

THE CONSTITUTIONAL RIGHT TO CARRY FIREARMS ON
CAMPUS

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INTRODUCTION

In 2007, a man used a firearm to claim thirty-three lives on the campus of Virginia Tech, a public university.¹ The next year, the Supreme Court of the United States recognized, for the first time in history, that individuals have the fundamental right under the Second Amendment to keep and bear arms within their homes for the purpose of self-defense.² Since 2008, federal circuit courts have either assumed or interpreted the Supreme Court's decision to extend to some sort of individual right to carry firearms in public.³ For over a decade, the Supreme Court refused to weigh in on public carry;⁴ however, the Court recently granted certiorari in *New York State Rifle & Pistol Ass'n v. Bruen* to resolve this question.⁵ Nevertheless, the public carry issue in *Bruen* does not specifically deal with carrying firearms on college campuses.⁶

This begs the question, do individuals have the fundamental right under the Second Amendment to carry firearms on the campus of a public university? Additionally, can a public university totally ban firearms on its campus without impeding on the constitutional right to keep and bear arms protected by the Second Amendment? This Note will argue that individuals have a narrow, but constitutionally guaranteed, right to carry firearms on the campus of a public

1. Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), <https://www.nytimes.com/2007/04/16/us/16end-shooting.html> [<https://perma.cc/V8DN-LQTH>].

2. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

3. See, e.g., *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (assuming that the Second Amendment protects the right to carry in public).

4. See *Rogers v. Grewal*, 140 S. Ct. 1865, 1865 (2020) (denying certiorari on the public carry issue).

5. *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566, 2566 (2021) (Respondent's name changed to Bruen after Court granted the petition); Scott Neuman & Nina Totenberg, *Supreme Court to Take up 1st Major Gun Rights Case in More Than a Decade*, NPR (Apr. 26, 2021, 5:03 PM), <https://www.npr.org/2021/04/26/990846329/supreme-court-to-take-up-first-major-gun-rights-case-in-more-than-a-decade> [<https://perma.cc/LA6W-ZCTL>].

6. See *Corlett*, 141 S. Ct. at 2566 (granting certiorari to answer the narrow question of "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment"); *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 F. App'x 99, 100 (2d Cir. 2020), *cert. granted sub nom.* *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566 (2021).

university. Therefore, it is beyond the power of states and public universities to totally ban firearms from campus premises.

Part I is the backbone of this Note. Part I provides an overview of the Second Amendment and the federal case law interpreting it. This Part discusses the two most influential Supreme Court decisions on the Second Amendment: *District of Columbia v. Heller* and *McDonald v. City of Chicago*.⁷ Determining the scope of the Second Amendment necessarily requires an examination of these two cases. The *Heller* opinion, although its holding is very narrow, is the most detailed guidance lower courts have when determining the Second Amendment's scope.⁸ It is beyond the purview of this Note to examine whether *Heller* and its progeny were correctly decided. Part I will also discuss the various decisions by the federal circuit courts on the issue of carrying firearms in public and why those decisions support a fundamental right to carry in public.

Part II is the heart of this Note. Part II argues that individuals have a slim constitutional right to carry firearms on the campus of a public university. Part II then discusses why the Supreme Court in *Heller* did not intend public universities to fall within its definition of "sensitive places," although the Court specifically listed "schools and government buildings" as examples.⁹ Part II relies on *Heller's* text and reasoning to support this contention. This Part also uses dictionaries from around the time *Heller* was decided to parse the meaning of *Heller's* dicta. Both *Heller's* historical approach and First Amendment doctrine support the contention that public universities are not sensitive places. *Heller* and subsequent federal case law interpreting the Second Amendment demonstrate why absolute bans on campus carry fail constitutional muster. Consequently, individuals do not necessarily give up their constitutional right to keep and bear arms simply because they choose to step foot on the campus of a public university.

Part III is the mind of this Note. Part III describes the broad power of regulation that states, and universities, may enjoy without

7. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); see, e.g., *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018) ("The Supreme court's seminal decision in *Heller* guides our voyage.").

8. However, the Court is likely to provide additional guidance this term. See *Corlett*, 141 S. Ct. at 2566.

9. See *Heller*, 554 U.S. at 626-27.

infringing on the individual right to carry firearms on campus. The purpose of Part III is not to describe every permissible way in which states and public universities may regulate firearms on campus. Rather, the goal of Part III is to illustrate that the implied constitutional right to carry firearms on the campus of a public university is extremely narrow. Instead of attempting to hypothetically determine constitutionally permissible regulations on firearms, Part III points to firearms regulations that federal courts have upheld as constitutional. Part III will also analyze and expand on those decisions to provide helpful insight for states and public universities when trying to regulate firearms on campus. This Note provides counterarguments throughout, as many scholars have argued that states and public universities have the power to totally prohibit any and all firearms on campus.

I. INTERPRETING THE SECOND AMENDMENT

The Second Amendment reads, “[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.”¹⁰ Although the Second Amendment is composed of only one sentence, its meaning and scope are not straightforward.¹¹ Its language is broad and leaves a reader with more questions than answers.¹² Thus, one must turn to the Supreme Court of the United States for guidance on the meaning of the Second Amendment.

A. *The Seminal Cases: Heller and McDonald*

The Court’s most monumental decision interpreting the Second Amendment is *District of Columbia v. Heller*.¹³ This decision laid the foundation for contemporary Second Amendment law.¹⁴ Again, the purpose of this Note is not to decide whether the Court in *Heller* reached the correct decision. Instead, this Note will accept the

10. U.S. CONST. amend. II.

11. *See id.*

12. *See id.*

13. 554 U.S. 570 (2008).

14. *See id.*

Heller decision as the seminal Supreme Court case interpreting the Second Amendment.

Unlike Second Amendment law, the facts of *Heller* were fairly simple. Dick Heller was a security officer who frequently carried a firearm, specifically a handgun, while performing his job-related duties.¹⁵ However, D.C. law generally prohibited individuals from possessing a pistol within their homes.¹⁶ Heller applied for a special permit to allow him to carry a handgun within his home, but the District of Columbia rejected his application.¹⁷ Subsequently, Heller sued and argued that the D.C. laws were unconstitutional under the Second Amendment.¹⁸ Heller's case made it all the way up to the Supreme Court.¹⁹

Justice Scalia wrote the majority opinion, reaching the conclusion that the D.C. laws forbidding Heller from carrying a pistol within his home were unconstitutional under the Second Amendment.²⁰ To interpret the Second Amendment, the Court split the provision into two parts: (1) the prefatory clause, "[a] well regulated Militia, being necessary to the security of a free State," and (2) the operative clause, "the right of the people to keep and bear Arms, shall not be infringed."²¹ The Court said that the prefatory clause merely states the purpose of the operative clause, and it does not limit the right to one that is *collective*.²² Therefore, the Court interpreted the Second Amendment to protect an *individual* right "to keep and bear arms."²³

Two years after *Heller*, the Court took up the case of *McDonald v. City of Chicago*.²⁴ Like the District of Columbia in *Heller*, Chicago and one of its suburbs prohibited the possession of handguns within one's home.²⁵ The plaintiffs, wishing to possess such firearms,

15. *Id.* at 575.

16. *Id.* at 574-75.

17. *Id.* at 575.

18. *Id.* at 575-76.

19. *Id.* at 576.

20. *Id.* at 573, 635.

21. U.S. CONST. amend. II; see *Heller*, 554 U.S. at 577.

22. *Heller*, 554 U.S. at 577-79. Collective rights are "rights that may be exercised only through participation in some corporate body." *Id.* at 579.

23. *Id.* at 595, 598.

24. 561 U.S. 742 (2010).

25. *Id.* at 749-50.

challenged the constitutionality of the pistol bans under both the Second and Fourteenth Amendments.²⁶ The Court agreed with the plaintiffs.²⁷ *McDonald*'s legal effect was to incorporate the individual right recognized in *Heller* to the states through the Due Process Clause of the Fourteenth Amendment.²⁸

It is important to note that *Heller*'s core holding was very narrow.²⁹ *Heller* only held that the Second Amendment guarantees a fundamental individual right to carry a handgun, for the purpose of self-defense, within one's home.³⁰ However, *Heller*'s dicta provides great insight into the scope of the Second Amendment. Specifically, Justice Scalia wrote for the majority:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.³¹

In a footnote to the sentence quoted above, the Court noted, “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”³² However, the Court failed to fully define “sensitive places.”³³ The Court provided “schools and government buildings” as examples, but it is unclear from the phrase itself whether public universities are included.³⁴

26. *See id.* at 752.

27. *See id.* at 750, 791.

28. *Id.*

29. *See* James M. Manley, *Defining the Second Amendment Right to Carry: Objective Limits on a Fundamental Right*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 81, 87-88 (2012).

30. *See McDonald*, 561 U.S. at 791 (“In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.”).

31. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

32. *Id.* at 627 n.26.

33. *See id.* at 626.

34. *See id.*

B. Public Carry: The “Circuit Split”

Since *Heller*, the federal circuit courts have struggled to determine whether the individual right guaranteed by the Second Amendment extends outside the home, and what the scope of that right is.³⁵ Scholars have noted a circuit split and have voiced their opinions on the issue.³⁶ However, as discussed below, the circuit case law after *Heller* strongly suggests that an individual constitutional right to carry firearms in public exists.

1. Circuits Declaring an Individual Right to Public Carry

In 2012, the Seventh Circuit struck down Illinois laws that effectively prohibited the carrying of loaded firearms in public.³⁷ The court was clear that the Second Amendment protects an individual right to carry firearms outside the home.³⁸ Specifically, the majority opined, “[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”³⁹

In 2017, the D.C. Circuit struck down a D.C. law that prevented most residents of the District from carrying a gun in public.⁴⁰ The law required applicants wishing to carry in public to demonstrate a “good reason to fear injury” or “any other proper reason for carrying a pistol.”⁴¹ The D.C. Circuit read *Heller* and the Second Amendment more broadly than the other circuits and held that “the individual

35. See *Rogers v. Grewal*, 140 S. Ct. 1865, 1868 (2020) (Thomas, J., dissenting from denial of certiorari) (explaining that the circuits have reached different conclusions regarding the right to carry in public).

36. See John C. Frazer, *Home, Sweet Home? The Second Amendment and the Right to Carry Firearms in Public*, 4 REGENT J.L. & PUB. POL’Y 1, 1, 4-5, 22 (2012) (arguing that there is an individual right to carry in public); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 226, 229-30 (2008) (arguing that the home/public line drawn in *Heller* is justified); Jackson Carter, Comment, *Take Your Guns to Town: Expanding the Scope of the Second Amendment Beyond the Home*, 83 MISS. L.J. SUPRA 101, 103-04 (2014) (arguing that there is an individual right to carry a handgun in public for self-defense).

37. *Moore v. Madigan*, 702 F.3d 933, 934, 942 (7th Cir. 2012).

38. See *id.* at 942.

39. *Id.*

40. *Wrenn v. District of Columbia*, 864 F.3d 650, 655, 666, 668 (D.C. Cir. 2017).

41. *Id.* at 655 (quoting D.C. Code § 22-4506(a)-(b) (2009)).

right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment’s protections.”⁴²

2. *Circuits Assuming an Individual Right to Public Carry*

In 2011, the Fourth Circuit upheld a defendant’s criminal conviction for carrying a loaded pistol in a motor vehicle at a national park.⁴³ The majority assumed that an individual right to carry firearms in public exists by explaining that individual gun rights are subject to more regulation in public.⁴⁴ If individual gun rights are more limited in public, it follows that there are some individual gun rights in public.⁴⁵ One judge wrote separately for part of the opinion, explicitly declaring that individuals have the constitutional right to bear arms in public.⁴⁶

In 2012, the Second Circuit upheld New York’s *concealed* carry licensing requirement, which required individuals to show a “proper cause” for carrying a concealed firearm in public.⁴⁷ Although the court upheld New York’s “proper cause” requirement, the court did not grant states the implicit power to completely prohibit the carrying of firearms in public.⁴⁸ Rather, the court assumed, and implied, that a constitutional right to carry in public exists by noting that the individual right to carry outside the home is more limited than the right to carry within the home.⁴⁹

In 2013, the Third Circuit upheld New Jersey’s requirement that applicants wishing to carry firearms in public for self-defense show

42. *See id.* at 661.

43. *United States v. Masciandaro*, 638 F.3d 458, 459-60 (4th Cir. 2011).

44. *See id.* at 470. The Fourth Circuit also assumed that a right to carry in public exists in a later case in which it upheld Maryland’s good reason requirement for carrying handguns. *See Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

45. *See Masciandaro*, 638 F.3d at 470.

46. *Id.* at 468 (Niemeyer, J., concurring) (“[I]t follows that the right extends to public areas beyond the home.”).

47. *Kachalsky v. County of Westchester*, 701 F.3d 81, 83, 101 (2d Cir. 2012).

48. *See id.* at 91 (“New York’s proper cause requirement does not operate as a complete ban on the possession of handguns in public.”).

49. *See id.* at 89.

a “justifiable need” for doing so.⁵⁰ Like the Second Circuit, the Third Circuit assumed, without deciding, that the Second Amendment guarantees an individual right to carry firearms in public.⁵¹ In 2018, the First Circuit followed suit by similarly assuming, without deciding, that the Second Amendment implies an individual right to carry firearms beyond the home.⁵²

In summary, the circuits weighing in on the issue of public carry have either assumed or declared that some constitutional right to carry firearms in public exists.⁵³ Notably, in 2016, the Ninth Circuit refused to answer the question altogether.⁵⁴ The circuits have varied in their holdings and the scrutiny they have applied to laws challenged under the Second Amendment,⁵⁵ but there is certainly a consensus among the federal circuit courts that *Heller* and the Second Amendment imply an individual right to carry in public.⁵⁶ However, as the Second and Fourth Circuits have noted, the right to carry firearms in public is not as robust as it is within one’s home.⁵⁷

Additionally, at least one current Supreme Court Justice has expressly declared that there is an individual constitutional right to carry firearms in public.⁵⁸ A second Justice has agreed with that declaration.⁵⁹ Other Justices expressed their concerns with New York’s “proper cause” law during oral arguments in *New York State Rifle & Pistol Ass’n v. Bruen*.⁶⁰ Thus, in *Bruen*, the Supreme Court

50. *Drake v. Filko*, 724 F.3d 426, 428, 440 (3d Cir. 2013).

51. *See id.* at 431.

52. *See Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018) (interpreting *Heller* to imply a right to public carry).

53. *See, e.g., Kachalsky*, 701 F.3d at 89 (assuming individuals have some right to carry in public); *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) (declaring individuals have some right to carry in public).

54. *Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (“The Second Amendment may or may not protect, to some degree, a right of a member of the general public to carry firearms in public.”).

55. *Compare Wrenn*, 864 F.3d at 666 (declining to apply any tier of scrutiny), *with Drake*, 724 F.3d at 435 (applying intermediate scrutiny).

56. *See, e.g., Kachalsky*, 701 F.3d at 89.

57. *See id.*; *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

58. *See Rogers v. Grewal*, 140 S. Ct. 1865, 1868 (2020) (Thomas, J., dissenting from denial of certiorari) (“[T]he Second Amendment protects a right to public carry.”).

59. *See Peruta v. California*, 137 S. Ct. 1995, 1996, 1998 (2017) (Thomas, J., dissenting from denial of certiorari) (Justice Gorsuch joining).

60. Ariane de Vogue, *Supreme Court Seems Poised to Expand Second Amendment Rights and Strike Down NY Handgun Law*, CNN (Nov. 3, 2021, 2:44 PM), <https://www.cnn.com/>

will likely hold, consistent with this Note, that there is a constitutional right to carry firearms in public.⁶¹

II. THE CONSTITUTIONAL RIGHT TO CARRY FIREARMS ON CAMPUS

Heller and its progeny suggest there is a constitutional right to generally carry firearms in public. Now it is important to determine whether that right remains intact on public university campuses. *Heller* specifically mentioned that certain “sensitive places” are subject to less Second Amendment protection,⁶² but the Court did not intend to include public universities as sensitive places. Instead, *Heller* and subsequent cases support a narrow constitutional right to carry firearms on public university campuses.

A. *Heller Did Not Intend “Schools” to Include College Campuses*

Given the widespread agreement that individuals have the right to publicly carry firearms, it is important to determine whether that right extends to carrying on public universities’ campuses. Remember, *Heller*’s dicta specifically stated that its opinion did not cast doubt on “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”⁶³ One might presume that this language forecloses any possibility of an individual right to carry firearms on campus because public universities are “schools,” which *Heller* explicitly provided as an example of sensitive places.⁶⁴ Some scholars agree with this simple analysis.⁶⁵ Shaundra Lewis takes this position by stating, “there is nothing in [*Heller*] that indicates that the Court did not intend for colleges and universities to be encompassed in the term ‘schools.’”⁶⁶ Although compelling at first glance, this argument is misguided.

2021/11/03/politics/supreme-court-second-amendment-new-york-bruen/index.html [https://perma.cc/L9X4-G4YL].

61. *See id.*

62. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

63. *Id.*

64. *See id.*

65. *See* Shaundra K. Lewis, *Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide*, 102 IOWA L. REV. 2109, 2135 (2017).

66. *Id.*

The Court in *Heller* did not intend public universities to be included in the term schools. While public universities are definitely schools in the broad sense, common usage of the word “schools” supports the contention that the term does not include college campuses. Similar to the Court in *Heller*, which examined the intent and meaning behind the Second Amendment’s text,⁶⁷ this Note uses a comparable method to examine the meaning of *Heller*’s dicta.

Law dictionaries from around the time *Heller* was decided provide some guidance. *Black’s Law Dictionary* from 2004, four years before the *Heller* decision, defined school as “[a]n institution of learning and education, esp[ecially] for children.”⁶⁸ The 1999 and 2009 editions of the *Black’s Law Dictionary* identically mirror the 2004 edition’s definition of “school.”⁶⁹ Colleges are for adults, not children. Elementary, middle, and high schools are for children. Although in exceptional circumstances children may attend college,⁷⁰ this does not change the fact that public universities and colleges are largely composed of adults.⁷¹ Therefore, these dictionary definitions support the contention that the Court in *Heller* intended the word schools to encompass only elementary, middle, and high school institutions.⁷² Joan Miller takes this same position and indicates that arguing otherwise would be onerous.⁷³ A second scholar writing on campus carry interpreted the *Heller* opinion to deem “pre-K-12 schools” as sensitive places.⁷⁴

67. See *Heller*, 554 U.S. at 576-98.

68. See *School*, BLACK’S LAW DICTIONARY (8th ed. 2004).

69. Compare *id.*, with *School*, BLACK’S LAW DICTIONARY (9th ed. 2009) [hereinafter *School* 2009], and *School*, BLACK’S LAW DICTIONARY (7th ed. 1999).

70. See DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 367 (Va. 2011) (explaining that a public university had students who were under the age of eighteen).

71. Michael Rogers, Note, *Guns on Campus: Continuing Controversy*, 38 J. COLL. & U.L. 663, 674-75 (2012).

72. Modern state laws also limit the definition of “school” to pre-K-12 institutions. See, e.g., MICH. COMP. LAWS § 750.237a(6)(b) (2017) (defining “school” as “a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12”).

73. See Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE UNIV. L. REV. 235, 248 (2011).

74. See Aurora Temple Barnes, *Guns and Academic Freedom*, 53 GONZ. L. REV. 45, 58 (2017). Barnes does not explicitly state that public universities are excluded, but it is noteworthy she wrote “pre-K-12 schools,” rather than simply writing “schools.” See *id.*

Ballentine's Law Dictionary from 1969 more explicitly supports the argument that the term schools does not encompass public universities.⁷⁵ Under the definition of school, the dictionary states: "In usual sense, exclusive of university, college, business college, or other institution of higher education."⁷⁶ Although quite old, this dictionary was published during the early legal career of Justice Scalia,⁷⁷ who wrote for the majority in *Heller*.⁷⁸ This definition makes it clear that the word "school" has had a relatively stable, rather than evolving, meaning over time.⁷⁹

Common usage of the word school in other contexts further illustrates this point. The clearest example is when people use the word "school-age" to describe a person's age. For example, say that someone reads a flyer that details a contest, and the flyer states that all contestants must be "school-age." Common sense would indicate to most people reading the flyer that college students are unable to participate. Similarly, the Court in *Heller* intended schools to merely mean the word's most common definition, which excludes public universities.⁸⁰ However, schools were mentioned only as examples of sensitive places in *Heller*.⁸¹ Therefore, this does not stop someone from arguing that even if public universities were not intended to be included as schools, public universities are still sensitive places.⁸²

B. Public Universities Are Not "Sensitive Places"

Public universities are not sensitive places under *Heller*. While the definition of sensitive places remains up for debate,⁸³ the D.C. Circuit and at least one federal district court agree that places are

75. See *School*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) [hereinafter *School 1969*].

76. *Id.*

77. See *id.*; Aaron M. Houck, *Antonin Scalia*, BRITANNICA (Mar. 7, 2020), <https://www.britannica.com/biography/Antonin-Scalia> [<https://perma.cc/CUW2-DT7Z>].

78. See *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

79. Compare *School 2009*, *supra* note 69, with *School 1969*, *supra* note 75.

80. See *School 1969*, *supra* note 75.

81. See *Heller*, 554 U.S. at 626.

82. See *id.* This is precisely the argument that Miller makes. See Miller, *supra* note 73, at 248.

83. See Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 465 (2019).

sensitive “because of ‘the people found there’ or the ‘activities that take place there.’”⁸⁴ This definition, *Heller*’s implication that the home is not a sensitive place, and First Amendment doctrine demonstrate that public universities do not qualify as sensitive places.

1. *Heller and the Home as a Non-Sensitive Place*

Heller implies that the home is not a sensitive place because *Heller*’s holding recognized the individual right to carry firearms within the home for self-defense purposes.⁸⁵ *Heller* mentioned sensitive places in its dicta as possible exceptions to this fundamental right, providing the two examples of “schools and government buildings.”⁸⁶ In other words, *Heller* stands for the proposition that homes are not sensitive while schools and government buildings are sensitive.⁸⁷

One might reach a quick conclusion by arguing public universities are more similar to schools and government buildings than homes; therefore, the campuses of public universities are sensitive places. However, as federal courts have noted, a place is sensitive because of the people or activities found there,⁸⁸ not because the place itself is more similar to a school or government building, nor because the place is different than a home. Thus, instead of a straightforward comparison of two places, it is necessary to compare the people and activities found at the places.

When examining the people and activities found at public universities, it becomes clear that they do not qualify as sensitive places. The court that created the people and activities definition explained that schools are sensitive because of the people found within them, while government buildings are sensitive because of the activities that occur within them.⁸⁹ The people and activities

84. *United States v. Class*, 930 F.3d 460, 465 (D.C. Cir. 2019) (quoting *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1319 (M.D. Ga. 2011)).

85. *See Heller*, 554 U.S. at 636.

86. *Id.* at 626-27.

87. *See id.* at 626-27, 636.

88. *See Class*, 930 F.3d at 465.

89. *See GeorgiaCarry.Org, Inc.*, 764 F. Supp. 2d at 1319. The court noted that “[a] reasonable argument can be made that places of worship are also sensitive places because of the activities that occur there;” however, the court refused to reach such a conclusion. *See id.*

definition rests on the premise that children attend schools and the fact that courts have considered children as defenseless people.⁹⁰ If people are what determine the distinction, then public universities are not to be considered sensitive places because they are primarily composed of adults rather than children.

Although up for interpretation, the activities occurring in government buildings that deem them sensitive places are likely activities which can easily provoke others.⁹¹ For example, courtrooms have activities within them, such as adversarial court proceedings, that can easily lead to someone becoming provoked.⁹² The activities occurring in any legislative, executive, or judicial building can easily provoke someone. This is why there are “longstanding prohibitions on the possession of firearms” in such locations.⁹³ Accordingly, some commentators have argued or assumed that the controversial nature of the material conveyed at public universities characterizes them as sensitive places.⁹⁴

However, the courts must draw a line. *Heller* and the Second Amendment cannot stand for the proposition that simply because a place contains activities that are controversial, all Second Amendment rights are thrown out the door. This principle is obvious given that controversial speech and activities often occur within one’s home. Spouses often disagree politically, and families may discuss controversial topics amongst themselves within their home.⁹⁵ But those facts do not destroy individual gun rights under *Heller*.

90. See Brian C. Whitman, Comment, *In Defense of Self-Defense: Heller’s Second Amendment in Sensitive Places*, 81 MISS. L.J. 1987, 1992 (2012).

91. See, e.g., Ted Barrett, Manu Raju & Peter Nickeas, *US Capitol Secured, 4 Dead After Rioters Stormed the Halls of Congress to Block Biden’s Win*, CNN (Jan. 7, 2021, 3:33 AM), <https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html> [<https://perma.cc/66AT-ZJ2S>].

92. E.g., *WATCH: Brawl Breaks out in Ohio Courtroom During Sentencing for Killer*, WFLA (July 11, 2019, 12:56 PM), <https://wfla.com/news/watch-brawl-breaks-out-in-ohio-courtroom-during-sentencing-for-killer/> [<https://perma.cc/FVK6-QUBL>].

93. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

94. See Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 211 (2018); Lewis, *supra* note 65, at 2129, 2132, 2135.

95. See, e.g., Molly Langmuir, *Donald Trump Is Destroying My Marriage*, N.Y. MAG. (Nov. 27, 2018), <https://nymag.com/intelligencer/2018/11/donald-trump-is-destroying-my-marriage.html> [<https://perma.cc/64FA-NDCL>].

Perhaps the distinction is that the activities occurring in courtrooms and other similar government buildings are primarily adversarial, whereas presumably most activities within one's home are non-adversarial.⁹⁶ Whatever the distinction may be, as in the home, controversial material is often conveyed at public universities.⁹⁷ Nevertheless, the bulk of information conveyed at public universities is noncontroversial. Although the people and activities definition remains ambiguous, the activities occurring at a public university are no more sensitive than activities that frequently occur within one's home, such as heated debates over politics or religion. Thus, there is no reason to believe public universities qualify as sensitive places simply because controversial topics are sometimes mentioned in class.

Heller implies the home is not a sensitive place because the Court preserved Second Amendment rights within the home but suggested in dicta that sensitive places like schools and government buildings should be treated differently.⁹⁸ In sum, the people and activities found at public universities are more similar to the people and activities found at a non-sensitive place, such as the home.

2. First Amendment Rights

Many scholars have used First Amendment doctrine to interpret sensitive places.⁹⁹ However, these approaches have varied tremendously.¹⁰⁰ Scholars likely focus on First Amendment doctrine to help

96. This distinction also presents issues because there are government buildings with activities that are not primarily adversarial. *Heller* never stated that gun prohibitions in government buildings were always lawful, rather that they were "presumptively lawful." See *Heller*, 554 U.S. at 627 n.26.

97. E.g., Mike Luery, *VIDEO: Dispute over Politics Leads to Fight at Sacramento State*, KCRA (Dec. 8, 2019, 6:43 PM), <https://kcra.com/article/video-dispute-politics-fight-sacramento-state/30162704> [<https://perma.cc/TBY3-EB6S>].

98. See *Heller*, 554 U.S. at 626-27.

99. See, e.g., Morgan, *supra* note 94, at 182 (arguing that bans on armed political protests are constitutional because the First Amendment limits *Heller's* sensitive places dicta in "places where the presence of guns negatively impacts the exercise of free speech").

100. Compare Lewis, *supra* note 65, at 2117-34 (arguing that guns on campus burden free speech and that the notion of academic freedom overrides any potential Second Amendment rights on campus), with Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller's "Schools" and "Government Buildings"*, 92 NEB. L. REV. 537, 574-79 (2013) (arguing that First Amendment doctrine suggests colleges are excluded from *Heller's* sensitive places dicta).

interpret the Second Amendment because the Court in *Heller* analogized to the First Amendment multiple times.¹⁰¹ Overall, First Amendment doctrine suggests that schools should be treated differently than college campuses in the Second Amendment context, further supporting the notion that universities are not sensitive places.

One argument is to read the First Amendment as a limit on the Second Amendment.¹⁰² Shaundra Lewis has advocated that, in the campus carry context, a university's constitutional right of "academic freedom" outweighs any potential Second Amendment rights on campus.¹⁰³ The argument follows that colleges can and should ban all guns from campus.¹⁰⁴ However, this position disregards the importance of an enumerated constitutional right, which *Heller* repeatedly emphasized.¹⁰⁵ Lewis herself admits that the right of academic freedom has not been enumerated by the Supreme Court, and there are scholarly arguments that it is simply a defense rather than a constitutional right.¹⁰⁶ While the right to keep and bear arms is expressly stated in the Second Amendment,¹⁰⁷ a constitutional right of academic freedom is nowhere to be found in the First Amendment.¹⁰⁸ It is far too attenuated to argue that a constitutional right "strongly suggested" (but never announced) by the Supreme Court, nor contained in the Constitution, trumps an enumerated right.¹⁰⁹

101. See *Heller*, 554 U.S. at 582, 595, 635.

102. See Lewis, *supra* note 65, at 2134-41 (arguing First Amendment rights trump Second Amendment rights in the campus carry context); Shaundra K. Lewis, *Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 IDAHO L. REV. 1, 13-17 (2011) (arguing state laws that compel colleges to allow campus carry violate the First Amendment); Morgan, *supra* note 94, at 213 (arguing that a place is sensitive when guns will burden core First Amendment rights there).

103. See Lewis, *supra* note 65, at 2117-33.

104. See Lewis, *supra* note 102, at 28.

105. See *Heller*, 554 U.S. at 628 n.27, 634.

106. See Lewis, *supra* note 102, at 17.

107. U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed.").

108. See U.S. CONST. amend. I; Lewis, *supra* note 65, at 2117 ("[T]he constitutional right to academic freedom is not expressly stated in the First Amendment.").

109. Compare U.S. Const. amend. II (announcing the right "to keep and bear [a]rms"), with Lewis, *supra* note 65, at 2117 (explaining that the right of academic freedom is not in the First Amendment), and Lewis, *Bullets and Books*, *supra* note 102, at 17 (explaining that the

A stronger scholarly argument is that First Amendment doctrine supports the contention that colleges are less sensitive than schools; therefore, universities are not sensitive places under *Heller's* dicta.¹¹⁰ Jordan Pratt advanced this argument by explaining Supreme Court decisions that have interpreted First Amendment rights to be more limited in schools than at universities.¹¹¹ Luke Morgan has criticized Pratt's argument as borrowing too much from the First Amendment,¹¹² yet the crux of Morgan's argument is that *Heller's* sensitive places dicta should be interpreted based on First Amendment concerns, rather than Second Amendment concerns.¹¹³ Although Pratt's argument borrows from the First Amendment, it helps explain why the Court intended to treat colleges differently than schools in the Second Amendment context.¹¹⁴

Morgan argued that “[n]othing about college students having greater free speech rights than kindergarteners indicates that undergrads should also have the right to carry a weapon to Philosophy 101.”¹¹⁵ The problem with this statement is that Morgan misleads the reader by making a comparison of the rights themselves, rather than a comparison of the places, which is ultimately the debate.¹¹⁶ The argument here is not over the two rights themselves, but how to interpret why certain places are sensitive. *Heller* implies that something about the places themselves allows for more regulation.¹¹⁷ Furthermore, Morgan overlooks the fact that colleges are primarily composed of adults who can actually buy firearms, while schools are primarily composed of children who cannot.¹¹⁸ In sum, First Amendment doctrine illustrates that

right of academic freedom has yet to be announced by the Supreme Court).

110. See Pratt, *supra* note 100, at 576-79.

111. See *id.*

112. See Morgan, *supra* note 94, at 211.

113. See *id.* at 213 (“[C]ourts should adopt the following test: a place is sensitive under *Heller* when introducing guns into that place seriously threatens core First Amendment interests or activity.”).

114. See Pratt, *supra* note 100, at 576-79.

115. Morgan, *supra* note 94, at 211.

116. See *id.*

117. The adjective “sensitive” preceding the noun “places” suggests that the sensitivity of the places is what permits the greater restriction of constitutional rights in such places. See *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

118. See 18 U.S.C. § 922(b)(1) (making it illegal for gun dealers to sell shotguns, rifles, and ammunition to anyone under the age of eighteen or to sell handguns to anyone under the age

constitutional rights are subject to more regulation in schools than on college campuses, which explains why *Heller* did not intend to include college campuses as sensitive places.

C. Federal Case Law Suggests Absolute Gun Bans on Campus Are Unconstitutional

Even if public universities can be defined as sensitive places, federal case law suggests that total bans on all firearms on college campuses are unconstitutional, which, in turn, implies that there is some constitutional right to carry on campus. So far, this Note has characterized the campus carry issue as whether individuals have the individual right to carry firearms on campus. The issue can also be framed this way: Can a public university constitutionally prohibit any and all firearms from its campus? If a public university (or state) cannot constitutionally ban all firearms from its campus, then some individual right to carry firearms on campus must exist. In what follows, this Note argues that *Heller* and its progeny suggest absolute prohibitions on firearms on campus are unconstitutional.

Michael Rogers, a law student writing on campus carry, reached this same conclusion and suggested that courts should apply strict scrutiny to absolute firearms bans on campus.¹¹⁹ This Note agrees with Rogers's contention that absolute prohibitions on campus are unconstitutional, but this Note does not suggest or analyze hypothetical total bans under any tier of scrutiny. This is because the sensitive places doctrine originated from *Heller*, in which the Court specifically refused to apply any tier of scrutiny to a prohibition on handgun possession within the home.¹²⁰ *Heller* notes that "long-standing prohibitions" on firearms in sensitive places are "presumptively lawful."¹²¹ Interpreting this language to mean that courts should apply the lowest level of scrutiny to firearms bans in sensitive places is too far of a stretch—especially given that the Court

of twenty-one).

119. See Rogers, *supra* note 71, at 700 ("[O]utright firearm bans on college and university campuses, due to their distant reach, absolute nature, and scope of effect, warrant the highest level of scrutiny.").

120. See *Heller*, 554 U.S. at 628-29.

121. *Id.* at 626, 627 n.26.

in *Heller* refused to apply a specific level of scrutiny to a ban on a particular type of firearm, namely, handguns.¹²²

1. The Tiers of Scrutiny Do Not Apply to Absolute Bans

The Court in *Heller* faced a constitutional challenge to a D.C. law that effectively prohibited Dick Heller from possessing a handgun within his home.¹²³ However, the Court struck down the ban without applying a traditional tier of scrutiny.¹²⁴ Specifically, the Court stated, “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, [the District of Columbia’s prohibition] would fail constitutional muster.”¹²⁵ Rather, the Court simply said that the law was a “severe restriction.”¹²⁶ The *Heller* Court’s failure to apply a specific level of scrutiny left lower courts with little practical guidance when dealing with Second Amendment challenges.¹²⁷ However, *Heller* counsels in favor of lower courts not applying any specific standard of scrutiny when facing complete bans or “severe restriction[s]” like the D.C. law that was at issue.¹²⁸ Instead of applying a standard of scrutiny, *Heller* focused on the history of gun regulations and the Second Amendment to strike down the D.C. law.¹²⁹

Many federal circuit courts have followed *Heller*’s analysis when faced with absolute prohibitions on firearms. In 2012, the Seventh Circuit did not apply any standard of scrutiny when it struck down a law effectively prohibiting the public carrying of firearms.¹³⁰ Similarly, in 2017, the D.C. Circuit declined to apply a tier of scrutiny when it struck down a law that it categorized as a complete

122. *See id.* at 628-29.

123. *Id.* at 574-75.

124. *Id.* at 628-29.

125. *Id.* (citation omitted).

126. *Id.* at 629.

127. *See* *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (explaining *Heller*’s failure to define the scope of public carry and the appropriate standard); *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (explaining the unsettled law regarding the scope of public carry).

128. *See Heller*, 554 U.S. at 628-29.

129. *See id.* at 595, 629 (emphasizing the importance of history throughout the opinion).

130. *See Moore v. Madigan*, 702 F.3d 933, 934, 941-42 (7th Cir. 2012).

ban.¹³¹ The D.C. Circuit reasoned that *Heller's* refusal to apply a level of scrutiny stopped lower courts from finding persuasive grounds to uphold total bans.¹³² Even circuits that have applied intermediate scrutiny to gun regulations have adamantly pointed out that the laws upheld were not complete bans on firearms.¹³³ Before applying intermediate scrutiny and upholding New York's "proper cause" requirement, the Second Circuit pointed out that the law did "not operate as a complete ban on the possession of handguns in public."¹³⁴ Furthermore, the Fourth Circuit followed this approach by differentiating Maryland's good reason requirement from an absolute ban before applying intermediate scrutiny and upholding the law.¹³⁵ These approaches by federal circuit courts illustrate *Heller's* stringency toward absolute bans on firearms and the common practice of not applying a standard of scrutiny to absolute bans on firearms.

One might think that *Heller's* sensitive places language explicitly carved out an exception for absolute bans in places that are deemed sensitive; however, this contention reads *Heller's* sensitive places dicta far too broadly. In footnote twenty-six, the Court noted that its sensitive places dicta simply identified "presumptively lawful regulatory measures."¹³⁶ The words "presumptively lawful" may lead one to believe that the lowest level of scrutiny should be applied to firearms prohibitions in such places.

Practically speaking, this interpretation makes little sense: if courts applied mere rational basis scrutiny to all gun regulations in sensitive places, almost every measure would be upheld because of the danger that firearms pose.¹³⁷ This would leave litigants with little ability to challenge any gun regulations in sensitive places under the Second Amendment. If virtually all gun regulations in sensitive places, including absolute bans, would be upheld under rational basis scrutiny, then there would be no reason for the *Heller*

131. See *Wrenn v. District of Columbia*, 864 F.3d 650, 665-66, 668 (D.C. Cir. 2017).

132. *Id.* at 665.

133. See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012).

134. *Id.*

135. See *Woollard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013).

136. See *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

137. See *id.* at 628 n.27 (explaining that nearly every law would survive rational basis scrutiny).

Court to precede the word “lawful” with “presumptively.”¹³⁸ The term “presumptively” implies that some regulations within sensitive places are unlawful.¹³⁹ Absolute bans on firearms are the most restrictive gun regulations that can be imposed within sensitive places. Thus, this word usage implies that such a severe restriction is likely unconstitutional.¹⁴⁰ If the Court intended the language to be read broadly, it could have simply excluded the word “presumptively” and simply stated that measures in sensitive places were lawful. More importantly, *Heller* itself stated in the very next footnote that the D.C. law at issue would pass rational basis scrutiny, but that such a test is inapplicable to enumerated rights like those in the Second Amendment.¹⁴¹ Specifically, the Court stated, “[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”¹⁴² Therefore, a narrower interpretation of *Heller*’s sensitive places dicta is more persuasive and more aligned with the *Heller* Court’s intentions.

The sensitive places dicta seems to operate more as a factor weighing in favor of upholding a gun regulation rather than a straightforward exception.¹⁴³ Thus, when courts are faced with

138. *See id.* at 627 n.26.

139. *See* United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010) (“In fact, the phrase ‘presumptively lawful regulatory measures’ suggests the possibility that one or more of these ‘longstanding’ regulations ‘could be unconstitutional in the face of an as-applied challenge.’” (quoting United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010))). The court in *Chester* followed *Heller* by expressly rejecting rational basis review and declined the interpretation that *Heller*’s “longstanding prohibitions” language was a straightforward exception for gun regulations. *See id.*

140. If absolute bans on any and all firearms in sensitive places are constitutional, then the word “presumptively” is useless because restricting all firearms from a sensitive place is the most restrictive gun measure that can be imposed. *See Heller*, 554 U.S. at 629.

141. *See id.* at 628 n.27; *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) (“*Heller* clearly does reject any kind of ‘rational basis’ or reasonableness test.”); *Chester*, 628 F.3d at 682 (“*Heller* ... indicate[d] that rational basis review would not apply in this context.”).

142. *Heller*, 554 U.S. at 628 n.27.

143. *See Chester*, 628 F.3d at 679 (rejecting the idea that *Heller*’s “longstanding prohibitions” language was a “safe harbor” for gun measures because that would be applying rational basis scrutiny in the Second Amendment context, which is forbidden by *Heller*). In dicta, the Third Circuit has taken the opposite approach by explaining that *Heller*’s dicta works as an exception. *See* United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010). Notably, however, the Third Circuit assumed that the challenged law burdened Second

absolute bans in sensitive places, they should follow *Heller* and federal circuit courts by refusing to apply a typical standard of scrutiny.¹⁴⁴ The fact that a place is sensitive should certainly support upholding a gun regulation, but the characterization itself should not be determinative. Rather, courts should follow *Heller* by invoking its historical method when dealing with constitutional challenges to absolute bans on firearms in sensitive places.

In the context of a public university, the most severe and restrictive gun regulation would be a total prohibition on all firearms. There would be no need to apply any tier of scrutiny to such an absolute prohibition according to *Heller* and subsequent decisions by federal circuit courts.¹⁴⁵ Thus, a court facing an absolute firearms ban on a college campus should invoke *Heller's* historical approach to determine whether the challenged restriction is constitutional.¹⁴⁶ In the next Section, this Note describes how a complete ban on firearms at a public university fails under *Heller's* historical approach. Therefore, following *Heller* and subsequent federal case law, an absolute ban on firearms on a public university campus would likely fail constitutional muster.

2. Absolute Firearms Bans on Campus Fail Heller's Historical Method

Under *Heller's* historical analysis, a total firearms prohibition on campus would likely be held unconstitutional, which implies that individuals have *some* constitutional right to carry firearms on campus. Until the Supreme Court provides further guidance, it is necessary for lower courts to roll up their sleeves and apply a historical-based approach to absolute firearms bans, even if those bans are in sensitive places. This analysis is most aligned with the

Amendment rights, and it chose to apply intermediate scrutiny rather than upholding the law as falling under the exception it claimed *Heller's* dicta created. *See id.* at 95. Furthermore, the court relied on *Heller's* express rejection of rational basis scrutiny for laws burdening Second Amendment rights. *See id.* at 95-96.

144. *See supra* notes 120-35 and accompanying text.

145. *See supra* notes 120-35 and accompanying text.

146. *See Wrenn v. District of Columbia*, 864 F.3d 650, 663 (D.C. Cir. 2017) (describing that *Heller* used a historical analysis and that it is the appropriate test for absolute firearms bans).

Court's approach in *Heller*.¹⁴⁷ When examining the history of gun measures on college campuses, it becomes easily understood that total bans on campus are likely unconstitutional.

Scholars David Kopel and Joseph Greenlee argued that *Heller's* sensitive places dicta has "a weak foundation in history and tradition."¹⁴⁸ They analyzed the earliest gun regulations at public universities and reached the conclusion that the regulations do not underpin *Heller's* designation of schools as sensitive places.¹⁴⁹ Perhaps they reached this conclusion because they miscategorized public universities as schools.¹⁵⁰ Nevertheless, their examination of early campus gun regulations actually supports the contention that absolute gun prohibitions on campus are unconstitutional under *Heller's* historical method.

Specifically, Kopel and Greenlee noted that the College of New Jersey, Rutgers University's predecessor, allowed guns on campus in 1853, but the state made pistol ranges illegal if they were within three miles of the campus.¹⁵¹ In 1874, New Jersey enacted a similar law for Drew University, but the state again refused to ban guns from the campus.¹⁵² The University of Virginia banned firearms in 1824 after student rioting, but the measure was not an absolute ban because it applied only to students.¹⁵³ Mississippi banned concealed carry at all colleges in 1878, but the law applied only to students and allowed open carry.¹⁵⁴

Kopel and Greenlee's research shows that states and universities that promulgated some campus gun restrictions still refrained from enacting absolute prohibitions. Importantly, James Madison and Thomas Jefferson were part of the board at the University of Virginia that chose to ban students from having firearms on campus.¹⁵⁵ Yet even after riots and shootings on campus, Madison

147. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008) (emphasizing the importance of history throughout the opinion).

148. David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 294 (2018).

149. *Id.* at 249-52.

150. See *id.*

151. *Id.* at 250-51.

152. *Id.* at 251.

153. See *id.* at 249-50.

154. *Id.* at 251-52.

155. *Id.* at 250.

and Jefferson did not enact an absolute gun ban.¹⁵⁶ Perhaps that was because, as drafters of America's founding documents, the Second Amendment was in the back of their minds.

Modern laws also support a Second Amendment right to carry on campus. As Shaundra Lewis explained, there has been a modern trend of states removing very restrictive campus gun laws, and some states now *require* colleges to permit campus carry.¹⁵⁷ Lewis noted that only a minority of states “expressly ban” campus carry.¹⁵⁸ Even among the seventeen states that Lewis mentions “expressly ban” campus carry, a closer examination of those laws reveals that many of them are not absolute bans.¹⁵⁹ For example, Massachusetts and South Carolina allow campus carry when an individual obtains the university's consent.¹⁶⁰ Michigan forbids *concealed* carry, but not open carry, in *classrooms and dorms*.¹⁶¹ Missouri and Wyoming also limit their campus carry bans to only concealed carry.¹⁶²

Although the majority of states have not prohibited campus carry, the majority of public universities have adopted their own measures

156. *See id.* at 249-50.

157. *See* Lewis, *supra* note 65, at 2113-17.

158. *Id.* at 2115.

159. *See id.* at 2115-16.

160. *Id.* at 2115 n.32, 2116 n.42; MASS. GEN. LAWS ch. 269, § 10(j) (2021) (making it a criminal violation to possess a firearm on college campuses without consent); S.C. CODE ANN. § 16-23-420(A) (2009) (making it illegal to possess a firearm on college campuses without consent). These are not absolute bans because they allow the universities to consent to individual firearm possession; however, a university's firearms policy could be deemed an absolute ban depending on the circumstances in which it gives consent.

161. Lewis, *supra* note 65, at 2115 n.33. This means that in Michigan, those with a concealed carry license can carry everywhere on campus except in dorms and classrooms. *See* MICH. COMP. LAWS § 28.425o(1)(h) (2017). The statute is silent on open carry on campus. *See id.*

162. *See* Lewis, *supra* note 65, at 2116 nn.34 & 43; MO. REV. STAT. § 571.107.1(10) (2014) (prohibiting concealed carry on college campuses, but allowing concealed firearms to remain in vehicles); WYO. STAT. ANN. § 6-8-104(t)(x) (2021) (prohibiting concealed carry on college campuses unless written consent is obtained). Forbidding concealed carry, but not open carry, is in accordance with the Ninth Circuit's interpretation of *Heller* and the Second Amendment. *See* *Peruta v. County of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (“If there is such a right [to carry in public], it is only a right to carry a firearm openly.”). At least one commentator shares this view. *See generally* Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2014) (arguing that the Second Amendment protects the right to open carry, but not concealed carry, in public).

to effectively ban guns on campus.¹⁶³ This may conflict with the Court's recognition of an individual right to carry firearms under the Second Amendment in *Heller*¹⁶⁴ and subsequent federal case law interpreting *Heller* and the Second Amendment to imply a right to carry in public.¹⁶⁵ In 2014, five state legislatures proposed bans on campus carry, but not a single one passed.¹⁶⁶ In contrast, as of 2019, ten state legislatures had passed laws allowing concealed carry on campus.¹⁶⁷ The refusal by the majority of states to enact absolute firearms bans on college campuses, combined with the trend by states to compel colleges to allow some form of campus carry,¹⁶⁸ shows that states are likely concerned about their universities violating individual rights guaranteed by the Second Amendment.

In sum, historical gun measures illustrate the hesitancy by colleges and our founding fathers to enact absolute bans on campus carry. Although today most colleges ban guns on their own, most state legislatures have refrained from enacting absolute bans on campus carry.¹⁶⁹ Instead, there has been a trend by state legislatures to force universities to loosen their restrictions and allow campus carry in some form.¹⁷⁰ Therefore, under *Heller*'s historical analysis, there is little support that public universities can constitutionally enact total prohibitions on campus carry. It follows that there exists some individual right to carry firearms on campus. However, as the next Part explains, this right is extremely narrow, and states and universities still retain broad power to enact gun restrictions.

163. See, e.g., *Weapons, Firearms, Combustibles, and Explosives*, WM. & MARY (2020), https://www.wm.edu/offices/deanofstudents/services/communityvalues/studenthandbook/weapons_firearms/ [<https://perma.cc/E6Y7-KVS4>] (effectively banning firearms from campus by generally prohibiting firearms and reserving the right to refuse permission in any case); see also Lewis, *supra* note 65, at 2116-17 (stating that the majority of U.S. universities ban firearms).

164. See *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008).

165. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

166. *Guns on Campus: Overview*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 1, 2019), <https://www.ncsl.org/research/education/guns-on-campus-overview.aspx> [<https://perma.cc/WB7F-SRBR>].

167. *Id.*

168. See, e.g., TEX. GOV'T CODE ANN. § 411.2031(d-1) (West 2016) (prohibiting universities from generally banning concealed carry on campus).

169. See *supra* notes 158, 164 and accompanying text.

170. See *supra* notes 169-70 and accompanying text.

III. HOW CAN STATES AND PUBLIC UNIVERSITIES REGULATE FIREARMS?

As discussed above, *Heller's* sensitive places dicta, lower court case law, and history and tradition suggest that there is a narrow, but constitutionally protected, right to keep and bear arms on the campus of a public university. However, like other constitutional rights, this right is not unlimited. States and public universities still hold broad power to regulate firearms on campus without infringing on individual rights guaranteed by the Second Amendment. The circuit courts have largely applied or incorporated intermediate scrutiny when assessing gun laws that are not complete bans on firearms.¹⁷¹ This suggests that almost every gun restriction up to a total prohibition on campus would be permissible.

A. Likely Permissible Regulations Under *Heller*

It is important to look at *Heller* for direction as to which campus gun regulations may be permissible. *Heller* specifically mentioned that some gun restrictions are “presumptively lawful” irrespective of whether they are in sensitive places, such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill.”¹⁷² This means that states and public universities can presumptively ban “the possession of firearms by felons and the mentally ill.”¹⁷³ However, the Court’s statement provides little guidance for public universities because many states already generally ban these categories of people from possessing firearms.¹⁷⁴

Furthermore, under *Heller's* historical approach, it is likely permissible for public universities to prohibit *students* from possessing

171. See *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 473-74 (4th Cir. 2011); *Heller II*, 670 F.3d 1244, 1256 (D.C. Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 95, 97 (3d Cir. 2010).

172. See *District of Columbia v. Heller*, 554 U.S. 570, 626-27, 627 n.26 (2008).

173. See *id.* at 626.

174. See, e.g., Va. Code Ann. § 18.2-308.2 (2021) (making it a crime for felons to possess firearms).

firearms on campus given that the University of Virginia enacted such a restriction in the nineteenth century with a board composed of Thomas Jefferson and James Madison.¹⁷⁵ In the late nineteenth century, Mississippi prohibited college students from *concealed* carrying on campus, which under *Heller*'s historical approach, would support the constitutionality of such a restriction today.¹⁷⁶ However, in order to appropriately assess specific gun restrictions that are not absolute bans, it is necessary to look beyond *Heller*'s historical approach. The *Heller* Court applied a historical approach and rejected a specific level of scrutiny because the challenged law was a *complete ban* on one of the "most popular" firearms for self-defense.¹⁷⁷ Thus, *Heller* did not foreclose the application of a specific level of scrutiny in all circumstances.

B. Likely Permissible Regulations Under Intermediate Scrutiny

The Supreme Court has not specifically indicated which level of scrutiny lower courts should apply to gun regulations that are not complete bans.¹⁷⁸ However, the federal circuit courts have largely applied intermediate scrutiny to gun restrictions that are not complete bans, which often leads to courts upholding the challenged regulation.¹⁷⁹ Under intermediate scrutiny, the government must show: (1) an important governmental interest, and (2) that the law is substantially related to that interest.¹⁸⁰ If both elements are satisfied, the court will uphold the law.¹⁸¹

In 2011, in a case commonly referred to as *Heller II*, the D.C. Circuit applied intermediate scrutiny and upheld a D.C. law banning assault weapons and high-capacity magazines.¹⁸² The court pointed to the dangerousness of assault weapons (and the speed at which they can fire) to find that the law was substantially related to the important "interest in crime control in the densely populated

175. See Kopel & Greenlee, *supra* note 148, at 250.

176. See *id.* at 251-52.

177. *Heller*, 554 U.S. at 628-29.

178. See *id.* (refusing to apply a traditional tier of scrutiny).

179. See *supra* note 172 and accompanying text.

180. See *Heller II*, 670 F.3d 1244, 1262 (D.C. Cir. 2011).

181. See *id.*

182. *Id.* at 1262-64.

urban area that is the District of Columbia.”¹⁸³ Furthermore, the ten-round magazine capacity restriction was substantially related to the important interest of protecting innocent people and police officers because high-capacity magazines enable criminals to shoot more rounds and injure more people.¹⁸⁴

Heller II shows that, at a minimum, states and universities in densely populated urban areas could constitutionally prohibit assault weapons and high-capacity magazines from campus.¹⁸⁵ Additionally, *Heller II* shows that when intermediate scrutiny is applied in the Second Amendment context, the first element is almost always satisfied because controlling crime and protecting innocent people are generally the goals behind all gun restrictions.¹⁸⁶ Therefore, the determining element is often whether the gun regulation is too overinclusive or too underinclusive to be considered substantially related to safety interests.¹⁸⁷

In 2012, the Fifth Circuit applied intermediate scrutiny to uphold a federal law that prohibited the commercial sale of pistols to people under the age of twenty-one.¹⁸⁸ The court reasoned the law was sufficiently related to the important interest of controlling crime because the law only applied to handguns, meaning that adults between the ages of eighteen and twenty could still purchase long guns.¹⁸⁹ Furthermore, adults in that age range were responsible for a large portion of homicides.¹⁹⁰ This case shows that states and public universities could likely institute an age restriction to possess

183. *Id.* at 1262-63.

184. *See id.* at 1263-64.

185. *See id.* at 1262-64.

186. *See id.*; see also Geoff Dancy, Mirya Holman & Kayden McKenzie, *The Origins of Gun Policy in U.S. States*, 60 WASH. UNIV. J.L. & POL'Y 171, 176-78 (2019) (explaining that gun control policies are perceived by public health researchers to “lower the risk of fatalities” and describing the belief that more guns lead to more crime); Laurel Loomis, *A New Look at Gun Control Legislation: Responding to a Culture of Violence*, 27 BEVERLY HILLS BAR ASS'N J. 160, 162 (1993) (explaining that the goal behind the Gun Control Act of 1968 “was to limit crime by restricting public access to firearms”).

187. *See, e.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (“As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention. The only question then is whether the proper cause requirement is substantially related to these interests.” (citations omitted)).

188. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 207 (5th Cir. 2012).

189. *Id.* at 208-09.

190. *Id.* at 210.

certain firearms on campus, which could significantly lower the number of guns on campus.

The lower federal court case law demonstrates the leniency of the intermediate scrutiny standard when it is applied in the Second Amendment context. Generally, when the lower courts apply intermediate scrutiny, the challenged gun restriction is upheld.¹⁹¹ It would likely be even easier for campus gun restrictions to pass intermediate scrutiny. As scholars have noted, there are often high densities of people on college campuses, and controversial material is often conveyed in college classrooms.¹⁹² Although this Note disagrees that those characteristics make a place sensitive under *Heller*,¹⁹³ they remain important considerations when determining whether a law passes intermediate scrutiny. For example, the high densities of people on college campuses would support a public university's decision to implement more gun restrictions at campus events or in crowded dorms or lecture halls.¹⁹⁴ Limiting the gun restrictions to those high-density areas would likely be substantially related to the important governmental interest of campus safety.¹⁹⁵

In sum, states and public universities have broad regulatory power if intermediate scrutiny applies to gun restrictions that are not complete bans. However, the Supreme Court's upcoming decision in *New York State Rifle & Pistol Ass'n v. Bruen* may clarify what standard of scrutiny applies to challenged laws that are not complete bans.¹⁹⁶

Notably, then-Judge Kavanaugh dissented from the D.C. Circuit's majority opinion in *Heller II*.¹⁹⁷ He argued that *Heller*'s historical approach applies to all gun regulations and expressly rejected intermediate scrutiny.¹⁹⁸ Justice Thomas has criticized the lower courts for purporting to apply intermediate scrutiny but actually

191. *See, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013).

192. *See supra* note 97 and accompanying text.

193. *See supra* Part II.C.1.

194. *See Heller II*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (emphasizing that the challenged law applied to a "densely populated urban area").

195. *See id.*

196. *See de Vogue, supra* note 60.

197. *Heller II*, 670 F.3d at 1269-96 (Kavanaugh, J., dissenting).

198. *Id.* at 1271.

applying a more permissive standard.¹⁹⁹ In a dissent while she was a judge on the Seventh Circuit, Justice Barrett expressed her originalist and historical approach to the Second Amendment.²⁰⁰ Although the majority incorporated intermediate scrutiny in its analysis,²⁰¹ Barrett's dissent failed to mention anything about intermediate scrutiny.²⁰² Recently, Justice Alito wrote a dissenting opinion, joined by Justice Gorsuch and Justice Thomas, which stated, "[a]lthough the courts below claimed to apply heightened scrutiny, there was nothing heightened about what they did."²⁰³ Justice Kavanaugh explained in a concurrence that he agreed with Alito's worries about lower courts improperly applying *Heller* and *McDonald*.²⁰⁴

Given that a majority of the Supreme Court is skeptical about lower courts' application of *Heller* and their interpretation of the Second Amendment, it is likely that the Court's current makeup would affirm the narrow constitutional right to carry on campus. The Justices' distrust in lower courts may also lead to an opinion clarifying the Second Amendment. But until then, it is safe for public universities to assume their gun restrictions are constitutional as long as they are substantially related to an important interest and do not amount to a complete ban of firearms from campus.

CONCLUSION

Although policy reasons may indicate otherwise, contemporary Second Amendment law strongly suggests that there is a narrow constitutional right for individuals to carry firearms on the campus

199. See *Silvester v. Becerra*, 138 S. Ct. 945, 948 (2018) (Thomas, J., dissenting from denial of certiorari) ("The Ninth Circuit claimed to be applying intermediate scrutiny, but its analysis did not resemble anything approaching that standard.").

200. See *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

201. *Id.* at 447-48 (majority opinion).

202. See *id.* at 451-69 (Barrett, J., dissenting). Although Justice Barrett did not mention intermediate scrutiny, she did mention that the majority's holding "treat[ed] the Second Amendment as a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Id.* at 469 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)).

203. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1541-42 (2020) (Alito, J., dissenting).

204. *Id.* at 1527 (Kavanaugh, J., concurring).

of a public university. The Supreme Court in *Heller* took a historical approach to interpret the Second Amendment, holding that there is an individual right to carry a firearm, for the purpose of self-defense, within the home. Federal circuit courts have recognized that *Heller* extends into the public arena. A close examination of *Heller's* sensitive places dicta illustrates the Court did not intend for its dicta to encompass public universities. Even if it did, applying *Heller's* historical approach to a total ban of firearms on campus demonstrates that such a ban is unconstitutional under the Second Amendment. However, states and public universities may still heavily regulate firearms on campus as long as their regulations do not amount to absolute bans or fail intermediate scrutiny.

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