UCLA LAW REVIEW

Second Amendment Challenges to Student Housing Firearms Bans: The Strength of the Home Analogy

Michael L. Smith

ABSTRACT

Public colleges and universities or state governments often ban the possession of firearms on public university or college property. These bans typically extend to student housing. While much has been written about campus bans on the carrying of concealed firearms, the topic of gun bans in the student housing context has been largely unaddressed in Second Amendment literature. This Comment seeks to fill that gap by evaluating potential student challenges to firearms bans in the student housing context in light of potential standards of review courts may apply and in light of the U.S. Supreme Court's decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. This Comment concludes that students may challenge firearms bans in student housing by characterizing student housing as homes for purposes of Second Amendment analysis. Given the close analogy between the homes in *Heller* and *McDonald* and certain forms of student housing, these challenges are likely to persuade a court to strike down student housing firearms bans that prohibit the use of firearms in self-defense in students' homes for violating core Second Amendment protections, especially in cases involving apartment-style student housing.

AUTHOR

Michael L. Smith is an Articles Editor for the *UCLA Law Review*, Volume 61, and J.D. Candidate, 2014 at UCLA School of Law.

I would like to thank Professor Adam Winkler for his comments and suggestions on an earlier draft. I would also like to thank the editors of the *UCLA Law Review* especially Lauren Bernadett and Patrick Murray. I would also like to thank Alexander Hiland, Elaisha Nandrajog, and my family for their support.

TABLE OF CONTENTS

INTRODUCTION

Public universities or state governments typically ban the possession of firearms on public university or college property.[1] Many bans of firearms on university or college property extend to student housing.[2] This Comment addresses the constitutionality of these bans in light of the U.S. Supreme Court's decisions in *District of Columbia v. Heller*[3] and *McDonald v. City of Chicago*.[4] In the wake of *Heller* and *McDonald*, several courts have addressed the question of possession of firearms on public campuses in general, but no opinions have focused specifically on firearm ownership limited to student housing.[5] This Comment argues that students in public college and university student housing have a strong argument by analogy to *Heller* and *McDonald* and may raise viable chal-lenges to bans on the possession of firearms in student housing.

This Comment is relevant to the Second Amendment debate because *Heller*'s simultaneous strong support of Second Amendment protection of gun ownership in the home[6] and *Heller*'s "sensitive places" limitation[7] are on a collision course in the context of student housing, which is government property, but also is a place that students consider home. These competing provisions of *Heller* create a fundamental tension.

1. *See* Shaundra K. Lewis, *Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 IDAHO L. REV. 1, 4–8 (2011) (noting that prior to January 8, 2011, twenty-eight state legislatures and Guam completely banned guns on the premises of secondary schools and nineteen state legislatures gave educational institutions discretion to determine their own gun policies; of the nineteen discretionary states, "nearly all of the colleges and universities elected to be 'gun free'"); *see also Colleges and Universities That Allow Guns on Campus: A Guide for Students and Parents*, ARMED CAMPUSES, http://www.armedcampuses.org (last visited Mar. 26, 2013) (observing that out of over 4300 colleges and universities in the United States, only twenty-five allow "carrying of firearms on their premises").
2. *See* Lindsey Craven, Note, *Where Do We Go From Here? Handgun Regulation in a Post-*Heller *World*, 18 WM. & MARY BILL RTS. J. 831, 853 n.185 (2010).
3. 554 U.S. 570 (2008).
4. 130 S. Ct. 3020 (2010).
5. *See, e.g.*, DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 367 (Va. 2011) (addressing Second Amendment challenge by visitor seeking to carry concealed weapon into general campus buildings); Students for Concealed Carry on Campus, L.L.C. v. Regents of the Univ. of Colo., 280 P.3d 18 (Colo. App. 2010), *aff'd*, 271 P.3d 496 (2012) (en banc).
6. *Heller*, 554 U.S. at 571 (noting that a total handgun ban in the home would "fail [to pass] constitutional muster" under "any of the standards of scrutiny the Court has applied to enumerated constitutional rights").
7. *Id.* (noting that the Court's opinion should "not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings").

The success of a constitutional challenge to campus gun bans is contingent on many factors, including the standard of review applied to the challenge. Neither *Heller* nor *McDonald* provides a clear standard of review for Second Amendment cases,[8] and there is no scholarly consensus on how this issue should be resolved.[9] This Comment does not seek to propose or support a single standard of review for Second Amendment challenges. Rather, this Comment considers the strength of Second Amendment challenges and responses to these challenges in light of potential standards courts may apply.

Additionally, this Comment is limited to possession of firearms in public college and university student housing and will not address the issue of these educational institutions banning carrying concealed weapons beyond student housing. When discussing the strengths and weaknesses of students' Second Amendment challenges, this Comment assumes that such challenges are limited to university firearms bans in student housing.

Additionally, this Comment occasionally draws on the University of California at Los Angeles (UCLA), its policies, and its student housing model for purposes of illustration. UCLA is an ideal candidate for a case study of firearms bans in student housing. It is a public university that offers a variety of student housing options, including undergraduate dormitories on campus, university-owned graduate student apartments off campus, and university-owned graduate student family housing off campus.[10] The on-campus dormitories offer rooms cohabited by two to three students.[11] The off-campus housing offers apartment-style living where students have their own private rooms with a shared common area.[12] UCLA bans weapons, including firearms, in its on-campus housing and

8. *See* Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald*?*, 21 CORNELL J.L. & PUB. POL'Y 489, 490 (2012) (arguing that *Heller* and *McDonald* did not resolve the question of what standard of review applies to Second Amendment challenges).

9. *See generally* Craven, *supra* note 2, at 832 (advocating a strict scrutiny standard of review); Sobel, *supra* note 8, at 491 (proposing that courts review Second Amendment challenges using the undue burden test); 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, 1443 (2009) (arguing that typical scrutiny tests do not apply and that courts should consider scope, burden, danger reduction, and government-as-proprietor justifications); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 706 (2007) (arguing against a strict scrutiny approach to Second Amendment challenge and arguing in favor of a "reasonable regulations" approach).

10. *See generally* UCLA HOUS., UCLA STUDENT HOUSING MASTER PLAN 2011–2021 (2012), *available at* http://www.housing.ucla.edu/shmp/SHMP-2021-v1-19WEB.pdf.

11. *Id.* at 6.

12. *Id.* at 7.

its off-campus apartments.[13] This firearms ban in these various locations offers not only an example of an absolute ban on firearms but also an example of such a ban as applied to various types of student housing, from on-campus dormitories to off-campus apartments.

Part I of this Comment briefly summarizes *Heller* and *McDonald* and their impact on Second Amendment law. Part II raises the issue of weapons bans in public college and university student housing and argues that these bans place different provisions of *Heller* on a collision course. Part III evaluates the strength of potential constitutional challenges to these bans under various standards of review courts may apply. Part IV considers the argument that the government's role as proprietor rather than sovereign justifies firearms bans in student housing. Universities may make this argument regardless of the standard of review the court applies. This Comment concludes that students can raise strong challenges to the constitutionality of these restrictions, especially in the context of apartment-style housing.

I. *HELLER*'S STRENGTH AND LIMITATIONS

On June 26, 2008, the Supreme Court, in *District of Columbia v. Heller*, determined that the Second Amendment protects an individual's right to possess a firearm unconnected to service in a militia and struck down the District of Columbia's ban on private ownership or possession of handguns.[14] This was the first Supreme Court opinion holding that a law violated the Second Amendment.[15] This was also the first Supreme Court opinion to apply the Second Amendment substantively in almost seventy years.[16] The Court held that the Second Amendment protected

13. *See On Campus Housing Regulations*, UCLA OFFICE RESIDENTIAL LIFE, https://www.orl.ucla.edu/regulations (follow "A. General Conduct Regulations" hyperlink to "A.15 Weapons") (last visited Mar. 27, 2013) (banning firearm possession in on-campus student housing); UCLA UNIV. APARTMENTS N., UCLA UNIVERSITY APARTMENTS RULES AND REGULATIONS 53 (2012), *available at* http://www.housing.ucla.edu/housing_site/apartments/handbook/Student/Stu-5-Regulations.pdf (banning firearm possession in off-campus student apartments). Bans on nonlethal weapons as well as firearms may also be subject to Second Amendment challenges. *See* Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 231–32 (2009). This Comment, however, is limited to a discussion of firearms and challenges brought by students seeking to possess firearms rather than other weapons such as stun guns and tasers.

14. District of Columbia v. Heller, 554 U.S. 570, 622, 635 (2008).

15. Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of* District of Columbia v. Heller *and* McDonald v. City of Chicago, 19 VA. J. SOC. POL'Y & L. 1, 6 (2011).

16. *See* Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL. 273, 274 (2011) (noting that the Supreme Court's "only real Second Amendment case of the twentieth century" was *United States v. Miller*, 307 U.S. 174 (1939)).

the individual right to keep and bear arms for self-defense.[17] The Court noted that self-defense was the "central component" of the right to bear arms.[18]

Soon after *Heller*, the Supreme Court incorporated the Second Amendment against the states in *McDonald v. City of Chicago*.[19] In this decision, the Court overturned a Chicago handgun ban similar to the ban overturned in *Heller*.[20] The Court held that the Second Amendment right to keep and bear arms in self-defense is a fundamental right and incorporated the Second Amendment against the states.[21] Because of this incorporation, the challengers may use the Second Amendment to address the laws of states and localities, including public college and universities that operate an extensions of states.

Before addressing the details of these potential challenges, it is important to note two key characteristics of the *Heller* decision: *Heller*'s strong protection of handgun possession in the home, and *Heller*'s "sensitive places" limitation.

A. The Protection of the Home

The Court in *Heller* did not specify a level of scrutiny that courts should apply to Second Amendment challenges and did not provide any clarification in *McDonald*. This lack of specification prompted harsh words from dissenters, with Justice Stevens decrying *Heller* as unleashing a "tsunami of legal uncertainty" and criticizing the absence of a "rule that is clearly and tightly bounded in scope."[22]

While the Court did not outline a clear test, language pertaining to standards of review was not absent from its opinion. In *Heller*, the Court emphasized the importance of the home in the context of defending oneself, one's family, and one's property, and noted that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster."[23]

Whatever standard the Court may end up adopting to evaluate Second Amendment challenges, this language indicates that a blanket ban on handguns in the home fails under any standard of scrutiny.[24]

17. *Heller*, 554 U.S. at 592, 599.
18. *Id.* at 599 (emphasis omitted).
19. 130 S. Ct. 3020, 3026 (2010).
20. *Id.*
21. *Id.* at 3040–42.
22. *Id.* at 3105 (Stevens, J., dissenting).
23. *Heller*, 554 U.S. at 628–29 (footnote omitted) (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).
24. *See* Volokh, *supra* note 9, at 1463–64 (arguing that *Heller*'s language indicates per se invalidation of any law that severely burdens the Second Amendment right).

B. The "Sensitive Places" Limitation

While *Heller* was the first Supreme Court case to overturn a law on the grounds of the Second Amendment, the Court's language in *Heller* indicated that the scope of its opinion remained limited. The Court noted that its holding did not give the Second Amendment unlimited power:

> 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.[25]

The Court reiterated this limitation on their holding in *McDonald*, noting that "incorporation does not imperil every law regulating firearms."[26] In *Heller,* Justice Breyer argued that this limitation constituted an implicit rejection of strict scrutiny.[27] While this language was not central to *Heller*'s holding, post-*Heller* courts have upheld firearms regulations, citing this list of firearms prohibitions in *Heller* as authority.[28] Some courts have stated that this list serves to identify exceptions to the right to bear arms because the regulations included on this list apply to conduct falling outside the scope of the Second Amendment's protection.[29] Courts and scholars have recognized that this portion of *Heller* supports the argument that firearms bans on public campuses may survive Second Amendment challenges since these campuses are government property.[30]

25. *Heller*, 554 U.S. at 626–27.
26. *McDonald*, 130 S. Ct. at 3047.
27. *Heller*, 554 U.S. at 688 (Breyer, J., dissenting).
28. *See, e.g.*, United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) (upholding statute prohibiting felons from possessing firearms); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) (upholding same statute); United States v. Rene E., 583 F.3d 8, 12, 16 (1st Cir. 2009) (upholding federal ban on possession of firearms by juveniles).
29. *See* United States v. Huet, 665 F.3d 588, 600 (3d Cir. 2012); *see also* Doe v. Wilmington Hous. Auth., No. 10-473-LPS, 2012 WL 3065285 (D. Del. July 27, 2012). In *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), the court analogized this scope analysis to First Amendment jurisprudence which includes "categorical limits" on "obscenity, defamation, incitement to crime, and others." *Id.* at 641.
30. *See* DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 369–70 (Va. 2011) (holding that George Mason University's campus qualifies as a "sensitive place" under *Heller* because its buildings are owned by the government); *see also* Wasserman, *supra* note 15, at 36, 52.

II. *HELLER*'S "HOME" AND "SENSITIVE PLACES" ARE ON A COLLISION COURSE

Firearms are typically banned on the property of public educational institutions.[31] These bans are the result of an overall ban by the state legislature or are the result of a university's own policy.[32] Student housing is typically the property of the educational institution and therefore is often covered by these weapon bans.

Gun bans in student housing at public educational institutions place the previously mentioned portions of the *Heller* decision on a collision course. Public college or university students who live in student housing may consider it as their home. These students may argue that *Heller*'s affords them strong protection of firearm possession in the home. At the same time, the university may argue that the students reside in government buildings, which appear to be "sensitive places" under *Heller*.[33]

Public student housing illustrates an apparent contradiction in *Heller*'s provisions. This contradiction needs resolution. The remainder of this Comment contemplates Second Amendment challenges to a firearm policy similar to UCLA's absolute firearms ban in all student housing. This Comment assumes that students raising the Second Amendment challenge are otherwise lawful gun owners and meet age and background check requirements for gun ownership.

III. SECOND AMENDMENT CHALLENGES TO STUDENT HOUSING FIREARMS BANS

A. Argument by Analogy: Student Housing as "Home"

1. The Students' Analogy to *Heller* and *McDonald*

Heller's holding that self-defense is the "central component" of the Second Amendment's right to keep and bear arms provides the foundation for Second Amendment challenges to firearms bans in student housing.[34] Educational

31. *See* Lewis, *supra* note 1, at 4–8 (summarizing various state legislative bans and noting that when educational institutions have discretion, they almost all opt to ban firearms).
32. *Id.*
33. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).
34. *Id.* at 599 (emphasis omitted).

institutions' firearms bans infringe on students' Second Amendment rights by preventing students from owning any sort of firearm for purposes of self-defense, much like the petitioners in *Heller* and *McDonald*.[35] Most importantly, students are unable to possess these firearms in their dorms or university-owned apartment housing, where the students live.

The facts of *Heller* and *McDonald* will likely provide a successful analogy for students raising a Second Amendment challenge. *Heller* and *McDonald* both invalidated laws that were essentially blanket restrictions on the ownership and possession of handguns.[36] As stated previously, *Heller* notes that a ban on handguns in the home for purposes of self-defense would fail constitutional muster under any standards of scrutiny applied to enumerated constitutional rights.[37]

While this argument-by-analogy approach has not yet been used in Second Amendment challenges or employed by courts reviewing Second Amendment challenges, a case that illustrates this approach's potential is *Ezell v. City of Chicago*.[38] In *Ezell*, the court reversed and remanded the denial of a plaintiff's motion for a preliminary injunction to prevent the enforcement of a Chicago gun control ordinance.[39] The ordinance conditioned gun permits on the completion of a firearm-safety course, part of which required range training.[40] The ordinance also prohibited firing ranges within Chicago's city limits.[41]

The court held that the plaintiffs had a strong likelihood of success on their Second Amendment challenge to this law.[42] While basing this decision on a heightened form of scrutiny, the court's preliminary language suggested an alternate approach in different cases.[43] Before embarking on the discussion of Second Amendment scrutiny of laws and regulations, the court noted *Heller* and *McDonald*'s strong language against the prohibition of home handgun possession.[44] The court noted that "broadly prohibitory laws restricting the core Second

35. *See* Craven, *supra* note 2, at 854–55 (drawing the analogy between students in dormitories and the residents of Washington, D.C. in the *Heller* case).
36. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010); *Heller*, 554 U.S. at 574–75.
37. *Heller*, 554 U.S. at 628–29; *see also* Volokh, *supra* note 24 and accompanying text.
38. 651 F.3d 684 (7th Cir. 2011).
39. *Id.* at 690–92.
40. *Id.* at 691.
41. *Id.*
42. *Id.* at 711.
43. *Id.* at 708–09 (arguing that a "more rigorous showing" than an intermediate scrutiny standard should be applied to Chicago's firing range ban).
44. *Id.* at 703 (citing District of Columbia v. Heller, 554 U.S. 570, 628–35 (2008)).

Amendment right" are "categorically unconstitutional."[45] The court concluded that in "all other cases" the court chooses the appropriate standard of review.[46]

A substantial obstacle to any Second Amendment challenge is that *Heller* and *McDonald* do not establish a standard of review, leaving courts with the difficult task of determining such a standard.[47] As long as a student can establish a strong analogy to the facts of the *Heller* or *McDonald* cases, the reviewing court need not engage in this difficult task and may simply rely on *Heller*'s language that such a factual situation would not survive review under any standard.[48] Applying the approach suggested in *Ezell*, students may argue that campus firearms bans constitute the broad prohibitions on the core Second Amendment right, which are categorically unconstitutional.[49] If courts accept the argument's analogy to the facts of *Heller* and *McDonald* and conclude that campus bans constitute such broad prohibitions, courts can forego the establishment of any standard of review and rely on the reasoning suggested in *Ezell* as a sufficient basis to overturn the bans.

2. The Response: Whether Student Housing Is a "Home" for Second Amendment Purposes

The success of the argument by analogy turns on the definition of the word home.[50] Public educational institutions may argue that student housing is not a home as discussed by the Court in *Heller*. If student housing is not a home, then the argument by analogy loses the force of *Heller*'s language that prohibiting handgun possession in the home for purposes of self-defense will not pass constitutional muster under any standard of scrutiny.[51] If student housing is a home for purposes of Second Amendment review, a Second Amendment challenge is likely to succeed.[52]

45. *Id.*
46. *Id.*
47. *See* Philip J. Cook et al., *Gun Control After* Heller*: Threats and Sideshows From a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1064 (2009) (noting that *Heller* provides no theory to determine valid regulations or a generic test for violation of the Second Amendment); Ryan L. Card, Comment, *An Opinion Without Standards: The Supreme Court's Refusal to Adopt a Standard of Constitutional Review in* District of Columbia v. Heller *Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 BYU J. PUB. L. 259, 278 (2009) ("[T]he majority in *Heller* . . . failed to adopt a specific standard of constitutional scrutiny.").
48. *Heller*, 554 U.S. at 628–29.
49. *Ezell*, 651 F.3d at 703.
50. *See* Wasserman, *supra* note 15, at 37.
51. *Heller*, 554 U.S. at 628–29.
52. *See* Wasserman, *supra* note 15, at 37; *see also* Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235, 262 (2011) (noting that if a state legislature was to pass

Educational institutions may make two arguments that student housing does not constitute a home for purposes of Second Amendment analysis. Universities may argue that first, dormitories are so different from private residences that dormitories fall outside the typical definition of home. Second, universities may argue that refusing to define student housing as a home in the context of Second Amendment analysis resolves a seeming contradiction in the text of the *Heller* opinion.

a. The Argument From Different Characteristics

Student housing may not be considered a home because of its differences from private housing. In many cases, student dormitories are "communal living arrangements that often have shared bathrooms for an entire floor, common kitchen areas, and other shared spaces not typically found in private residences."[53] Confined to single rooms shared with one or two other students, student living spaces may create a semipublic space that does not typically exist in private residences. Students may sign agreements that give them limited rights to alter the characteristics of their dorm rooms, and many students leave their dormitory at the end of the school year.[54] This lack of permanent residency and the limitation on freedoms to alter the living space are also characteristics that may not be typical of private residences. These differences between dormitories and private residences all support the conclusion that a dorm room is not a home.

While the characteristics of a dormitory may be different from a typical private residence, a student's dorm room still functions like a home. A student typically contracts with the college or university to stay in the dorm room, similar to signing a lease for a private apartment. Students sleep, study, and socialize in dorm rooms, which are practices typically carried out in private residences.

Case authority supports these arguments by analogy. Courts have recognized dormitories as "a student's home away from home" for purposes of

legislation defining dorm rooms as homes, this may be an obstacle to public colleges' and universities' firearms bans in residence halls).

53. Miller, *supra* note 52, at 261.

54. *See, e.g.*, *On Campus Housing Move Out Procedures*, UCLA, http://map.ais.ucla.edu/portal/site/UCLA/menuitem.789d0eb6c76e7ef0d66b02ddf848344a/?vgnextoid=6355e799f749b010VgnVCM100000db6643a4RCRD (last visited Mar. 28, 2013) (describing UCLA's on-campus housing move-out deadlines).

Fourth Amendment protection.[55] In *Piazzola v. Watkins*,[56] the court held that a student occupying a "college dormitory room enjoys the protection of the Fourth Amendment."[57] Other dormitories in noncollege settings have also been held to constitute homes for Fourth Amendment purposes.[58]

In *Morale v. Grigel*,[59] the court noted that a student considers a dorm room to be a private place that is free from governmental intrusion without permission.[60] Despite the communal living arrangements of dormitories, the court held that students in dorm rooms have a reasonable expectation of privacy under the Fourth Amendment.[61]

Admittedly, the Fourth Amendment allows for a reasonable expectation of privacy in one's person, vehicle, and other locations not typically considered one's home.[62] Despite this, the language of *Morale* and other cases combined with cases that recognize the privacy interest in a dorm room support the conclusion that a dorm is a "home" for Second Amendment purposes. Students may argue that Fourth Amendment cases' recognition of dorm rooms as homes may transfer to Second Amendment analysis.

The arguments above, both for and against the definition of student housing as a home for purposes of Second Amendment analysis, are unsupported by direct authority. This is because courts have not yet taken the opportunity to define the term "home" in the Second Amendment context following *Heller*'s recent language. Ultimately, courts and possibly legislatures will have broad dis-

55. *See* Medlock v. Trs. of Ind. Univ., No. 1:11-cv-00977-TWP-DKL, 2011 WL 4068453, at *4 (S.D. Ind. Sept. 13, 2011) (noting that a number of courts have recognized that a dormitory room is a student's "home away from home" (internal quotation marks omitted)); Morale v. Grigel, 422 F. Supp. 988, 997 (D.N.H. 1976) (reasoning that "[a] dormitory room is a student's home away from home" for purposes of reasonable expectations of privacy in the Fourth Amendment context); Smyth v. Lubbers, 398 F. Supp. 777, 790 (W.D. Mich. 1975) (holding that student dorms are protected by the Fourth Amendment); *see also* Craven, *supra* note 2, at 853–54 (arguing that a dormitory room should be considered a home for purposes of a Second Amendment challenge); Bryan R. Lemons, *Public Education and Student Privacy: Application of the Fourth Amendment to Dormitories at Public Colleges and Universities*, 2012 BYU EDUC. & L.J. 31, 38 ("[C]ourts have unanimously determined that 'a student who occupies a college [or university] dormitory room enjoys the protection of the Fourth Amendment.'" (second alteration in original) (quoting Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971))).

56. 442 F.2d 284.

57. *Id.* at 289.

58. *See* Anobile v. Pelligrino, 303 F.3d 107, 118–21 (2d Cir. 2002) (holding that dormitories near a horse racetrack were homes for Fourth Amendment purposes due to high privacy expectations in the private rooms).

59. 422 F. Supp. 988.

60. *Id.* at 997.

61. *Id.*

62. *See, e.g.*, Katz v. United States, 389 U.S. 347, 359 (1967) (holding that there is a reasonable expectation of privacy over what is said within a public phone booth).

cretion in determining the definition of home for purposes of Second Amendment analysis, especially in the context of student dormitories.[63]

It is important to note, however, that the argument fails to address the situation of apartments owned by a public college or university. UCLA, for example, owns a number of off-campus apartment buildings that it uses to meet its ever-expanding student housing needs.[64] In the case of apartment-style housing, the student housing bears all the characteristics of a private apartment with the exception that an educational institution owns the building. While courts may be persuaded by arguments that dormitories lack the characteristics of private residences because of their shared spaces and facilities, courts will be hard pressed to apply similar reasoning to student housing that is almost identical to private apartments, with the mere difference of having a government landlord.[65]

b. The Argument From Contradiction Resolution

Public colleges and universities may argue that courts should refuse to define student housing as a home for purposes of Second Amendment analysis because this refusal resolves a seeming contradiction in the text of *Heller*. This argument arises from the two provisions previously identified: the provision that firearm possession in the home is strongly protected,[66] and the provision that *Heller* does not disturb longstanding firearms bans in schools or in government buildings.[67]

As previously noted, these two provisions of *Heller* seem to be on a collision course.[68] If student housing is defined as the student's home yet is still owned by the public college or university, then *Heller* seems to simultaneously indicate that the firearms ban will not survive under any standard of scrutiny and that the firearms ban should not be disturbed. Colleges and universities can argue that there is an easy way to avoid this seeming contradiction: refuse to define student housing as a home for purposes of Second Amendment analysis on the basis that student housing is a school or government property that *Heller*'s holding leaves untouched.

Students may reply by arguing that defining student housing as a home for Second Amendment purposes resolves the contradiction. If courts rule that student housing is the student's home, then the sensitive place classification does

63. *See* Wasserman, *supra* note 15, at 37.
64. UCLA HOUS., *supra* note 10, at 7.
65. The fact that the government is in the role of the landlord may still be constitutionally relevant. *See infra* Part IV.
66. District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).
67. *Id.* at 626–27.
68. *See supra* Part II.

not apply and firearm possession is protected under the Second Amendment. This approach would also appear to resolve the contradiction in *Heller*.

Additionally, the universities' argument is vulnerable to the counterargument that resolving the home debate in favor of government property may constitute an overly restrictive definition of the term home. This approach would also apply to public housing establishments in which a government landlord provides housing for low-income tenants at reduced rates.[69] Like student dormitories, public housing developments are "both government-owned buildings and citizen dwellings, thus producing an inherent conflict given the holding and dicta in *Heller*."[70] Resolving this conflict by not deeming government property a home for purposes of Second Amendment analysis would have the impact that the 1.16 million public housing units in the United States are not homes for the purposes of this analysis.[71]

Courts may still hold that when property at issue is government property, the property cannot simultaneously be a home. Courts may balk, however, at the prospect of applying this reasoning not only to student dormitories but also to public housing. Whether this result is consistent with the Second Amendment's core purpose of bearing arms in self-defense of one's home and family is especially questionable given the high need for self-defense in a public housing context.[72] Additionally, holding that government property cannot be a home in the context of Second Amendment analysis seems inconsistent with at least one court's treatment of public housing as a home for purposes of Fourth Amendment analysis.[73] While the logic of refusing to define government property as a home is clean, the impact of this definition may have an unappealingly broad scope.[74]

69. *See* Jamie L. Wershbale, *The Second Amendment Under a Government Landlord: Is There a Right to Keep and Bear Legal Firearms in Public Housing?*, 84 ST. JOHN'S L. REV. 995, 996 (2010).
70. *Id.* at 1033.
71. *See id.* at 998 (listing the number of public housing units).
72. *See id.* at 1005–07 (providing statistics on elevated violent crime and gun violence in public housing); *see also* Jason S. Thaler, Note, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 FORDHAM L. REV. 1777, 1777–78 (1995) (describing the high level of crime and violence in public housing). While Thaler concludes that high amounts of gun violence warrant gun bans in public housing, the counterargument remains that the more gun violence there is in a neighborhood, the more of a need there is for individuals to protect themselves from this violence.
73. *See, e.g.*, Davis v. City of New York, No. 10 Civ. 0699(SAS), 2012 WL 4813837, at *26 (S.D.N.Y. Oct. 9, 2012) (noting that Fourth Amendment protection of the home applies to plaintiffs living in public housing).
74. *See* Volokh, *supra* note 9, at 1475 (noting that "people's need for self-defense can remain even on government property" and that the constitutional analysis of public housing may be similar to the analysis of private property).

Universities may attempt to avoid this unpleasant conclusion by narrowing the conflict resolution to the conclusion that schools cannot be homes for purposes of Second Amendment analysis. If only schools cannot be homes, this leaves open the possibility that government property can still be a home, which would leave public housing unaffected by the university's argument.

While this argument is logically possible, it is vulnerable to criticism on the ground that it appears ad hoc. *Heller* defines both schools and government property as examples of "sensitive places."[75] While universities may limit their arguments to the claim that only schools are sensitive, nonhome places, there is no reason why these arguments cannot also apply to government property since both schools and government property are subcategories of the category "sensitive places." Additionally, recall that the force of the universities' argument derives solely from the fact that it resolves an apparent contradiction in *Heller*. Limiting the argument to schools alone leaves open a continuing contradiction between the provision deeming government property a sensitive place and the provision deeming the home as highly protected.

B. Strict Scrutiny

A student's Second Amendment challenge would likely succeed under a strict scrutiny standard of review. If the reviewing court adopts a strict scrutiny standard, the university's firearms ban must serve a compelling government interest and it must be narrowly tailored to meet that interest.[76] This standard is difficult for the university to meet, but not impossible.[77] While there are currently no Second Amendment cases that explicitly apply this level of scrutiny, this analysis is relevant to courts in Louisiana because a recent amendment to the state constitution requires strict scrutiny analysis of any restrictions on the "fundamental" right of "each citizen" to bear arms.[78]

75. District of Columbia v. Heller, 554 U.S. 570, 571 (2008).

76. *See* United States v. Marzzarella, 614 F.3d 85, 96 & n.14 (3d Cir. 2010) (defining strict scrutiny and rejecting it in the Second Amendment context).

77. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006) (noting that nearly one in three applications of strict scrutiny result in the reviewed law being upheld).

78. *See* LA. CONST. art. I, § 11 ("The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."); *see also* Eugene Volokh, *Newly Strengthened Louisiana Right-to-Arms Provision*, VOLOKH CONSPIRACY (Nov. 7, 2012, 12:36 PM), http://www.volokh.com/2012/11/07/newly-strengthened-louisiana-right-to-arms-provision.

1. The University's Possible Interests: Safety and Academic Freedom

Colleges and universities may argue that they have multiple compelling interests behind implementing their firearms ban. It may be strategic for colleges and universities to diversify the interests they use in their arguments in order to provide multiple possible avenues to meet the requirements of strict scrutiny.

The educational institution would likely be able to prove that it has a compelling government interest in the form of the safety and security of students at the university.[79] The government's concern for the safety of its citizens is a primary goal of the government and this interest will likely be recognized as being of paramount importance.[80]

The university may also argue that it has an interest in limiting its liability for the misuse of firearms by individuals on its campus. Schools have a duty to keep their students free from foreseeable harm, and have an interest in avoiding lawsuits resulting from a failure to adhere to this duty.[81] This interest is coextensive with the university's interest in the security of its students, as the harm to students would typically be the source of potential lawsuits against the university. Because the university will be liable only when its students or other individuals within the scope of the university's care are harmed, discussion on the university's interest in the safety and security of its students and the public applies to the university's parallel interest in limiting the university's liability for harm to its students.

Alternatively, one government interest that commentators have not fully explored in the context of addressing students' Second Amendment challenges is the government's interest in preserving academic freedom and maintaining an open learning environment.[82] This interest, however, has been noted by courts in the context of student Second Amendment challenges.[83] Public colleges and

79. *See* United States v. Salerno, 481 U.S. 739, 749–50, 754–55 (1987); *see also* Winkler, *supra* note 9, at 727.

80. *See* sources cited *supra* note 79.

81. *See* DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 370 (Va. 2011) ("[P]arents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm.").

82. *See* Craven, *supra* note 2, at 851 (mentioning the interest in an atmosphere conducive to learning but providing analysis on firearms bans' relationship to campus safety). *See generally* Lewis, *supra* note 1 (arguing that colleges and universities have a compelling interest in academic freedom in the context of challenging state laws mandating campuses to allow firearms).

83. *See* Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, L.L.C., 271 P.3d 496, 497 (Colo. 2012) (en banc) (noting that the defendant university justified its ban on firearm possession in part by stating that possession of firearms is inconsistent with the school's academic mission); *DiGiacinto*, 704 S.E.2d at 370 (noting that the university has a traditional mission of public education).

universities should argue for this interest as existing separately from, and in addition to, their compelling interest in public and student safety.[84]

A potential problem with the academic freedom interest is that academic freedom as a government interest has not been applied in the context of strict scrutiny. While Supreme Court rhetoric and dicta indicates that academic freedom is certainly valuable, the Court has not indicated whether this freedom constitutes a compelling interest for purposes of overcoming constitutional challenges.[85] Courts may hesitate to label academic freedom as being a compelling interest in the absence of direct authority.

2. Whether Student Housing Firearms Bans Are Narrowly Tailored to Achieve Student and Public Safety

Overcoming the narrow tailoring requirement of strict scrutiny is a far more daunting task than proving the existence of a compelling interest. There are several cases in which firearms restrictions have survived strict scrutiny, but these cases are limited to restrictions on the possession of firearms by those convicted of crimes.[86]

84. *See* Kathy L. Wyer, Comment, *A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah*, 2003 UTAH L. REV. 983, 1008–15 (noting Supreme Court language that indicates constitutional support of colleges' and universities' interest in academic freedom).

85. *See* Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003) (recognizing a law school's interest in academic freedom as informing the Court's holding that the school has a compelling interest in maintaining a diverse student body); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) (noting the national importance and essentiality of academic freedom); Lewis, *supra* note 1, at 15–18 (arguing for the importance of academic freedom and the strength of colleges' and universities' interest in academic freedom); *see also* Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 EDUC. L. REP. 1, 1–2 (2002) (noting that while the importance of academic freedom originates in the Court's language and is discussed in academia, the Court has not applied the interest academic freedom in a coherent form in its constitutional analysis); Lewis, *supra* note 1, at 17 (admitting that the Supreme Court has yet to expressly state that academic freedom is a distinct First Amendment right).

86. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001) (deeming restriction of gun ownership for person subject to domestic violence restraining order to be "narrowly tailored"); United States v. Miles, 238 F. Supp. 2d 297, 303 (D. Me. 2002); Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 827 (S.D. Ind. 1998) (holding that the restriction of gun ownership for a person convicted of a domestic violence offense and subject to restraining order passes strict scrutiny review); *see also* United States v. Patterson, 431 F.3d 832, 835–36 (5th Cir. 2005) (upholding a law banning gun possession by a convicted drug offender, although challenges to the law itself are not addressed); United States v. Darrington, 351 F.3d 632, 633–34 (5th Cir. 2003) (upholding conviction under ban on felon gun possession); United States v. Herrera, 313 F.3d 882, 885 (5th Cir. 2002) (upholding conviction for possessing firearms after drug conviction over the dissenting opinion that strict scrutiny was not met); Winkler, *supra* note 9, at 729 (noting that prior three cases, under *Emerson* test, upheld convictions despite strict scrutiny review standard).

A ban on firearm possession by convicted criminals is more likely to survive the narrow tailoring requirement because courts will probably find that convicted criminals have shown a disregard for the law and therefore may be likely to use firearms in illegal or dangerous ways.[87] These same arguments do not apply to students, many of whom have not been convicted of crimes.[88]

Colleges and universities face a difficult empirical challenge in arguing that a ban on firearms in student housing is narrowly tailored to meet the interest of student and public safety.[89] The relationship between increased gun possession and its impact on public safety is a difficult empirical question, with a vast and divided literature.[90] Because the literature is both extensive and far from conclusive, students bringing Second Amendment challenges will always have an array of studies and statistics from which they cite when appealing an unfavorable decision.[91] Students can argue that because the connection between the firearms ban and public safety cannot be conclusively established, the ban is not narrowly tailored.

Universities may argue that a ban on firearm possession in student housing meets the narrow tailoring requirement because students are uniquely dangerous to themselves and others.[92] Students in college may have an elevated risk for suicide because of the stress of attending college.[93] Students are also at an age during which they are more likely to experience initial onset of mental illness,

87. *See Gillespie*, 13 F. Supp. 2d at 827 (holding that ban on firearm possession by those convicted of domestic violence crimes survives the narrow tailoring requirement because it is limited to those who commit domestic violence crimes and are therefore statistically more likely to reoffend); *see also* Volokh, *supra* note 9, at 1498–99 (noting that *Heller* held that bans on felon gun possession are expressly constitutional and that worry of felon recidivism makes it "unlikely that the settled law on the subject will change").

88. *See Study Finds at Least 1-in-29 College Students Have Criminal Records*, MYBACKGROUNDCHECK.COM (Dec. 22, 2009, 4:01 PM), http://www.mybackgroundcheck.com/ blog/post/2009/12/22/Study-Finds-At-Least-1-in-29-College-Students-Have-Criminal-Records.aspx.

89. *See* Volokh, *supra* note 9, at 1467 (noting that the Supreme Court has suggested that substantial scientific proof may be a necessary requirement to overcome strict scrutiny).

90. *See id.* at 1465–67 (surveying the lack of scientific proof and empirical certainty on this issue).

91. For an example of a statistics-based approach to Second Amendment arguments, see generally Brief of the International Law Enforcement Educators and Trainers Ass'n et al. as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), and Brief of the International Law Enforcement Educators and Trainers Ass'n et al. as Amici Curiae Supporting Petitioners, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

92. *See* Kathleen Reich et al., *Children, Youth, and Gun Violence: Analysis and Recommendations*, 12 FUTURE CHILD. 5, 8 (2002) (noting high percentages of gun homicides and suicides among youth below the age of twenty-five).

93. *See* Lewis, *supra* note 1, at 24.

such as schizophrenia.[94] Students may also be more likely to misuse firearms because of their consumption of drugs and alcohol at student gatherings.[95] Because students present these unique dangers, educational institutions may argue that their firearms bans are narrowly tailored because they are limited to these uniquely dangerous students in student housing.

While this argument indicates that some students may pose a danger to themselves or others, the argument does not defeat the challenge's claim that the firearms ban is overinclusive. Not all students pose these dangers. Additionally, arguments based on the probability of students developing schizophrenia may be misplaced, as mental illnesses such as schizophrenia may not serve as reliable indicators of potential for violence.[96] Also, as this Comment assumes that the students challenging the firearm gun ban are lawful gun owners, the students must have already met the requirements for gun ownership, which often includes background checks and safety classes.[97] These qualifications reduce the risk that students will misuse their firearms.

Additionally, colleges may be able to tailor their restrictions more narrowly by applying firearms bans only to those students who indicate that they are depressed or are psychologically unstable. College officials who notice bizarre behavior such as threats to faculty or classmates by students, disruptive behavior, or outbursts may take preventative measures or refer students to counseling to evaluate if such measures are necessary.[98] This approach may not be practical, however, given the sensitive nature of mental illness and the difficulty in basing safety regulations on matters that most individuals would like to keep private.

94. *See* Heinz Häfner et al., *The Influence of Age and Sex on the Onset and Early Course of Schizophrenia*, 162 BRIT. J. PSYCHIATRY 80, 82 fig.1 (1993) (noting a peak in the onset of schizophrenia in both males and females at the age range of twenty to twenty-four).

95. *See* Lewis, *supra* note 1, at 24.

96. *See* Edward P. Mulvey, *Assessing the Evidence of a Link Between Mental Illness and Violence*, 45 HOSP. & COMMUNITY PSYCHIATRY 663 (1994), *reprinted in* VIOLENT BEHAVIOR AND MENTAL ILLNESS: A COMPENDIUM OF ARTICLES FROM PSYCHIATRIC SERVICES AND HOSPITAL AND COMMUNITY PSYCHIATRY 14, 15–16 (1997) (noting that the absolute risk for violence posed by mental illness is very small); *see also* Seena Fazel et. al., *Schizophrenia and Violence: Systematic Review and Meta-analysis*, 6 PLOS MED. 1, 7–8 (2009) (noting that mental illness does not seem to add any additional risk of general violence beyond substance abuse, although there is an association between psychosis and homicide).

97. *See* Craven, *supra* note 2, at 853.

98. *See, e.g.*, Robert Anglen, *Ariz. Campus Was on Alert for Jared Loughner*, USA TODAY (Mar. 2, 2011, 5:56 PM), http://www.usatoday.com/news/nation/2011-02-15-college-loughner-alert_N.htm (recounting how campus officials at Pima Community College noticed a student's, Jared Loughner's, bizarre behavior and proceeded to bar Loughner from campus; Loughner later killed six people and wounded thirteen more, including Congresswoman Gabrielle Giffords, in a shooting rampage).

The institution's argument is further weakened by the fact that any narrow tailoring argument will probably be based on assumptions or inferences since existing campus gun bans will likely prevent any strong statistical evidence from being collected on the subject of gun possession in student housing.[99] Absent such proof, courts may conclude that the university cannot meet the narrow tailoring requirement of strict scrutiny.[100]

Colleges alternatively may argue that bans on firearm possession in student housing are narrowly tailored because they tend to cover students who are ineligible to lawfully possess firearms in the first place. Many students who live in student housing are likely under the age of twenty-one, since many students tend to enter college at the age of eighteen. Federal law prohibits the sale of handguns by licensed dealers to persons under the age of twenty-one.[101] Institutions may argue that the firearms bans are narrowly tailored because most students covered are prohibited by other laws from possessing handguns and the campus ban is simply a reiteration of these laws in the student housing context.[102]

An initial response to this argument is that while circumstances may focus the firearms ban on those students who cannot lawfully own firearms in the first place, the ban is still overinclusive. Students over the age of twenty-one who live in campus housing, even if a minority, are still affected by this blanket ban. The argument is further undermined by the fact that while federal law prohibits the sale of handguns by licensed dealers to people under the age of twenty-one, federal law permits other transfers of handguns to people who are at least eighteen years old.[103] In some situations, students under twenty-one may lawfully possess firearms by other means.

Additionally, while the university's argument may apply to on-campus housing for undergraduate students, the argument would be of virtually no use in the context of graduate student housing, as the students in this housing typically have completed their undergraduate education and are likely to be age twenty-two or above. While an educational institution may gain some traction from this argument, institutions like UCLA that apply a blanket ban on firearm possession in all student housing, including graduate student housing, cannot rely on this argument in all scenarios.[104]

99. *See* Lewis, *supra* note 1, at 4–8 (noting the prevalence of campus gun bans).
100. *See* Volokh, *supra* note 9, at 1467–68.
101. *See* 18 U.S.C. § 922(b)(1), (c)(1) (2006).
102. *See* Wasserman, *supra* note 15, at 38.
103. *See* 18 U.S.C. § 922(x)(1).
104. *See* UCLA UNIV. APARTMENTS N., *supra* note 13, at 56 (indicating that UCLA bans all firearm possession in all student housing).

3. Whether Student Housing Firearms Bans Are Narrowly Tailored to Achieve Academic Freedom

The college or university has a better chance of proving that a firearms ban in student housing is narrowly tailored to serve its interest in academic freedom. Rather than proving the complicated empirical matter of whether firearms bans lead to more or less public safety, the college or university can instead argue that the presence of firearms on campus is likely to lead to an atmosphere of tension in which stifles the exchange of ideas.[105] Professors may be afraid of being critical of their students and may be worried about giving students poor grades.[106] Professors and students alike may be worried about expressing controversial views, knowing that students may possess firearms in close proximity to the classroom.[107]

The college or university can argue that the tailoring requirement of strict scrutiny is not a substantial obstacle if the government interest involved is academic freedom. Abstract questions about levels of intimidation do not easily lend themselves to statistical counterattacks, and courts may be more likely to defer to the educational institution, which will likely be best able to provide accounts of intimidation and limits on academic freedom.[108] In this way, student housing firearms bans may overcome the narrow tailoring requirement that is likely to be fatal to bans grounded in the interest of student and public safety.

Students can reply that firearms bans in student housing are not narrowly tailored to the interest of academic freedom because student housing is too far removed from the classroom. Many of the arguments that academic freedom will be undermined by firearm possession are premised on the firearm possession being in the form of carried, concealed firearms rather than firearms that are kept in student housing.[109] Student possession of firearms in student housing does not pose as direct of a threat to academic freedom. The gun is not in the student's possession when the student is in the classroom or in a professor's office and therefore cannot be used to directly threaten a professor or other students in the classroom setting.

Additionally, if it takes the student a longer time to access a weapon, it is more likely that the student will cool off and be less likely to use the weapon in a

105. *See* Lewis, *supra* note 1, at 13–14; Miller, *supra* note 52, at 236–37, 260–61.
106. *See* Lewis, *supra* note 1, at 13–14 (discussing the danger of intimidation in the context of carrying concealed weapons).
107. *See* Miller, *supra* note 52, at 260 (noting that the presence of guns may intimidate students and keep them from expressing ideas).
108. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (noting the Supreme Court's "tradition of giving a degree of deference to a university's academic decisions").
109. *See* Lewis, *supra* note 1, at 13–14; Miller, *supra* note 52, at 260–61.

fit of rage.[110] A narrower university policy that allows firearms in student housing but not in campus buildings with classrooms and offices carries the advantage of this cool-off period while not instituting a blanket firearms ban. This decreased threat level due to the cool-off period would serve to mitigate student and faculty fear of firearm use, thereby decreasing classroom tension and affirming the free exchange of ideas and criticism.

Furthermore, this Comment only addresses student challenges of firearms bans limited to the context of student housing. This Comment leaves open the possibility that colleges and universities may ban firearms in buildings with classrooms since these are government buildings and because students do not live in these buildings. Carrying a weapon to class or to a professor's office would take the firearm beyond the home that the student claims is covered by the Second Amendment.[111] Once the student carries a gun to class or to a professor's office, the student is violating the campus's ban on guns in the nonhome government buildings.[112] At the point in which the student is willing to violate the university's ban on firearms, the ban is no longer effective in preventing the student from using the firearm as a retaliatory or threatening device to stifle academic freedom. If the student is willing to violate the ban on firearms in campus buildings beyond student housing, it is unlikely that a ban on firearms in student housing would have deterred the student any further from possessing a firearm in the first place.

C. Intermediate Scrutiny

If courts decide to review a ban on firearm possession under an intermediate scrutiny standard of review, the firearms ban must serve an important government interest and the ban must be substantially related to achieving that interest.[113] The university will maintain that its interests in maintaining student security and public safety as well as its interest in protecting academic freedom are important interests.

The university's argument that courts recognize academic freedom as an important interest is likely to succeed. While still a heightened form of scrutiny, intermediate scrutiny permits more flexible review than strict scrutiny, so courts

110. Derek P. Langhauser, *Gun Regulation on Campus: Understanding* Heller *and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 91 (2009).

111. *See* District of Columbia v. Heller, 544 U.S. 570, 628–29 (2008).

112. A ban that a college or university would likely be able to lawfully enforce given *Heller*'s "sensitive place" limitation. *Id.* at 626–27.

113. *See, e.g.*, United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).

may be more lenient in applying this test.[114] This means that while courts may be hesitant to recognize that academic freedom constitutes a compelling government interest, it is more likely that courts will at least recognize academic freedom as an important government interest based on the Supreme Court language that favors academic freedom.[115]

As a preliminary note on determining the existence of a substantial relationship between regulations and interests, there is authority that may specifically indicate that some gun regulations can overcome intermediate scrutiny.[116] Some courts that apply intermediate scrutiny apply a standard of review that requires that the "fit between the challenged regulation and the asserted objective of the regulation must be reasonable."[117] This "reasonable fit" approach, in theory, requires the same showing by the government to prove a substantial relationship.[118] This Comment approaches intermediate scrutiny from a "substantially related" perspective, but acknowledges that courts may apply the reasonable fit approach.

1. Whether Student Housing Firearms Bans Are Substantially Related to Student and Public Safety

Universities' arguments that student housing firearms bans are substantially related to student and public safety will likely take the same form as the arguments the universities make in support of these bans being narrowly tailored to this interest.[119] Universities may argue that students are uniquely dangerous and more likely to abuse firearms. The university may assert that because bans on firearms in student housing apply only to these uniquely dangerous students, the bans are substantially related to the interest of student and public safety.[120] While empirical difficulties may spell defeat for the university in the context of strict scrutiny, courts may be more lenient under an intermediate scrutiny standard of

114. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 646–47 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (noting that the en banc majority gives "the government a decisive assist" when applying an intermediate scrutiny standard of review in evaluating a regulation prohibiting gun ownership by individuals convicted of domestic violence).

115. *See* sources cited *supra* note 81.

116. *See* United States v. Masciandaro, 638 F.3d 458, 471–74 (4th Cir. 2011) (applying intermediate scrutiny in upholding ban on firearms in national park); Doe v. Wilmington Hous. Auth., No. 10-473-LPS, 2012 WL 3065285, at *16–18 (D. Del. July 27, 2012) (upholding public housing ban on firearms in common areas under intermediate scrutiny).

117. *Wilmington Hous. Auth.*, 2012 WL 3065285, at *10 (quoting United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010)) (internal quotation marks omitted).

118. *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989); *see also* United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010).

119. For a full discussion of these arguments, see *supra* Part III.B.2.

120. *See* sources cited *supra* notes 92–95.

review.[121] Furthermore, as the following cases show, colleges and universities have positive authority to draw on in arguing that their firearms bans meet the burden of intermediate scrutiny.

In *United States v. Masciandaro*,[122] the court upheld a ban on the possession of loaded firearms in a vehicle in a national park.[123] In addressing the substantial relation of this regulation to the government interest in securing public safety, the court noted that the ban applied only to loaded firearms, which are more dangerous than unloaded firearms.[124] The court also noted that the need for armed self-defense was less acute in the park than in one's home because the park is patrolled by U.S. Park Police.[125]

While *Masciandaro* offers strong support for universities' arguments that their firearms bans are substantially related to student and public safety, this case is not without problems. *Masciandaro*'s analysis is limited to loaded firearms and relies on the dangerousness of loaded firearms to support a conclusion of a substantial relationship to securing public safety.[126] Many firearms bans in student housing will likely be blanket bans on all firearms, including unloaded firearms, which weakens the analogy to *Masciandaro*. This case illustrates, however, that a university may narrow its regulation to cover only loaded firearms in an effort to meet the substantial relationship requirement. Such a ban may be difficult to enforce, however, since students can claim that their firearms are unloaded and can ultimately require a university to check to see if the firearms are loaded if the university wishes to verify the student is not violating the policy.

Masciandaro's analysis that "the need for armed self-defense is less acute" in the park "than in the context of one's home" because of patrolling police officers provides a tempting argument for universities.[127] Universities may have existing policies and practices that provide student housing security such as guards and cameras, and student housing may be located in relatively low-crime areas.

This argument is problematic, however, in the context of substantial relationship analysis. While the *Masciandaro* court placed this argument in the context of its substantial relationship analysis, a decreased overall need for firearms for self-defense purposes does nothing to make a firearms ban more closely related to the interest of protecting public safety. The fact that circumstances beyond the

121. *See* United States v. Skoien, 614 F.3d 638, 646 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) ("[M]ost of the empirical data cited to sustain § 992(g)(9) has been supplied by the court.").
122. 638 F.3d 458 (4th Cir. 2011).
123. *Id.* at 474.
124. *Id.* at 473.
125. *Id.* at 474.
126. *Id.* at 473.
127. *Id.* at 474.

scope of the firearms ban may make firearms less necessary does not influence the relationship between the ban and the interest in public safety. Rather, this argument applies to the question of how substantial of a burden the firearms ban is for visitors in the park, a question separate from substantial relationship considerations.[128] Schools' arguments that their security reduces the need for a firearm apply to the burden of the firearms ban, rather than the ban's effectiveness in promoting safety.

In *United States v. Skoien*,[129] an en banc Seventh Circuit upheld a statute making it unlawful for people convicted of misdemeanor domestic violence to "carry firearms in or affecting interstate commerce."[130] The *Skoien* court held that the statute was substantially related to the important governmental objective of preventing armed mayhem.[131] The court noted that the deadliness of firearms when used in domestic violence, the increased risk of homicide when guns are present in the home of a convicted domestic abuser, and the high recidivism rate for individuals convicted of domestic violence all supported the conclusion that a substantial relationship existed.[132]

While the *Skoien* court relied on an empirical basis to support its finding of scrutiny, a similar approach will likely be unavailable in the case of university bans on firearms in student housing. Given the prevalence of campus gun bans, accurate empirical evidence on the impact of these bans on campus safety will likely be difficult to find.[133] Furthermore, *Skoien* applies to individuals convicted of crimes involving some degree of violence in concluding that these individuals are uniquely dangerous.[134] On the other hand, students have not all been convicted of violent activity, weakening the conclusion that armed students may constitute a danger to student and public safety.

While the universities' counterarguments in intermediate scrutiny cases may have a stronger impact, the requirement of substantial relation raises the same problems of the lack of empirical evidence concerning the effectiveness of gun bans on achieving the goal of public safety.[135] Even under an intermediate scru-

128. For a discussion of undue burden analysis for which this argument would be relevant, see *infra* Part III.D.
129. 614 F.3d 638 (7th Cir. 2010) (en banc).
130. *Id.* at 639, 645.
131. *Id.* at 642.
132. *Id.* at 642–44; *see also* United States v. Booker, 644 F.3d 12, 25–26 (1st Cir. 2011).
133. *See* Lewis, *supra* note 1, at 4–8 (noting the prevalence of campus gun bans).
134. *Skoien*, 614 F.3d at 642.
135. *See* Volokh, *supra* note 9, at 1465–67.

tiny test, courts will likely require some empirical evidence to support the university's claim that a substantial relationship exists.[136]

Nevertheless, explicit adoption of an intermediate scrutiny standard may lead courts to grant educational institutions more latitude, as several pre-*Heller* cases purporting to apply strict scrutiny seem to apply a standard no more restrictive than intermediate scrutiny.[137] This suggests that purported application of an intermediate scrutiny standard may end up being no more restrictive in practice than a reasonable regulation standard since the outcomes of pre-*Heller* cases indicate there is not much of a difference between the reasonable regulation and strict scrutiny approaches.[138] Alternatively, the pre-*Heller* courts may have preferred an intermediate scrutiny approach in practice, and the explicit adoption of an intermediate standard may not change the courts' approach.

Regardless, cases in which firearms bans overcome strict scrutiny will be strong authority for debates over substantial relationships. The higher level of scrutiny applied in strict scrutiny cases may persuade courts to overlook factual differences between these cases and firearms bans in student housing in drawing on strict scrutiny cases as additional authority in the intermediate scrutiny context.[139]

2. Whether Student Housing Firearms Bans Are Substantially Related to Academic Freedom

Universities' arguments that student housing firearms bans are substantially related to academic freedom will likely be the same arguments the universities make in support of these bans being narrowly tailored to this interest.[140] Courts will probably find that firearms bans in student housing are substantially related to the interest in academic freedom. While these bans may not be narrowly tailored, courts stress that intermediate scrutiny does not require regulations to be the least intrusive means of achieving the objective.[141] Due to the more lenient

136. *See, e.g.*, Gowder v. City of Chicago, No. 11 C 1304, 2012 WL 2325826, at *13 (N.D. Ill. June 19, 2012) (overturning portion of Chicago firearm ordinance prohibiting firearm possession of those convicted of nonviolent misdemeanor firearm offenses, noting that the City of Chicago did not show "sufficiently detailed evidence" to show increased likelihood of future gun violence by these individuals).

137. *See* Winkler, *supra* note 9, at 732. Winkler refers to *United States v. Darrington*, 351 F.3d 632 (5th Cir. 2003), *United States v. Patterson*, 431 F.3d 832 (5th Cir. 2005), and *United States v. Herrera*, 313 F.3d 882 (5th Cir. 2002), as examples of cases that do not meet the typical "vigorous fit" requirement of strict scrutiny, yet nevertheless were upheld under strict scrutiny analysis. Winkler, *supra* note 9, at 729–30.

138. *See* Winkler, *supra* note 9, at 729–30.

139. *See* sources cited *supra* note 86.

140. *See supra* Part III.B.3.

141. *See, e.g.*, United States v. Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011).

burden on the universities, the universities' arguments in favor of their firearms bans in student housing may be more successful under intermediate scrutiny review.

One potential obstacle to the universities' use of academic freedom in the intermediate scrutiny context is that there is no direct case law applying the interest in academic freedom in the context of a Second Amendment challenge. Due to the weapons and firearms that are involved in these cases, courts typically settle on the government interest in preserving public safety and apply the standard of review from that perspective. Academic freedom as an interest remains untested in Second Amendment intermediate scrutiny cases.

While a novel approach, colleges and universities should not count out academic freedom as an interest worth arguing. As discussed previously, academic freedom allows courts to sidestep difficult empirical questions about the relationship between firearms bans and public safety.[142] Similar empirical questions will arise in determining the existence of a substantial relationship.[143] Universities may attempt to bypass the difficulty of providing this empirical support by taking the academic freedom approach; this is an option colleges and universities should pursue.

D. Undue Burden

An undue burden analysis of Second Amendment claims may proceed in two ways. Courts may choose to apply a strong undue burden test based on the test applied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[144] Alternatively, courts may apply a two-part test approach adopted by many courts when evaluating Second Amendment challenges.[145]

1. Strong Undue Burden Analysis

If the reviewing court decides to implement a strong undue burden standard of review to a Second Amendment challenge, the court must evaluate whether

142. *See supra* Part III.B.3.

143. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 643–44 (7th Cir. 2010) (en banc) (concluding that there was a substantial relationship between a firearms ban for those who are convicted of domestic violence and public safety based on empirical data).

144. 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

145. *See, e.g.*, United States v. Decastro, 682 F.3d 160, 166 (2d Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

the ban places a substantial burden in the path of the exercise of the right.[146] In applying the strong undue burden test to the Second Amendment, the court must ask whether the firearms ban places a substantial burden on the student's right to possess firearms for purposes of self-defense in the home.[147] If the ban creates such a burden, the ban must be "categorically invalidated."[148] But if the court finds that there is no such burden, the ban must only be rationally related to the government interest.[149]

A ban on firearms in student housing poses a substantial burden on the student's right to possess firearms for the purposes of self-defense in the context of the student's home. This argument is similar to the previously stated argument by analogy to *Heller*, in which students can argue that student housing is their home and therefore that their situations are analogous to those of the residents of Washington, D.C. in the *Heller* case.[150] A complete ban on firearms in student housing renders students unable to keep and bear arms to defend themselves in their homes.[151]

One response to this argument is that a ban on firearms in the student housing context does not substantially burden the right to self-defense because the low crime rate on university campuses lessens the need to exercise the right to self-defense in the context of student housing.[152] Educational institutions can argue that low campus crime rates distinguish the cases of educational institution firearms bans from the bans in comparatively high-crime areas of Washington, D.C. and Chicago.[153] Because there is very little need to use firearms for self-

146. *See* Gonzales v. Carhart, 550 U.S. 124, 156 (2007); *Casey*, 505 U.S. at 877 (opinion of O'Connor, Kennedy, and Souter, JJ.) (applying undue burden test in context of abortion); *see also* Sobel, *supra* note 8, at 522 (discussing the application of the undue burden test); Volokh, *supra* note 9, at 1472.

147. *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

148. Volokh, *supra* note 9, at 1472.

149. *See* Dano v. Collins, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990) (holding that ban on carrying concealed weapons did not "broadly stifle the exercise" of the right to bear arms, noting that appellant was free to carry weapons openly); Lacy v. State, 903 N.E.2d 486, 492 (Ind. Ct. App. 2009) (holding that ban on possession of switchblades does not place material burden on Second Amendment core value of self-defense). *See generally* Volokh, *supra* note 9, at 1471.

150. Craven, *supra* note 2, at 854.

151. *See Heller*, 554 U.S. at 629–30 (noting that handguns are the "quintessential self-defense weapon" and that requiring them to be rendered and kept inoperable at all times makes it "impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional").

152. *See* Miller, *supra* note 52, at 255 (indicating that gun threats and homicide rates are extremely low on college campuses and concluding that a college campus is "one of the safest places you can be").

153. *See Chicago Crime Rate Report (Illinois)*, CITYRATING.COM, http://www.cityrating.com/crime-statistics/illinois/chicago.html (last visited Mar. 28, 2013) (indicating that the violent crime rate for Chicago in 2010 was higher than the average national violent crime rate by over 148 percent); *Washington DC Crime Statistics and Rates Report*, CITYRATING.COM, http://www.cityrating.com/crime-statistics/district-of-columbia (last visited Mar. 28, 2013) (indicating that the violent crime rate

defense in student housing, a restriction on firearms does not constitute a substantial burden on the right to possess arms for purposes of self-defense.[154]

The reply to this counterargument is that while the need for self-defense in the student housing environment is rare, it is not nonexistent. While the number of instances may be smaller, the need for self-defense is not diminished in those few cases in which students are threatened, and a blanket ban is unconstitutional because it completely hinders the ability of these students to bear a firearm in self-defense.[155] Furthermore, because justified use of self-defense necessarily involves a student who fears losing his or her life or suffering substantial bodily harm, the burden caused by a firearms ban is certainly substantial in magnitude, if not in scope of application.[156] Additionally, the counterargument from lower campus crime rates may not apply to off-campus apartment housing which may be located in a higher-crime area than the campus itself.

2. Two-Part Test for Undue Burden

Courts may apply a two-part test approach that first seeks to determine whether the firearms ban creates a burden on the conduct that falls within the scope of the Second Amendment's protection.[157] If the firearms ban does not burden conduct within the scope of the Second Amendment's protection, the "inquiry is complete" and the ban survives the challenge.[158] If the ban creates a burden on conduct within the scope of Second Amendment protection, the ban must be evaluated under "some form of means-end scrutiny."[159]

This alternative to the strong undue burden test uses the initial conclusion on the magnitude of the burden to determine what standard of review should apply. As stated by the Seventh Circuit in their initial opinion on *United States v.*

for Washington, D.C. in 2010 was higher than the average national violent crime rate by over 273 percent).

154. *See* United States v. Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011) (applying a similar argument in the context of national parks, noting the lower need for firearms for self-defense purposes because police officers patrol the parks).

155. *See* Wershbale, *supra* note 69, at 1052 (arguing that public housing lease restrictions requiring safe storage and trigger-lock provisions may be unconstitutional because these rules "hinder a law-abiding tenant's ability to engage in confrontation for purposes of immediate self-defense"). A complete ban on firearms is an even more restrictive approach than these examples.

156. *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b) (1985) (restricting use of deadly force in self-defense to situations in which the user of deadly force believes his or her life to be in danger or believes he or she is facing serious bodily injury).

157. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

158. *Id.*

159. *Id.*

Skoien,[160] "[a] severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified."[161] A court applying this approach must determine whether the firearms ban creates a substantial burden on the students' Second Amendment rights. If a substantial burden exists, the level of scrutiny the court applies to the firearms ban will be higher, while a lower burden warrants a lower level of scrutiny.

Based on the arguments considered in Part III.D.1, students have a strong argument that firearms bans in student housing constitute a severe burden on their core Second Amendment right to bear arms in self-defense. If the firearms ban constitutes a severe burden, the court is likely to apply a strict scrutiny standard of review, which will likely result in the ban being overturned.[162]

E. Reasonable Regulation

If courts choose a reasonable regulation test to evaluate Second Amendment challenges, courts must determine "whether the challenged law is a reasonable method of regulating the right to bear arms."[163] This test is the most lenient, recognizing firearm restrictions as mere regulations as long as they do not constitute total bans on the right to bear arms.[164] In several instances, courts have overturned blanket bans on firearm transportation under the reasonable regulation approach, illustrating that while the test is lenient, it may still occasionally result in a successful Second Amendment challenge.[165] These cases involve extremely restrictive bans on firearms, however, as a complete ban on transportation outlaws the transportation of firearms from the firearm seller's place of business to the buyer's home.

A Second Amendment challenge against student housing firearms bans would likely fail under a reasonable regulation level of scrutiny. College and uni-

160. 587 F.3d 803 (7th Cir. 2009), *vacated*, 614 F.3d 638 (7th Cir. 2010) (en banc). The Fourth Circuit has adopted this view. *See* United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010).
161. *Skoien*, 587 F.3d at 813–14.
162. *See* Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) (applying a heightened level of scrutiny after determining that a firearms ban constituted a substantial burden on Second Amendment rights; while not quite strict scrutiny, the level of review was strong enough to strike down the city ordinance). For a full discussion of firearms bans and their likelihood of success under a strict scrutiny standard, see *supra* Part III.B.
163. Winkler, *supra* note 9, at 717.
164. *Id.*
165. *Id.* at 724 & n.238, 725–26.

versity bans are limited to campus buildings and grounds and courts would likely find that this limitation does not constitute a total ban on the right to bear arms.[166]

IV. THE GOVERNMENT-AS-PROPRIETOR JUSTIFICATION

While Part III discussed the arguments that colleges and universities may make within the boundaries of various standards of review, this Part addresses a justification that universities may argue regardless of the standard of review adopted. Colleges and universities may argue that their role as a proprietor rather than as a sovereign gives them a special justification in banning firearms in student housing. This argument is uniquely appealing because it functions outside of the boundaries of standards of review and gives courts the option to avoid resolving the question of which standard of review to apply.[167]

An educational institution's ban on firearm possession in student housing may be justified by the fact that the government is acting as a landlord rather than a sovereign.[168] In nonsovereign roles, the government may have more latitude in restricting rights. For example, in *International Society for Krishna Consciousness, Inc. v. Lee*,[169] the Supreme Court rejected a First Amendment challenge to the Port Authority's ban on the solicitation of money in airport terminals.[170] The Court noted that "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."[171]

Universities may argue that in banning firearms in student housing, the university functions as a landlord rather than as a sovereign. Universities may also argue that they are managing their own internal affairs and deserve flexibility in carrying out their missions.[172] This justifies the universities' policies of banning firearms in student housing.

166. Courts can draw authority for this limitation from *Heller*'s sensitive place limitations which indicates that the *Heller* decision does not affect bans of firearms in schools or government buildings. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

167. *See generally* Sobel, *supra* note 8, at 508–11.

168. *See* Volokh, *supra* note 9, at 1475.

169. 505 U.S. 672 (1992).

170. *Id.* at 675, 685.

171. *Id.* at 678.

172. *See, e.g.*, Souders v. Lucero, 196 F.3d 1040, 1044 (9th Cir. 1999) (rejecting student's First and Fourteenth Amendment challenges after being excluded from campus due to student's being served with a Temporary Protective Stalking Order (citing Healy v. James, 408 U.S. 169, 193, 194 & n.24 (1972))); *see also* Miller, *supra* note 52, at 261 ("Putting the interest of public safety aside, the question becomes whether firearms on campus inhibit a college's compelling interest in ensuring aca-

This argument may serve as an independent justification of the regulations, meaning that courts may decline to apply the typical tests of heightened scrutiny that Second Amendment cases may demand.[173] Courts might find this argument especially appealing because they may sidestep the question of what level of scrutiny applies in a so-called typical Second Amendment case involving the government acting in a nonproprietor role. Courts may apply a reasonable regulation standard of review because of the government's role as proprietor, and leave unanswered the question of what standard of review typically applies. As previously discussed, firearms bans would likely be upheld under the reasonable regulation standard of review.[174]

While universities may argue that they are acting in a nonsovereign role, there may be limits to how far their regulations in this role can extend. Students in public university dormitories still maintain a reasonable expectation of privacy from government intrusion that restricts the government's ability to search dorm rooms despite having the government as a landlord or any other proprietor role the university may claim.[175] Additionally, in the public housing context, "[t]he First and Fourth Amendments might also apply to the inside of public housing, much the same way as they apply to privately owned homes."[176]

Eugene Volokh notes that bans on nonlethal weapons in public housing and public student housing are likely unconstitutional.[177] While Volokh's conclusions are limited to nonlethal weapons, several arguments Volokh raises are applicable to lethal firearms. Volokh notes that a limitation on the right to self-

demic freedom and the free exchange of ideas, and whether a total prohibition is narrowly tailored to meet that objective.").

173. *See Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678–79 (noting that while "regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny," limitations on other public property that has not been opened for expressive activity "must survive only a much more limited review" (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983))).

174. *See supra* Part III.E.

175. *See, e.g.*, Smyth v. Lubbers, 398 F. Supp. 777, 786 (W.D. Mich. 1975) (holding that a student has the same privacy interest in his dorm room as "any adult has in the privacy of his home, dwelling, or lodging"); *cf.* Medlock v. Trs. of Ind. Univ., No. 1:11-cv-00977-TWP-DKL, 2011 WL 4068453, at *4–5 (S.D. Ind. Sept. 13, 2011) (holding that a university student does not have a reasonable expectation of constitutionally protected privacy from a resident specialist conducting a preannounced health and safety inspection in accordance with university regulations and not acting in the capacity of a state actor).

176. Volokh, *supra* note 9, at 1474 (citing Pratt v. Chi. Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994) (holding that the Fourth Amendment protected public housing tenants from warrantless sweeps); Resident Action Council v. Seattle Hous. Auth., 174 P.3d 84 (Wash. 2008) (en banc) (applying same level of scrutiny to material posted on tenants' doors as Supreme Court applied to private residents' posting of material in their windows).

177. *See* Volokh, *supra* note 13, at 231–32.

defense is unique from other government-as-proprietor limitations that courts have permitted.[178] Unlike the right to speech, which individuals may choose to exercise at alternate locations, self-defense is something individuals "must engage in where and when the need arises."[179] Additionally, bans on firearms in student housing effectively bar students from possessing the firearms altogether, making them unable to possess the firearms in locations that may be lawful.[180] These uniquely burdensome characteristics of firearms bans in student housing may weaken the university's government-as-proprietor argument.

Universities may argue that their role as landlord rather than as sovereign is further supported if they engage in the practice of leasing student housing to students. Universities may argue that the student contracting that they will not possess firearms places the university and the student in the relationship of parties to a negotiation rather than the relationship of sovereign and governed.

This argument may support the university's view that it is acting as proprietor, but this too has its limits. The university, in drawing its argument from its contract with the student, risks a challenge based on the doctrine of unconstitutional conditions: that a government may not grant a benefit on the condition that the individual receiving the benefit surrender a constitutional right.[181]

In *Smyth v. Lubbers*,[182] the court held that a contract for student housing contained an unconstitutional condition in the form of a search consent clause.[183] The clause stated that the student's signature on the housing contract indicated consent to searches pursuant to the college's regulations.[184] The college regulations, in turn, allowed the college to search dormitory rooms when the college officials had "reasonable cause" to believe the student violated state, federal, or college rules, laws, or regulations.[185] The college defined reasonable cause to be "more than mere suspicion but less than probable cause."[186]

178. *Id.* at 232.
179. *Id.*
180. *Id.*
181. *See, e.g.*, Smyth v. Lubbers, 398 F. Supp. 777, 788–89 (W.D. Mich. 1975) ("The state cannot [grant] condition[al] attendance . . . on a waiver of constitutional rights."); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (outlining the doctrine's definition and support for the doctrine). *But see* Volokh, *supra* note 9, at 1532–33 (cautioning against the absolute, overbroad application of this doctrine, noting that common practices involve the forfeiture of constitutional rights in exchange for a benefit, such as a plea bargain where the defendant waives the right to trial in exchange for a reduced sentence).
182. 398 F. Supp. 777.
183. *Id.* at 788–89.
184. *Id.* at 788.
185. *Id.* at 790 (internal quotation marks omitted).
186. *Id.*

The court held that despite signing this contract, the student had not waived his Fourth Amendment right of privacy.[187] The court noted that the school's action constituted an "adhesion contract" and did not involve "the type of focused, deliberate, and immediate consent contemplated by the Constitution."[188] The court held that the college was "unjustifiably claiming extraordinary powers" and could not infringe the student's Fourth Amendment rights based on this contract.[189] *Smyth* is not the only case concluding that the waiver of a constitutional right as a condition of living in a college dormitory is an unconstitutional practice.[190]

An absolute ban on the possession of a firearm in student housing constitutes an absolute ban on the ability of the student to bear such a firearm in self-defense since the student does not have a firearm available for this purpose. While courts will not and should not automatically apply the doctrine of unconstitutional conditions when any rights are named in the bargaining process, the absolute forfeiture of the "central component" of the Second Amendment right to bear arms[191] may give courts pause when considering whether to apply the government-as-proprietor justification.

CONCLUSION

Student housing offers a multifaceted example of the dynamic state of Second Amendment law. Student housing's dual nature as a home for students and as school and government property positions student housing at the center of the collision course for two seemingly contradictory provisions of *Heller*.[192] The factual debate is complex, as the case of UCLA illustrates, since student housing may take different forms, from multiple-student dorm rooms to apartment-style housing arrangements.[193] The variety of government interests at stake in Second Amendment cases and the present confusion over what standard of review should apply in these cases creates a landscape teeming with possible approaches to presenting and responding to Second Amendment challenges.

While the landscape of Second Amendment law is complex and dynamic, one thing is clear: Students have strong grounds to challenge firearms bans in

187. *Id.* at 788.
188. *Id.*
189. *Id.* at 789.
190. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971).
191. *See* District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (noting that individual self-defense is the central component of the right to keep and bear arms).
192. *See supra* Part II.
193. *See supra* Part II.

student housing. Given the prevalence of absolute firearms bans in the student-housing context,[194] student Second Amendment challenges are likely to be numerous and successful, especially when addressing firearms bans in apartment-style housing.

194. *See* Lewis, *supra* note 1, at 4–8.