

A LIMITED REVIEW OF THE POST-HELLER
FATE OF CAMPUS CARRY:
*Preemption and Constitutionality in
New Hampshire and Beyond*

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Abstract

While there are numerous instances of college or university mass shootings to be found in previous decades, the contemporary debate over the legal right to carry a firearm on a public college or university campus begins with the Virginia Tech massacre in 2007. It was in the aftermath of this event that the Students for Concealed Carry began a concerted effort to allow persons already permitted by their state to carry concealed firearms to also do so on college campuses—an effort that seems to have jumpstarted a vigorous debate that continues to this day. At the time, the Virginia Tech shooting resulted in the highest death and injury tolls on an American campus since Charles J. Whitman, the “Texas Tower Sniper,” shot and killed 15 and injured more than 30 at the University of Texas at Austin in 1966. It is this historic scale that helps define the current era. Against that backdrop, and in light of persistent efforts to deregulate firearms on and off campuses in New Hampshire, this article both considers and answers the question: Upon what legal bases do the systems and campuses under control of the University System of New Hampshire and the Community College System of New Hampshire prohibit the carrying of firearms on their premises? Along the way, Section I reviews firearms policies in place within both the University System of New Hampshire (USNH) and the Community College System of New Hampshire (CCSNH); Section II reviews New Hampshire state laws establishing and describing the character and governance of those systems of higher education; and Section III reviews New Hampshire state laws regarding possession and carrying of firearms. After those reviews, Section IV presents analysis of a court decision out of New Hampshire addressing issues of preemption and Second Amendment rights, as well as decisions from Oregon and Texas that touch on similar issues; and Section V concludes this analysis by highlighting connections between cases, including Supreme Court decisions Heller and McDonald, and suggesting possible impact of the decisions for policy makers at public campuses across the country.

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INTRODUCTION

It is difficult to make sweeping statements about the status of campus carry laws and policies across the nation (see Figure 1),¹ laws that explicitly grant the right to individuals to carry firearms onto college and university campuses. To begin with, there is disagreement about the empirical basis underlying advocacy for, and opposition to, campus carry as a self-defense measure,² wide variability of state laws³ and public university and college system policies,⁴ and diverging decisions across federal court districts.⁵ Add to the mix the fact that the Supreme Court reconstrued the purpose and scope of the Second Amendment just over ten years ago.⁶ This means that states with very strict preemption laws may firearms

1 National Conference of State Legislatures, *Guns on campus: Overview* (2018, August 14), available at www.ncsl.org/research/education/guns-on-campus-overview.aspx.

2 Robert Birnbaum, *Ready, Fire, Aim: The College Campus Gun Fight*, Change: The Magazine of Higher Learning (Sept-Oct, 2013).

3 Danielle Kurtzleben, *Here's Where Gun Laws Stand in Your State*, NPR Politics (June 14, 2016), available at <https://www.npr.org/2015/12/09/458829225/heres-where-gun-laws-stand-in-your-state>. (Note: this story preceded the 2017 repeal by the New Hampshire legislature and governor of any requirement for concealed carry permits, making the state a "no permit" state.)

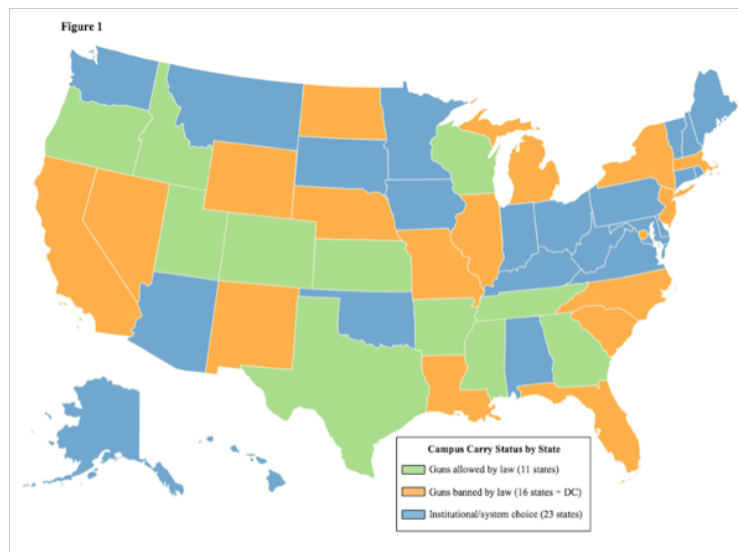
4 Andrew Morse et al., *Guns on Campus: The Architecture and Momentum of State Policy Action* (NASPA: Student Affairs Professionals in Higher Education, 2016), available at https://www.naspa.org/images/uploads/main/ECS_NASPA_GunsOnCampus.pdf (last visited Sept. 19, 2018).

5 *Oregon Firearms Educational Foundation v. Board of Higher Education and OUS*, 264 P3d 160 (2011). See also, *Glass et al. v. Paxton et al.*, 900 F.3d 233 (2018).

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

prohibitions on public college campuses,⁷ and it may feel that the only agreement to be found is that the debates rage on.

Among the facets of the debate over gun rights in America, campus carry has only recently come to the fore. While there are numerous instances of college or university mass shootings to be found in previous decades,⁸ the contemporary debate over the legal right to carry a firearm on a public college or university campus begins with the Virginia Tech massacre in 2007.⁹ It was in the aftermath of this event that the Students for Concealed Carry began a concerted effort to allow persons already permitted by their state to carry concealed firearms to also do so on college campuses—an effort that seems to have jumpstarted a vigorous debate that continues to this day. At the time, the Virginia Tech shooting resulted in the highest death and injury tolls on an American campus since Charles J. Whitman, the “Texas Tower Sniper,” shot and killed 15 and injured more than 30 at the University of Texas at Austin in 1966.¹⁰ It is this historic scale that helps define the current era.



7 North Dakota, as just one example, has a strict preemption law, N.D. Cent. Code § 62.1-01-03, and another law, N.D. Cent. Code § 62.1-02-05, that allows firearms prohibitions at “public events” (a category including “an athletic or sporting event, a school, a church, and a publicly owned or operated building” such as a public college or university).

8 See Connie Post, *Deadliest College Campus Shootings in U.S. History*, Dayton Daily News, Nov. 28, 2016, available at <https://www.daytondailynews.com/news/crime--law/the-deadliest-college-campus-shootings-history/bx9GETTkckx0on6k8QiyCN/> (last visited Sept. 19, 2018).

9 Adam Weinstein, *The Secret History of the Campus Carry Movement*, The Trace (July 5, 2015), available at <https://www.thetrace.org/2015/07/the-making-of-the-campus-carry-movement/> (last visited Sept. 19, 2018).

10 Associated Press, *Beginning of an Era: The 1966 University of Texas Clock Tower Shooting*, NBC News, July 31, 2016, available at <https://www.nbcnews.com/news/us-news/beginning-era-1966-university-texas-clock-tower-shooting-n620556> (last visited Sept. 19, 2018). (Note: the death toll of 15 includes a survivor who died a week later from wounds, as well as another survivor who was shot in his only functioning kidney and who much later elected to cease dialysis. The figure does not include Whitman’s mother and wife, whom he killed by knife at their homes before heading to UT Austin.) See also JoAnn Ponder, *From the Tower Shootings in 1966 to Campus Carry in 2016: Collective Trauma at the University of Texas at Austin*, 15 Int’l J. of Applied Psychoanalytic Stud. 239 (2018).

Against that backdrop, and in light of persistent efforts to deregulate firearms on and off campuses in New Hampshire, this article both considers and answers the question: *Upon what legal bases do the systems and campuses under control of the University System of New Hampshire and the Community College System of New Hampshire prohibit the carrying of firearms on their premises?* Along the way, Section I reviews firearms policies in place within both the University System of New Hampshire (USNH) and the Community College System of New Hampshire (CCSNH); Section II reviews New Hampshire state laws establishing and describing the character and governance of those systems of higher education; and Section III reviews New Hampshire state laws regarding possession and carrying of firearms. After those reviews, Section IV presents analysis of a court decision out of New Hampshire addressing issues of preemption and Second Amendment rights, as well as decisions from Oregon and Texas that touch on similar issues; and Section V concludes this analysis by highlighting connections between cases, including Supreme Court decisions *Heller* and *McDonald*,¹¹ and suggesting possible impact of the decisions for policy makers at public campuses across the country.

I. Firearms Policies at New Hampshire's Public Colleges and Universities

The University System of New Hampshire governs the four-year public higher education institutions of the state; USNH has a policy governing the presence of firearms, and three of its four institutions have adopted their own policies. The Community College System of New Hampshire governs the two-year public higher education institutions of the state; CCSNH also has a policy governing firearms on its constituent institutions, with each of its institutions adopting similar language at the campus level (see Table 1). The firearms policies for USNH and CCSNH are fairly straightforward; while there are slight variations in language between the two systems policies (e.g., specific campus locations), and while there are differences between USNH and CCSNH policy language and placement (e.g., under general policy or student codes of conduct), the substantive purpose is the same across all public higher education institutions in the state: to limit the carrying of firearms on campuses. With exceptions for public safety or law enforcement

11 *McDonald v. Chicago*, 561 U.S. 742 (2010).

Table 1: Firearms Policies Across New Hampshire Public Higher Education Systems

<u>University System of New Hampshire</u> ¹²	[T]he use or possession of any firearms, other dangerous weapons that could be used to inflict injury, or explosives is absolutely prohibited on any property owned, controlled, or operated by the System Office.
UNH Durham/Manchester ¹³	The use and possession of all firearms, other dangerous weapons intended to inflict injury, or explosives are prohibited on the Durham and Manchester core campuses of the University of New Hampshire. Law enforcement officers duly authorized to carry such instruments are excepted.
Plymouth State University ¹⁴	[U]se and possession of all firearms, other dangerous weapons intended to inflict injury, or explosives are prohibited on any property owned, controlled or operated by Plymouth State University.
Granite State College ¹⁵	No person, except law enforcement officers while actively engaged in carrying out their duties as such, shall have in possession any deadly weapon as defined in RSA 625:11, V, while in any building or facility used by the College for administration or classes or on the grounds adjacent thereto.
Keene State College	<i>No campus-specific policy; covered by USNH policy above.</i>
<u>Community College System of New Hampshire</u> ¹⁶	[Prohibits] possession of firearms, explosives, other weapons, or dangerous chemicals on college premises (including in vehicles) except as authorized by the college for instructional, maintenance, or law enforcement purposes.
Great Bay, ¹⁷ Lakes Region, ¹⁸ Manchester, ¹⁹ Nashua, ²⁰ River Valley, ²¹ White Mountains, ²² and NH Technical Institute ²³	<i>General college policy: Students, staff, faculty, and guests are not allowed to have a weapon on campus or in any vehicle on campus. Student Handbook/Code of Conduct language identical to CCSNH policy above.</i>

12 USA.III.F.1, available at <https://goo.gl/ciufe4>. (Note: policy in place at the time of the district court case described in section IV of this article varies from current policy, but is in substance and function nearly indistinguishable.)

13 UNH.III.J.2, available at <https://goo.gl/c2LhrD>.

14 PSU.III.D.1, available at <https://goo.gl/STvoCX>.

15 GSC.III.J.1, available at <https://goo.gl/Bmyzxr>.

16 CCSNH Student Code of Conduct, §B.5, available at <https://goo.gl/BxfuDC>.

17 Great Bay CC Student Code of Conduct, §A.18, available at <https://goo.gl/sNV9pH>.

18 Lakes Region CC Student Code of Conduct, §B.5, available at <https://goo.gl/29QPwR>. There is additional language about Housing Community Standards and Health & Safety mirroring policy embedded in Student Code of Conduct.

19 Manchester CC Student Code of Conduct, §A.17, available at <https://goo.gl/VFPtxo>. Mirrors General College Policy, §G.8, available at <https://goo.gl/95ugRy>.

20 Nashua CC Student Code of Conduct, §B.5, available at <https://goo.gl/3VuAlt>.

21 River Valley CC Student Code of Conduct, §A.17, available at <https://goo.gl/oi5JMK>.

22 White Mountains CC Student Code of Conduct, §B.5, available at <https://goo.gl/qm3Y35>.

23 NHTI Campus Firearms and Weapons Policy, available at <https://goo.gl/yuy2b8>. NHTI Student Code of Conduct, §B.5, available at <https://goo.gl/TrkZCF>.

officers, there are also campus-specific prohibitions within USNH at the Durham and Manchester locations of the University of New Hampshire, at Plymouth State University, and at Granite State College, though not at Keene State College (which is nonetheless covered by the system-wide policy). The policy for CCSNH includes similar exceptions, and also includes language stating that it is a violation of the Student Code of Conduct to possess a firearm on campus premises. The CCSNH campuses each mirror that System policy and place it in the Student Code of Conduct, but also include policy language that more broadly prohibits carrying of firearms on campus, and not just by students. Generally, all policies prohibit the student from possessing firearms on campus.

At the University of New Hampshire and Plymouth State University, in addition to an exception for law enforcement, the Chief of Police or Director of Public Safety “may grant permission in writing to an individual, academic or research department, or operational department to possess a weapon or ammunition on campus *for instructional or other qualified purposes*”²⁴ (emphasis added). Inquiries with the UNH Police Department suggest that the final clause allows for training courses or perhaps ROTC-related events, but that “other qualified purposes” has been invoked to allow hunting on limited plots of university-owned land, and never to allow anyone except law enforcement officers to carry a firearm on campus. The CCSNH policy also includes exceptions for instructional purposes, and for maintenance purposes, presumably to allow for the use of “dangerous chemicals” for cleaning.²⁵ In each case, the rationale for prohibiting firearms is both to safeguard public safety and to preserve an environment dedicated to the free exchange of ideas for the purposes of education. Implied in these policies, and their justifications, is the notion that the presence of firearms pose an inherent risk to the health and safety of students, staff, faculty, and visitors, and that such a risk is disruptive of the missions and functions of institutions of higher education.

II. New Hampshire State Law Establishing USNH and CCSNH

Both USNH and CCSNH, as well as their constituent campuses, are established by state statute. USNH “is established and made a body politic and corporate, the main purpose of which shall be to provide a well coordinated system of public higher education offering liberal undergraduate education encompassing the major branches of learning, emphasizing our cultural heritage, and cultivating the skills of reasoning and communication.”²⁶ CCSNH is “established and made a body politic and corporate, the main purpose of which shall be to provide a well-coordinated system of public community college education offering, as a primary mission, technical programs to prepare students for technical careers as well as general, professional, and transfer programs, and certificate and short term training programs which serve the needs of the state and the nation.”²⁷ Key language in these nearly identical

24 *Id. supra* note 13, at J.4, and *supra* note 14, at D.2.

25 *Id. supra* note 16.

26 RSA 187-A:1.

27 RSA 188-F:1.

establishment statutes includes the purpose of education, but also the reference to both systems as “bod[ies] politic and corporate,” indicating that the state views these systems as separate from the state, and effectively treats them as corporate citizens rather than arms of the state (more on this in section III below).

In addition to these indications of educational mission and governmental separateness, there is clear statutory language in the case of each system that gives their boards of trustees wide legal berth within which to govern their respective campuses. While there are parallel descriptions of the state’s interest in receiving annual reports from both systems of public higher education, including financial matters, there is also recognition and affirmation of “the need to protect the institutions of the [university and community college systems] from inappropriate external influence that might threaten the academic freedom of faculty members or otherwise inhibit the pursuit of academic excellence.”²⁸ To this end, the boards of trustees of both systems have been imbued with “broad authority” to manage and control properties and affairs. This authority is especially sweeping in the case of USNH campuses: “the institutions are to be permitted to operate with the highest measure of autonomy and self-governance, subject to the supervision of the board of trustees.”²⁹

III. New Hampshire State Law Regarding Firearms

There are laws in some states that require a permit or license to carry a firearm, and in some of those states there are distinctions in the law between licenses to openly carry firearms and licenses to carry them in a concealed fashion;³⁰ New Hampshire no longer has such a licensing requirement, and makes no such distinctions as to the manner of carry. At the time of the case described in the next section of this article, state law required licensing for the ownership or possession of handgun,³¹ and also required licensing for concealed carry.³² In 2017, the concealed license requirement was repealed and the open carry requirement was effectively repealed, as clarified in the newly-adopted Section III of the law:

The *availability* of a license to carry a loaded pistol or revolver under this section or under any other provision of law *shall not be construed to impose a prohibition* on the unlicensed transport or carry of a firearm in a vehicle, or on or about one’s person, whether openly or concealed, loaded or unloaded, by a resident, nonresident, or alien if that individual is not otherwise prohibited by statute from possessing a firearm in the state of New Hampshire.³³ [emphasis added]

28 See RSA 187-A:2-b:I Legislative Oversight; RSA 187-A:22 Reports (in the case of USNH). See also RSA 188-F:3:I Legislative Oversight; RSA 188-F:11 Report (in the case of CCSNH).

29 See RSA 187-A:16 Authority of the Trustees (in the case of USNH). See also RSA 188-F:6 Authority of the Board of Trustees (in the case of CCSNH).

30 *Id. supra* note 9.

31 RSA 159:6 §I(a).

32 RSA 159:4.

33 RSA 159:6 (as amended by SB12, passed by the General Court Feb. 15, 2017, and signed into law Feb. 22, 2017).

In other words, licenses are available but not required. This new provision may be viewed as an attempt to avoid the same kind of situation created by Texas' campus carry law,³⁴ which achieved sufficient support only after limiting campus carry to those already licensed to carry by the state. In the event that New Hampshire legislators pass and the governor signs a campus carry bill like the one that failed in 2018,³⁵ the lack of state licensing requirements for handguns carried on or about the person will mean the campuses of the state's colleges and universities may not be able to implement policies to the contrary.

There are certain exceptions to the rights of New Hampshire citizens to carry loaded pistols and handguns without obtaining a license, alluded to in the section quoted above. First, while there is no license requirement for carrying a firearm, there is a license requirement to sell firearms;³⁶ second, there are restrictions on owning or possessing firearms for convicted felons, armed career criminals, and minors.³⁷ There are caveats to these restrictions, though, as in the case of law enforcement officers or on-duty armed service members, exempted from the felony exception, and in the case of minors receiving firearms from parents, guardians, grandparents, trainers, or licensed hunters accompanying minors for the purpose of legal taking of game.³⁸ Despite this fairly permissive legal framework governing sales and possession of firearms, it is a misdemeanor in New Hampshire to own, possess, or sell "any blackjack, slung shot, or metallic knuckles,"³⁹ suggesting a distinction between weapons construed by state legislators as useful for self-defense and those without any apparent *defensive* purpose.

Importantly, state law denies "a political subdivision" the ability to "regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms."⁴⁰ A political subdivision is defined as a "division of a state that exists primarily to discharge some function of local government,"⁴¹ including such geographic or territorial divisions as a school district or municipality. If an entity such as a municipality, for example, sought to prohibit the carrying, whether open or concealed, of any firearm, whether loaded or not, this statute would prevent its enforceability. This kind of narrowly-tailored preemption against local regulation of firearms became common by the 1980s, a

34 Tex. Gov't Code §411.2031. See also Texas State University, *Campus Carry Rules* (2017), available at www.txstate.edu/campuscarry/rules.htm.

35 See An Act Relative to Carrying a Pistol or Revolver on University System and Community College System Property, H.B. 1542, N.H. General Court (2018).

36 RSA 159:8.

37 RSA 159:3, RSA 159:3-a, and RSA 159:12, respectively.

38 RSA 159:5, and RSA 159:12 §II(a-d), respectively.

39 RSA 159:16.

40 RSA 159:26 Firearms, Ammunition, and Knives; Authority of the State (according to this statute, all such regulatory power resides with the state).

41 *University System of New Hampshire v. Bradley Jardis, et al.*, Grafton Superior Court, Docket No. 215-2011-CV-00553 (2012), at 5 (citing Black's Law Dictionary 1277, 9th ed. 2009).

trend that followed intensified and targeted lobbying by groups like the National Rifle Association.⁴²

USNH and CCSNH are each defined by law as a “body politic and corporate,” so the question remains whether the systems and their campuses are political subdivisions of the state, whether restrictions on the presence of firearms contradicts state law allowing the same, and whether or not they may enforce policies in contradiction to state law. There are no state laws specifically guaranteeing the right to carry firearms on the premises of the state’s public institutions of higher education, whether concealed or openly, or laws limiting on that right. Because there is no such explicit prohibition, and because there is legal ambiguity regarding the relationship of the systems and the state, there have been challenges to the legal merit of prohibitive firearms policies, including an attempt by individuals to carry firearms openly on one of the state’s public campuses, in defiance of that campus’ stated policy. The next section takes up the questions, rules, and conclusions of a state Superior Court decision in a case regarding plans by individuals to openly carry loaded rifles onto a public university campus, and also reviews cases out of Oregon and Texas that address similar issues.

IV. Campus Carry Cases in New Hampshire, Oregon, and Texas

A. New Hampshire

The legal questions in *University System of New Hampshire v. Bradley Jardis, et al.*⁴³ a case concerning a legal challenge to system and campus firearms policies, are whether or not USNH has legal autonomy from the state whose legislature established it in the first place, and whether that autonomy is sufficient to allow for the implementation of policies in apparent conflict with state law and the doctrine of preemption. Jardis (a member of and contributor to the blog for *Free Keene*, a libertarian, anti-government organization) and other individuals planned to protest USNH firearms policy by openly carrying loaded rifles onto the campus of Plymouth State University. Jardis announced these plans via a blog post on Monday, December 5, 2011, with the date of protest set for Friday, December 9, 2011. Sympathetic response to the post included “numerous electronic comments from other individuals, some of whom stated that they intended to join the respondents at Plymouth State University on December 9th ‘with their weapons.’”⁴⁴ One day before the planned protest, December 8, 2011, USNH filed a petition for temporary restraining order, as well as for preliminary and permanent injunction against Jardis et al. In issuing the preliminary injunction, the court confirmed that USNH adequately presented a case that it would suffer irreparable harm should Jardis

42 See Grassroots Change, *Preemption Watch* (2019), available at <https://grassrootschange.net/preemption-watch/#/category/guns>. See also Giffords Law Center to Prevent Gun Violence, *Preemption of Local Laws* (2018), available at <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/>.

43 *Id. supra* note 41.

44 *Id. supra* note 41, at 3, 4.

prevail, and that the argument in favor of USNH prohibitions on firearms was likely to succeed on the merits.⁴⁵

The respondents, Jardis, et al., based their argument on the claim that USNH is a political subdivision of the state, preempting any policies contrary to state law:

To the extent consistent with federal law, the state of New Hampshire shall have authority and jurisdiction over the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, firearms supplies, or knives in the state. Except as otherwise specifically provided by statute, no ordinance or regulation of a political subdivision may regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms[...].⁴⁶

In attempting to capture USNH within the category of “political subdivision,” the respondents cited *USNH v. U.S. Gypsum*,⁴⁷ in which the district court refers to the university system as a “political subdivision.” That decision turned on whether the university system was a state, which is not a citizen, or a political subdivision (such as a county or local school district), which is a citizen, for diversity jurisdiction purposes. The court in *Gypsum* considered several factors to assess whether an entity is an arm of the state or not, including “whether [a political subdivision or agency] performs a government function, whether it functions with substantial autonomy, [and] to what extent it is financed independently of the state treasury.”⁴⁸ The court noted that “it is not agency status *per se* that gives rise to the alter ego designation; the crucial question is the agency’s degree of autonomy from the state.”⁴⁹ In refusing to dismiss the suit, the *Gypsum* court explains that “[w]ith sufficient autonomy from the state, especially with regard to financial matters, an agency, political subdivision, or state university [...] is thus a ‘citizen.’”⁵⁰ The court considered that, in 1991, only one quarter of the USNH operational budget came through state apportionment, and noted the statutory authority given to that system’s Board of Trustees to manage and control properties and affairs. The court also highlighted that the USNH establishing legislation sought to protect the system from “inappropriate external influence.” Ultimately, the *Gypsum* decision held that USNH was not an arm of the state, but rather “a governmental corporation of sufficient autonomy to escape designation as an alter ego of the state.”⁵¹

45 *Id. supra* note 41, at 4 (internal quotations and citations omitted).

46 RSA 159:26, Firearms, Ammunition, and Knives; Authority of the State.

47 *University System of New Hampshire v. U.S. Gypsum Company*, 756 F.Supp. 640, 644 (1991) (“although it is a political subdivision of the state, it is not an ‘alter ego’ of the state”).

48 *Id.* at 645 (noting that the test is the same as that for diversity jurisdiction).

49 *Id. supra* note 47, at 646, 647.

50 *Id. supra* note 47, at 645.

51 *Id. supra* note 47, at 647.

Citing *Gypsum*, the respondents in *Jardis* also argued the USNH firearms policy is unconstitutional under both the state and federal constitutions. The court denied both claims. As to the Second Amendment in the U.S. Constitution, the court, citing *Heller*, reaffirmed the authority to limit the “right to bear arms,” explaining that “[l]ike most rights, the right secured by the Second Amendment is not unlimited. . . . (The Second Amendment) right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵² The *Jardis* court added that “‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings’ are ‘presumptively lawful regulatory measures.’”⁵³ In framing the argument at the state level, the court quoted the New Hampshire State Constitution, which says that “[a]ll persons have the right to keep and bear arms in defense of themselves, their families, their property and the State.”⁵⁴ However, the court also quoted previous State Supreme Court precedent that “‘the State constitutional right to bear arms is not absolute and may be subject to restriction and regulation.’”⁵⁵ The ability to regulate the state right to bear arms is subject to a “reasonableness test,” under which the court “focuses on the balance of the interests at stake.”⁵⁶ Reasonably speaking, the court determined that *Jardis et al.* were not armed in defense of themselves, their families, their property, or the state; rather, they were marching onto a public university campus in a manner “disruptive, highly visible, and intended to bring about a confrontation,”⁵⁷ which “carries with it ‘the virus of violence,’ and, thus, it is subject to reasonable restraint.”⁵⁸

In enjoining *Jardis et al.*, the court held that USNH, though established by and required to submit annual reports to the state, is not a political subdivision of the state, unlike a municipality or school district.⁵⁹ The legislative establishments of both USNH and CCSNH (were someone to challenge *that* system’s firearms policies) clearly intended for the state, through the General Court, to provide sufficient autonomy to the public college and university systems to provide for

52 *Id. supra* note 41, at 10 (quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008), at 626). An example of this is a law signed years before in 2000 by then-Governor Jeanne Shaheen prohibiting firearms in courthouses, which passed in an evenly-divided State Senate (12R, 12D) and a State House of Representatives with a significant Republican majority (245R, 155D). See *Relative to the Carrying of Firearms in Courthouses*, H.B. 312, N.H. General Court (2000). Enacted into law as RSA 159.19.

53 *Id. supra* note 41, at 10 (quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008), at 626-27 n.26).

54 Part I, Article 2-a, New Hampshire State Constitution.

55 *Id. supra* note 41, at 11 (quoting *State v. Smith*, 132 N.H. 756 (1990), at 758).

56 *Id. supra* note 41, at 11 (quoting *Bleiler v. Chief, Dover Police Dep’t*, 155 N.H. 693 (2007), at 700).

57 *Id. supra* note 41, at 5.

58 *Id. supra* note 41, at 12 (quoting *Lieberman v. Marshall*, 236 So. 2d 120 (Fla. 1970), at 123).

59 In early 2019, the New Hampshire state legislature began hearings for a bill, HB101, which “allows a school district, school administrative unit, or chartered public school to adopt and enforce a policy regulating firearms, firearms components, ammunition, firearms supplies, or knives within its jurisdiction.” Control at this level is rare, with preemption against local firearms regulation in effect in 43 states, according to the Giffords Law Center to Prevent Gun Violence, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/>.

and encourage an environment conducive to education and the free exchange of ideas. It is this educational environment the *Jardis* court has in mind when quoting from an earlier district court decision in Florida: “The State and its citizens, through their University and public school officials, have a valid interest in the orderly, peaceful, and nondisrupted operation of the University system.”⁶⁰

B. Oregon

Turning to another example, a case out of the Oregon Court of Appeals presents useful comparison. In *Oregon Firearms Educational Foundation v. Board of Higher Education and Oregon University System*,⁶¹ the petitioners argued that an Oregon University System (OUS) firearms policy was in excess of authority granted by relevant statute. That statute grants the Board of Higher Education authority to “adopt rules and bylaws for the government thereof, including the faculty, teachers, students and employees therein,”⁶² while the OUS policy asserted control over “any person”⁶³ found using or in possession “of firearms, explosives, dangerous chemicals, or other dangerous weapons or instrumentalities on institutionally owned or controlled property.”⁶⁴ In its decision, the court held invalid the policy in question, which gave OUS effective regulatory authority over use or possession of firearms on its property. State law stipulates, in part, that any administrative rule will be deemed invalid in the courts if that rule “exceeds the statutory authority of the agency”⁶⁵ enforcing the rule. The petitioner in *Oregon Firearms* also claimed a violation of the Second Amendment, but because the court eventually finds grounds for preemption, “the Court of Appeals therefore need not address when it also violates the Second Amendment.”⁶⁶

The success of the petitioner’s case relied on statutory language that vests “the authority to regulate in any matter whatsoever [...] solely in the Legislative Assembly,”⁶⁷ and so requires preemption of the Board of Higher Education policy in question. Citing a previous decision by the same court, in which a school district’s policy regulating firearms possession by district employees was deemed legal despite an apparent conflict with state law, the court remembers that “[consistent] with what the legislative history suggests, the legislature intended the preemptive effect of

60 *Lieberman v. Marshall*, 236 So. 2d 120, 123 (Fla. 1970).

61 245 Or. App 713 (2011). See also *Regents of University of Colorado v. Students of Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colorado 2012). The court in this case comes to a conclusion similar to the court in the Oregon case: “In sum, we hold that the [Concealed Carry Act] divested the Board of Regents of its authority to regulate concealed handgun possession on campus” (271 P.3d 496, at 502).

62 *Id.* at 716 (quoting ORS 351.070(4)) [emphasis added].

63 Oregon Administrative Rule 580-022-0045.

64 *Id.* at §3.

65 *Id. supra* note 61, at 715 (quoting ORS 183.400(4)(b)).

66 *Id. supra* note 61, at 713.

67 ORS 166.170(1).

ORS 166.170(1) to be limited to the *lawmaking authority* of local governments.”⁶⁸ In that school district decision, the court viewed the rule in question as an employment policy and “concluded that the school district’s policy was not the exercise of that sort of ‘authority to regulate’ and that, therefore, it was not preempted.”⁶⁹ The *Oregon Firearms* decision, on the other hand, construes the OSU policy as an overreaching regulation. Citing a case in which the Oregon state Bureau of Labor’s rules were found to “have the effect of statutory law,”⁷⁰ and another holding that “[g]enerally, administrative rules and regulations have the same regulatory force as statutes,”⁷¹ the court agrees that “[a]dministrative rules, unlike internal employment policies, have the regulatory force and effect of law.”⁷² Because the OSU policy was created through the Board of Higher Education’s “quasi-legislative ‘lawmaking’ authority,”⁷³ the court concludes that the policy must be viewed as “an exercise of an ‘authority to regulate’ firearms”⁷⁴ exceeding that Board’s authority to do so.

C. Texas

Another, more recent, decision out of the 5th Circuit Court of Appeals, *Glass, et al., v. Paxton, et al.*,⁷⁵ considers constitutional rather than preemption claims in a case about the alleged impact of the Campus Carry Law⁷⁶ enacted after passage of Senate Bill 11 in 2015. In its decision, the court held that allowing firearms onto the University of Texas at Austin campus, and into its classrooms, does not violate the First, Second, or Fourteenth Amendments rights of professors at the university. Glass claimed that the presence of weapons in class, or even the notion that it might be possible that some students in class could be carrying concealed weapons, would have a chilling effect on the pursuit of knowledge, and should therefore be restricted in the pursuit of “nondisrupted”⁷⁷ educational environments.

The First Amendment claim was that “classroom speech would be ‘dampened to some degree by the fear’ it could initiate gun violence in the class by students who have ‘one or more handguns hidden but at the ready if the gun owner is

68 *Id. supra* note 61, at 721 (quoting *Doe v. Medford School Dist.* 549C, 232 Or App 38, 60, (2009)) [emphasis added].

69 *Id. supra* note 61, at 721 (quoting *Doe v. Medford School Dist.* 549C, 232 Or App 38, 61, (2009)).

70 *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 157, 903 P2d 351 (1995).

71 *Atchley v. GTE Metal Erectors*, 149 Or App 581, 586, 945 P2d 557, rev den, 326 Or 133 (1997).

72 *Id. supra* note 61, at 722.

73 *Id. supra* note 61, at 723.

74 *Id.*

75 900 F.3d 233 (2018). (The lower court decision does not take up the Second or Fourteenth Amendment questions, and Glass argued that the appellate court should also decline, but the court decided to do so anyhow.)

76 TEX. GOV’T CODE § 411.2031.

77 *Id. supra* note 60, at 126.

moved to anger and impulsive action.”⁷⁸ The court rejects this as a “subjective chill,”⁷⁹ and effectively describes as self-censorship any choice by the petitioners (all three of them professors) to avoid topics of discussion because of a vague fear or “speculation” of possible future violence: “Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”⁸⁰ The court also cited previous Supreme Court cases considering claims that military surveillance would violate free speech rights through an “attenuated chain of possibilities” and “the decisions of independent actors.”⁸¹ Linking this previous analysis to the *Glass* decision, the court observes that Glass’ allegation of harm is contingent on the possibility of “(1) harm from concealed-carrying students incited by classroom debate and (2) harm from University disciplinary action,” both of which “must be ‘certainly impending.’”⁸² Because harm has not yet occurred, and despite the “concession by [the University] that consequences would follow if she were to ban concealed carry,” the court finds that Glass’ “decision to self-censor her speech rests on a harm that is not certainly impending.”⁸³ This all suggests that any similar claims of First Amendment violation as a result of a campus carry policy would have to flow *directly* from an *actual* harm, “consequences” such as firing or some other sanction following Glass’s or some other UT Austin professor’s classroom ban in violation of the policy.

The Second Amendment claim made by Glass is that “firearm usage in her presence is not sufficiently ‘well regulated,’”⁸⁴ and is therefore a violation of her rights under the Amendment. This represents a novel interpretation of the Amendment’s prefatory clause⁸⁵ that describes the need for a well-regulated militia. In order for Glass to prevail in this portion of her argument, the Amendment must be read to guarantee not only a right to bear arms in service of a militia, but also to guarantee that “persons not carrying arms have a right to the practice being well-regulated.”⁸⁶ However, “Glass’s argument is foreclosed by *Heller*.”⁸⁷ That decision held⁸⁸ that the prefatory clause of the Second Amendment, “A well regulated Militia, being necessary to the security of a free State,” does not limit the operative clause, that “the right of the people to keep and bear Arms, shall not be infringed.” Because the

78 *Id. supra* note 75, at 238.

79 *Id. supra* note 75, at 238 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).

80 *Id.*

81 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410-14 (2013). See also *Laird v. Tatum*, 408 U.S. 1 (1972).

82 *Id. supra* note 75, at 239 (citing *Clapper* at 410-14).

83 *Id. supra* note 75, at 240.

84 *Id. supra* note 75, at 243.

85 *Id. supra* note 75, at 244.

86 *Id. supra* note 75, at 244.

87 *Id. supra* note 75, at 244.

88 *Id. supra* note 6, at 577.

protections of the Amendment have been interpreted, since *Heller*, as accorded to individuals, and because the foundation of Glass’s argument requires a reading of those rights as belonging to a collective, the militia, or to individuals in connection with militia service⁸⁹ her argument in this area falls apart: “She has failed to state a claim under the Second Amendment.”⁹⁰

As with the Second Amendment claim, the court found that Glass “fail[ed] to meet her burden”⁹¹ in her equal protection claim under the Fourteenth Amendment. The application of rational basis review was applied “because the professors are not part of a protected class,”⁹² and Glass argued that “[t]here is no rational basis for the division in the state’s policies between where concealed carry of handguns is permitted and where it may be prohibited.”⁹³ Specifically, Glass argued that there was “no rational basis for Texas to allow private universities to ban concealed carry but not public universities” and “no rational basis for the University to allow concealed carry in classrooms while simultaneously prohibiting the practice in other campus locations such as faculty offices, research laboratories, and residence halls.”⁹⁴ The argument on behalf of the University was that distinguishing between public and private institutions is a means to protect property rights and that distinguishing between busy classrooms and less-frequented spaces promotes public safety and self-defense, which are specific goals of the Concealed Carry Act. To the point, the University argues that “public safety and self-defense cannot be achieved if concealed carry is banned in classrooms because attending class is a core reason for students to travel to campus.”⁹⁵ Glass made no real effort to respond to these arguments, describing the University concealed-carry zoning as “inexplicable hodge-podge.”⁹⁶ In the final sentences of the *Glass* decision, the court quoted Supreme Court precedent that “when conceiving of hypothetical rationales for a law, the assumptions underlying those rationales may be erroneous so long as they are ‘arguable.’”⁹⁷ Because “Texas’s rationales are arguable at the very least” and because “Glass fail[ed] to [...] ‘negative every conceivable basis which might support’ Texas’s purported rational basis,”⁹⁸ the court did not find any violations of equal protection under the Fourteenth Amendment.

What this decision means in a broader context is that claimants must prove a harm is “certainly impending” in order to make a First Amendment claim that

89 Justice John Paul Stevens, in his dissenting opinion in the split 5-4 *Heller* case, argues that the proper interpretation is to consider the right as tied to militia service.

90 *Id.*

91 *Id. supra* note 75, at 246.

92 *Id. supra* note 75, at 246

93 *Id. supra* note 75, at 245.

94 *Id. supra* note 75, at 245.

95 *Id. supra* note 75, at 245.

96 *Id. supra* note 75, at 245.

97 *Id. supra* note 75, at 246. Quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 320 (1993).

98 *Id. supra* note 75, at 246. Quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

speech has been chilled by implementation of campus carry law or policy, and cannot rely on a bad feeling about a possible but not yet obvious harm; further, the claims must be made against a named party, and not against unnamed third parties such as hypothetical students. As to Second Amendment claims, the court here suggests that *Heller* carves out room for arguments that certain spaces like classrooms and hospitals and courts may be given special regulatory consideration because of their purpose or vulnerability, but does not allow for any arguments about militia-related activity. Lastly, the decision suggests that the Fourteenth Amendment can only provide faculty with a rational basis review of policy justification,⁹⁹ and that the bar for “rational” is fairly easy for institutions to meet.

V. Conclusion

One of the persistent findings across more than 130 years of court decisions between 1876 and 2008¹⁰⁰ is that the rights to keep and bear arms are not absolute. Even in *District of Columbia v. Heller*, which construed, for the first time at the Supreme Court level, the right to bear arms as an individual right rather than a state’s or collective’s right, the court recognized that the right is not unlimited:

...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.¹⁰¹

While this decision reinforced the argument that individuals have a right to own and possess firearms regardless of militia service, it also upheld the notion that reasonable limitations on ownership and possession are well within current interpretation of the Second Amendment.

Jardis was not primarily a case about registration or licensing, as *Heller* and *McDonald* were. At the time of the planned protest, the state of New Hampshire only had requirements for registering concealed weapons.¹⁰² Nor was *Jardis* about excessive prohibitions on the ownership or possession of handguns, “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and

99 Had the challenge been made by Black or Muslim faculty claiming discriminatory impact on the basis of race or religion, and had the challengers proven discriminatory intent by the legislature, then strict scrutiny would have required the government to prove that there was a compelling state interest for such discrimination and that the law was narrowly tailored to achieve its end. Had the challenge, made as it was by three women, included claims of discriminatory impact on the basis of gender, and had they proven discriminatory intent, then intermediate scrutiny would have required the government to prove that the law served an important government purpose and that it was substantially related to that purpose. The challengers made no such claims, and so the burden was theirs to prove that the state had no interest in the control of firearms and that the law provided no reasonable link to that interest.

100 Gregg Lee Carter, *Gun Control in the United States* 42 (ABC-CLIO 2017).

101 *Id. supra* note 6, at 626.

102 *Id. supra* note 32.

family,”¹⁰³ nor a case about defense of the home, “where the need for defense of self, family, and property is most acute.”¹⁰⁴ As a case about carrying firearms in a public space dedicated to education, rather, *Jardis* was concerned with preemption and the question of the bounds and authorities of the state and the university system. The decision left the injunction and temporary restraining order in effect “because RSA 159:26 [state law establishing USNH and granting it broad authority] likely does not preempt the Firearms policy and the Firearms policy is likely valid under the Federal and State Constitutions.”¹⁰⁵ The lack of conflict between statute and policy indicates the *likely* result should other cases arise in the state, but that result is only possible because of the way statutory and policy language interact.

While the decision in *Oregon Firearms* found a compelling argument for preemption, and while the decision in *Glass* found no compelling argument that a campus carry law violates First, Second, or Fourteenth Amendment rights, the decision in *Jardis* denies preemption, denies violation of the Second Amendment, and gives credence to the fear of possible or contingent harm: “If the respondents were permitted to bring firearms onto the Plymouth State campus in violation of the Firearms policy, it would introduce an element of volatility and a heightened risk of harm to the students, faculty, and staff present on the campus.”¹⁰⁶ The decision presents one possible argument to be made that unregulated open *or* concealed carry of firearms on campuses poses a threat to the tradition of academic freedom,¹⁰⁷ but in light of the *Glass* decision, it seems as though stronger evidence is required to prove harm, and that evidence is available. As long as those tasked with maintaining the safety and security on campus believe that there is “no credible evidence to suggest that the presence of students carrying concealed weapons would reduce violence on our college campuses,”¹⁰⁸ there is no good reason to experiment and risk the lives of students, faculty, staff, administrators, or their visitors. And as long as the link between levels of gun ownership and levels of gun violence remains strong, it is likely that others¹⁰⁹ will challenge the claim that campuses will be safer from the “virus of violence”¹¹⁰ if more of their population carried weapons to classrooms, to offices, to residence halls, to gyms, to cafeterias, or to libraries.¹¹¹ It is no guarantee that a Supreme Court decision on the matter would end this debate, but the trend is also unlikely to fade before such a decision is reached.

103 *Id. supra* note 6, at 628.

104 *Id. supra* note 6, at 628.

105 *Id. supra* note 41, at 13.

106 *Id. supra* note 41, at 13.

107 Laura Houser Oblinger, *The Wild, Wild West of Higher Education: Keeping the Campus Carry Decision in the University's Holster*, 53 Washburn L.J. 87-117 (2013)

108 Lisa A. Sprague, *IACLEA Position Statement: Concealed Carrying of Firearms Proposals on College Campuses*, Int'l Ass'n of Campus Law Enforcement Administrators (Aug. 12, 2008). See also Jesus M. Villahermosa, Jr., *Guns Don't Belong in the Hands of Administrators, Professors, or Students*, 54 Chron. High. Ed. A56 (2008).

109 See *GeorgiaCarry.org, Inc., v. Code Revision Commission, et al.*, 299 Ga 896 (2016).

110 *Id. supra* note 60, at 126.

111 Higher Educ. Ctr. for Alcohol, Drug Abuse, & Violence Prevention, *E-Fact Sheet: Guns on Campus: A Current Debate* (U.S. Dep't of Educ. 2010).