

2014

A First Amendment-Inspired Approach to *Heller's* “Schools” and “Government Buildings”

Jordan E. Pratt
jpratt@law.fsu.edu

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller's “Schools” and “Government Buildings”*, 92 Neb. L. Rev. (2014)
Available at: <https://digitalcommons.unl.edu/nlr/vol92/iss3/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

A First Amendment-Inspired Approach to *Heller*'s "Schools" and "Government Buildings"

TABLE OF CONTENTS

I. Introduction	538
II. <i>Heller</i> , <i>McDonald</i> , and the Right to Bear Arms Outside the Home	543
A. <i>District of Columbia v. Heller</i> : A Brief Review	543
B. <i>McDonald v. City of Chicago</i> : A Brief Review	549
C. Why <i>Heller</i> and <i>McDonald</i> Strongly Imply a Robust Right to Armed Self-Defense Outside the Home	551
1. <i>Heller</i> 's Early American Commentary and Case Law	552
2. <i>Heller</i> 's "Sensitive Places" Passage	554
3. <i>Heller</i> 's and <i>McDonald</i> 's Strong Emphasis on Self-Defense	554
III. <i>Terra Incognita</i> and Emerging Second Amendment Doctrine in the Lower Courts	556
A. Two-Step Analysis: Scope and Scrutiny	558
B. Differing Treatment of <i>Heller</i> 's Longstanding, Presumptively Lawful Regulations	562
C. Different Approaches to the Right to Armed Self-Defense Outside the Home	564
IV. The Dangers Inherent in Analogies to Categorical First Amendment Exceptions	571
V. How First Amendment Doctrines Suggest a Cautious Approach to <i>Heller</i> 's Enumerated Sensitive Places	574
A. "Schools"—Student-Speech Jurisprudence and the Secondary-Post-Secondary Distinction	575

© Copyright held by the NEBRASKA LAW REVIEW

* Law Clerk to the Honorable Harvey E. Schlesinger, U.S. District Court for the Middle District of Florida, 2012–14; Law Clerk to the Honorable Jennifer W. Elrod, U.S. Court of Appeals for the Fifth Circuit, 2014–15. J.D., University of Florida, 2012; B.A., University of Florida, 2009. I thank Daniel Suhr, Nelson Lund, John Nagle, Lyrissa Lidsky, and Ray Treadwell for their helpful input. Any opinions expressed in this Article are mine alone.

B. “Government Buildings”—First Amendment Forum Doctrine and the Government as Property Owner . . .	579
VI. Conclusion	584

I. INTRODUCTION

In America, few things evoke more political controversy than guns, and as with many contentious public policy issues, participants in the American gun debate tend to polarize into two camps.¹ Advocates of stricter regulations claim that high rates of gun ownership cause increases in violent crime and that allowing even law-abiding adults to carry firearms in public results in a net loss to public safety.² Proponents of more permissive gun laws disagree, arguing that lawful gun ownership and possession deter crime and that the primary effect of restrictions on the carry of firearms is to disarm the law-abiding and make them more vulnerable to attack by the violent.³ This debate gained considerable attention during the late 1980s and early 1990s, when many states began to enact more permissive concealed carry laws,⁴ and it intensified in recent years as the country witnessed

-
1. The gun policy debate is outside the scope of this Article and contains many nuances not covered here. This Article offers a broad summary of the competing positions merely to show the political perspectives that have fueled (and will continue to fuel) Second Amendment litigation.
 2. For articulations of this view, see *About Gun Violence*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/?q=about-gun-violence> (last visited Aug. 14, 2013); Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034 (2009).
 3. For perhaps the most well-known articulation of this view, see JOHN R. LOTT JR., *MORE GUNS LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (3d ed. 2010). See also *Gun Control Fact Sheet 2004*, GUN OWNERS OF AMERICA, <http://gunowners.org/fs0404.htm> (last visited Mar. 4, 2013).
 4. In 1987, Florida triggered this trend by enacting a modern “right to carry” law that requires the issuance of a concealed weapons permit to any applicant who meets objective statutory requirements. FLA. STAT. § 790.06 (2012). Currently, the number of states with similar “shall issue” statutory permitting regimes totals forty. These states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. ALA. CODE § 13A-11-75(a)(1) (2013); ALASKA STAT. § 18.65.700 (2010); ARIZ. REV. STAT. ANN. § 13-3112 (2010); ARK. CODE ANN. § 5-73-309 (2005); COLO. REV. STAT. § 18-12-203 (2012); GA. CODE ANN. § 16-11-129 (2011); IDAHO CODE ANN. § 18-3302 (2010); 430 ILL. COMP. STAT. 66/10 (LexisNexis 2006); IND. CODE § 35-47-2-3 (LexisNexis 2009); IOWA CODE § 724.7 (West 2003); KAN. STAT. ANN. § 75-7c03 (1997 & 2012 Supp.); KY. REV. STAT. ANN. § 237.110 (LexisNexis 2007); LA. REV. STAT. ANN. § 40:1379.3 (2008) (amended 2013); ME. REV. STAT. tit. 25, § 2003 (2000 & Supp. 2010); MICH. COMP. LAWS SERV. § 28.422 (LexisNexis 2009); MINN. STAT. ANN. § 624.714 (West 2009); MISS. CODE ANN. § 45-9-101 (2004 & Supp. 2009); MO. ANN. STAT. § 571.101 (West 2011) (amended 2013); MONT. CODE ANN.

several high-profile mass shootings.⁵

In the wake of these tragedies, discussion has often centered on the topic of so-called “gun-free zones”—places where persons other than sworn law enforcement officers are prohibited from carrying firearms, even if they are law-abiding adults and possess a concealed-weapons

§ 45-8-321 (2011); NEB. REV. STAT. § 69-2430 (Reissue 2009); NEV. REV. STAT. ANN. § 202.3657 (LexisNexis 2012); N.H. REV. STAT. ANN. § 159:6 (LexisNexis 2010); N.M. STAT. ANN. § 29-19-4 (2004 & Supp. 2012); N.C. GEN. STAT. § 14-415.11 (West 2011); N.D. CENT. CODE § 62.1-04-03 (2010) (amended 2013); OHIO REV. CODE ANN. § 2923.125 (West 2006) (amended 2013); OKLA. STAT. tit. 21, § 1290.12 (2003 & Supp. 2013); OR. REV. STAT. § 166.291 (2011); 18 PA. STAT. ANN. § 6109 (West 2000 & West Supp. 2010); S.C. CODE ANN. § 23-31-215 (2007 & Supp. 2009); S.D. CODIFIED LAWS § 23-7-7 (2006); TENN. CODE ANN. § 39-17-1351 (2010); TEX. GOV'T CODE ANN. § 411.177 (West 2012); UTAH CODE ANN. § 53-5-704 (LexisNexis 2012); VA. CODE ANN. § 18.2-308 (2012); WASH. REV. CODE § 9.41.070 (2012); W. VA. CODE ANN. § 61-7-4 (LexisNexis 2010); WIS. STAT. ANN. § 175.60 (West 2006); WYO. STAT. ANN. § 6-8-104 (2013).

Vermont allows unlicensed concealed carry, and so do Alaska, Arizona, and Wyoming (in addition to their shall-issue permitting regimes). WYO. STAT. ANN. § 6-8-104(a)(iv) (2013) (exempting from concealed weapons prohibition persons who lack a permit but otherwise meet requirements for lawful possession). *Cf.* VT. STAT. ANN. tit. 13, §§ 4003 & 4004 (West 2007) (prohibiting the carry of a dangerous or deadly weapon only when it is carried “with the intent or avowed purpose of injuring a fellow man” or in certain locations); ALASKA STAT. §§ 11.61.190–11.61.210 (2010) (criminalizing the carry of firearms only in narrow circumstances); ARIZ. REV. STAT. ANN. § 13-3102 (2010) (same). Additionally, while Connecticut is a “may issue” state that gives its licensing authority a measure of discretion, its licensing authority has voluntarily adopted a permissive issuance policy. *See* CONN. GEN. STAT. ANN. § 29-28a (West 2009); *Right to Carry*, NAT'L RIFLE ASS'N, 2012, <http://www.nraila.org/gun-laws/articles/2012/right-to-carry-2012.aspx> (observing that, at the time of publication, there were forty-one “right-to-carry” states and noting that “[i]n addition to the ‘shall issue’ states,” Connecticut has a “fairly-administered discretionary-issue carry permit system[.]”) (last visited Mar. 4, 2013); *Shall-Issue, May-Issue, No-Issue, and Unrestricted States*, BUCKEYE FIREARMS ASS'N, <http://www.buckeyefirearms.org/node/6744> (“Within the range and scope of ‘may issue’ states,” Connecticut is “as forthcoming with the issuance of permits and licenses as to be practically ‘shall issue.’”) (last visited Mar. 4, 2013). Therefore, the number of U.S. jurisdictions with liberalized concealed carry regimes comes in at forty-two.

5. The highest profile mass shootings since 1999 have been Columbine (1999—13 murdered), Virginia Tech (2007—32 murdered), Fort Hood (2009—13 murdered), Tucson (2011—6 murdered), Aurora (2012—12 murdered), and Sandy Hook Elementary (2012—27 murdered). According to the commonly accepted definition of “mass shooting,” which encompasses shootings in which four or more people are murdered, there have been numerous others in the past decade. *Newtown, Conn. Shooting: Timeline of Mass Killings Since Columbine*, NEWSMAX (Dec. 14, 2012), <http://www.newsmax.com/US/mass-shootings-us-colorado/2012/07/20/id/445971>; U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, SERIAL MURDER: MULTIDISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 8 (Robert J. Morton, 2008), available at <http://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-july-2008-pdf> (“Generally, mass murder was described as a number of murders (four or more) occurring during the same incident, with no distinctive time period between the murders.”) (last visited Mar. 5, 2013).

permit.⁶ Supporters of gun-free zones argue that certain locations are especially sensitive, either because of the people or the activities they host, and that allowing the general public to carry firearms in those locations would cause an especially great threat to public safety.⁷ Gun-rights proponents take exactly the opposite view, contending that gun-free zones actually *attract* violent crime (and especially mass killings) because violent criminals and grievance killers are undeterred by laws forbidding the carry of firearms and prefer unarmed targets when looking to carry out their sinister plots.⁸ The pro-carry movement has gained traction in several states, leading to the legalization of concealed carry on college campuses and by teachers and administrators in primary and secondary schools.⁹

When the Supreme Court invalidated Washington, D.C.'s restrictive gun laws six years ago in *District of Columbia v. Heller*,¹⁰ it signaled an intention to leave at least a portion of the debate over gun-free zones to the political process. In a now familiar passage, the Court stressed that while the Second Amendment confers an individual right to keep and bear arms, the Court's decision should not "be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . ." ¹¹ The Court strongly suggested that the right to bear arms extends beyond

6. Even states with liberalized carry laws often prohibit those outside law enforcement from carrying firearms in certain locations, such as primary and secondary schools, university campuses, sports stadiums, courthouses, bars, and police stations. For a compilation of such laws, see HANDGUNLAW.US, <http://www.handgunlaw.us/> (last visited Mar. 5, 2013).

7. See, e.g., Brian Malte, *Keep Guns Off College Campuses! Brady Campaign to Prevent Gun Violence*, http://www.bradynetwork.org/site/MessageViewer?em_id=46081.0&pgwrap=n ("Introducing guns into a volatile environment where binge drinking and drug use are all too prevalent would dramatically increase the risks of suicide, gun thefts, and the number of gun violence victims.") (last visited Aug. 15, 2013).

8. See, e.g., STUDENTS FOR CONCEALED CARRY, <http://concealedcampus.org/about/> ("Recent high-profile shootings and armed abductions on college campuses clearly demonstrate that 'gun free zones' serve to disarm only those law-abiding citizens who might otherwise be able to protect themselves.") (last visited Mar. 5, 2013).

9. See *Guns on Campus: Overview*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/educ/guns-on-campus-overview.aspx> ("Due to recent state legislation and court rulings, 5 states now have provisions allowing the carrying of concealed weapons on public postsecondary campuses. These states are Colorado, Mississippi, Oregon, Utah, and Wisconsin.") (last visited Mar. 5, 2013); John Roberts, *States Mull Whether Arming Teachers Can Prevent Another School Massacre*, FOX NEWS, Jan. 30, 2013, <http://www.foxnews.com/politics/2013/01/30/states-mull-whether-arming-teachers-will-prevent-another-school-massacre/> (detailing legislative proposals in thirteen states that would allow teachers and administrators with concealed carry permits and additional training to carry firearms in schools and reporting that two school districts in Texas now allow trained teachers to carry concealed weapons) (last visited Mar. 6, 2013).

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

11. *Id.* at 626–27.

the home,¹² but it nevertheless reaffirmed the presumptive validity of gun-free zones in “sensitive places” two years later when it incorporated the Second Amendment in *McDonald v. City of Chicago*.¹³

The Court’s brief references to gun-free zones remain somewhat of a mystery. In neither *Heller* nor *McDonald* did the Court offer much explanation for its dicta, aside from the casual observations that gun-free zones in certain places are “longstanding” and have “historical justifications.”¹⁴ Perhaps the strongest clue lies in the decisional method of both opinions, which focused almost entirely on how the public likely understood the Second and Fourteenth Amendments when they were ratified in 1791 and 1868.¹⁵ To date, however, the Supreme Court has offered no further guidance on the precise scope of the right to keep and bear arms, and lower courts have begun to fill the void.¹⁶

This Article focuses on *Heller’s* enumerated sensitive places—“schools” and “government buildings”—and begins with the premise that these terms allow some room for interpretation. In affirming the likely constitutionality of laws prohibiting the carrying of firearms in schools, did the Court intend to leave undisturbed gun bans in primary and secondary schools only or also on university campuses? In its reference to government buildings, did the Court mean to suggest that the government may act with impunity whenever it bans the carry of firearms on its property, or are there some types of public property—particularly national parks and remote lands home to dangerous wildlife—where a combination of low security risks and historical practices limits the government’s authority as property owner?

This Article further assumes that the historical record will not fully resolve these interpretive issues. Indeed, as several commentators have noted, the historical pedigree of even *Heller’s* most noncontroversial “presumptively lawful” regulations—“prohibitions on the possession of firearms by felons”¹⁷—can fairly be disputed.¹⁸ Perhaps

12. See discussion *infra* sections II.C., III.C.

13. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion). This passage actually appears in a portion of Justice Alito’s opinion commanding the support of a four-Justice plurality, but since Justice Thomas did not address the issue in his concurrence, there is no reason to doubt that *Heller’s* presumptively lawful regulations still enjoy the endorsement of a majority of the Court. See discussion *infra* section II.B.

14. *Heller*, 554 U.S. at 626–27, 635; *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

15. See discussion *infra* Part II.

16. See discussion *infra* Part III.

17. *Heller*, 554 U.S. at 626.

18. See, e.g., C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695 (2009) (concluding that the current federal ban on the possession of firearms by all felons is much broader in scope than its historical analogues); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 273 (2009) (“[T]he Court does not explain why [*Heller’s*

Heller's reference to the longstanding nature of certain presumptively constitutional gun laws was meant to convey the notion that when the American people reach a wide and longstanding consensus on the propriety of a given legislative solution, their judgment is entitled to great deference, even if their consensus occurs after the ratification of the relevant constitutional provision.¹⁹ This Article offers no speculation as to how long such a consensus must exist to be considered longstanding and, recognizing also that originalism's historical inquiry has its limits,²⁰ proceeds on the assumption that lower courts will need to look to established constitutional doctrines from other areas of law for additional guidance.

Ultimately, this Article concludes that lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller's* schools and government buildings. Part II summarizes the Supreme Court's decisions in *Heller* and *McDonald* and describes how they strongly imply a robust right to armed self-defense outside the home. Part III surveys how the lower federal courts have begun to develop Second Amendment doctrine after *Heller* and *McDonald*, focusing on the different treatment they have given to *Heller's* presumptively valid regulations and the right to bear arms outside the home. Part IV focuses on those courts that have classified *Heller's* presumptively valid regulations as categorical Second Amendment exceptions, arguing that while this analogy to First Amendment unprotected speech carries some intuitive force, an expansive view of *Heller's* exceptions threatens to swallow *Heller's* general rule in favor of armed self-defense. In the First Amendment context, categories of speech that receive no constitutional protection have been kept to a very small

presumptively valid] restrictions are embedded in the Second Amendment. The Constitution's text, at least, has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy." (footnote omitted).

19. See *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("[S]tatutory prohibitions on the possession of weapons by some persons are proper—and, importantly for current purposes . . . the legislative role did not end in 1791. That some categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details.").

20. Professor Nelson Lund has observed that "[t]he serious challenges for originalism involve questions about its limits as a tool for adjudication" and has described originalism's "three main difficulties" as follows:

First, it is sometimes hard to find adequate objective evidence of how the Constitution's text would have been understood by the relevant audience at the time of adoption. Second, it is sometimes difficult to know how the commands in the text should be applied, consistent with its original meaning, to particular circumstances that the enacting public did not consider, and often could not have foreseen. Third, courts will inevitably make some decisions based on mistaken interpretations of the Constitution, and later courts will have to decide how much deference to give these precedents.

Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 U.C.L.A. L. REV. 1343, 1346 (2009).

number of well-defined exceptions in an effort to preserve the broad scope of the guarantee as it was understood by the ratifying public. It should be the same with *Heller's* sensitive places exception to the Second Amendment right of armed self-defense outside the home.

Finally, Part V demonstrates how broad themes from existing First Amendment doctrines support a restrained interpretation of even *Heller's* enumerated sensitive places—schools and government buildings. Specifically, Part V argues that student speech cases observe a line between the First Amendment rights of secondary and post-secondary students, and these cases indicate that college campuses generally are less sensitive than primary and secondary school classrooms. Courts therefore should not interpret *Heller's* schools to encompass college campuses. Furthermore, Part V argues that, as with First Amendment forum doctrine, the scope of the government's authority to regulate the carry of firearms on its property should depend on the character of the property at issue, and just as some government property has historically hosted public assembly and debate, some government properties—particularly national parks and remote lands home to dangerous wildlife—have historically accommodated an armed citizenry. Courts therefore should not interpret *Heller* to stand for the sweeping proposition that the government may act with impunity whenever it bans the carry of firearms on its property. In sum, Part V concludes that courts should subject broad gun bans on university campuses, national parks, and remote public lands to some form of heightened scrutiny, rather than regard them as burdening conduct that is categorically unprotected under the Second Amendment.

II. *HELLER*, *McDONALD*, AND THE RIGHT TO BEAR ARMS OUTSIDE THE HOME

This Part describes why *Heller* and *McDonald* strongly imply a robust right to armed self-defense that extends outside the home to many public places. A brief review of both decisions is necessary to explain this extension.

A. *District of Columbia v. Heller*: A Brief Review

In *District of Columbia v. Heller*,²¹ the Supreme Court undertook its first thorough examination of the Second Amendment in modern history.²² The Court in *Heller* confronted a challenge to Washington,

21. 554 U.S. 570 (2008).

22. Before *Heller*, the Court's most recent examination of the Second Amendment had occurred in *United States v. Miller*, 307 U.S. 174 (1939). In a somewhat enigmatic opinion, the *Miller* Court reversed a district court's demurrer of an indictment that charged two defendants with transporting an unregistered short-barreled shotgun in interstate commerce. The Court reasoned that the Second Amendment protects only those arms that have "some reasonable relationship to

D.C.'s gun laws, which effectively banned the possession of all handguns and operable firearms in the home.²³ The challenge required the Court to decide whether the Second Amendment guarantees an individual right to keep and bear arms or rather only a collective right tied to militia service.²⁴ Prior to the Court's decision, the U.S. courts of appeal, in line with the prevailing view among academics, had largely rejected the individual-right interpretation and had embraced the collective-right model.²⁵ Only the Fifth Circuit and the D.C. Circuit (in the decision below) had held that the Second Amendment guarantees an individual right unconnected to service in a militia.²⁶

In a 5–4 decision, the Supreme Court rejected the collective right theory and struck down the challenged gun laws as violative of the Second Amendment. The Court held that the Second Amendment secures an individual right to keep and bear arms that does not depend on militia service and that, at its core, the Second Amendment guarantees “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”²⁷

The Court began by dividing the Amendment into its prefatory and operative clauses.²⁸ In its textual analysis of the operative clause, the Court observed that in every other instance in the Constitution, the phrase “right of the people” referred unambiguously to an individual—not collective—right.²⁹ Furthermore, the Court observed that the term “the people” “unambiguously refers to all members of the political community,” and the Second Amendment right, therefore, “belongs to all Americans,” not merely to those who serve in a militia.³⁰ As to the phrase “keep and bear Arms,” the Court noted that “the

the preservation or efficiency of a well regulated militia,” and at the time of ratification, those serving in militias were expected to supply themselves with arms “of the kind in common use at the time.” *Id.* at 178, 179. For a detailed discussion of *Miller's* procedural history and precedential value, see Nelson Lund, *Heller and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335, 336–39 (2009).

23. *Heller*, 554 U.S. at 574–75.

24. *Id.* at 577.

25. *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942).

26. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

27. *Heller*, 554 U.S. at 635.

28. That is, respectively, (1) “A well regulated Militia, being necessary to the security of a free State”; and (2) “the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II; *Heller*, 554 U.S. at 577.

29. *Heller*, 554 U.S. at 579.

30. *Id.* at 580–81.

18th-Century meaning [of 'Arms'] is no different from the meaning today," and the Amendment protects modern-day weapons just as the First Amendment protects modern forms of communication.³¹ The Court then thoroughly examined an array of colonial and founding-era sources indicating that the phrase "keep arms" meant "have weapons," and the phrase "bear arms" meant to carry weapons for either offensive or defensive use.³² Notably, the Court found that when the Bill of Rights was ratified, both phrases often referred to the possession and carry of weapons outside of an organized militia.³³

Putting the operative clause's textual elements together, the Court determined that the Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," and observed that this interpretation "is strongly confirmed by the historical background of the Second Amendment."³⁴ The Court again surveyed a litany of seventeenth-, eighteenth-, and early nineteenth-century sources supporting the conclusion that, at the time of its ratification, the public understood the Second Amendment to protect an individual right to bear arms for self-defense.³⁵ The Court noted, however, that "[o]f course the right was not unlimited, just as the First Amendment's right of free speech was not."³⁶ Thus, the Court declined to "read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose."³⁷

Turning to the Second Amendment's prefatory clause, the Court noted that, at the time of the founding, the "militia" consisted of all able-bodied men.³⁸ The Court rejected the government's argument that the militia identified in the Amendment was the *organized* militia—a military body created by Congress or the States.³⁹ Rather, the Court observed, the Second Amendment's prefatory clause addressed the *general* militia, whose existence pre-dated the Constitution's ratification.⁴⁰ The Court found textual support for this interpretation in Article I's grants of power to Congress to "provide for calling forth" and to "organiz[e]" the militia.⁴¹ These grants of power assumed the pre-existence of their object, in contrast to Congress's grants of power to "raise . . . Armies" and "provide . . . a Navy," which were powers to

31. *Id.* at 581–82.

32. *Id.* at 582–84.

33. *Id.* at 582–92.

34. *Id.* at 592.

35. *Id.* at 592–95.

36. *Id.* at 595.

37. *Id.*

38. *Id.* at 596.

39. *Id.*

40. *Id.*

41. *Id.*

create.⁴² As for the adjective “well-regulated,” the Court found it to imply “nothing more than the imposition of proper discipline and training.”⁴³ The Court then briefly examined the phrase “security of a free State,” observing that it was a “term[] of art in 18th-Century political discourse, meaning a ‘free country’ or free polity.”⁴⁴ A well-regulated militia was thought “necessary to the security of a free state,” the Court observed, because it could repel invasions, suppress insurrections, eliminate the need for standing armies, and resist domestic tyranny.⁴⁵

Putting the Second Amendment’s prefatory and operative clauses together, the Court noted that they complement each other perfectly since the founding generation knew that past tyrants had eliminated militias by disarming the citizenry.⁴⁶ The Court observed that during the 1788 ratification debates, Antifederalists feared that a powerful federal government would disarm the people and impose tyrannical rule by a standing army.⁴⁷ At the same time, the Court cautioned that just because the founding generation *codified* the right to bear arms for the main purpose of preventing the elimination of the militia did not mean that the right to bear arms was limited to militia service.⁴⁸ Numerous historical sources confirmed that, for the founding generation, self-defense “was the *central component* of the right itself,” even if it was not the main purpose for the right’s codification in the Constitution.⁴⁹

Having made its case for interpreting the Second Amendment to protect an individual right, the Court turned to founding-era analogues in state constitutions and post-ratification commentary, case law, and legislation. The Court found that these sources overwhelmingly confirmed that the Court’s understanding of the Amendment comported with that of the American public at the time of ratification and well into the 19th-Century.⁵⁰

Before its analysis of the challenged D.C. gun laws, the Court paused to stress the narrowness of its decision. In a now familiar passage, the Court declared:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For

42. *Id.*

43. *Id.* at 597.

44. *Id.*

45. *Id.*

46. *Id.* at 598.

47. *Id.*

48. *Id.* at 599.

49. *Id.*

50. *Id.* at 600–19.

example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. *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.*⁵¹

The Court explained that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”⁵²

The Court then finally turned its attention to Washington, D.C.’s complete ban on the possession of handguns and operable firearms in the home. The Court noted that “the inherent right of self-defense has been central to the Second Amendment right,” and the District’s handgun ban “amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”⁵³ Furthermore, the Court noted that the handgun ban extended to the home, “where the need for defense of self, family, and property is most acute.”⁵⁴ Such a sweeping measure would fail “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights,” the Court opined, explicitly ruling out rational basis review.⁵⁵ The Court noted that the severity of D.C.’s handgun ban knew almost no historical parallel, and it cited with approval state decisions that had invalidated prohibitions on carrying pistols openly (though leaving intact bans on the concealed carry of pistols).⁵⁶ That the ban still allowed the possession of long guns would not cure the constitutional infirmity—Americans consider the handgun to be the “quintessential self-defense weapon,” and a complete prohibition of “the most popular weapon chosen by Americans

51. *Id.* at 626–27 (footnote and internal citations omitted) (emphases added). The Court further opined:

We also recognize another important limitation on the right to keep and carry arms. Miller said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”

Id. at 627 (internal citation omitted).

52. *Id.* at 627 n.26.

53. *Id.* at 628.

54. *Id.*

55. *Id.* at 628–29 (footnote omitted). The Court noted that “[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.” *Id.* at 628 n.27.

56. *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. (3 Hesik.) 165, 187 (1871)).

for self-defense in the home . . . is invalid.”⁵⁷ The Court was equally unsympathetic to the District’s blanket prohibition against the in-home possession of operable firearms, declaring it unconstitutional because it made it “impossible for citizens to use [firearms] for the core lawful purpose of self-defense.”⁵⁸

The Court then made several parting observations in response to Justice Breyer’s dissent, which had enlisted a compilation of colonial-era gunpowder storage and firearms discharge regulations to advance an argument in favor of the constitutionality of the District’s handgun ban and which had also criticized the majority for declining to establish a level of scrutiny for evaluating Second Amendment claims. The Court noted that Justice Breyer’s “fire-safety laws . . . do not remotely burden the right of self-defense as much as an absolute ban on handguns.”⁵⁹ As to Justice Breyer’s “broad jurisprudential point,” the Court defended its refusal to provide a detailed framework for analyzing future Second Amendment claims and flatly rejected Justice Breyer’s proposed “judge-empowering ‘interest-balancing inquiry.’”⁶⁰ The Court insisted that “[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach,” remarking that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”⁶¹ The First Amendment’s guarantee was understood by the ratifying public to contain exceptions for obscenity, libel, and espionage but not for the expression of unpopular opinions.⁶² “The Second Amendment is no different,” the Court concluded, “[a]nd whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁶³ Finally, responding to Justice Breyer’s criticism of the Court for failing to provide “extensive historical justification for those regulations of the right that we describe as permissible,” the Court assured that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”⁶⁴

57. *Id.*

58. *Id.* at 630.

59. *Id.* at 632.

60. *Id.* at 634.

61. *Id.* at 634–35.

62. *Id.* at 635

63. *Id.*

64. *Id.*

B. *McDonald v. City of Chicago*: A Brief Review

Having prevailed against the District of Columbia's draconian fire-arms laws, gun-rights proponents turned their gaze to the next logical step for Second Amendment litigation: incorporation. They set their sights on Chicago, and they picked their target well.

Over 120 years beforehand, the Supreme Court had refused to incorporate the Second Amendment in *Presser v. Illinois*, a case which involved a Chicago resident's constitutional challenge to his conviction under an Illinois law that generally prohibited groups of citizens from "drill[ing] or parad[ing] with arms in any city or town of this state" without a license from the governor.⁶⁵ The Supreme Court upheld the conviction on the grounds that the Second Amendment applied only to the federal government, citing *United States v. Cruikshank*⁶⁶ as the main support for its decision.⁶⁷ *Presser* and *Cruikshank* had been decided in the wake of the *Slaughter-House Cases* and long before the flowering of the Court's modern selective incorporation doctrine, and in their effort to overturn these stale decisions, gun-rights advocates looked to Chicago once again, which had enacted a handgun ban nearly identical to the one that the Court had invalidated in *Heller*.

Emboldened by their success in *Heller*, gun-rights proponents achieved another victory at the Supreme Court. In *McDonald v. City of Chicago*,⁶⁸ the Court invalidated Chicago's near-total handgun ban and held that the Fourteenth Amendment makes the Second Amendment right fully applicable against the States, effectively overruling *Presser* and *Cruikshank*.⁶⁹ A plurality opined that the Second Amendment right was incorporated through the Fourteenth Amendment's

65. 116 U.S. 252, 253 (1886).

66. 92 U.S. 542 (1875). *Cruikshank* had similarly held that the Second Amendment had no application to the States. *Id.* at 553. Twelve years after *Presser*, the Court repeated its conclusion that the Second Amendment was not incorporated. *Miller v. Texas*, 153 U.S. 535 (1894).

67. *Presser*, 116 U.S. at 265.

68. 130 S. Ct. 3020 (2010).

69. *McDonald* did not *technically* overrule these decisions because they rested entirely on the *Slaughter-House Cases*' restrictive interpretation of the Fourteenth Amendment's Privileges or Immunities Clause. However, to the extent that *Cruikshank*, *Presser*, and *Miller* stood for the general proposition that the Fourteenth Amendment does not make the Second Amendment right applicable against the states, *McDonald* may fairly be seen to have overruled them. The Seventh Circuit's decision in *McDonald*, which refused to incorporate the Second Amendment, had viewed them as controlling. See *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). The Supreme Court even agreed that *Cruikshank*, *Presser*, and *Miller* "doomed Petitioners' claims at the Court of Appeals level." *McDonald*, 130 S. Ct.

Due Process Clause,⁷⁰ while Justice Thomas saw the Privileges or Immunities Clause as the proper vehicle for incorporation.⁷¹ The end result, however, was clear: *Heller's* right to keep and bear arms applied fully to state and local governments, and lower courts would now have to begin the arduous task of developing Second Amendment doctrine amidst a flurry of challenges to restrictive gun laws across the country.

The Court in *McDonald* acknowledged that by the 1850s, the American public—unlike the founding generation—no longer held a widespread fear that the federal government would disarm the general militia.⁷² Even so, the Court observed that “the right to keep and bear arms was highly valued for purposes of self-defense.”⁷³ The Court then argued that historical sources overwhelmingly confirm that at the time of the Fourteenth Amendment’s ratification in 1868, the American public deemed the right of armed self-defense to be “fundamental.”⁷⁴

The Court chronicled the attempted disarmament of Free-Soilers in Bloody Kansas, as well as the systematic disarmament of blacks during the period immediately following the Civil War.⁷⁵ The Court then recounted Congress’s legislative efforts to curb the violence perpetrated against disarmed southern blacks, beginning with § 14 of the Freedmen’s Bureau Act of 1866, which provided that “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race, or color, or previous condition of slavery.”⁷⁶ The Court noted that § 1 of the Civil Rights Act of 1866 similarly sought to protect the right to keep and bear arms and that “it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.”⁷⁷ The Court also looked to the debates leading up to the ratification of the Fourteenth Amendment, evidence from the period immediately following ratification, and the overwhelming majority of state constitutions that protected a right to

at 3030. For lower courts, then, *McDonald* effectively overruled these stale decisions.

70. *Id.* at 3050 (plurality opinion).

71. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment). For an assessment of the relative merits of the plurality’s and Justice Thomas’s approaches, see Nelson Lund, *Two Faces of Judicial Restraint (or Are There More?)* in *McDonald v. City of Chicago*, 63 FLA. L. REV. 487 (2011).

72. *McDonald*, 130 S. Ct. at 3038.

73. *Id.*

74. *Id.* at 3038–42.

75. *Id.* at 3038.

76. *Id.* at 3039–40.

77. *Id.* at 3040–41.

keep and bear arms in 1868.⁷⁸ These sources buttressed the Court's conclusion that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."⁷⁹

Justice Alito, in a portion of his opinion that commanded the votes of a four-Justice plurality, took pains to re-emphasize *Heller's* assurance that the right to keep and bear arms knows several limitations:

It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "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." *We repeat those assurances here.* Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.⁸⁰

In his separate concurrence, Justice Thomas did not directly address the issue, but neither did he give any reason to doubt his continued support for *Heller's* dictum.⁸¹ *McDonald* therefore preserved the Court's position that bans on the carry of firearms in sensitive places are presumptively valid, but it shed no further light on the issue. The decision also followed *Heller's* lead by declining to establish a standard of review for Second Amendment claims, thereby leaving the task of doing so to lower courts in future challenges.

C. Why *Heller* and *McDonald* Strongly Imply a Robust Right to Armed Self-Defense Outside the Home

While both *Heller* and *McDonald* confronted highly restrictive laws that applied to the in-home possession of commonly used firearms, they nevertheless strongly imply a robust right to armed self-defense outside the home. Most obviously, *Heller* acknowledged that the Second Amendment protects two different rights—to "keep" and to "bear" arms—and it specifically interpreted the latter as a right to "carry" weapons.⁸² But *Heller* and *McDonald* also suggest that the Second

78. *Id.* at 3041–42.

79. *Id.* at 3042.

80. *Id.* at 3047 (plurality opinion) (emphasis added) (internal citations omitted).

81. *See id.* at 3058–88 (Thomas, J., concurring in part and concurring in the judgment).

82. *District of Columbia v. Heller*, 554 U.S. 570, 582, 584, 592 (2008) (interpreting "keep arms" to mean "have weapons" and "bear arms" to mean "carry" weapons, and finding that the Second Amendment guarantees "the individual right to possess and carry weapons") (emphases added). *Heller* reinforced the distinction by rejecting Justice Breyer's contention that "keep and bear Arms" was a term of art that guaranteed only one right. *Id.* at 591; *see also* *Drake v. Filko*, No. 12-1150, 2013 WL 3927735, at *13 (3d Cir. July 31, 2013) (Hardiman, J., dissenting) (find-

Amendment should not be confined to the home in three other ways. First, *Heller* focused on how the ratifying public likely understood the Second Amendment, referencing commentary and case law that point unmistakably toward a right to carry firearms outside the home. Second, a reading of *Heller* that confines the right to carry a firearm to the home renders its sensitive places passage superfluous. Finally, both *Heller* and *McDonald* strongly emphasized the centrality of self-defense to the Second Amendment right, and the need for self-defense is not—and never has been—confined to the home.

1. *Heller's Early American Commentary and Case Law*

As the Seventh Circuit has observed, “[t]o speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage,” and “one doesn’t have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home.”⁸³ Indeed, the very historical sources that *Heller* approvingly cited confirm that the American public understood the Second Amendment to protect a right to armed self-defense outside the home. For example, in discussing the original public meaning of “bear arms,” *Heller* partially relied on Cecil Humphreys’s early nineteenth-century observation that “in this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily.”⁸⁴ This passage would make little sense if the Second Amendment right were limited to the home; if the right to bear arms did not extend past the home, then its exercise could not possibly run the risk of “terrify[ing] people unnecessarily.” The Court’s approval of William Rawle’s observation in 1825 that the Second Amendment right “ought not ‘be abused to the disturbance of the public peace,’ such as by assembling with other armed individuals ‘for an unlawful purpose,’”⁸⁵ further underscores the point. Additionally, to decipher the original meaning of “bear arms,” the *Heller* Court also relied on Justice James Wilson’s interpretation

ing that the Supreme Court has indicated that the Second Amendment extends beyond the home because “*Heller* engaged in significant historical analysis on the meaning of the text of the Second Amendment, specifically focusing on the words ‘keep’ and ‘bear’ as codifying distinct rights”); *Drake*, 2013 WL 3927735, at *13 (Hardiman, J., dissenting) (“To speak of ‘bearing’ arms solely within one’s home not only would conflate ‘bearing’ with ‘keeping,’ in derogation of the Court’s holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court.”).

83. *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

84. *Heller*, 554 U.S. at 587–88 n.10 (2008) (quoting C. HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822)) (alteration omitted).

85. *Id.* at 607–08 (quoting W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (1825)).

of the Pennsylvania Constitution's Second Amendment analogue. As the Court acknowledged, Justice Wilson interpreted Pennsylvania's arms-bearing right as "a recognition of the natural right of defense 'of one's person *or* house'—what he called the law of 'self preservation.'"⁸⁶ This passage explicitly made a distinction between the right to self-defense in the home and the right to self-defense outside the home, asserting that both were protected.

But perhaps most telling is *Heller's* reliance on two antebellum state court decisions that unequivocally interpreted the Second Amendment to protect a right to bear arms outside the home.⁸⁷ In *Nunn v. State*, the Georgia Supreme Court struck down a near-total prohibition on the carry of firearms in public, holding that the Second Amendment protects a right to openly carry firearms.⁸⁸ The *Nunn* court opined that under the Second Amendment, the state could regulate the *manner* in which pistols were carried and thus could criminalize the practice of carrying them in *concealment*, but the state could not completely prohibit the carry of firearms for protection outside the home.⁸⁹ Similarly, in *State v. Chandler*, the Louisiana Supreme Court upheld a prohibition on the concealed carry of weapons while describing a person's "right to carry arms . . . in full open view" as "the right guaranteed by the Constitution of the United States."⁹⁰ In *Heller*, the Supreme Court cited both of these holdings with approval to support its conclusion that the Second Amendment guarantees an individual right unconnected with militia service.⁹¹ *Heller's* favorable

86. *Id.* at 585 (citing 2 COLLECTED WORKS OF JAMES WILSON 1142, & n.x (Kermit L. Hall & Mark Hall eds., 2007)) (emphasis added).

87. *C.f.* *Drake v. Filko*, No. 12-1150, 2013 WL 3927735, at *19 (3d Cir. July 31, 2013) (Hardiman, J., dissenting) ("The crux of these [state high-court decisions upholding concealed carry bans but striking down total carry bans], endorsed by the Supreme Court [in *Heller*], is that a prohibition against both open and concealed carry without a permit is different in kind, not merely in degree, from a prohibition covering only one type of carry.")

88. *Nunn v. State*, 1 Ga. 243 (1846). The *Nunn* court erroneously opined that the Second Amendment applied to the States, notwithstanding the United States Supreme Court's contrary holding in *Barron v. Baltimore*, 32 U.S. 243 (1833). *Nunn*, 1 Ga. at 250–51.

89. *Id.* at 249. Indeed, the Supreme Court itself has stated in *dicta* that prohibitions on *concealed* carry do not offend the Second Amendment. *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897) (stating that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons").

90. *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (internal quotation marks omitted).

91. *Heller*, 554 U.S. at 612–13. The Court also approvingly cited several other state court decisions that interpreted arms-bearing provisions in state constitutions to guarantee a right to bear arms outside the home. *Id.* at 585 n.9 (citing *State v. Reid*, 1 Ala. 612, 616–17 (1840) (upholding a statute that prohibited the carrying of concealed weapons but allowed the open carry of weapons, finding that the legislature may regulate the *manner* in which arms are carried as long as it leaves intact the right to armed self-defense); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91–92 (1822) (invalidating a statute that prohibited the carrying of *con-*

citations of these holdings, coupled with its reliance on the commentary of Cecil Humphreys, William Rawle, and Justice Wilson, strongly suggest the Court's willingness to recognize a right to carry firearms outside the home for the purpose of self-defense.

2. *Heller's "Sensitive Places" Passage*

In addition to the legal sources upon which *Heller* relied to decipher the original public meaning of the Second Amendment, *Heller's* sensitive places passage itself strongly suggests a right to bear arms outside the home.⁹² If the right to bear arms does not extend beyond the home, then the Court simply could have said so and would then have had no need to reassure the District of Columbia that it could ban the carry of firearms in sensitive places. That a location's sensitivity has any bearing at all on the constitutional analysis seems to rule out the possibility that the Court meant to confine the Second Amendment to the home. *Heller's* sensitive places passage strongly implies that in the developing landscape of Second Amendment jurisprudence, prohibitions on the carry of firearms in public should be the exception, not the rule. Any other interpretation of *Heller* would render unnecessary the specificity with which it reassured the District of Columbia regarding its bans on the carry of firearms in sensitive places.

3. *Heller's and McDonald's Strong Emphasis on Self-Defense*

Finally, in both *Heller* and *McDonald*, the Supreme Court implied that the right to bear arms extends beyond the home by its repeated emphases on the centrality of self-defense to the Second Amendment right. In *Heller*, the Court recognized that colonial Americans understood the pre-existing, natural "right of self-preservation" to permit a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury."⁹³ *Heller* also made clear that this pre-existing right was codified in the Second Amendment.⁹⁴ In fact, the *Heller* Court called self-defense "the *central com-*

cealed weapons)); *id.* at 629 (citing *Andrews v. State*, 50 Tenn. (2 Heisk.) 165, 187 (1871) (striking down a sweeping prohibition on openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances").

92. See *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir.) (Niemeyer, J., writing separately), *cert. denied*, 132 S. Ct. 756 (2011) ("If the Second Amendment right were confined to self-defense in the home, the Court would not have needed to express a reservation for 'sensitive places' outside of the home."); *Drake v. Filko*, No. 12-1150, 2013 WL 3927735, at *14 (3d Cir. July 31, 2013) (Hardiman, J., dissenting) (agreeing with Judge Niemeyer).

93. *Heller*, 554 U.S. at 595 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 145–46 n.42 (1803)).

94. *Id.* at 599–600.

ponent of the [Second Amendment] right itself,”⁹⁵ observing that commentators such as St. George Tucker—presumably alongside the early American public at-large—equated the right to self-defense with the Second Amendment.⁹⁶ In *McDonald*, the Court repeated these observations, finding that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day,” and, therefore, the Second Amendment right is “deeply rooted in this Nation’s history and tradition.”⁹⁷

Clearly, the need for self-defense is not—and never has been—confined to the home, and both *Heller* and *McDonald* implicitly acknowledged this fact. *Heller* recognized the need for self-defense outside the home when it observed that the District’s handgun ban extended “to the home, where the need for defense of self, family, and property is most acute.”⁹⁸ If the need for self-defense is “most acute” in the home, then presumably there must be some other places outside the home where it is also “acute.”⁹⁹ Similarly, *Heller* stated that “[the Second Amendment’s operative clause] guarantee[s] the individual right to possess and carry weapons *in case of confrontation*.”¹⁰⁰ Nowhere did the Court suggest that confrontations requiring access to a means of

95. *Id.* at 599.

96. *Id.* at 606.

97. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (internal quotation marks omitted); see also *Drake v. Filko*, No. 12-1150, 2013 WL 3927735, at *14 (3d Cir. July 31, 2013) (Hardiman, J., dissenting) (noting that “the *McDonald* Court described the holding in *Heller* as encompassing a general right to self-defense,” and the broad manner in which *McDonald* described *Heller*’s holding “demonstrates that the legal principle enunciated in *Heller* is not confined to the facts presented in [*Heller*]”).

98. *Heller*, 554 U.S. at 628 (emphasis added).

99. See *Moore v. Madigan*, 702 F.3d 933, 935–36 (7th Cir. 2012) (“Both *Heller* and *McDonald* do say that ‘the need for defense of self, family, and property is most acute’ in the home, but that doesn’t mean it is not acute outside the home. *Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home, as when it says that the amendment ‘guarantee[s] the individual right to possess and carry weapons in case of confrontation.’ Confrontations are not limited to the home.”) (internal citations omitted); *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir.) (Niemeyer, J., writing separately), cert. denied, 132 S. Ct. 756 (2011) (reading *Heller* to suggest “that some form of the right [to possess firearms for self-defense] applies where that need is not ‘most acute’”); *Drake*, 2013 WL 3927735, at *13 (Hardiman, J., dissenting) (agreeing with the Seventh Circuit and Judge Niemeyer because “[w]ere it otherwise, there would be no need for the modifier ‘most,’” and “[t]his reasoning is consistent with the Supreme Court’s historical understanding of the right to keep and bear arms as ‘an individual right protecting against both public and private violence’”) (quoting *Heller*, 554 U.S. at 594).

100. *Heller*, 554 U.S. at 592 (emphasis added); see also *Moore*, 702 F.3d at 935–36 (noting that “*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home, as when it says that the amendment ‘guarantee[s] the individual right to possess and carry weapons in case of confrontation.’”).

self-defense occur only within the home, and for good reason: such a statement would border on the ridiculous.¹⁰¹

McDonald underscored the need for self-defense outside the home by its extensive discussion of the systematic disarmament of—and subsequent violence against—southern blacks shortly after the Civil War. To provide support for the proposition that the ratifying public understood the Fourteenth Amendment to make the right to keep and bear arms applicable against the states, *McDonald* alluded to several instances in which disarmed blacks were tortured and killed outside their homes.¹⁰² It would have been a cruel trick for the Fourteenth Amendment to have guaranteed freedmen the right to bear arms only when inside their homes, while corrupt state officials, ex-Confederate soldiers, and Klansmen patrolled the streets outside and waited for them to emerge unarmed. Fortunately, nothing in the Court's opinion in *McDonald* suggests that was the case, and its extensive discussion of the plight of freedmen during Reconstruction highlights the need for a robust right to armed self-defense outside the home.

III. *TERRA INCOGNITA* AND EMERGING SECOND AMENDMENT DOCTRINE IN THE LOWER COURTS

Heller and *McDonald* answered the fundamental questions—whether the Second Amendment secures an individual right and whether that right is enforceable against the states—but they left to lower courts the arduous task of developing a detailed analytical framework for Second Amendment claims. The Court did not, however, send them out to explore this vast *terra incognita* without a map or compass.¹⁰³ The Court's opinions, by focusing on how the American

-
101. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY FOR 2004–08, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=44> (reporting that from 2004 to 2008, only 33.7% of violent crimes occurred in or near the home of the victim) (last visited Mar. 10, 2013); *Drake*, 2013 WL 3927735, at *13, *15 (Hardiman, J., dissenting) (“Obviously, confrontations and conflicts ‘are not limited to the home.’ . . . Because the need for self-defense naturally exists both outside and inside the home, I would hold that the Second Amendment applies outside the home.”) (quoting *Moore*, 702 F.3d at 936).
102. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038–42 (2010); see also *id.* at 3080–83, 3087–88 (Thomas, J., concurring in part and concurring in the judgment) (providing more detail and emphasizing that blacks routinely suffered violence in the North, as well).
103. See discussion *supra* section II.C. But see, e.g., *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir.), cert. denied, 132 S. Ct. 756 (2011) (“This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed core holding. . . . There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions.”) (internal citations omitted).

public likely understood the Second and Fourteenth Amendments upon ratification, indicate that courts in future challenges should similarly focus their attention on the public's understanding of the right to keep and bear arms in 1791 and 1868. *Heller* also makes clear that the Second Amendment has a limited scope¹⁰⁴ and that even within the range of activities protected by the Second Amendment, some activities—such as a law-abiding citizen's possession of a pistol for self-defense in the home—fall more closely to its center than others.¹⁰⁵ Similarly, *Heller* recognized that some regulations burden the right to keep and bear arms more than others, and the Second Amendment may set a lower hurdle for less burdensome regulations.¹⁰⁶ At the same time, the Court explicitly ruled out rational basis review for laws that burden Second Amendment rights.¹⁰⁷ Finally, *Heller* provided a non-exhaustive list of several types of gun laws that will presumably survive a Second Amendment challenge.¹⁰⁸

-
104. *See, e.g., Heller*, 554 U.S. at 626 (“Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-Century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”); *id.* at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.”); *id.* at 625 (“[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of *the scope of the right*.”) (emphasis added); *id.* at 634–35 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. . . . The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different.”).
105. *See id.* at 599 (declaring that self-defense “was the *central component* of the [right to keep and bear arms] itself”); *id.* at 628–29 (striking down the District of Columbia’s handgun ban because “the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of arms that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”) (internal quotation marks omitted).
106. *See, e.g., id.* at 632 (observing that the gunpowder storage laws Justice Breyer cited in his dissent “do not remotely burden the right of self-defense as much as an absolute ban on handguns” and asserting that the Court’s analysis does not “suggest the invalidity of laws regulating the storage of firearms to prevent accidents”).
107. *Id.* at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).
108. *See id.* at 626–27 & n.26; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion).

Armed with these tools, the federal courts of appeals have already filled in many of the gaps left by *Heller* and *McDonald* and have even reached a widespread consensus on the general framework that courts should follow when analyzing claims founded on the right to keep and bear arms. Even so, courts that apply this general framework disagree on two key issues. First, courts diverge in their treatment of *Heller*'s "presumptively lawful regulatory measures." Second, courts following the majority approach also disagree on whether—and if so, to what extent—the right to bear arms extends beyond the home.

A. Two-Step Analysis: Scope and Scrutiny

The overwhelming majority of federal courts of appeals that have entertained post-*Heller* Second Amendment claims have adopted a two-step approach for analyzing such claims.¹⁰⁹ According to the majority approach, courts will ask whether the challenged statute imposes a burden on conduct that falls within the Second Amendment's guarantee. If it does not, the statute is constitutional. If the statute *does* burden conduct that the Second Amendment protects, however, courts will ask whether it passes muster under the appropriate level of heightened review.¹¹⁰ For cases that advance to this second step,

109. Judge Brett Kavanaugh has proposed, and Judge Jennifer Elrod has endorsed, an alternative one-step approach that omits a "levels of scrutiny" analysis and focuses solely on constitutional text, history, and tradition. See *Heller v. District of Columbia*, 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Houston v. City of New Orleans*, 675 F.3d 441, 451–52 (5th Cir.) (Elrod, J., dissenting), *majority opinion withdrawn and superseded on reh'g* by 682 F.3d 361 (5th Cir. 2012). This alternative approach appears more consistent with *Heller*'s rejection of "judge-empowering 'interest-balancing inquir[ies].'" See *Heller*, 554 U.S. at 634–35; Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013). However, because the text-history-tradition approach has not gained a foothold in the federal courts of appeals, this Article proceeds using the majority two-step approach.

110. See *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.), *cert. denied*, 133 S. Ct. 375 (2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 700–04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

Just before this issue went to print, a divided panel of the Ninth Circuit announced that it would follow the majority two-step approach *except when confronted with a complete prohibition of the core right to armed self-defense*. When government prohibits nearly all "typical responsible, law-abiding citizen[s]" from exercising the core right to armed self-defense, the Ninth Circuit will decline to apply any form of scrutiny and will simply declare the prohibition invalid *per se*. See *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014).

courts will select a level of scrutiny greater than rational basis review—usually something approximating either intermediate or strict scrutiny—based on how close the burdened right comes to the core of the Second Amendment’s guarantee and how severely the challenged statute burdens that right.¹¹¹

The first federal court of appeals decision to articulate this bifurcated approach was the Seventh Circuit’s now-vacated decision in *United States v. Skoien*.¹¹² In an opinion by Judge Diane Sykes, a panel of the Seventh Circuit vacated a defendant’s conviction under 18 U.S.C. § 922(g)(9), which prohibits convicted domestic violence misdemeanants from possessing firearms. The defendant had moved to dismiss his indictment, arguing that prosecuting him under § 922(g)(9) violated his Second Amendment right to bear arms for hunting.¹¹³ The government defended the indictment merely by referencing *Heller’s* intention to leave intact “longstanding prohibitions on the possession of firearms by felons and the mentally ill.”¹¹⁴ Judge Sykes rejected the government’s superficial analogy to *Heller’s* “longstanding prohibitions,” observing that *Heller’s* “reference to exceptions cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights.”¹¹⁵

Judge Sykes began her analysis with an examination of *Heller*. She observed that *Heller’s* reference to exceptions could have been intended to mean that certain gun laws are valid because they burden conduct that “fall[s] outside the scope of the Second Amendment right as it was understood at the time of the framing,” or rather because “they are presumptively lawful under even the highest standard of scrutiny applicable to laws that encumber constitutional rights.”¹¹⁶ Without resolving that question directly, Judge Sykes interpreted *Heller* to “establish[] the following general approach” to claims founded on the right to keep and bear arms:

First, some gun laws will be valid because they regulate conduct that falls outside the terms of the right as publicly understood when the Bill of Rights was ratified. If the government can establish this, then the analysis need go no further. If, however, a law regulates conduct falling within the scope of the right, then the law will be valid (or not) depending on the government’s ability to satisfy whatever level of means-end scrutiny is held to apply; the degree of fit required between the means and the end will depend on how closely the law comes to the core of the right and the severity of the law’s burden on the right. . . . If the first inquiry into the founding-era scope of the right doesn’t

111. See sources cited *supra* note 110.

112. *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *vacated en banc*, 614 F.3d 638 (7th Cir. 2010).

113. *Id.* at 805.

114. *Id.* at 808 (citing *Heller*, 554 U.S. at 626).

115. *Id.* at 805.

116. *Id.* at 808.

resolve the case, then the second inquiry into the law's contemporary means-end justification is required.¹¹⁷

Applying this general approach, Judge Sykes noted that the first inquiry didn't yield a conclusive answer as to whether domestic violence misdemeanants fall outside the scope of the Second Amendment's guarantee as the founding generation originally understood it. But since the government had not argued the point, Judge Sykes proceeded on the assumption that the defendant's Second Amendment rights were intact.¹¹⁸ Turning to the second inquiry, Judge Sykes selected intermediate scrutiny as the appropriate level of review for the case. She noted that "strict scrutiny cannot apply across the board" to all Second Amendment claims, given "*Heller's* dicta about 'presumptively lawful' firearms laws."¹¹⁹ Because the defendant was a convicted domestic violence misdemeanor claiming a right to bear arms only for hunting purposes, Judge Sykes noted that the case presented a claim that was "several steps removed from the core constitutional right identified in *Heller*," to wit, the right of "law-abiding, responsible citizens" to bear arms for self-defense.¹²⁰ Judge Sykes therefore held that intermediate scrutiny provided the correct standard of review, and she remanded the case to the district court, giving the government an opportunity to discharge its burden on a more developed record.¹²¹

Judge Sykes's decision was later vacated when the Seventh Circuit reheard the case *en banc*,¹²² but it nonetheless proved highly influen-

117. *Id.* at 808–09 (citing 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 (2009); Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035 (2008); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1372–75 (2009); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1572–73 (2009)).

118. *Id.* at 810.

119. *Id.* at 811. This suggests that *Heller's* presumptively valid regulations are valid because they pass scrutiny (rather than because they fall outside the scope of the Second Amendment).

120. *Id.* at 812 (internal quotation marks omitted). See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

121. *Skoien*, 587 F.3d at 816.

122. See *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*). The Court held that just as First Amendment categorical exceptions have been expanded to include child pornography (even though it fails the historical test for obscenity), *Heller's* categories of presumptively valid gun laws "are not restricted to those recognized in 1791." *Id.* at 641. Even so, the court declined to rule whether domestic violence misdemeanants fall completely outside the scope of the Second Amendment's guarantee, subjected § 922(g)(9) to intermediate scrutiny, and found that it passes muster without any need for a more developed record. *Id.* at 641–45.

tial. Two weeks after the Seventh Circuit vacated Judge Sykes's opinion, the Third Circuit similarly found that *Heller* "suggests a two-pronged approach to Second Amendment challenges."¹²³ Under the Third Circuit's test, courts must ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," and if it does, they must then evaluate the law under some form of heightened review.¹²⁴ For guidance in selecting the appropriate standard of review, the Third Circuit opined that just as First Amendment claims receive a sliding scale of scrutiny, "depending upon the type of law challenged and the type of speech at issue," the level of review for Second Amendment claims should similarly hinge on the particular iteration of the right asserted and the degree to which the challenged statute burdens that right.¹²⁵ This framework ultimately led the Third Circuit to uphold, under an intermediate scrutiny test, the federal ban on the possession of firearms with obliterated serial numbers.¹²⁶

Judge Sykes's and the Third Circuit's two-prong test, or a substantially similar one, has been adopted by the Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and District of Columbia Circuits.¹²⁷ Additionally, just before this issue went to print, a divided panel of the Ninth Circuit announced that it will follow the scope-scrutiny approach in most Second Amendment cases, but it will omit the scrutiny step in favor of "*Heller*-style per se invalidation" when confronted with a complete prohibition of the core right to armed self-defense.¹²⁸ The lower federal courts have therefore widely settled on the two-step

It should also be noted that Judge Sykes, in a later case, wrote for a panel of the Seventh Circuit and formally adopted the scope-scrutiny two-step approach. See *Ezell v. City of Chicago*, 651 F.3d 684, 700-04 (7th Cir. 2011).

123. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

124. *Id.*

125. *Id.* at 96-97.

126. *Id.* at 98-99.

127. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.), *cert. denied*, 133 S. Ct. 375 (2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 700-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011).

128. See *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014) (declining to apply any form of scrutiny when government prohibits nearly all "typical responsible, law-abiding citizen[s]" from exercising the core right to armed self-defense).

scope—scrutiny method for evaluating most claims founded on the Second Amendment right to keep and bear arms.¹²⁹

B. Differing Treatment of *Heller*'s Longstanding, Presumptively Lawful Regulations

While most of the federal circuits have settled on a bifurcated scope—scrutiny framework for dealing with Second Amendment challenges, they disagree on where to place *Heller*'s “presumptively lawful regulatory measures” on that framework. Some circuits treat them as categorical exceptions that either presumptively or conclusively burden conduct that falls completely outside the scope of the Second Amendment's protections.¹³⁰ Such courts draw an analogy to categories of speech that receive no First Amendment protection, such as obscenity and incitement, and find it unnecessary to subject *Heller*'s presumptively valid laws to any form of review. Other circuits have instead opted to regard *Heller*'s presumptively valid regulations as burdens on conduct that *is* protected by the Second Amendment but which presumptively pass muster in a facial attack.¹³¹ This is not an inconsequential distinction, because as-applied challenges to *Heller*'s exceptions can theoretically succeed in courts that adopt the latter approach.

Both approaches have considerable merit. Courts adopting the first approach observe that *Heller* repeatedly stressed the limited

129. *But see, e.g.*, *United States v. Decastro*, 682 F.3d 160, 166–68 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013) (reserving heightened scrutiny only for laws that “substantially burden” the exercise of Second Amendment rights).

130. *See, e.g.*, *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011). In a small but not insignificant variation of the Eighth and Third Circuits' approach, the District of Columbia and Fifth Circuits have treated *Heller*'s exceptions as regulations that, due to their “longstanding” public acceptance, are “presumed not to burden conduct within the scope of the Second Amendment.” *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (emphasis added); *see also Nat'l Rifle Ass'n of Am.*, 700 F.3d at 196–97 (adopting the D.C. Circuit's formulation).

131. *See, e.g.*, *United States v. Chester*, 628 F.3d 673, 678–80 (4th Cir. 2010) (contrasting *Heller*'s “dangerous and unusual weapons” exception, which refers to arms that are completely outside the scope of the Second Amendment, with *Heller*'s “presumptively lawful regulatory measures,” which the court interpreted to refer to regulations on conduct that *does* fall within the scope of the Second Amendment); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir.), *cert. denied*, 131 S. Ct. 805 (2010) (“*Heller* referred to felon disarmament bans only as ‘presumptively lawful,’ which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge.”); *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010) (upholding the constitutionality of 18 U.S.C. § 922(g)(9) as a “presumptively lawful ‘longstanding prohibition[] on the possession of firearms,’ a category of prohibitions the Supreme Court has implied survives Second Amendment scrutiny”) (emphasis added) (citing *Heller*, 554 U.S. at 626).

scope of the Second Amendment's guarantee and that it even invoked the First Amendment's categorical exceptions when discussing the limited scope of the right to keep and bear arms.¹³² Furthermore, the Court itself called its list of presumptively valid regulations "exceptions" for which there are "historical justifications" and did so in the context of an opinion that stressed that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them."¹³³ Courts that adopt the first approach have also focused on what *Heller* said immediately following its list of presumptively valid regulations:

We also recognize *another important limitation* on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons *protected* were those "in common use at the time." We think that *limitation* is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."¹³⁴

This passage plainly refers to a class of arms outside the "protect[ion]" of the Second Amendment's guarantee, and some courts contend that this passage in *Heller* equates laws prohibiting "dangerous and unusual weapons" with the list of presumptively valid regulations that immediately precedes the passage.¹³⁵

On the other hand, courts that adopt the second approach also find support in the language and decision method of *Heller*. They note that *Heller* declined to establish a standard of review for Second Amendment claims, opting instead to invalidate the District of Columbia's gun laws on the ground that they would fail *any* standard of scrutiny. Interpreting *Heller's* exceptions as laws that *pass* any standard of scrutiny would give the decision a certain symmetry, they observe.¹³⁶ Furthermore, the historical pedigree of *Heller's* list has never been established, and courts have read *Heller's* originalist approach to require the application of heightened review if a historical inquiry does not definitively resolve the "scope" portion of the scope-scrutiny analysis.¹³⁷ Finally, the Court used the term "*presumptively* lawful"—not "*categorically* lawful"—to describe its list of longstanding regulations. Lower courts adopting the second approach have often found this language to indicate that as-applied challenges to *Heller's* list of regulations may well succeed.¹³⁸ Such courts have therefore found it inappropriate to treat them as categorical Second Amendment excep-

132. See, e.g., *Bena*, 664 F.3d at 1183.

133. *Heller*, 544 U.S. at 634–35; see, e.g., *Bena*, 664 F.3d at 1183; *Marzzarella*, 614 F.3d at 91.

134. *Heller*, 554 U.S. at 627 (emphases added) (citations omitted).

135. See, e.g., *Marzzarella*, 614 F.3d at 91.

136. See, e.g., *Chester*, 628 F.3d at 679.

137. See, e.g., *Chester*, 628 F.3d at 679–80; *Williams*, 616 F.3d at 692.

138. See, e.g., *Chester*, 628 F.3d at 679; *Williams*, 616 F.3d at 692.

tions that fail at step one of the scope–scrutiny analysis and instead will subject them to heightened scrutiny in as-applied challenges.¹³⁹

C. Different Approaches to the Right to Armed Self-Defense Outside the Home

The U.S. Courts of Appeals are also divided on the issue of whether—and if so, to what extent—the Second Amendment protects a right of armed self-defense outside the home. Generally, most circuits have tried to avoid the question.¹⁴⁰ The Second, Seventh, and Ninth Circuits, however, have directly stated that the right to armed self-defense extends beyond the home,¹⁴¹ while the Fourth Circuit has strongly suggested that it will decline to recognize such a right until the Supreme Court provides further guidance on the issue.¹⁴² Finally,

139. See, e.g., *Chester*, 628 F.3d at 679; *Williams*, 616 F.3d at 692.

140. See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1210–11 (10th Cir. 2013) (in a challenge where plaintiff waived argument as to ban on open carry of firearms, holding that the *concealed* carry of firearms falls outside the scope of the Second Amendment); *Hightower v. Boston*, 693 F.3d 61 (1st Cir. 2012) (upholding revocation of a concealed weapons permit, noting that the Supreme Court has indicated that prohibitions on *concealed* carry do not run afoul of the Second Amendment and failing to address whether the right to bear arms *openly* extends beyond the home); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013) (rejecting facial challenge to Georgia law that prohibits the carry of firearms in “places of worship” without the express prior approval of management, noting that trespass law was part of the historical background of the Second Amendment); *United States v. Dorosan*, 350 F. App’x 874 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1714 (2010) (assuming, without deciding, that the right to bear arms extends to one’s vehicle and upholding a conviction for possession of a loaded handgun in a vehicle in a post office parking lot).

141. See *Moore v. Madigan*, 702 F.3d 933, 935–37 (7th Cir. 2012) (striking down Illinois’s flat prohibition on the carry of firearms in public and holding that the right to bear arms is not limited to the home); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 & n.10 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (upholding New York’s discretionary concealed carry licensing regime but recognizing that *Heller’s* and *McDonald’s* analyses suggest “that the [Second] Amendment must have *some* application in the very different context of the public possession of firearms” and that “[t]he plain text of the Second Amendment does not limit the right to bear arms to the home”); *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014) (“[T]he carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes ‘bear[ing] Arms’ within the meaning of the Second Amendment.”). *Cf. also Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (granting preliminary injunction against enforcement of Chicago ordinance that prohibited firing-range training within city limits).

142. See *United States v. Masciandaro*, 638 F.3d 458, 474–76 (4th Cir.), *cert. denied*, 132 S. Ct. 756 (2011) (declining to decide whether the right to bear arms extends past the home but strongly suggesting the court would confine the right to the home in a future case, citing with approval a decision by Maryland’s highest court that limited the right to the home) (citing *Williams v. State*, 417 Md. 479, 496, *cert. denied*, 132 S. Ct. 93 (2011) (“If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly.”)); *cf.*

while they have not squarely decided whether the Second Amendment has application outside the home, the First, Tenth, and Third Circuits have significantly weighed in on the potential scope of such a right.¹⁴³

The Fourth Circuit was the first federal court of appeals to extensively comment on *Heller's* potential applicability outside the home. In *United States v. Masciandaro*,¹⁴⁴ the Fourth Circuit upheld a defendant's conviction for possessing a loaded handgun in his vehicle while inside a national park area. Judge Paul Niemeyer wrote most of the opinion for the panel but wrote separately to express his belief that under *Heller*, the Second Amendment provides a "right to possess a loaded handgun for self-defense outside the home . . . at least in some form."¹⁴⁵ Judge Niemeyer's colleagues refused to join in that portion of his opinion. Writing for the rest of the panel, Judge J. Harvie Wilkinson III explained that the case did not make it necessary to decide the question because the panel unanimously agreed that "intermediate scrutiny of any burden on the alleged right would plainly lead the court to uphold the National Park Service regulation."¹⁴⁶

Judge Wilkinson could have stopped there, but he continued to make a broader point:

This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed core holding. On the question of *Heller's* applicability outside the home environment, we think it prudent to await direction from the Court itself. . . . The notion that "self-defense has to take place wherever [a] person happens to be," appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. . . . The whole matter strikes us as a vast terra incognita that courts should enter only upon necessity and only then by small degree.¹⁴⁷

also *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, No. 13-42, 2013 WL 3479421 (U.S. Oct. 15, 2013).

143. *Hightower v. City of Boston*, 693 F.3d 61, 72–74 (1st Cir. 2012) (rejecting a challenge to a Massachusetts gun license revocation, stating that the in-home possession of firearms for self-defense constitutes the "core" of the Second Amendment, any purported right to defensively carry a firearm in public falls outside the core, and even total prohibitions on concealed carry are presumptively lawful); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (in a challenge where plaintiff waived argument as to ban on open carry of firearms, holding that the *concealed* carry of firearms falls outside the scope of the Second Amendment); *Drake v. Filko*, No. 12-1150, 2013 WL 3927735 (3d Cir. July 31, 2013) (declining to decide whether the right to bear arms has application outside the home and holding that, even if it does, New Jersey's restrictive standard for issuing licenses to carry firearms in public is constitutional because it is "longstanding" and, alternatively, would pass intermediate scrutiny).

144. *Masciandaro*, 638 F.3d 458 (4th Cir. 2011).

145. *Id.* at 467.

146. *Id.* at 475.

147. *Id.* at 475 (*quoting* Volokh, *supra* note 117, 1515) (internal citation omitted).

In this passage, Judge Wilkinson cited with approval *Williams v. State*,¹⁴⁸ a case in which Maryland's highest court held that the possession of firearms in public falls outside the scope of the Second Amendment. In particular, Judge Wilkinson approved of *Williams's* statement that "[i]f the Supreme Court, in [*McDonald's*] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly."¹⁴⁹ Judge Wilkinson's opinion thus signaled that if a future case forces the Fourth Circuit to decide whether the Second Amendment applies outside the home, the court will follow in *Williams's* footsteps and hold that it does not.

Other federal courts of appeals have been less hesitant to acknowledge *Heller's* implications beyond the home. In *Kachalsky v. County of Westchester*,¹⁵⁰ the Second Circuit upheld New York's handgun licensing scheme, which requires concealed handgun license applicants to demonstrate "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."¹⁵¹ In doing so, the Second Circuit conceded that "the [Supreme] Court's analysis [in *Heller* and *McDonald*] suggests . . . that the Amendment must have SOME application in the very different context of the public possession of firearms."¹⁵² Indeed, "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home," the court observed.¹⁵³ The Second Circuit, therefore, proceeded on the assumption that the right to bear arms extends beyond the home but upheld New York's restrictive licensing standard on the grounds that "New York's restriction . . . has a number of close and longstanding cousins" and passes intermediate scrutiny.¹⁵⁴

Just two weeks after the Second Circuit decided *Kachalsky*, the Seventh Circuit struck down Illinois's general ban on the carry of loaded firearms in public in *Moore v. Madigan*.¹⁵⁵ In a 2–1 decision authored by Judge Richard Posner, the court concluded that a robust right to bear arms extends beyond the home and that Illinois could not

148. *Williams v. State*, 417 Md. 479, *cert. denied*, 132 S. Ct. 93 (2011).

149. *Williams*, 417 Md. at 1177; *see also Masciandaro*, 638 F.3d at 475 (supporting the holding in *Williams*).

150. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

151. *Id.* at 86 (*quoting* *Klenosky v. N.Y. City Police Dep't*, 75 A.D.2d 793, 793 (1st Dep't 1980), *aff'd on opinion below*, 53 N.Y.2d 685 (1981)) (internal quotation marks omitted).

152. *Kachalsky*, 701 F.3d at 89.

153. *Id.* at 89 n.10.

154. *Id.* at 89–101.

155. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). It is worth mentioning that before *Moore*, the Seventh Circuit had acknowledged that the right to bear arms extends beyond the home. *See Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (granting preliminary injunction against enforcement of Chicago ordinance that prohibited firing-range training within city limits).

make the “strong showing” required to justify its near-total prohibition on that right.¹⁵⁶ The court began with the observation that the Supreme Court’s historical analyses in *Heller* and *McDonald* strongly imply a right of armed self-defense outside the home.¹⁵⁷ Like the Second Circuit, the court further noted that the right to “bear” arms—as distinct from the right to “keep” them—probably did not refer to the home. “To speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage,” the court asserted.¹⁵⁸ Additionally, given the perils of life on the early American frontier, the court found that “a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home.”¹⁵⁹ Even in modern times, the court continued, one’s chances of suffering a violent attack are much greater outside the home, and confining the right of armed self-defense to the home would “create[] an arbitrary difference” and “divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”¹⁶⁰

In its decision, the Seventh Circuit acknowledged that Illinois’s prohibition was more restrictive than the New York permitting scheme upheld by the Second Circuit in *Kachalsky*. It nonetheless took issue with *Kachalsky*’s “suggestion that the Second Amendment should have much greater scope inside the home than outside,” given that “the interest in self-protection is as great outside as inside the home.”¹⁶¹ The Seventh Circuit also responded to Judge Wilkinson’s concerns regarding the propriety of navigating this “vast *terra incognita*,” observing that *Heller* and *McDonald* opened it up for exploration and “[t]here is no turning back by the lower federal courts.”¹⁶²

In the most recent and sweeping federal appeals court decision to squarely address the issue, a divided panel of the Ninth Circuit held in *Peruta v. County of San Diego* that the Second Amendment guarantees a robust right to armed self-defense beyond the doorstep.¹⁶³ *Peruta* involved a challenge to San Diego County’s restrictive concealed carry issuance policy, which, in combination with California’s overall regulatory landscape, effectively prohibited most citizens from carrying firearms outside their homes for protection.¹⁶⁴ In California, the open carry of firearms is generally prohibited, as is the concealed

156. *Moore*, 702 F.3d at 935–40.

157. *Id.* at 935–36, 937

158. *Id.* at 936.

159. *Id.*

160. *Id.* at 937.

161. *Id.* at 941.

162. *Id.* at 942.

163. *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014).

164. *Id.* at 3.

carry of firearms without a permit issued by one's city or county.¹⁶⁵ California law allows a county or city to issue a concealed carry permit only upon a showing of "good cause" by the applicant.¹⁶⁶ Interpreting this "good cause" requirement, the County of San Diego refused to issue permits unless applicants demonstrated "circumstances that distinguish [them] from the mainstream"—a concern for "one's personal safety alone" would not suffice.¹⁶⁷ In an opinion authored by Judge Diarmuid O'Scannlain, the majority conducted an exhaustive textual and historical analysis to determine the original public meaning of "bear Arms."¹⁶⁸ This analysis led the majority to conclude that "the Second Amendment [requires] that the states permit *some form* of carry for self-defense outside the home,"¹⁶⁹ and this form of carry—whether open or concealed—must be available to the "typical responsible, law-abiding citizen."¹⁷⁰ Because San Diego County effectively prohibited concealed carry for all but a chosen few, and because state law prohibited the only other possible carry method, the majority found that the county's policy "destroy[ed] (rather than merely burden[ed]) a right central to the Second Amendment . . ."¹⁷¹ The majority, therefore, held that "*Heller*-style per se invalidation" was appropriate and struck down the policy without applying any form of scrutiny.¹⁷²

Finally, while they have yet to squarely decide whether the Second Amendment has application outside the home, the First, Tenth, and Third Circuits have made significant contributions to the ongoing dialogue among the federal courts of appeals. The First Circuit, in rejecting a challenge to a Massachusetts concealed carry license revocation, stated that the in-home possession of firearms for self-defense constitutes the "core" of the Second Amendment; therefore, any purported right to defensively carry a firearm in public falls outside the core.¹⁷³ The court also observed that, specifically as to *concealed* carry, the Supreme Court has stated that even total prohibitions do not offend the Second Amendment.¹⁷⁴ Similarly, the Tenth Circuit, in a lawsuit where a plaintiff waived his challenge to a ban on the open

165. *Id.* at 2–3 (discussing CAL. PENAL CODE §§ 25400, 25850, 26350, 26150, and 26155).

166. *Id.* at 2–3 (discussing CAL. PENAL CODE §§ 26150, 26155, and 26160).

167. *Id.* at 3.

168. *Id.* at 9–49.

169. *Id.* at 61.

170. *Id.* at 53.

171. *Id.* at 48.

172. *Id.* at 56, 77.

173. *Hightower v. City of Boston*, 693 F.3d 61, 72 (1st Cir. 2012).

174. *Id.* at 73 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."); *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897) (stating

carry of firearms, relied on the same rationale to hold that the Second Amendment does not protect a right to concealed carry.¹⁷⁵ The court was careful, however, to stress the narrowness of its decision.¹⁷⁶ Most recently, the Third Circuit joined the discussion when a divided panel upheld New Jersey's restrictive standard for issuing licenses to carry firearms in public.¹⁷⁷ The majority held that even if the Second Amendment applies outside the home in some form, limiting that right to the extraordinarily small number of citizens who can show an "urgent necessity for self-protection" is constitutional because it is a "longstanding" regulation and, alternatively, would pass intermediate scrutiny.¹⁷⁸

This area of Second Amendment law is still in flux, and the federal courts of appeals continue to hotly debate the right's applicability outside the home. Perhaps that is why, as of the time of this writing, the Supreme Court has not yet granted certiorari in any of these cases, although its eventual intervention is inevitable.¹⁷⁹ As section

in obiter dicta that the Second Amendment "is not infringed by laws prohibiting the carrying of concealed weapons").

175. *Peterson v. Martinez*, 707 F.3d 1197, 1209–10 (10th Cir. 2013) (relying on the same passages from *Heller* and *Robertson*).
176. *Id.* at 1212 ("Peterson has affirmatively waived any challenge to the Denver ordinance's restriction on the open carrying of firearms.")
177. *Drake v. Filko*, No. 12-1150, 2013 WL 3927735 (3d Cir. July 31, 2013).
178. *Drake*, 2013 WL 3927735 at *1, *2. To meet this "urgent necessity" standard, an applicant must point to "specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." *Id.* at *1.
179. *See Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, No. 13-42, 2013 WL 3479421 (U.S. Oct. 15, 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 & n.10 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Georgia-Carry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013); *United States v. Masciandaro*, 638 F.3d 458, 474–76 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011); *United States v. Dorosan*, 350 F. App'x 874 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1714 (2010); *see also Williams v. State*, 417 Md. 479, 496 (2011), *cert. denied*, 132 S. Ct. 93 (2011) (Maryland Court of Appeals decision holding that possession of firearms in public falls outside the scope of the Second Amendment).

As of this writing, a petition for certiorari is still pending in *Drake*, and it appears that whether or not San Diego County seeks *en banc* review, a petition for certiorari may also be forthcoming in *Peruta*. The express conflict between the Ninth and Seventh Circuits and the Fourth Circuit (and not to mention Maryland's highest court), and the tension—to put it mildly—between the Ninth and Seventh Circuits and the Second and Third Circuits, will eventually necessitate the Supreme Court's intervention. *See Eugene Volokh, Third Circuit Upholds New Jersey's Highly Restrictive Scheme for Gun Carry Licenses*, VOLOKH CONSPIRACY (July 31, 2013), <http://www.volokh.com/2013/07/31/third-circuit-upholds-new-jerseys-highly-restrictive-scheme-for-gun-carry-licenses/> (guessing there is a "decent chance" that the Supreme Court will grant certiorari in *Drake* because "[t]here is something of a split between the circuits and state supreme courts that have upheld [restrictive permitting schemes], and the Seventh Circuit").

II.C. describes, however, *Heller* and *McDonald* strongly imply a robust right to bear arms for self-defense in public.¹⁸⁰ It therefore appears likely the Court will not keep the Second Amendment on house arrest for much longer. Even so, given that the Supreme Court itself has affirmed the constitutionality of bans on the *concealed* carry of firearms,¹⁸¹ recognizing a general right to armed self-defense would by no means cripple the government from regulating the *manner* in which firearms are carried outside the home.¹⁸² Additionally, even if the Court recognizes a right to armed self-defense in public, lower courts are very likely to disagree on the scope of that right¹⁸³ and particularly on their interpretation of *Heller's* sensitive places exception to the right. As the next two Parts argue, lower courts—and especially those that interpret *Heller's* dictum to establish categorical Second Amendment exceptions—should narrowly construe *Heller's* sensitive

180. See discussion *supra* section II.C.

181. See *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897) (“[T]he right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons”); see also *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”).

182. See, e.g., *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014) (“To be clear, we are not holding that the Second Amendment requires the states to permit concealed carry. But the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home.”); *Moore v. Madigan*, 702 F.3d 933, 938 (7th Cir. 2012) (“[A] state may be able to require ‘open carry’—that is, require persons who carry a gun in public to carry it in plain view rather than concealed.”); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 95–96 (2nd Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (acknowledging that the right to bear arms extends beyond the home but noting that outright prohibitions of *concealed* carry pass constitutional muster); *Drake*, 2013 WL 3927735, at *19 (3d Cir. July 31, 2013) (Hardiman, J., dissenting) (“The crux of these [state high court decisions upholding concealed carry bans but striking down total carry bans], endorsed by the Supreme Court [in *Heller*], is that a prohibition against both open and concealed carry without a permit is different in kind, not merely in degree, from a prohibition covering only one type of carry.”); *Peterson v. Martinez*, 707 F.3d 1197, 1210–11 (10th Cir. 2013) (holding that the Second Amendment does not guarantee a right to carry firearms *in concealment*, and as “longstanding prohibitions,” *concealed carry* bans pass muster at step one of the scope-scrutiny analysis).

183. Compare *Kachalsky*, 701 F.3d at 94 (“The state’s ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home.”) with *Moore*, 702 F.3d at 941 (disagreeing with *Kachalsky's* “suggestion that the Second Amendment should have much greater scope inside the home than outside,” given that “the interest in self-protection is as great outside as inside the home”), and *Peruta*, No. 10-56971, at 56–57, 64–69 (9th Cir. Feb. 13, 2014) (equating a near-total prohibition on defensive handgun carry with the near-total handgun ownership ban that *Heller* struck down and cataloguing disagreements with *Kachalsky*).

places passage in order to preserve *Heller's* strong general rule in favor of armed self-defense.

IV. THE DANGERS INHERENT IN ANALOGIES TO CATEGORICAL FIRST AMENDMENT EXCEPTIONS

As described in the previous Part, some federal courts of appeal regard *Heller's* longstanding regulations, including prohibitions on armed self-defense in sensitive places, as laws that conclusively receive no Second Amendment scrutiny.¹⁸⁴ Their choice to do so is not a completely unreasonable one, given *Heller's* mixed messages on the subject.¹⁸⁵ That said, courts interpreting *Heller's* list to establish categorical Second Amendment exceptions have good reason to narrowly construe it, especially as it relates to sensitive places. Declaring a law-abiding citizen's ability to defend himself—what *Heller* called the “*central component*” of the Second Amendment right—to receive no constitutional protection in a given location is very serious business.¹⁸⁶ Too many exceptions could swallow *Heller's* strongly implied

184. See, e.g., *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

185. See discussion *supra* section III.B.

186. *Cf. Marzzarella*, 614 F.3d at 93 (finding that just as restraint is necessary when extending the logic of categorical exceptions for unprotected speech to new types of speech, “prudence counsels caution when extending [*Heller's*] recognized exceptions to novel regulations unmentioned by *Heller*”); *Drake*, 2013 WL 3927735, at *16 (Hardiman, J., dissenting) (“Our hesitance to recognize additional exceptions [beyond those listed in *Heller*] is unsurprising in light of the fact that by doing so we are determining that a certain regulation is completely outside the reach of the Second Amendment”); *Drake*, 2013 WL 3927735, at *22 (Hardiman, J., dissenting) (“As we and other courts have stated, we must be cautious in recognizing new exceptions to the Second Amendment. After all, finding that a regulation is longstanding insulates it from Second Amendment scrutiny altogether Accordingly, unless history and tradition speak clearly, we should hesitate to recognize new exceptions.”); *United States v. Skoien*, 614 F.3d 638, 649–50 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (warning that placing convicted domestic violence misdemeanants completely outside the Second Amendment’s protections is dangerous).

On the other hand, Judge Wilkinson suggested that the Fourth Circuit would confine *Heller* to the home because “circumscrib[ing] the scope of popular governance” is “serious business.” *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011); see also J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (arguing that *Heller*, like *Roe v. Wade*, improperly cut short the democratic process with a debatable interpretation of an ambiguous constitutional command). It bears mentioning, however, that Judge Wilkinson has not hesitated to circumscribe popular governance in other contexts when he thought the Constitution required it. As one example, Judge Wilkinson risked a circuit split while offering a novel, expansive interpretation of the Establishment Clause that cut short the democratic process. *Compare Joyner v. Forsyth Cnty.*, 653 F.3d 341 (4th Cir. 2011) (Wilkinson, J., for the court) (declaring unconstitutional a local govern-

right of self-defense outside the home. Courts should hesitate to take the value that lies at the core of the Second Amendment and place it wholly outside the Constitution's protections.

Strikingly, the analogy to categories of unprotected speech underscores the gravity of its use. True, the First Amendment right has its exceptions, but they are limited to those "*well-defined and narrowly limited* classes of speech, the prevention and punishment of which ha[ve] *never been thought to raise any Constitutional problem.*"¹⁸⁷ Even nude dancing, the historical protection and societal value of which is debatable,¹⁸⁸ has been found by courts to receive some basic quantum of constitutional protection.¹⁸⁹ It would be unwise for courts to broadly interpret *Heller's* sensitive places while equating them with categorical First Amendment exceptions, giving absolutely no protection to the core of the Second Amendment where citizens most often need it: outside the home.¹⁹⁰ Courts that treat *Heller's* sensitive places as categorical Second Amendment exceptions therefore have great reason to narrowly confine them.

Additionally, a critical difference between the right to free speech and the right to armed self-defense highlights a special danger of riddling *Heller's* right with too many geographic exceptions. If a person

ment's prayer policy that randomly invited religious leaders from the community—regardless of their religious or denominational affiliation—to offer nonproselytizing prayers to open public meetings), *with Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008) (upholding, under Supreme Court precedent, a similar prayer policy). To the extent that Judge Wilkinson is willing to circumscribe the scope of popular governance with a debatable interpretation of the Establishment Clause but at the same time unwilling to enforce a right to armed self-defense clearly implied by the Court in *Heller* and *McDonald*, one might wonder whether Judge Wilkinson has heeded the Court's command that the Second Amendment not be treated as a "second-class right." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3044 (2010) (plurality opinion); *id.* at 3058–88 (Thomas, J., concurring in part and concurring in the judgment) (like the plurality, declining to treat the right to keep and bear arms as a second-class right).

187. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (emphases added). *See Skoien*, 614 F.3d at 649 (Sykes, J., dissenting) (warning against imprecise analogies to categorical First Amendment exceptions in the Second Amendment context).
188. *See Barnes v. Glen Theatre*, 501 U.S. 560, 573 (1991) (Scalia, J., concurring in the judgment) (observing that the challenged ban on completely nude dancing "is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of 'the freedom of speech'").
189. *See, e.g., id.* at 566 (plurality opinion) (observing that totally nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"); *id.* at 581 (Souter, J., concurring in the judgment) (agreeing that totally nude dancing receives some First Amendment protection); *id.* at 587 (White, J., dissenting) (same).
190. *See* U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY FOR 2004–08, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=44> (last visited Mar. 10, 2013) (reporting that from 2004 to 2008, only 26.7% of violent crimes occurred in the home of the victim).

passes through a restricted location in the First Amendment context, he regains the ability to speak freely immediately upon exiting the location.¹⁹¹ Not so with the right to bear arms. To avail oneself of his right to armed self-defense after passing through a restricted location, one has to first retrieve his firearm, which he likely will have stored off-site. Unlike with First Amendment rights, increasing the number of restricted locations has the potential to chill the exercise of Second Amendment rights. Having to pass through several restricted locations in a day will dissuade a person from exercising his right to armed self-defense in other locations due to the burden of continually storing and retrieving his means of defense. This problem generally does not arise with First Amendment rights because the ability to speak follows a person wherever he goes.

In short, regarding *Heller's* sensitive places as categorical Second Amendment exceptions while at the same time adopting an expansive interpretation of them would run a serious risk of undermining the very value that the Second Amendment most strongly protects. As the next Part demonstrates, lessons from other areas of First Amendment law counsel in favor of a restrained interpretation of even *Heller's* enumerated sensitive places—schools and government buildings.

191. For example, take nonpublic and limited public forums, where the government may constitutionally impose even content-based restrictions on speech. In nonpublic forums, the government may exclude speakers as long as it does not do so on the basis of their viewpoint and the exclusion is otherwise reasonable in light of the property's purpose. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1988). In limited public forums, exclusions of speakers who do not fall within the class to which the forum has been held open also merit only reasonableness review, even if the class has been defined on the basis of content. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum . . .") (internal quotation marks omitted); *see also* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1989 (2011) (summarizing the constitutional rules applicable to limited public forums).

A speaker may therefore have to refrain from communicating his message in a limited or nonpublic forum if that message would violate the forum's "lawful boundaries," but he regains his freedom to speak his mind as soon as he exits the restricted location. At a public university's town hall meeting with a politician, for instance, the university may prohibit attendees from speaking out of turn or shouting epithets at the guest, but an attendee wishing to voice his criticism of the guest or shout out of turn regains the freedom to do so as soon as he steps outside. *Cf., e.g., University of Florida Student Tasered at Kerry Forum*, YOUTUBE (Sept. 17, 2007), <https://www.youtube.com/watch?v=6bVa6jn4rpE> (depicting a public university student's controversial—but arguably lawful—arrest for refusing to comply with a town hall meeting's rules).

V. HOW FIRST AMENDMENT DOCTRINES SUGGEST A CAUTIOUS APPROACH TO *HELLER*'S ENUMERATED SENSITIVE PLACES

Just as they do with the First Amendment's categorical exceptions, courts regarding *Heller*'s sensitive places as categorical Second Amendment exceptions should narrowly confine them to those few areas where bans on the carry of firearms "have never been thought to raise any [c]onstitutional problem."¹⁹² But what should lower courts do about *Heller*'s enumerated sensitive places—"schools" and "government buildings"? These examples from *Heller* may at first glance appear unambiguous, but closer examination reveals that they are not. The term "schools" might refer to primary and secondary schools only or also to post-secondary colleges and universities. The Supreme Court's reference to "government buildings" might encompass only actual *structures* where sensitive government business takes place or might instead broadly imply that the government may prohibit armed self-defense whenever it acts as property owner. This Part argues that lessons from First Amendment student-speech jurisprudence and public-forum doctrine caution against expansive interpretations of *Heller*'s listed sensitive places.

Before proceeding, it is necessary to deal with an obvious objection. Some courts and commentators have cautioned against the wholesale importation of First Amendment doctrines into Second Amendment jurisprudence.¹⁹³ This Article heeds their warning. The argument here is not that First Amendment forum doctrine and student-speech jurisprudence should be cloned and imported in unmodified form directly into Second Amendment doctrine. Rather, this Part argues merely that broad themes from First Amendment law, at some level of generality, suggest a cautious approach to interpreting *Heller*'s enu-

192. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

193. *See, e.g., Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (cautioning against the wholesale importation of "substantive First Amendment principles" and declining to apply prior-restraint doctrine to Second Amendment claims); Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 99 (2012) ("The right to free speech differs in important descriptive, normative, and functional ways from the right to keep and bear arms. As a consequence, analogies to First Amendment doctrine offer very little help in formulating Second Amendment doctrine."). Not all commentators share Professor Magarian's skepticism of First Amendment analogies. *See, e.g.,* Glenn H. Reynolds & Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. 89 (2013) ("The Court's efforts [to modernize the Second Amendment by emphasizing individual self-defense], we argue, dissolve any ostensible tension between the rights guaranteed by the First and Second Amendments and should ease Professor Magarian's anxieties about the suitability of an individual right to private arms ownership in a liberal democracy.").

merated sensitive places. Even courts that have warned against the blanket adoption of First Amendment doctrines have nonetheless looked to broad themes in other areas of constitutional law—including the First Amendment—as guideposts.¹⁹⁴ This Article follows in their footsteps.

A. “Schools”—Student-Speech Jurisprudence and the Secondary–Post-Secondary Distinction

Heller listed schools as an example of a sensitive place where flat gun bans will presumably pass muster. Setting aside the unique issues raised by laws that prohibit guns in public university campus housing,¹⁹⁵ in public university classrooms,¹⁹⁶ and in private colleges

194. See, e.g., *Kachalsky*, 701 F.3d at 91–94 (cautioning against the wholesale importation of “substantive First Amendment principles” and declining to apply prior-restraint doctrine to Second Amendment claims but nonetheless looking to the Supreme Court’s obscenity, Fourth Amendment, and sexual-privacy decisions for the proposition that the right to bear arms should receive substantially less protection outside the home; *Kwong v. Bloomberg*, No. 12-1578, 2013 WL 3388446, at *4 (2d Cir. July 9, 2013) (applying First Amendment fee jurisprudence to a Second Amendment challenge to New York’s gun licensing fees); see also *United States v. Skoien*, 614 F.3d 638, 649 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (acknowledging that “[a]dapt[ing] First Amendment doctrine to the Second Amendment context is sensible in some cases” but disapproving of the Seventh Circuit’s offhanded comparison of domestic violence misdemeanor-in-possession bans to categorical First Amendment exceptions); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (“Labels aside, we can distill this First Amendment doctrine and extrapolate a few *general* principles to the Second Amendment context.”).

195. Students who challenge gun bans in public university housing may draw on *Heller*’s and *McDonald*’s emphases on the “home” and argue that the government cannot constitutionally condition access to campus housing on the relinquishment of the right to keep and bear arms. See generally Volokh, *supra* note 117, at 1529–33 (discussing the special considerations at play when the government restricts constitutional rights in public housing). In fact, an Idaho state trial court recently confronted and rejected such a claim. See *Tribble v. State Bd. of Educ. & Bd. of Regents of the Univ. of Idaho*, SMARTGUNLAWS.ORG, <http://smartgunlaws.org/wp-content/uploads/2012/06/TribbleDecision.pdf> (last visited Mar. 20, 2013).

196. Colleges certainly have a greater interest in regulating student conduct in the classroom learning environment than they do on other parts of campus where classroom instruction does not take place. On the other hand, one could make a strong argument that lawfully *concealed* firearms—which by definition must remain hidden from sight—have much less potential to disrupt the learning environment than *Tinker*’s *unconcealed* armband. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 517–18 (1969) (Black, J., dissenting) (describing the disruption caused by high school students’ wearing of armbands to protest the Vietnam War). Perhaps future scholarship might explore how the fact of a firearm’s concealment should factor into the balance between college students’ right to armed self-defense and their schools’ interest in regulating classroom conduct for the education and safety of their students.

that object to the carry of firearms on their property,¹⁹⁷ what should lower courts do with untailed general prohibitions on the carry of firearms on college campuses? *Heller* did not specify whether its schools category should encompass post-secondary educational institutions,¹⁹⁸ but broad lessons from student-speech jurisprudence suggest that colleges and universities are less sensitive than primary and secondary schools. Courts, and especially those that interpret *Heller* to establish categorical Second Amendment exceptions, should therefore interpret *Heller*'s "schools" to encompass only primary and secondary educational institutions.

As a starting point, the Supreme Court has made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁹⁹ The Court has relied on this proposition to protect students' Fourteenth Amendment right to due process and Fourth Amendment right against unreasonable searches and seizures.²⁰⁰ It would be inconsistent with these precedents to hold that the Second Amendment offers no protection at all for law-abiding, adult students at public universities who—unlike primary and secondary school students—fall within the Second Amendment's guarantee.²⁰¹ College students do not forfeit their consti-

197. The Eleventh Circuit has recognized that the Framers wove into the fabric of the Second Amendment traditional notions of criminal law, tort law, and private property law, which have always protected the right of private property owners to exclude unwanted visitors or activities from their land. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261–66 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013).

198. As used in this Article, the terms "post-secondary educational institution," "college," and "university" all refer interchangeably to institutions of higher learning where first-year students typically have attained the age of eighteen.

199. *Tinker*, 393 U.S. at 506. The Court further held: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Id.* at 511.

200. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975) (citing *Tinker* for the proposition that public school students "do not 'shed their constitutional rights' at the schoolhouse door"); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (citing *Tinker* and *Goss* and observing that "[i]f school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students").

201. *Heller* stressed that the Second Amendment right inheres most strongly in "law-abiding, responsible citizens." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added). Several federal courts of appeals have suggested that the right to keep and bear arms does not extend to juveniles and may not even fully extend to those below the age of twenty-one. *See, e.g., United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009) (upholding a partial federal ban on the possession of firearms by juveniles); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012) (upholding a federal law that prevents those under the age of twenty-one from purchasing handguns from

tutional rights simply because they step onto a public university campus.²⁰²

At the same time, the Supreme Court has also recognized that the First Amendment's protections do not sweep as widely for students in a classroom as they do for adults.²⁰³ For example, high schools may punish even silent, passive expressions of opinion that "materially and substantially disrupt the work and discipline of the school" or "involve[] substantial disorder or invasion of the rights of others."²⁰⁴ They may also prohibit "vulgar and lewd speech" that would "undermine the school's basic educational mission."²⁰⁵ The Court has similarly allowed a high school to punish students for displaying a sign at a school event that could be "reasonably viewed as promoting illegal drug use."²⁰⁶ And in what many commentators have lamented as the Court's most restrictive interpretation of students' free speech rights, the Court held in *Hazelwood School District v. Kuhlmeier* that high schools may "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."²⁰⁷

Interestingly, each of these decisions limiting student speech rights took place in the high school context,²⁰⁸ and the Supreme Court placed a strong emphasis on the youth and immaturity of the speakers (and listeners). In *Bethel School District No. 403 v. Fraser*, the Court upheld a high school's suspension of a student for his delivery of a vulgar student government campaign speech, emphasizing that the

licensed dealers and noting that twenty-one was the age of majority at the time the Second Amendment was ratified).

202. See *Goss*, 419 U.S. at 574 ("[Public school students] do not shed their constitutional rights at the schoolhouse door.") (internal quotation marks omitted).
203. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (observing that the Court's student speech cases affirm that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").
204. *Tinker*, 393 U.S. at 513.
205. *Fraser*, 478 U.S. at 685.
206. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).
207. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). For scholarly criticism of the *Hazelwood* decision and arguments why it should not be extended to the public university context, see Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 TENN. L. REV. 481 (2001); Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002).
208. See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring in the judgment) ("Our . . . cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education.") (internal citations omitted).

First Amendment does not permit “*children* in a public school” as much latitude as “*adults* in other settings.”²⁰⁹ The Court called the student who delivered the offensive remarks a “confused *boy*,” noting that his sexually explicit language “could well be seriously damaging to its *less mature audience*, many of whom were only 14 years old and on the threshold of awareness of human sexuality.”²¹⁰ In *Hazelwood*, the Court upheld a high school principal’s decision to censor portions of a school newspaper issue that described students’ experiences with pregnancy and parental divorce. The Court reasoned that schools “must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to . . . teenage sexual activity in a high school setting.”²¹¹ In *Morse v. Frederick*, the Court upheld a high school principal’s suspension of students who, at a school event, unfurled a banner that read “BONG HiTS 4 JESUS.”²¹² In its opinion, the Court called the students “schoolchildren” and emphasized the effects of illicit drug use among “young people,” declaring that schools have an “important—indeed, perhaps compelling interest” in deterring youth from illegal drug use.²¹³

These dicta suggest as a general proposition that older and more mature college students might enjoy broader constitutional rights than their primary and secondary school counterparts, and that colleges and universities are less sensitive than elementary, middle, and high schools.²¹⁴ The Supreme Court has even suggested in other contexts that the First Amendment distinction between secondary and post-secondary students may be one of kind and not simply degree.²¹⁵

Coincidentally, in *Hazelwood*, the Court expressly recognized the possibility that students’ free speech rights might admit a second-

209. *Fraser*, 478 U.S. at 682 (emphases added).

210. *Id.* at 683 (emphases added).

211. *Hazelwood*, 484 U.S. at 272.

212. *Morse v. Frederick*, 551 U.S. 393, 397, 403 (2007).

213. *Id.* at 407 (internal quotation marks omitted).

214. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring in the judgment) (“Our . . . cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”) (internal citations omitted).

215. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 276–77 n.14 (1981) (in an Establishment Clause case, noting that “[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University’s policy is one of neutrality toward religion.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (observing that “[t]he college classroom with its surrounding environs is *peculiarly* the marketplace of ideas”) (emphasis added) (internal quotation marks omitted).

dary–post-secondary distinction, although it declined to decide the question.²¹⁶ Facing this lack of clear guidance, lower courts have divided over whether *Hazelwood*'s extremely deferential standard should apply in the university setting,²¹⁷ but even those courts that do apply it to post-secondary curricular student speech have recognized that what counts as reasonable editorial control may vary from the high school context to the college context.²¹⁸ These cases add further support to the notion that colleges and universities are generally less sensitive than primary and secondary schools.

Given these lessons from student-speech jurisprudence, lower courts that interpret *Heller* to establish categorical Second Amendment exceptions should narrowly interpret *Heller*'s “schools” and subject general gun bans on public college and university campuses to some form of heightened review, rather than uphold them at step one of the scope–scrutiny analysis. The Supreme Court has made clear that students do not give up their constitutional rights simply because they find themselves on a college campus, and courts have often suggested that the secondary–post-secondary distinction matters in the First Amendment context. It should matter in the Second Amendment context, as well.

B. “Government Buildings”—First Amendment Forum Doctrine and the Government as Property Owner

The Fifth Circuit has recognized in an unpublished opinion that the government generally has much broader authority to regulate the carry of firearms on its own property than it does in other locations.²¹⁹

216. *Hazelwood*, 484 U.S. at 273–74 n.7 (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

217. *Compare, e.g., Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc) (holding *Hazelwood*'s standard to apply in the context of post-secondary education); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (same), and *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344 (11th Cir. 1989) (same), with *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (refusing to apply *Hazelwood* in the post-secondary educational context), and *Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“[*Hazelwood*], in which the Court held that a high school newspaper whose production was part of educational curriculum was not a public forum, is not applicable to college newspapers.”).

218. *See, e.g., Hosty*, 412 F.3d at 734 (“To the extent that the justification for editorial control depends on the audience’s maturity, the difference between high school and university students may be important.”).

219. *See United States v. Dorosan*, 350 F. App’x 874, 875 (5th Cir. 2009), cert. denied, 130 S. Ct. 1714 (2010) (affirming defendant’s conviction for possessing a handgun in his car on property belonging to the U.S. Postal Service, observing that unlike in *Heller*, the government’s restriction “stemmed from its constitutional authority as the property owner”).

No serious scholar would disagree.²²⁰ The sticking point for courts in post-*Heller* challenges will be defining the *precise contours* of the government's authority to prohibit the defensive possession of firearms on its property, given the ambiguity of *Heller's* "government buildings" phrase. Courts might interpret *Heller's* government buildings phrase to stand for the proposition that the government enjoys unlimited authority in this area and that it may ban firearms whenever it acts as property owner. Or courts might instead narrowly interpret *Heller's* dictum to mean that the government enjoys broad authority to ban firearms only in actual *buildings* where sensitive government business takes place. This latter interpretation would draw a distinction between such buildings and other types of public property.

The interaction between the general public's²²¹ individual liberties and the government's authority as property owner is nothing new to constitutional law. First Amendment forum doctrine in particular comes to mind. Modern forum doctrine is premised on the notion that the scope of the government's authority to limit the exercise of individual liberties on its property hinges on "the character of the property at issue."²²² The Supreme Court has developed a fairly comprehensive sliding-scale approach to handling First Amendment claims on government property, wherein the strength of such claims depends almost entirely on whether the subject property is classified as a traditional public forum, designated (or "limited") public forum, or nonpublic forum.²²³ Certainly then, a one-size-fits-all approach to Second Amendment claims on government property would fail to harmonize with this most basic theme of First Amendment law. Even the broadest analogy to public-forum doctrine, therefore, counsels strongly against an interpretation of *Heller* that would give the government unfettered power to prohibit firearms on its property in all circumstances.²²⁴

220. See Volokh, *supra* note 117, at 1473 (2009) (describing how the government's authority to restrict individual liberties generally expands when it acts as proprietor).

221. This Article focuses on the relationship between the government as property owner and the general public to demonstrate the need for a restrained interpretation of *Heller's* "government buildings" passage. It does not address, for example, the special relationship between the government and public housing tenants or the government and its employees. For general observations about how Second Amendment doctrine might develop in those specific contexts, see *id.* at 1473–75, 1529–33.

222. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

223. See *Perry*, 460 U.S. at 45–46 & n.7; see also *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010) (using the terms "traditional public forums," "designated public forums," and "limited public forums").

224. *Cf.* Volokh, *supra* note 117, at 1533 ("Courts need to work out a government-as-proprietor doctrine for the right to bear arms much as they have done for the freedom of speech.").

Another basic theme of First Amendment forum doctrine—the public’s ability to acquire a right by longstanding historical use—suggests that citizens’ Second Amendment rights should receive heightened protection on at least some types of government property. In the First Amendment context, the government’s authority to regulate speech in “traditional public forums” such as parks, streets, and sidewalks, is narrowly circumscribed.²²⁵ The heightened protection of free speech in those locations owes to the fact that “they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²²⁶ Commentators have described this special protection of free speech as a prescriptive easement-type right by which longstanding public use of government property justifies curtailment of the government’s authority as property owner.²²⁷

This broad theme of First Amendment forum doctrine bears obvious application at the very least to national parks, which have “immemorially been held in trust for the use of the public and, time out of mind,” have accommodated the right to bear arms. American citizens have historically enjoyed the freedom to carry firearms in national parks for protection against dangerous wildlife, and severe restrictions on that freedom did not come about until 1984.²²⁸ As one small but enlightening illustration, the father of America’s national parks

225. *See Perry*, 460 U.S. at 45.

226. *Id.* (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

227. *See, e.g.*, Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1163 (2005) (calling the Supreme Court’s rationale for affording heightened protection to speech in traditional public forums the “prescriptive easement” justification).

228. The U.S. Department of the Interior prohibited the carry of loaded firearms in a small number of national park areas in 1966 but even then allowed the killing of “dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury.” *See* 31 Fed. Reg. 16652 § 2.11, 31 Fed. Reg. 16655 § 2.32 (Dec. 29, 1966). In 1984, the Department strengthened its restrictions on the carry of firearms in national parks, generally prohibiting the practice with only a few narrow exceptions. *See* 49 Fed. Reg. 18450 § 2.4 (Apr. 30, 1984); *Court Decision Blocks Guns in National Parks*, NBCNEWS.COM (Mar. 19, 2009), <http://www.nbcnews.com/id/29781541/> (observing that heavy restrictions on the carry of loaded firearms in national parks “were adopted by the Reagan administration in the early 1980s”). On January 9, 2009, the Department, acting at Congress’s command, changed the existing general prohibition on the carry of loaded firearms in national parks to generally allow carry in accordance with state law. *See* 36 C.F.R. § 2.4(h); *United States v. Masciandaro*, 638 F.3d 458, 461 (4th Cir.), *cert. denied*, 132 S. Ct. 756 (2011); *see also* 16 U.S.C. § 1a-7b(b) (stating that “The Secretary of the Interior shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm . . . in any unit of the National Park System or the National Wildlife Refuge System if the individual is not otherwise prohibited by law from possessing the firearm and the possession of the firearm is in compliance with the law of the State in which the unit . . . is lo-

himself, John Muir,²²⁹ was known to travel with companions who carried rifles.²³⁰ Muir even acknowledged in one of his writings that he once picked up a rifle in Yosemite to defend himself and others against a bear.²³¹ In light of national parks' historical accommodation of the right to bear arms, courts may find it appropriate to proceed to step two of the scope-scrutiny analysis if they confront a Second Amendment challenge to a carry restriction in a national park.²³²

cated.”). The practice of severely restricting the carry of firearms in national parks thus dates back only to 1984 and lasted for just twenty-five years.

229. See, e.g., *Who Was John Muir?*, SIERRA CLUB, http://www.sierraclub.org/john_muir_exhibit/about/ (last visited Sept. 3, 2013) (“John Muir . . . was America’s most famous and influential naturalist and conservationist. . . . He has been called ‘The Father of our National Parks’ . . . His words and deeds helped inspire President Theodore Roosevelt’s innovative conservation programs, including establishing . . . Yosemite National Park by congressional action.”). As Professor John Nagle observes:

John Muir was the “publicizer” of wilderness. Beginning in 1868, Muir hiked thousands of miles throughout the wild areas of the southeast, Yosemite, and Alaska. Muir then wrote about his experiences, founded the Sierra Club, and worked to persuade federal and state officials to preserve the lands he had visited. Muir often used biblical language to express the wonders of wilderness lands. Muir believed “that while God’s glory was written over all His works, in the wilderness the letters were capitalized.”

John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENVTL L. 955, 976 (2005) (quoting RODERICK FRAZIER NASH, *WILDERNESS IN THE AMERICAN MIND* 125 (4th ed. 2001)) (footnotes omitted).

230. See, e.g., JOHN MUIR, *THE YOSEMITE* 240, 246 (Century Co. 1912), available at http://www.sierraclub.org/john_muir_exhibit/writings/the_yosemite/chapter_15.aspx (describing how Galen Clark, the “most amiable of all [Muir’s] mountain friends,” often “would take his rifle . . . and go off hunting” in the Yosemite Valley, and “he always shot a deer, sometimes a grouse, and occasionally a bear”); JOHN MUIR, *OUR NATIONAL PARKS* 181–82 (Houghton Mifflin Co. 1901), available at http://www.sierraclub.org/john_muir_exhibit/writings/our_national_parks/chapter_6.aspx (describing how “[t]he most famous hunter of the [Yosemite] region” would use his rifle to shoot bears and had told Muir that he and his dog had “had close calls at times”).
231. JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* 184 (Houghton Mifflin Co. 1911), available at http://www.sierraclub.org/john_muir_exhibit/writings/my_first_summer_in_the_sierra/chapter_5.aspx (“I reluctantly went back to camp for [a companion’s] rifle to shoot [a bear that ventured too close to camp], if necessary, in defense of the flock. Fortunately I couldn’t find him, and after tracking him a mile or two towards Mt. Hoffman I bade him Godspeed and gladly returned to my work on the Yosemite dome.”).
232. Because federal law currently makes state firearms possession laws applicable in national parks, parks located in states with strict gun carry laws may be the target of future Second Amendment challenges. See 36 C.F.R. § 2.4(h) (“Notwithstanding any other provision in this Chapter, a person may possess, carry, and transport concealed, loaded, and operable firearms within a national park area in accordance with the laws of the state in which the national park area, or that portion thereof, is located, except as otherwise prohibited by applicable Federal law.”) (emphasis added).

This historic right to the defensive carry of firearms might also be said to extend to undeveloped government property in general, and especially any remote locations that provide habitats for large predators. In *Heller*, the Supreme Court suggested that the right to armed self-defense extends especially to those places where the need for protection is “acute.”²³³ The United States is home to a variety of large predators such as grizzly bears, cougars, and wolves, and the need for self-defense is certainly “acute” in the areas that these animals call home.²³⁴ Courts should regard such land—and any other public property where a broad right to carry firearms may historically have been permitted²³⁵—as a sort of “traditional public forum” in the Second Amendment context. At the very least, courts should not read *Heller*’s “government buildings” to encompass all government-owned property, and they should subject bans on the defensive carry of firearms in national parks and remote public lands to some form of heightened scrutiny.

Finally, one more important theme permeates First Amendment forum doctrine that may prove instructive in the Second Amendment context. In all types of government property—even nonpublic forums, where the government’s ownership power is at its height and citizens’ right to free speech is at its low watermark—the government lacks the

233. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

234. See, e.g., Karl Vick, *Bear Attacks Hit Record High in Alaska*, WASH. POST, Aug. 17, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081601930.html> (noting that a record eight Alaskans suffered bear maulings between January and August 2008 and quoting an Alaskan Fish and Game Department biologist as stating: “Most places in Alaska don’t have a persistent problem with bear or moose, because if it’s anywhere near the village, they shoot it, no questions asked.”); see also, e.g., *Francis v. Utah Div. of Wildlife Res.*, No. 201111027, 2013 WL 3788798 (Utah July 19, 2013), available at <http://www.utcourts.gov/opinions/supopin/Francis1343071913.pdf> (allowing parents of a deceased bear-attack victim to bring a negligence suit against the State) (last visited July 21, 2013); *id.* at 19–23 (Parrish, J., dissenting) (arguing that the state should receive statutory immunity from suit because dangerous wildlife is a “natural condition on publicly owned or controlled lands”); Alaska Dep’t of Fish & Game, *The Essentials for Traveling in Bear Country*, STATE ALASKA, <http://www.adfg.alaska.gov/index.cfm?adfg=livingwithbears.bearcountry> (recommending that hikers in bear country who have experience with firearms and wish to carry one for protection should choose a powerful weapon such as a “.300-Magnum rifle or a 12-gauge shotgun with rifled slugs” and noting that “[h]eavy handguns such as a .44-Magnum may be inadequate in emergency situations”) (last visited Sept. 4, 2013).

235. Several states allow the carry of firearms on a variety of nonpark government-owned property. As one small example, Wisconsin recently authorized its citizens to carry firearms in the state’s Capitol. See *Concealed Carry Frequently Asked Questions*, WISC. DEP’T ADMIN., <http://www.doa.state.wi.us/docview.asp?docid=8991&locid=0> (last visited Apr. 29, 2013). Future scholarship might seek to explore the prevalence, scope, and historical roots of similar practices in other states, as well as the recent nature of any current restrictions on such practices.

power to tread on the First Amendment's most sacred protection: the guarantee against viewpoint discrimination.²³⁶ Although perhaps somewhat of a stretch beyond *Heller's* and *McDonald's* core right of "self"-defense, courts might find that the Second Amendment contains a similar basic guarantee, such as a guarantee that the government may only disarm law-abiding, adult members of the general public on its property if it makes reasonable provision for their safety. Courts examining flat prohibitions on the defensive carry of firearms on government-owned property might therefore subject them to meaningful review if the government does not conduct sensitive business in those locations and has no armed security or metal detectors to assure the visiting public's safety.

VI. CONCLUSION

While the right secured by the Second Amendment, like others secured by the Bill of Rights, is not unlimited, a broad view of *Heller's* sensitive places exception has the potential to swallow *Heller's* strong self-defense rule. As lower courts have begun to develop Second Amendment doctrine in the wake of *Heller* and *McDonald*, many have looked to the First Amendment and have analogized *Heller's* presumptively valid laws to regulations on categories of speech that receive no constitutional protection, such as obscenity and incitement. This analogy is appealing, but it also illustrates why courts should not take a broad view of *Heller's* dictum. In the First Amendment context, categories of speech that receive no constitutional protection have been kept to a very small number, with strict definitions to avoid infringements on even marginally protected speech. In the same way, the vast majority of Second Amendment claims should receive some type of scrutiny or the right will mean little. Courts that interpret *Heller's* presumptively constitutional regulations as categorical Second Amendment exceptions should therefore narrowly confine them to their historical roots to prevent the Second Amendment from falling back into its pre-*Heller* oblivion. As this Article has shown, lessons from First Amendment forum doctrine and student-speech jurisprudence in particular caution against a broad reading of even *Heller's* enumerated sensitive places—schools and government buildings.

This is not to say that laws banning the carry of firearms on college campuses, national parks, and remote public lands are necessarily unconstitutional. Rather, this Article has advanced the more narrow argument that law-abiding litigants who challenge such laws should at

236. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.") (emphasis added).

the very least be entitled to their day in court, and the government should bear the burden to prove the ban's constitutionality under some form of heightened review. In the First Amendment context, courts have narrowly confined categories of speech that receive no constitutional protection to preserve the broad scope of the guarantee, but they have also recognized that constitutional protection and governmental regulation are not mutually exclusive. So should it be with the Second Amendment.