)).

housing remains a murky issue. The authority and interests of PHAs—as governmental actors imbued with state police power to control crime and as landlords with a proprietary entitlement to regulate their own property—are diametric to the rights of public housing tenants to possess firearms. Important rights and interests are at stake on both sides of the issue, but there is little guiding jurisprudence. There is no definitive answer as to the constitutionality of prohibiting legal firearms in public housing. All that exists are persuasive arguments supporting outright public housing firearm bans and equally persuasive arguments challenging the constitutional underpinnings of such regulations.

When the interests of a PHA are pitted against those of public housing tenants, there are many potential outcomes. A lease-based public housing firearm ban may be categorically rejected as an unconstitutional condition. A ban may be upheld under constitutional scrutiny as a proper local gun control law, or it may be preempted by state law before ever reaching the constitutional issue. A ban may be upheld premised on a sui generis classification or struck down as an Equal Protection violation of a fundamental right. Lamentably, until a contemporary court encounters a meritorious challenge to public housing firearm bans, these possibilities are all merely studied speculation.

Nationwide, federally-subsidized, PHA-owned public housing developments provide necessary shelter to low-income families who have few viable options for decent affordable housing. For this reason, public housing is a small but vital component in federal housing policy that should be maintained as a vehicle to assist those in need. Nonetheless, banning legal firearm possession in public housing enables government interference with otherwise legal gun ownership, strips residents of an important means of self-defense, and very likely "constitutes a ludicrously ineffectual attempt to stem the tide of illegal" gun-related violent crime in public housing.[363] Although there is

[363] *Cf. Plyler II*, 457 U.S. 202, 228–29 (1982) (quoting Doe v. Plyler (*Plyler I*), 458 F. Supp. 569, 585 (E.D. Tex. 1978)) (referring to a law charging tuition to the children of illegal aliens in an effort to reduce illegal immigration); *accord* Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 88 (1991) ("Reducing gun ownership among law-abiding citizens will do almost nothing to reduce violent crime directly, since such behavior is virtually nonexistent among persons without previous records of serious violence and criminal behavior."). *Contra* Ctr. for Gun Policy & Research, Bloomberg Sch. of Pub. Health, Johns Hopkins

almost certainly a right to legal firearm possession in public housing under *Heller* and *McDonald*, only future constitutional challenges will prove out the truth or falsity of this assertion.

Univ., Fact Sheet: Stolen Guns, *available at* http://www.jhsph.edu/bin/c/q/guns_theft_fs.pdf (reporting that the 500,000 plus guns stolen from private citizens each year play a substantial role in arming criminals).