

GUN REGULATION ON CAMPUS:  
UNDERSTANDING *HELLER* AND PREPARING  
FOR SUBSEQUENT LITIGATION AND  
LEGISLATION

DEREK P. LANGHAUSER\*

I. CASE SUMMARY OF *HELLER*.....68  
II. HOW THE *HELLER* COURT INTERPRETED THE TEXT OF THE SECOND  
AMENDMENT.....71  
III. HOW THE *HELLER* COURT INTERPRETED THE HISTORY OF THE  
SECOND AMENDMENT .....75  
IV. PREPARING FOR POST-*HELLER* LITIGATION AND LEGISLATION .....82  
V. CONCLUSION .....99

INTRODUCTION

The issue of whether to regulate, prohibit, or allow guns on campus remains important and visible for colleges and universities across the country. In 2009, twenty states considered various reforms to campus weapon laws,<sup>1</sup> up from the seventeen states that attempted such reforms in

---

\* The author is General Counsel of the Maine Community College System. This article is dedicated to the memory of Charles A. Harvey, Jr. whose own scholarship and practice in the most challenging areas of law set a standard for care, excellence, and reason.

It bears emphasizing at the outset that it is not a purpose of this article to argue whether gun regulation is or is not a good idea, or whether *District of Columbia v. Heller* 128 S.Ct. 2783 (2008), was correctly decided. Those tasks are for others; see, for example, *infra* note 20. Instead, the purpose of this article is to accept the reality as college and university counsel find it; i.e., that many of their clients currently restrict, and want to continue to restrict, gun possession on their campuses. Given that reality, this article focuses only on how to help such counsel defend their clients’ interests in doing so.

1. *Report of the National Conference of State Legislatures, Carrying Guns on Post-Secondary Campuses: 2009 Legislation* (Aug. 11, 2009) (password access through state law librarian or legislative staff) [hereinafter NCSL Report] at <http://www.ncsl.org>.

As of October 15, 2009 there were five states with active or enacted legislation to allow all or some individuals with Concealed Carry Weapon (“CCW”) permits to carry weapons on college and university campuses. See e.g., KAN. STAT. ANN. § 75-

2008.<sup>2</sup> Currently, approximately twenty-six states prohibit guns on public

---

7c10(14) (effective July 7, 2009) (prohibiting CCWs on “any . . . college or university facility”); ME. REV. STAT. ANN. tit. 20-A, § 10009 (effective Sept. 12, 2009) (stipulating that colleges and universities have the power to regulate the possession of firearms on campus); S.C. CODE ANN. § 16-23-430 (effective June 2, 2009) (allowing CCWs in a motor vehicle, but not on campus); H.R. 4348, 95th Leg., Reg. Sess. (Mich. 2009) (proposing to eliminate the list of specified premises, including college and university campuses, where CCW licensed persons may not carry a weapon); H.R. 129, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (eliminating public and private institutions of higher learning from a list of premises on which CCWs are prohibited).

There were also fourteen states where CCW legislation was defeated. *See, e.g.*, S. 310, 2009 Leg., Reg. Sess. (Ala. 2009) (prohibiting a state-supported college or university from adopting a policy prohibiting persons employed as a professor at the college or university from carrying a firearm on campus if the professor has any required license); H.R. 2607, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (allowing a governing board, officer, faculty member, staff member or other employee to prohibit the lawful possession of concealed weapon by persons with valid permits on property of an educational institution); H.R. 1097, 87th Gen. Assem., Reg. Sess. (Ark. 2009) (allowing an individual with a concealed permit to have a firearm in a locked car on campus); S. 493, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009) (prohibiting a state college or university from regulating in any manner the ownership, possession, carrying, or transportation of firearms or ammunition); H.R. 419, 2009 Leg., Reg. Sess. (Ky. 2009) (prohibiting colleges and universities from prohibiting employees from keeping a loaded firearm in their car); H.R. 27, 2009 Leg., Reg. Sess. (La. 2009) (authorizing concealed handgun permit holders to carry concealed weapons on campuses); H.R. 353, 424th Gen. Assem., Reg. Sess. (Md. 2009) (prohibiting the carrying or possession of firearms, knives, and deadly weapons on the property of public institutions of higher education); H.R. 645, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009) (removing the prohibition on persons with concealed carry endorsements carrying concealed firearms into an institution of higher education); Leg. B. 145, 101st Leg., 1st Reg. Sess. (Neb. 2009) (prohibiting firearms at schools, colleges and universities as prescribed); H.R. 1348, 61st Leg. Assem., Reg. Sess. (N.D. 2009) (governing the possession of a firearm or dangerous weapon by a person licensed to carry a concealed weapon); H.R. 1084, 2009 Leg., 52d Sess. (Okla. 2009) (authorizing the establishment of concealed handgun policies or rules for certain college or university events); H.R. 1257, 84th Leg. Assem., Reg. Sess. (S.D. 2009) (providing for the right to possess a firearm on the campuses of public institutions of higher education); H.R. 1893, 81st Leg., Reg. Sess. (Tex. 2009) (relating to the carrying of concealed handguns on the campuses of institutions of higher education); H.R. 1656, 2009 Leg., Reg. Sess. (Va. 2009) (allowing full-time faculty members of state institutions of higher education who possess a valid Virginia concealed handgun permit to carry a concealed handgun on campus); S. 245, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (allowing persons with handgun carry permit to carry in public postsecondary institutions); H.R. 724, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (authorizing full-time faculty and staff at public schools, colleges and universities to carry handguns if not otherwise prohibited by law); H.B. 823, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (authorizing certain law enforcement officers and military personnel to carry weapons on public college and university campuses).

2. *See* THOMAS HARNISCH, AM. ASS’N OF STATE COLLS. & UNIVS., CONCEALED WEAPONS ON STATE COLLEGE CAMPUSES: IN PURSUIT OF INDIVIDUAL LIBERTY AND COLLECTIVE SECURITY 2 (2008), available at <http://www.aascu.org/media/pm/pdf/pmdec08.pdf>. *See also* Sara Lipka, *Campaigns to Overrule Campus Gun Bans Have Failed in Many States*, CHRON. HIGHER EDUC.

college and university campuses.<sup>3</sup> Another twenty-three states allow public colleges and universities to determine their own weapons policies, with nearly all choosing to be “gun-free.”<sup>4</sup>

Debates about campus weapon regulations are continuing as courts and legislatures alike consider the authority of both public and private institutions to regulate guns on campus.<sup>5</sup> Increasingly, these reviews are being driven and/or shaped by the United States Supreme Court’s landmark decision in *District of Columbia v. Heller*.<sup>6</sup> There, the Court decided that the Second Amendment includes, in addition to rights related to organizing and maintaining state militias, a personal gun possession right unconnected to such militia service, and that such personal right extends “in case of confrontation”<sup>7</sup> to “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>8</sup> The Court also stated in dicta that its ruling should not be construed 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.”<sup>9</sup>

*Heller* may be viewed as posing little direct threat to colleges and universities that regulate gun possession on campus. Its particular holding is limited to a complete federal handgun ban in the privacy of a home. Extension of *Heller* to a like prohibition on state powers, and/or extension to weapons other than handguns and locations other than a private home, will have to come in subsequent cases. The *Heller* majority stated in dicta support for “longstanding” exercises of police power in regulating firearms “in sensitive places such as . . . schools and government buildings,”<sup>10</sup> and that “nothing in [its] opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms,”<sup>11</sup> or possession by “felons and the mentally ill,”<sup>12</sup> areas of ongoing concern for college or university administrators. Finally, recent litigation outside of

---

(Wash., D.C.), Apr. 18, 2008, available at <http://chronicle.com/article/Campaigns-to-Overrule-Campu/9639/>.

3. HARNISCH, *supra* note 2, at 2.

4. *Id.*

5. *Id.*

6. 128 S. Ct. 2783 (2008).

7. *Id.* at 2797.

8. *Id.* at 2821.

9. *Id.* at 2816–17. The Court also recognized the validity of “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 2817. The Court went on to state that “we identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 2817 n.26.

10. *Id.* at 2816–17.

11. *Id.*

12. *Heller*, 128 S. Ct. at 2817.

the higher education context attempting to achieve a broader application of *Heller* beyond its immediate holding have thus far not been successful, leading some commentators to suggest that it will not have a broad precedential impact.<sup>13</sup>

However, higher education counsel anxious to preserve their institution's authority to regulate guns on campus should not overlook *Heller*. For example, gun possession advocates are filing cases to extend the Second Amendment's restriction on Congressional power to a restriction on state actors such as public colleges and universities,<sup>14</sup> introducing bills to provide concealed possession rights on college and university campuses,<sup>15</sup> and bringing cases to challenge the power of public housing authorities—whose operations can look a lot like campus residence halls—to restrict weapons.<sup>16</sup> Moreover, *Heller* did not define the term “home” so to clarify whether a college or university residence hall qualifies as a “home” and did not define “school”—a term typically associated with K–12, not post-secondary, institutions.<sup>17</sup> Nor did the Court define the standard—rational basis, heightened or strict scrutiny—by which regulations that affect the interests of colleges and universities, such as gun bans in residence halls, will be judged for their constitutionality, if, in fact, the Second Amendment is eventually held to be applicable to the states.<sup>18</sup>

---

13. See, e.g., Adam Liptak, *Few Ripples from Supreme Court Ruling on Guns*, N.Y. TIMES, Mar. 17, 2009, available at <http://www.nytimes.com/2009/03/17/us/17bar.html> (“Lower federal courts have decided more than 80 cases interpreting [*Heller*], and . . . [s]o far, [it] is firing blanks.”).

14. See *infra* Part IV.E.

15. See sources cited *supra* note 1; see also *infra* Part IV.G. And in most states, private colleges and universities adopt their own restrictions in conformity with state concealed weapons laws. See HARNISCH, *supra* note 2, at 2.

16. See *infra* Part IV.H.; see also Sandra J. Mclelland & Steven D. Frenkil, *Banning Weapons on Campuses: The Battle is Far from Won*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 13, 2009, available at <http://chronicle.com/article/Banning-Weapons-on-Campuses-/21678>.

17. See *United States v. Booker*, No. CR-08-19-B-W, at \*2–5 (D. Me. Aug. 11, 2008), available at [http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW\\_08112008\\_1-08cr19\\_USA\\_V\\_BOOKER.pdf](http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW_08112008_1-08cr19_USA_V_BOOKER.pdf) (upholding 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence, against an argument based on *Heller*); see also Eric Kelderman & Sara Lipka, *Supreme Court Strikes Down a Gun Ban and Raises Questions for College Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), July 11, 2008, available at <http://chronicle.com/article/Supreme-Court-Strikes-Down-a/15127>. See e.g., *infra* Part IV.C.

18. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2783 (2008). The question of such application is now before the United States Supreme Court. See *National Rifle Association of America v. City of Chicago*, No. 08-4241 et al, 567 F.3d 856 (7th Cir. 2009), cert. granted *sub nom* *McDonald v. City of Chicago*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08-1521). See also discussion in Part IV.E, *infra*.

Given these issues, *Heller* and its effects must be acknowledged by college and university counsel. The purpose of this article is to explain the legal and historical rationale of *Heller*, and to suggest how counsel can prepare for the judicial and legislative challenges that *Heller* is already bringing their way. Part I of this article summarizes *Heller*. Parts II and III explain how the Court interpreted the text and history of the Second Amendment. These textual and historical frameworks are important because they may guide state courts as they construe the scope of their own state constitutions after *Heller*.<sup>19</sup> Finally, Part IV suggests steps that counsel can take to prepare for judicial or legislative efforts to limit college and university regulation of firearm possession on campus.<sup>20</sup> Part IV

---

19. State courts may or may not use *Heller* as a baseline in interpreting state constitutional provisions related to firearms. State constitutional provisions frequently have a different wording and many were adopted well after the National Framing era. While some state courts generally assume that a state constitutional provision has the same substantive meaning as its federal counterpart, others—particularly those that disapprove of recent United States Supreme Court decisions—have ruled that their state constitutions have a different meaning. Indeed, for the last thirty-five years, there has been a revival of state constitutional law. See William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

A judge who believes that her role is to be part of the democratic dialogue will study *Heller* when interpreting a state constitutional provision, whereas a judge who believes that interpretation turns on text as understood at the time the provision was adopted—which might be the 20th rather than the 18th Century—may well discount *Heller* if the text or date of adoption at issue is significantly different. It is beyond the scope of this article to detail how and why state constitutions pose significantly different jurisprudential questions from the federal constitution, but see *infra* note 118, for a brief identification of some of the primary differences.

20. It is not a purpose of this article to argue for or against the merits of the *Heller* decision, or to argue for or against the issues of gun rights more broadly. Those tasks are for others. For example, Justice Scalia sharply criticized Justice Stevens' opinion, calling Justice Stevens' rationale "dead wrong." *Heller*, 128 S. Ct. at 2790 n.5. Justice Scalia also found Justice Stevens' rationale to be "manufacture[d]" and "grotesque." *Id.* at 2794. It was "irrelevant," *id.* at 2795, "faulty," *id.*, "perilous," *id.* at 2796, "usefully eva[sive]," *id.* at 2797, "worthy of the mad hatter," *id.*, "bizarre," *id.* at 2797 n.14, "whit[less]" *id.*, "erroneous," *id.* at 2804, "unsupported" *id.*, "not comport[ing] with . . . widely understood liberties," *id.*, and a "betray[al of] a fundamental understanding of a Court's interpretive task" *id.* at 2805. Stevens' rationale did "not make sense," *id.* at 2806, and it was "particularly wrongheaded," *id.* at 2814.

In addition, critics of Justice Scalia's majority opinion have challenged its judicial methodology for employing analytical techniques typically criticized by Justice Scalia himself. These include analyzing terms out of their particular order, looking past a natural reading, relying on post-enactment sources as evidence of the drafter's pre-enactment intent, deviating from precedent without expressly overruling it, crafting seemingly new standards, and deciding a big case outright without remanding some part to a lower court for further narrowing. See J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265118](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265118); but see Alan Gura,

focuses on the statutory issues of pre-emption as it applies to the regulation of concealed weapons, the emerging constitutional issue of incorporation, and the current litigation on the related issue of public housing authority regulations, and practical legislative strategies relating to higher education specific issues.

This article concludes that although *Heller* will be used to launch certain judicial and legislative challenges against college and university policies that prohibit guns on campus, colleges and universities can withstand these challenges if that is what they choose to do. Even if the Second Amendment is incorporated against the states, colleges and universities can successfully defend their campus and/or dorm policies against concealed and/or non-concealed weapons if the colleges and universities have clear state statutory delegations of firearm regulatory authority. Such express delegations will likely defeat both statutory arguments based on pre-emption and constitutional arguments based on individual rights.

#### I. CASE SUMMARY OF *HELLER*

Since 1976, the District of Columbia (“D.C.”) banned handgun possession and required residents to keep all other firearms,<sup>21</sup> such as rifles and shotguns, bound by trigger locks.<sup>22</sup> Dick Heller was a special policeman at the Thurgood Marshall Judicial Building in D.C., and he applied to register a handgun that he sought to keep without a trigger lock at his home for self-defense. Pursuant to its ordinance, D.C. refused to register Mr. Heller’s handgun.

Mr. Heller then filed suit against D.C., arguing that D.C.’s handgun ban and firearm trigger lock requirement violated the Second Amendment of

---

*Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1129 (2009), available at <http://ssrn.com/abstract=1430680>.

Instead of entering into these methodological and related policy debates, the sole purpose of this article is to focus on reality as college and university counsel find it: most of their clients currently restrict, and/or want to continue to restrict, gun possession on their campuses. Given that reality, this article focuses on helping such counsel perform their job and defend their clients’ interests in doing so.

21. The definition of “firearm” varies depending upon the regulation, ordinance or statute at issue. Maine, for example, provides by statute a fairly common definition:

[A]ny weapon, whether loaded or unloaded, which is designed to expel a projectile by the action of an explosive and includes any such weapon commonly referred to as a pistol, revolver, rifle, gun, machine gun or shotgun. Any weapon which can be made into a firearm by the insertion of a firing pin, or other similar thing, or by repair, is a firearm.

ME. REV. STAT. ANN. tit. 17-A, § 2(12-A) (2009). The principle definitions under federal law are similar. See 18 U.S.C. § 921(a)(3) (2006); 26 U.S.C. § 5845 (2006).

22. *Heller*, 128 S. Ct. at 2788 (citing D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)).

the United States Constitution. The Second Amendment provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>23</sup> The suit sought to enjoin D.C. from enforcing both provisions. The United States District Court for the District of Columbia ruled in favor of D.C. and dismissed the suit.<sup>24</sup> Mr. Heller appealed to the Court of Appeals for the District of Columbia Circuit, which reversed<sup>25</sup> and D.C. appealed to the United States Supreme Court.<sup>26</sup>

The Supreme Court, by a 5-4 vote, ruled for Mr. Heller. In the majority, Justices Scalia, Kennedy, Thomas, Alito, and Chief Justice Roberts ruled for Mr. Heller, and Justices Stevens, Breyer, Ginsburg and Souter (with Justices Stevens and Breyer each writing separately) dissented.<sup>27</sup> The majority found that the handgun ban “amount[ed] to a prohibition of an entire class of ‘arms’ that Americans overwhelmingly choose for . . . [the] lawful purpose of [self-defense],” and that the trigger lock requirement “ma[de] it impossible for citizens to use [arms] for the core lawful purpose of self-defense and [wa]s hence unconstitutional.”<sup>28</sup>

---

23. U.S. CONST. amend. II.

24. *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004).

25. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

26. Vice President Richard Cheney joined as *amicus curiae* supporting Mr. Heller on all arguments. Brief for Amici Curiae 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). He did so after the United States Solicitor General filed a full-party brief supporting Mr. Heller’s general personal right of possession, but also supporting the District’s argument that the case should not be decided at that time and, instead, should be sent back to the lower court for further findings. Brief of United States as Amicus Curiae, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). This unique posture placed the Bush Administration on both sides of the case. For a fuller explanation of the Solicitor General’s position, see *infra*, note 136 and accompanying text.

27. This article focuses on Justice Stevens’s dissent because it addressed the primary issue: whether Mr. Heller had a personal, non-militia related right. *Heller*, 128 S. Ct. at 2822–47 (Stevens, J., dissenting). Justice Breyer’s dissent pursued a secondary analysis: that even if Mr. Heller has such a personal right, the public safety interests protected by the D.C. ordinance outweighed that right. *Id.* at 2847–70 (Breyer, J. dissenting).

28. *Id.* at 2817 (majority opinion).

The American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

Deviating from the rationale of, but not expressly overruling *United States v. Miller*,<sup>29</sup> a Supreme Court decision from 1939, the *Heller* majority concluded that the Second Amendment includes, in addition to rights related to organizing and maintaining state militias, a personal right unconnected to such militia service, and that such personal right extends to “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>30</sup> Moreover, this right to lawfully defend “self, family, and property”<sup>31</sup> is “elevate[d] above all other interests” protected by the Second Amendment.<sup>32</sup>

To limit the reach of this ruling, the majority added at the end of its opinion that “like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>33</sup> For example, the Court noted that:

[n]othing 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.<sup>34</sup>

---

*Id.* at 2818.

29. 307 U.S. 174 (1939).

30. *Heller*, 128 S. Ct. at 2821.

31. *Id.* at 2817.

32. *Id.* at 2821.

33. *Id.* at 2816.

34. *Id.* at 2816–17. This language responded to the brief of the United States Solicitor General whose primary interest in *Heller* was to make sure that the comprehensive scheme of federal laws regulating firearm type, manufacture, sale, possession and use by some or all people remained intact even if Mr. Heller won. The Solicitor General sought primarily to protect the Gun Control Act of 1968 which aims to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetence, and to prevent certain categories of persons from shipping, transporting, receiving or possessing firearms. See Gun Control Act of 1968, 18 U.S.C. § 922(g) (2006). The Solicitor General also sought to protect the National Firearms Act of 1934 which regulates firearms, such as machine guns, short-barrel rifles, short-barrel shotguns, silencers and certain destructive devices, and also requires that these weapons be registered by their makers, manufacturers and importers. See National Firearms Act of 1934, 26 U.S.C. § 5841 (2006). For a helpful and detailed summary of federal firearms laws, see DEPT. OF JUSTICE, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE 2005 (2005), available at [http://www.atf.gov/pub/fire-explo\\_pub/2005/p53004/index.htm](http://www.atf.gov/pub/fire-explo_pub/2005/p53004/index.htm).

Every state, of course, also has its own comprehensive laws regulating firearm possession by certain persons (e.g., felons, minors and incompetents), in certain locations (e.g., courthouses, schools and the capitol complex), and for particular uses (e.g., hunting at night or in residential areas). See Legal Community Against Violence,



## II. HOW THE *HELLER* COURT INTERPRETED THE TEXT OF THE SECOND AMENDMENT

This Part focuses on the *Heller* Court's interpretation of the text of the Second Amendment, and Part III focuses on the Court's interpretation of the history of the Amendment. Together, these interpretations are likely to guide state courts as they construe the scope of their own state constitutions after *Heller*.

### A. Militia vs. Personal Use

Both the majority and Justice Stevens, in his dissent, (hereinafter "Justice Stevens"),<sup>35</sup> agreed that the Second Amendment was a response to the concern of the anti-Federalists who worried that the new federal government would emasculate state powers by disarming the states. Specifically, the anti-Federalists worried that Congress would use its Article I powers to "raise and support [national] armies"<sup>36</sup> and to "provide for organizing, arming and disciplining"<sup>37</sup> the national army in order to disband or disarm the state militias, rendering the states powerless.<sup>38</sup> Indeed, the full Court essentially agreed that it was exactly those provisions that the Second Amendment intended to "amend" in 1791.<sup>39</sup>

The majority and the Stevens dissent nonetheless disagreed about the scope of the Framers' intent in so amending Article I. The majority found that, prior to 1791, citizens already had a right to possess and use firearms, and that this individual right was just as important to state security as the exercise of any formal militia rights. As a result, the majority read the Second Amendment as an effort—not just to codify a narrow militia gun right—but to codify the broader individual right, as well.<sup>40</sup>

Justice Stevens disagreed, arguing that, had the Framers intended to provide such an individual non-militia right, they could have done so expressly, just as several states had done at that time in their own

---

at [http://lcav.org/content/state\\_local.asp](http://lcav.org/content/state_local.asp) (linking to state gun laws).

35. Justice Stevens' dissent was joined by Justices Souter, Ginsburg, and Breyer. Justice Breyer also wrote a separate dissent, which Justices Stevens, Souter, and Ginsburg joined, but, as discussed *supra* note 27, this dissent addressed a secondary analysis outside the scope of this article.

36. U.S. CONST. art. I, § 8, cl. 12.

37. *Id.*, art. I, § 8, cl. 16.

38. *Heller*, 128 S. Ct. at 2801.

39. Former United States Solicitor General Walter Dellinger, who argued orally on behalf of D.C., expressed his thoughts after the decision that the *Heller* Court read the Second Amendment not just as amending the Article I powers that the anti-Federalists feared would be used to disarm state militias, but also as amending the individual liberty clause of the Preamble. A video of Mr. Dellinger's comments is available at <http://fora.tv/2008/07/25/>.

40. *Heller*, 128 S. Ct. at 2797–98, 2801–02, 2804.

constitutions.<sup>41</sup> For example, the 1777 Vermont Declaration of Rights guaranteed “[t]hat the people have a right to bear arms for the defence of themselves and the State.”<sup>42</sup> Pennsylvania’s 1776 Declaration of Rights expressly provided its citizens with self-defense and sporting rights: “[T]he people have a right to bear arms for the defence of themselves and the state” and “shall have the liberty to *fowl and hunt* in seasonable times on the lands they hold, and on all other lands therein not inclosed.”<sup>43</sup>

### B. Prefatory vs. Operative Clause

Both the majority and Justice Stevens agreed that the twenty-seven word Second Amendment has two distinct clauses. The first clause is “[a] well regulated Militia, being necessary to the security of a free State,”<sup>44</sup> and the second clause is “the right of the people to keep and bear Arms, shall not be infringed.”<sup>45</sup>

The majority began its analysis by setting aside the first clause and, instead, focusing on the second clause.<sup>46</sup> They did so by concluding that the essential purpose of the Amendment was to protect gun rights and not to protect militia rights.<sup>47</sup> Accordingly, the majority considered the first clause to be a mere “prefatory” clause, and the second clause to be the “operative” clause.<sup>48</sup>

Having reasoned that the first clause was merely “prefatory” in nature, the majority then concluded that the first clause only “announces a purpose, but does not limit or expand the scope” of the second clause.<sup>49</sup> The purpose in interpreting the “prefatory” clause was, the majority wrote, “to ensure that our reading of the operative clause is consistent with the announced purpose.”<sup>50</sup> In other words, because the recognition of a personal firearm right adds to, but does not interfere with, any militia-related rights, that recognition is warranted.

Justice Stevens sharply disagreed not only with this conclusion but, more importantly, with the methodology. Criticizing the majority’s complicated reversing analysis, Justice Stevens stated tersely:

That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the

---

41. *Id.* at 2825–26 (Stevens, J., dissenting).

42. *Id.* at 2826 (citing 1 B. SCHWARTZ, BILL OF RIGHTS 235, 324 (1971)).

43. *Id.* at 2825–26 (citing SCHWARTZ, *supra* note 42, at 266, 274).

44. U.S. CONST. amend II, cl. 1.

45. *Id.*, cl. 2.

46. *Heller*, 128 S. Ct. at 2789–90 (majority opinion).

47. *Id.*

48. Compare *id.* at 2789 with *id.* at 2803.

49. See *id.* at 2789.

50. See *id.* at 2790.

Amendment was adopted. . . . Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.<sup>51</sup>

Instead, Justice Stevens would have accorded more meaning to the first clause and, in so doing, would have recognized the reference to militia as a substantive limitation on the second clause.<sup>52</sup>

### C. Key Terms of the Prefatory Clause

Carrying forward their methodological differences, described above, the majority and dissent then interpreted the key terms of the first, or "prefatory", clause—"A well regulated Militia, being necessary to the security of a free State"—as follows.

#### 1. "Well-regulated militia"

Both the majority and Justice Stevens agreed that the term "militia" was intended to refer to the state militias. They also agreed that "well-regulated" referred to the many organizational attributes of these militias.<sup>53</sup> They disagreed, however, on how broadly the Framers intended to define the term "militia."

The majority read "militia" to be not only *formal* state sanctioned groups, but also *informal* groups of citizens, who gathered with arms to pursue some common interest.<sup>54</sup> The majority found that the Framers had a broad concern to ensure that the people could arm and protect themselves from a variety of possible sudden threats: foreign invasions, domestic insurrections, ineffectiveness of an inadequately trained and maintained militia to defend against such threats, and, as noted above, usurpation of power by rulers, particularly the new federal government.<sup>55</sup> In sum, the Framers' goal was to protect the opportunity for resistance, not to protect some standard of formality. Accordingly, the majority "start[ed] . . . with a strong presumption that the Second Amendment right is exercised

---

51. See *id.* at 2826 (Stevens, J., dissenting).

52. See *Heller*, 128 S. Ct. at 2824–26. Justice Stevens's analysis implies that the analysis employed by the majority effectively and improperly shifted the burden of proof from Mr. Heller—to show that his claimed right was valid—to the District—to show that Mr. Heller's claim was invalid.

53. These attributes include the creation of regiments, brigades and divisions; command structures; appointment of officers; how the militia assembled and provided for training; how they prescribed penalties for nonappearance, delinquency, and failure to keep the required weapons, ammunition and other necessary equipment. See *Heller*, 128 S. Ct. at 2825 n.6 (citations omitted).

54. See *id.* at 2790–91 (majority opinion).

55. See *id.* at 2800–01.

individually and belongs to all Americans.”<sup>56</sup>

Justice Stevens disagreed, essentially arguing that “informal” militias were, by definition, not regulated at all, let alone “well-regulated.”<sup>57</sup> Because the Amendment referred only and specifically to “well-regulated” militia, the Framers could not have intended the broader reading given by the majority.<sup>58</sup>

## 2. “Being necessary to the security of a free State”

Despite their differences, both the majority and Justice Stevens agreed that “security” meant both political sovereignty and social stability, and included the range of threats described above.<sup>59</sup> They also agreed that the principal threat to security was a new federal government that could disarm or disable the citizens’ militia, enable a politicized standing army, or enable a select militia to rule in its place.<sup>60</sup>

### D. Key Terms of the Operative Clause

Still carrying forward their methodological differences, the *Heller* majority and Justice Stevens then interpreted the key terms of the second or “operative” clause—“*the right of the people to keep and bear Arms, shall not be infringed*”—as follows.

#### 1. “The people”

The majority found that “the people” referred to all citizens, not just a militia-specific subset of the citizenry.<sup>61</sup> That interpretation, the majority wrote, was consistent with the way the term “people” is used and construed elsewhere in the Constitution, such as in the Preamble, Article II, and the First and Fourth Amendments.<sup>62</sup>

Justice Stevens agreed that those other parts of the Constitution use “people” to convey a broad meaning. However, Justice Stevens found that, as used in the Second Amendment, the word “people” does not “enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.”<sup>63</sup>

56. *Id.* at 2791.

57. *See id.* at 2825 n.6 (Stevens, J., dissenting).

58. *Id.* at 2840 (citing *Miller*, 307 U.S. at 182).

59. *Compare Heller*, 128 S. Ct. at 2800–01 (majority opinion) *with id.* at 2840 n.34 (Stevens, J., dissenting) (citing *Miller*, 307 U.S. at 182).

60. *Compare id.* at 2800–01 (majority opinion) *with id.* at 2840 n.34 (Stevens, J., dissenting) (citing *Miller*, 307 U.S. at 182).

61. *See id.* at 2790–91 (majority opinion).

62. *See id.*

63. *Id.* at 2827 (Stevens, J., dissenting).

## 2. “Keep and Bear Arms”

Both the majority and Justice Stevens found that “keep” meant “maintain,” and that “bear” meant “to use.”<sup>64</sup> The majority found that this “right,” although stated in the singular, is actually two separate rights—one to keep and one to bear<sup>65</sup>—neither of which has an exclusively military connotation.<sup>66</sup> For example, the majority argued that a military connotation is appropriate only when “bear arms” is expressed as “bear arms *against*”—as in “bear arms against an enemy.”<sup>67</sup> Because the Second Amendment does not use the word “against” to modify “bear,” the majority rejected a militia-centered interpretation.

Justice Stevens found that “‘bear arms’ is a familiar idiom [and] when used unadorned by any additional words, its meaning is ‘to serve as a soldier, do military service, fight.’”<sup>68</sup> The term is derived from the Latin *arma ferre*, which, “translated literally, means ‘to bear [*ferre*] war equipment [*arma*].”<sup>69</sup> Justice Stevens wrote that “keep” and “bear” describe “most naturally” a unitary, military-focused right: “to have arms available and ready for military service, and to use them for military purposes when necessary.”<sup>70</sup> Finally, Justice Stevens again argued that, had the Framers intended “bear arms” to encompass civilian possession and use, they could have done so simply by adding the phrase “for the defense of themselves” as Pennsylvania and Vermont had done. This approach, Justice Stevens wrote, was well known to the Framers had they intended to follow it.<sup>71</sup>

### III. HOW THE *HELLER* COURT INTERPRETED THE HISTORY OF THE SECOND AMENDMENT

Both the *Heller* majority and both dissenting opinions were heavy with analysis of historical sources from before, during and after the time that the Second Amendment was ratified.<sup>72</sup> Again, this analysis may serve, depending upon the age and text of each state’s own constitutional

---

64. *See id.* at 2791–97 (majority opinion); *see also id.* at 2827–31 (Stevens, J., dissenting).

65. *See Heller*, 128 S. Ct. at 2797 (majority opinion).

66. *See id.* at 2792.

67. *See id.* at 2794.

68. *Id.* at 2828 (Stevens, J., dissenting) (quoting OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989)).

69. *Id.* (citations omitted).

70. *Id.* at 2829–30.

71. *Heller*, 128 S. Ct. at 2825–26.

72. Again, it is beyond the scope of this article to explore the voluminous history that scholars and advocates argue is relevant here. This article, therefore, has selected those sources that exemplify the nature and range of such history.

provision, as an important reference point for how state courts will construe the history of their own state constitutions.<sup>73</sup>

#### A. Sources Before Ratification

Both the majority and Justice Stevens examined several English sources from before the Second Amendment was adopted in 1791.

##### 1. English Bill of Rights

Article VII of the English Bill of Rights from the 17th Century guaranteed that “the Subjects which are Protestants may have Arms for their defense, Suitable to their condition and as allowed by Law.”<sup>74</sup> The majority found this right to be a root of the Second Amendment and an affirmation of the Framers’ intent to accord an individual right to protect personal liberty.<sup>75</sup>

Justice Stevens found more narrowly that this English right was a specific response to abuses by the Stuart monarchs who had caused the “Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law.”<sup>76</sup> As such, it had no bearing on the American Framers’ intent in crafting the Second Amendment.<sup>77</sup>

##### 2. English Common Law

The authoritative record of law established by English judges in the 17th and 18th Centuries was transcribed by the scholarly lawyer, William Blackstone. Blackstone’s works are significant to this analysis because they were an important source for the Framers when writing the American Constitution.

Blackstone wrote in the early 18th Century of the Englishman’s “natural right[s] of resistance and self-preservation . . . [and] of having and using arms for self-preservation and defence.”<sup>78</sup> Because he did so citing Article VII in the English Bill of Rights discussed above, the majority found Blackstone’s writings to be further historical affirmation, and therefore evidence of the Framers’ intent, to accord an individual right to protect personal liberty.<sup>79</sup>

---

73. See *supra* note 19 and *infra* Part IV.B.

74. *Heller*, 128 S. Ct. at 2798 (majority opinion) (quoting Bill of Rights, 1689, 1 W. & M., c. 2, § 7 (Eng.)).

75. See *id.* at 2798–99.

76. *Id.* at 2838 (Stevens, J., dissenting) (quoting Bill of Rights, 1689, 1 W. & M., c. 1, § 6 (Eng.)).

77. *Id.* at 2838–39.

78. *Id.* at 2838 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*140).

79. *Id.* at 2798–99 (majority opinion).

Justice Stevens replied that Blackstone was simply interpreting Article VII of the English Bill of Rights, a document “very differently worded, and differently historically situated from the Second Amendment.”<sup>80</sup> Moreover, Justice Stevens turned Blackstone back on the majority as follows:

What *is* important about Blackstone is the instruction he provided on reading the sort of text before us today. Blackstone described an interpretive approach that gave far more weight to preambles than the Court allows. . . . Blackstone explained that “[i]f words happen to be . . . dubious, . . . ambiguous, equivocal, or intricate . . . [a] preamble is often called in to help the construction . . . .”<sup>81</sup>

Justice Stevens then used that observation to admonish the majority for not—as discussed above—giving due weight to the prefatory clause of the Second Amendment in defining the proper scope of the operative clause.

## B. Sources During Ratification

The majority found sources during the Second Amendment’s ratification process to be of “dubious” interpretive worth, and Justice Stevens all but agreed.<sup>82</sup> Instead, both sides looked to the following sources, other than the Framers’ own records.

### 1. Three State Proposals

The majority found “three state Second Amendment proposals that unequivocally referred to an individual right to bear arms.”<sup>83</sup> For example, the Massachusetts Ratification Convention entertained a motion to add the following language: “[T]hat the said Constitution never be construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms.”<sup>84</sup> The majority viewed this, and like proposals, as evidence that personal, non-militia gun rights were important at the time of ratification.

Nonetheless, Justice Stevens noted that this motion, and those like it from other state ratification conventions, failed to pass. Moreover, other

---

80. *Heller*, 128 S. Ct. at 2838 (Stevens, J., dissenting).

81. *Id.* at 2838 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*59–60).

82. *Compare id.* at 2804 (majority opinion) *with id.* at 2839 (Stevens, J., dissenting).

83. *Id.* at 2804 (majority opinion) (referring to New Hampshire, Massachusetts, and Pennsylvania and citing CREATING THE BILL OF RIGHTS 16, 17 (Helen E. Veit et al. eds., 1991) (New Hampshire proposal); 6 DOCUMENTARY HIST. 1452, 1453 (J. Kaminski & G. Saladino eds. 2000) (Massachusetts proposal); 2 DOCUMENTARY HIST. 624 (J. Kaminski & G. Saladino eds. 2000) (Pennsylvania proposal)).

84. *Id.* at 2834–35 (Stevens, J., dissenting) (quoting 1 B. SCHWARTZ, BILL OF RIGHTS 235, 665 (1971)) (citations omitted).

states—Virginia, New York, and North Carolina—all had proposals that Justice Stevens argued “embedded the phrase within a group of principles that are distinctly military in meaning.”<sup>85</sup> So no such conclusion can be drawn, according to Justice Stevens.

## 2. Contemporaneous State Constitutions

The majority found that its interpretation was confirmed by “analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment.”<sup>86</sup> Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two states, Pennsylvania and Vermont, “clearly adopted individual rights unconnected to militia service.”<sup>87</sup> North Carolina and Massachusetts referred to common defense or defense of the State, but the supreme court in each state has since construed these provisions to include an individual right.<sup>88</sup> All told, the majority construed these state constitutions as evidence that personal, non-militia, gun rights were important at the time of ratification.

Justice Stevens responded that if the Framers had intended to provide individual non-militia rights like those in Pennsylvania and Vermont, they would have done so expressly. Justice Stevens further compared the Framers to the committee tasked with drafting the Virginia Declaration of Rights. That committee considered a proposal by Thomas Jefferson that would have included within the Virginia Declaration the following language: “No freeman shall ever be debarred the use of arms [within his own lands or tenements].”<sup>89</sup> Yet the committee rejected that language, just like Justice Stevens believed the Framers did when the Framers did not follow the Pennsylvania and Vermont models.<sup>90</sup>

## C. Sources After Ratification

Both the majority and Justice Stevens also examined various, mostly post-Civil War, sources from after the Second Amendment was adopted in 1791.

---

85. *Id.* at 2834.

86. *Heller*, 128 S. Ct. at 2802 (majority opinion) (“Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights.”).

87. *Id.*

88. *See id.* 2802–03 (citations omitted).

89. *Id.* at 2835 (Stevens, J., dissenting).

90. *See id.* at 2835 n.23 (Stevens, J., dissenting).



### 1. New State Constitutions

The majority summarized and characterized the state constitutions adopted after the Second Amendment was ratified as follows:

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them—Kentucky, Ohio, Indiana, and Missouri—referred to the right of the people to “bear arms in defence of themselves and the State.” Another three States—Mississippi, Connecticut, and Alabama—used the even more individualistic phrasing that each citizen has the “right to bear arms in defence of himself and the State.” Finally, two States—Tennessee and Maine—used the “common defence” language of Massachusetts. That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789, at least seven unequivocally protected an individual citizen’s right to self-defense is strong evidence that that is how the founding generation conceived of the right.<sup>91</sup>

Justice Stevens replied that post-ratification sources, by their very nature “shed only indirect light[,] offer little support[, and are] the least reliable source of authority for ascertaining the intent of any provision’s drafters.”<sup>92</sup> Moreover, “there is no indication that any of them engaged in a careful textual or historical analysis of the federal constitutional provision,” so the interpretation of the Second Amendment advanced in those cases is “not as clear as the Court apparently believes.”<sup>93</sup>

### 2. Scholarship

The majority found, from a variety of scholarly sources, that, by the post-Civil War period, the Second Amendment was widely understood to secure a right to firearm use and ownership for purely private purposes, like personal self-defense.<sup>94</sup> Justice Stevens regarded these sources as simply unreliable and irrelevant. All such sources, Justice Stevens noted, were written

long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.<sup>95</sup>

---

91. *Id.* at 2803 (majority opinion) (citations omitted).

92. *Heller*, 128 S. Ct. at 2837 n.28 (Stevens, J., dissenting).

93. *Id.* at 2837 n.29.

94. *See id.* at 2811-12 (majority opinion).

95. *Id.* at 2841 (Stevens, J., dissenting).

### 3. Legislation

Both the majority and Justice Stevens examined the 1927 federal statute prohibiting mail delivery of firearms capable of being concealed on one's person and the 1934 federal statute prohibiting the possession of sawed-off shotguns and machine guns.<sup>96</sup> The majority did not find any legislative debate during the enactment of these statutes regarding their constitutionality under the Second Amendment and the majority used the absence of debate to conclude, in effect, that nothing then refuted its interpretation.<sup>97</sup>

Justice Stevens viewed the absence of Second Amendment debate to be more telling:

[The 1927 and 1934 laws] were enacted over minor Second Amendment objections dismissed by the vast majority of the legislators who participated in the debates. Members of Congress clashed over the wisdom and efficacy of such laws as crime-control measures. But since the statutes did not infringe upon the military use or possession of weapons, for most legislators they did not even raise the specter of possible conflict with the Second Amendment. Indeed, the Second Amendment was not even mentioned in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act.<sup>98</sup>

Justice Stevens's point was that if legislators at the time understood the Second Amendment to accord an individual right of self-defense, surely they would have debated such concerns given the nature and reach of those two laws.

### 4. Court Decisions

Finally, the majority and Justice Stevens sparred extensively over the meaning—and precedential constraint—of the Supreme Court's prior Second Amendment decisions.

Prior to *Heller*, the Supreme Court interpreted the core of the Second Amendment just four times in 217 years.<sup>99</sup> The key case, *United States v. Miller* in 1939, held that the Second Amendment is not a bar to federal

96. See sources cited *supra* note 34.

97. *Heller*, 128 S. Ct. at 2813.

98. *Id.* at 2842, 2844–45 (Stevens, J., dissenting).

99. The first two cases were *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886). See discussion *infra* Part IV.E. The majority and Justice Stevens in *Heller* sparred at length over the degree to which these cases supported their conclusions. Compare *Heller*, 128 S.Ct. at 2812–13 (majority opinion), with *id.* at 2842–43 (Stevens, J., dissenting).

controls on firearms not related to preserving a state militia.<sup>100</sup> The Supreme Court then affirmed *Miller* in 1980, holding that the “Second Amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>101</sup>

The majority found, however, that neither precedent expressly “refute[d] the individual-rights interpretation.”<sup>102</sup> In particular, the majority described *Miller* as an “uncontested and virtually unreasoned” opinion because Mr. Miller did not file a brief or make an appearance in the case.<sup>103</sup> On the merits, the majority wrote that *Miller* does not limit the right to keep and bear arms to militia purposes, but rather limits the “type of weapon”<sup>104</sup> to which the right applies to those weapons used by the militia (i.e., weapons in common use for “lawful purposes”).<sup>105</sup>

Justice Stevens responded sharply, writing that the majority was either ignoring or re-writing *Miller*:

The key to that decision did not, as the Court belatedly suggests . . . , turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes . . . ?

The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.<sup>106</sup>

Justice Stevens further noted that *Miller*’s militia-focused interpretation of the Second Amendment has been relied upon for decades by the lower

---

100. 307 U. S. 174 (1939).

101. *Lewis v. United States*, 445 U. S. 55, 65 (1980) (citing *Miller*, 307 U.S. at 178).

102. *Heller*, 128 S. Ct. at 2813 (majority opinion).

103. *Id.* at 2814–15.

104. *Id.* at 2814.

105. *Id.* at 2813 n.22.

106. *Id.* at 2845–46 (Stevens, J., dissenting).

federal courts.<sup>107</sup> For example, *Miller* has been cited approvingly between 1971 and 2004 by nine of the eleven federal appeals courts, as well as the Court of Appeals for the District of Columbia and Armed Forces Court of Criminal Appeals.<sup>108</sup> The majority replied tersely that those courts had all simply read *Miller* incorrectly.<sup>109</sup>

#### IV. PREPARING FOR POST-*HELLER* LITIGATION AND LEGISLATION

To prepare college and university attorneys for litigation or legislation seeking to apply and/or expand *Heller* to the campus setting, it is first helpful to survey the present regulatory environment. As noted in the Introduction, approximately twenty-six states prohibit guns on public college and university campuses, and twenty-three states allow public colleges and universities to determine their own weapons policies.<sup>110</sup> Because the issue remains active legislatively, the numbers and approaches of the states remain in flux. Twenty states in 2009 considered various reforms to campus weapon laws, with fourteen states defeating, five states passing and one state carrying over such measures. These numbers were up from the seventeen states that attempted such reforms in 2008, with most of these attempts failing. Likewise, post-*Heller* litigation remains very visible as well. Given this fluid legislative and litigation environment, college and university counsel can best prepare to meet any judicial and legislative challenges to their institutions' firearms possession policy by reviewing the following issues.

---

107. *See id.* at 2845 n.38.

108. *See, e.g.*, *United States v. Haney*, 264 F.3d 1161, 1164–1166 (10th Cir. 2001), *United States v. Napier*, 233 F.3d 394, 402–404 (6th Cir. 2000), *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710–711 (7th Cir. 1999), *United States v. Scanio*, No. 97–1584, 1998 WL 802060, at \*2 (2d Cir. Nov. 12, 1998), *United States v. Wright*, 117 F.3d 1265, 1271–1274 (11th Cir. 1997), *United States v. Rybar*, 103 F.3d 273, 285–286 (3d Cir. 1996), *Hickman v. Block*, 81 F.3d 98, 100–103 (9th Cir. 1996), *United States v. Hale*, 978 F.2d 1016, 1018–1020 (8th Cir. 1992), *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam), *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam), *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *see also Sandidge v. United States*, 520 A.2d 1057, 1058–1059 (D.C. 1987).

A number of courts have remained firm in their prior positions even after considering a competing conclusion from the Fifth Circuit Court of Appeals in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). *See e.g.*, *United States v. Lippman*, 369 F.3d 1039, 1043–1045 (8th Cir. 2004), *United States v. Parker*, 362 F.3d 1279, 1282–1284 (10th Cir. 2004), *United States v. Jackubowski*, 63 Fed. App'x 959, 961 (7th Cir. 2003), *Silveira v. Lockyer*, 312 F.3d 1052, 1060–1066 (9th Cir. 2002), *Bach v. Pataki*, 289 F. Supp. 2d 217, 224–226 (N.D.N.Y. 2003), *United States v. Milheron*, 231 F. Supp. 2d 376, 378 (D. Me. 2002), *United States v. Smith*, 56 M.J. 711, 716 (A.F. Ct. Crim. App. 2001).

109. *Heller*, 128 S. Ct. at 2815 n.24.

110. *See supra* notes 3 and 4.

### A. Understand the Issue of Pre-emption

The key statutory question that often precedes, and is frequently confused with, any constitutional questions arising from the Second Amendment, is whether the state has pre-empted regulation of firearms in a manner precluding a public college or university from adopting gun regulations. Maine offers a good example of a general pre-emption statute:

The State intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition, and supplies . . . . [A]ny existing or future order, ordinance, rule, or regulation in this field of any political subdivision of the State is void . . . . [N]o political subdivision of the State, including, but not limited to, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies.<sup>111</sup>

Such laws can impose possible barriers to a college or university's authority to adopt regulations.<sup>112</sup> For example, pre-emption is currently at the heart of a case challenging the University of Colorado's authority to regulate concealed weapons on campus,<sup>113</sup> and was at the heart of the litigation in *University of Utah v. Shurtleff*.<sup>114</sup> In *Shurtleff*, the Utah legislature enacted a law barring "state and local entities from enacting or enforcing any [rule] that in 'any way inhibits or restricts the possession or use of firearms on either public or private property.'"<sup>115</sup> The University of Utah, which generally banned students and employees from carrying guns while "on campus and 'while conducting university business off campus,'" claimed the state law interfered with its autonomy conferred by the state

---

111. ME. REV. STAT. ANN. tit. 25, § 2011(1)–(2) (2007).

112. It is also important to distinguish state statutory authority to regulate guns from a municipally imposed obligation to do so. If the source is municipal, then the issue of their pre-emption by a counter-veiling state bar is implicated. The issue of breadth may also be implicated, since municipalities often take broad positions. This is one lesson of *Heller* under the D.C. ordinance, and is the focus of the NRA's current litigation efforts. The lesson is that specifically delegated authority and/or specific exercises of broadly delegated authority may be more secure than broad delegations and broad exercises.

113. *Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, No. 2008-CV-492, slip op. (D. Colo. 2008). The University successfully defended its policy broadly as compliant with the Colorado Constitution, state pre-emption statutes and pertinent Attorney General Opinions.

114. 144 P.3d 1109 (2006).

115. *Id.* at 1111 (quoting UTAH CODE ANN. § 63-98-102 (Supp. 2004)).

constitution. The Utah Supreme Court rejected the claim, concluding that the Utah Constitution does not give the University autonomy; like other state government entities, the legislature has the “ability to generally manage all aspects of the University.”<sup>116</sup>

The key point is this: To overcome a pre-emption challenge, a college or university should have its authority to regulate firearms set out in an express statutory grant of authority. An express statute either restricting possession or authorizing the institution to restrict possession is the strongest defense against a pre-emption challenge. College or university assertions of such an implied power are less secure; this is one of the central lessons from *Shurtleff*.

Nonetheless, if a campus does not have an express power to regulate firearms, the argument can still be made that such power is implied from other sources, such as the express authority to provide for safety or, even less directly, manage property. Consider, for example, this discussion by the California Supreme Court upholding a county ordinance banning certain gun possession on the county’s property:

[T]he Ordinance does not propose a complete ban on gun shows within the county, but only disallows gun show sales on County property. Even assuming arguendo that a county is prevented from instituting a general ban on gun shows within its jurisdiction, it is nonetheless empowered to ban such shows on its own property. Government Code section 23004, subdivision (d), gives a county the authority to “[m]anage . . . its property as the interests of its inhabitants require.” To “manage” property must necessarily include the fundamental decision as to how the property will be used . . . . [I]t cannot be doubted that the County has the continuing authority . . . to make decisions about how its property will be used pursuant to Government Code section 23004, subdivision (d). It may exercise that discretion through ordinances . . . . None of the gun show statutes reviewed above impliedly seek to override the discretion a county retains in the use of its property.<sup>117</sup>

---

116. *Id.* at 1112. The Utah Supreme Court did not reach the University’s claimed First Amendment academic freedom right to exclude guns on the theory that the presence of guns on campus would hamper the free exchange of ideas. *Id.* at 1112, 1121. That issue was to be litigated in federal court, but the case reportedly settled without decision.

117. *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120, 129–30 (Cal. 2002) (holding that state law did not pre-empt cities and counties from banning gun shows on their property) (citations omitted), *reh’g denied*, 229 F.3d 1258 (9th Cir. 2000). In 2000, the Ninth Circuit certified certain state law issues to the California Supreme Court in connection with a gun show operator’s challenge to a county ordinance banning gun sales on county-owned property. *Great Western* was one of

Such an implied power argument may prove persuasive, but any questions may be removed by obtaining either an express statute restricting possession or an express statute authorizing the institution itself to restrict possession. Section IV.I below discusses strategies to pass legislation expressly delegating such regulatory authority.

B. Identify the Degree to which a State Constitution Provides an Express or Implied “Self-Defense” Right

The next important issue applies to cases presenting state constitutional claims.<sup>118</sup> There, an important starting point for defining the scope of an individual constitutional right to possess a firearm is to review the degree to which the state constitution expressly refers to common defense, sporting and/or personal defense. For example, as discussed in Section III.B.2 above, Pennsylvania’s constitution referred to “the defence of themselves and the state”<sup>119</sup> and “the liberty to fowl and hunt.”<sup>120</sup>

---

two decisions the California Supreme Court issued in 2002 rejecting state law challenges to county or city ordinances banning the sale of firearms on county or city property. *Id.* The Ninth Circuit then rejected the First and Second Amendment challenges to the ordinance. *See Nordyke v. King*, 44 P.3d 133 (Cal. 2002), *certifying questions to*, 229 F.3d 1266 (9th Cir. 2000). The Nordykes have continued their battle. *See infra* Part IV.E.

118. It is beyond the scope or ability of this article to detail how and why state constitutions pose significantly different jurisprudential questions from the federal Constitution. Nonetheless, NACUA Fellow and constitutional scholar William E. Thro has succinctly explained the primary differences and identified several informative resources as follows:

First, state constitutions are limitations on power rather than grants of power. Second, state constitutions are also much more ‘political’ in that they can be easily amended to reflect the current values. In addition, state constitutions often protect individual rights, such as the right to an education, which are not guaranteed by the federal charter. Finally, unlike the federal constitution that has been amended only seventeen times since 1791, state constitutions are frequently amended and often completely rewritten and revised.

William E. Thro, *The Judicial Enforcement of Educational Finance Reform: American Lessons for South Africa*, in FINANCIAL MANAGEMENT IN SOUTH AFRICAN PUBLIC EDUCATION (Jean Van Rooyean ed., forthcoming 2009) (citing *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 785 (Md. 1983); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 n.5 (N.Y. 1982); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241–42 (Bradely D. McGraw ed., 1984); Charles G. Douglas III, *State Judicial Activism, The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1144–45 (1978); A. E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1 (1974); Janice May, *Texas Constitutional Revision: Lessons and Laments*, 66 NAT’L CIVIC REV. 64 (1977)).

119. PA. CONST. of 1776, art. XIII, in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 266 (Chelsea House Publishers 1971). *Heller*, 128 S. Ct. at 2825–26 (Stevens, J., dissenting).

Likewise, Vermont's constitution referred to the "right to bear arms for the defence of themselves and the State."<sup>121</sup> By contrast, Massachusetts is textually a common defense state—"[t]he people have a right to keep and to bear arms for the common defence."<sup>122</sup> That provision was first construed by the Massachusetts Supreme Court to include a personal right,<sup>123</sup> and then construed in favor of a more narrow collective rights interpretation.<sup>124</sup> Then there are states like Maine, which started with an express common defense clause and then amended it to imply, but not expressly state, a broader individual right.<sup>125</sup> Again, in cases presenting state constitutional claims, this issue will be an important starting point for defining the scope of the individual state constitutional right.

### C. Anticipate Whether a Regulation will be Tested for a "Rational Basis" or by Some Higher Standard

The next question is: Even if there are personal or sporting rights clauses in one's state constitution, by what standard is their scope balanced against the state constitution's police powers clause?<sup>126</sup> Such clauses typically

120. PA. CONST. of 1776, § 43, in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 274 (Chelsea House Publishers 1971). *Heller*, 128 S. Ct. at 2826 (Stevens, J., dissenting).

121. VT. CONST. of 1777, ch. 1, § 15, in 6 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 3741 (Francis Newton Thorpe ed., 1909). Recently drafted state constitutions often contain even more expressly worded provisions. *See, e.g.*, W. VA. CONST. art. III, § 22 (1986) ("A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."); WIS. CONST. art. I, § 25 (1998) ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."). For a concise listing of state constitutional provisions that have been interpreted to protect an individual right to arms for self-defense, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 *TEX. REV. L. & POL.* 191 (2006).

122. *Heller*, 128 S. Ct. at 2802 (majority opinion) (citing MASS. CONST. art. XVII (amended 2003)).

123. *Id.* at 2803 (citing *Commonwealth v. Blanding*, 20 Mass. (1 Pick.) 304 (1825)).

124. *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976).

125. The Maine Constitution, by comparison, originally provided in 1820 that "[e]very citizen has a right to keep and bear arms for the *common defense* and this right shall never be questioned." ME. CONST. art. I, § 16 (emphasis added). In 1986, the Maine Supreme Court interpreted this right narrowly, ruling that the words "for the common defense" limited the right to "organized militia" purposes. *State v. Friel*, 508 A.2d 123, 125–26 (Me. 1986). In response to that decision, the People of Maine amended the Maine Constitution in 1987 and deleted reference to the "common defense" in order to establish a clearer non-militia right to possess and use firearms. *See* ME. CONST. art. I, § 16 (amended 1987).

126. The Maine Supreme Judicial Court has, for example, continued to construe the police powers clause of the Maine Constitution to permit regulation of personal



provide, as Maine does, that “[t]he Legislature . . . shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.”<sup>127</sup> A common test of a police power is whether the law or regulation is “reasonable” and “[r]easonableness in the exercise of the State’s police power requires that the purpose of the enactment be in the interest of the public welfare and that the methods utilized bear a *rational relationship* to the intended goals.”<sup>128</sup>

The bar can also be higher. “Intermediate” or “heightened” scrutiny has been applied to classifications based on gender and illegitimacy, and is met only if the regulation involves “important” governmental interests that are furthered by “substantially related” means. This contrasts with “strict scrutiny,” which requires “narrowly tailored” regulation and “least restrictive” means to further a “compelling” governmental interest. To date, strict scrutiny has been applied when a “fundamental” constitutional right is infringed, particularly those rights listed in the Bill of Rights and those the courts have deemed a fundamental right protected by the liberty provision of the Fourteenth Amendment.<sup>129</sup> It also has been applied when the government action involves the use of a “suspect classification,” such as race or national origin, that may render the action void under the Equal Protection Clause.<sup>130</sup>

So, with these options in mind, what scrutiny applies to Second Amendment claims after *Heller* (assuming, that is, that *Heller* will be found to be applicable to the states)? Scholars and commentators are currently debating this issue because the majority, despite Justice Breyer’s urging, did not give the answer to this question.<sup>131</sup> The majority only wrote: “[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.”<sup>132</sup> The Court explained further in a footnote:

[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are

---

possession and use. *Friel*, 508 A.2d at 125.

127. ME. CONST. art. IV, pt. 3, § 1.

128. *Hilly v. City of Portland*, 582 A.2d 1213, 1215 (Me. 1990) (emphasis added).

129. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996), *Silveira v. Lockyear*, 312 F.3d 1052 (9th Cir. 2003).

130. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

131. *Heller*, 128 S. Ct. at 2817–18, 2821. Justice Breyer criticized the majority for not setting the pertinent standard. *Id.* at 2851–53 (Breyer, J., dissenting). He also argued that the pertinent standard is rational basis and the D.C. ordinance satisfied that standard. *Id.*

132. *Id.* at 2817–18 (citation omitted).

themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee.<sup>133</sup>

Obviously, the rational basis test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right—be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.<sup>134</sup>

So, again, what level of scrutiny applies? The above quote appears to exclude rational basis. Is it strict scrutiny because attributes of the Second Amendment’s right are “expressly enumerated” or otherwise deemed “fundamental” by the Court?<sup>135</sup> Or is it heightened scrutiny, as argued by the Solicitor General in *Heller*, when “a law directly limits the private possession of ‘Arms’ in a way that has no grounding in Framing-era practice?”<sup>136</sup> Regrettably, the answer is uncertain. As one commentator

133. *Id.* at 2818, n.27.

134. *Id.* (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (“There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”).

135. *Heller* did say that the right to lawfully defend “self, family, and property,” *id.* at 2817, is “elevate[d] above all other interests” protected by the Second Amendment,” *id.* at 2821.

136. The Solicitor General, fearful that “strict scrutiny in theory” could be “fatal in fact” argued this in his brief to the *Heller* Court:

When, as here, a law directly limits the private possession of “Arms” in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny that considers (a) the practical impact of the challenged restrictions on the plaintiff’s ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives), and (b) the strength of the government’s interest in enforcement of the relevant restriction. Under that intermediate level of review, the “rigorousness” of the inquiry depends on the degree of the burden on protected conduct, and important regulatory interests are typically sufficient to justify reasonable restrictions. The court of appeals, by contrast, appears to have adopted a more categorical approach. The court’s decision could be read to hold that the Second Amendment *categorically* precludes any ban on a category of “Arms” that can be traced back to the Founding era. If adopted by this Court, such an analysis could cast doubt on the constitutionality of existing federal legislation prohibiting the possession of certain firearms, including machine guns. However, the text and history of the Second Amendment point to a more flexible standard of review. Just as the Second Congress expressed judgments about what “Arms” were appropriate for certain members of the militia, Congress today retains discretion in regulating “Arms,” including those with military uses, in ways

wrote:

[*Heller*] leaves lower courts free to conclude, by analogy to First Amendment case law, that strict scrutiny applies to Second Amendment claims, but they also would not violate the import of the *Heller* opinion by adopting intermediate scrutiny instead.<sup>137</sup>

The U.S. District Court for the District of Maine thoughtfully avoided this uncertain choice and focused instead on *Heller*'s important reference to "longstanding" prohibitions:

*Heller* left unanswered a significant question: The level of scrutiny the Court must apply to the restriction on Mr. Booker's individual right to bear arms. . . . Rather than tackle this complex and unanswered question, [this] Court starts from a different place. *Heller* teaches that even though the Second Amendment guarantees an individual right to bear arms, it is "not unlimited." *Heller* states that "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 . . . ."

A useful approach is to ask whether a statutory prohibition against the possession of firearms by felons and the mentally ill is similar enough to the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence to justify its inclusion in the list of "longstanding prohibitions" that survive Second Amendment scrutiny.

[This c]ourt concludes it does. . . . [T]he manifest need to protect the victims of domestic violence and to keep guns from the hands of the people who perpetrate such acts is well-

---

that further legitimate government interests. Under an appropriate standard of review, existing federal regulations, such as the prohibition on machine guns, readily pass constitutional muster.

Brief for the United States as Amicus Curiae at 8–9, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (citations omitted).

137. See Posting of Mike O'Shea to Concurring Opinions, [http://www.concurringopinions.com/archives/2008/06/meet\\_your\\_secon\\_2.html](http://www.concurringopinions.com/archives/2008/06/meet_your_secon_2.html) (June 26, 2008, 15:03 EST); but see Posting of David Hardy to Of Arms & the Law, [http://armsandthelaw.com/archives/2008/02/hellerparker\\_an.php](http://armsandthelaw.com/archives/2008/02/hellerparker_an.php) (Feb. 2, 2008, 08:48 EST):

The dilemma that those who argue for such a conclusion have to confront is to somehow justify using only a 'rational basis' for a right explicitly listed in the text of the Bill of Rights, while at the same time demanding 'strict scrutiny' for other rights that appear only as emanations or penumbra from some text, e.g., the 9th Amendment, and to do it in such a way that some shred of credibility for the Court is maintained.

documented and requires no further elaboration.<sup>138</sup>

This analysis<sup>139</sup> is very similar to that of the Solicitor General in *Heller*<sup>140</sup> and, until the higher courts resolve more clearly the question of which standard applies, Judge Woodcock's thoughtful approach may be helpful to college or university counsel in framing their defenses.<sup>141</sup>

D. Regardless of Standard, Identify the Specific "Rational,"  
"Important" or "Compelling" Basis for a Regulation

The next issue is that, regardless of which standard may come to apply, a college or university needs to be prepared to articulate the factual basis for its regulations of weapons if it hopes to keep those regulations in place. For example, a common argument now is that campus regulations are necessary to help avoid the premeditated psychotic tragedy that occurred at Virginia Tech in April of 2007.<sup>142</sup> An additional or even alternative argument, however, is that such regulations are necessary to help prevent a homicidal rampage by a non-psychotic person. Such events are typically precipitated by a tipping event—such as a breakup, firing, fight, or becoming intoxicated—and by their very nature present perhaps the more likely threat to a campus.

Consider, for example, a Maine law recently enacted based on just that rationale.<sup>143</sup> There, an experienced former member of the Maine State Police Tactical Team reported that the vast majority of armed incidents to which that team responds involve spontaneous, rather than premeditated, events. He further reported that, in such spontaneous events, the time it takes to access a weapon is a critical factor in predicting whether an enraged individual will act on his/her plan of harm. The longer it takes for the individual to access a weapon, the greater the likelihood that the individual will cool off and abandon the plan of harm. So if the gun is not

138. *United States v. Booker*, No. CR-08-19-B-W, at \*2–5 (D. Me. Aug. 11, 2008), available at [http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW\\_08112008\\_1-08cr19\\_USA\\_V\\_BOOKER.pdf](http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW_08112008_1-08cr19_USA_V_BOOKER.pdf).

139. *Id.*

140. *See supra* note 136.

141. For a thoughtful commentary on how courts should apply a deferential standard of scrutiny to Second Amendment claims, see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

142. *See* Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, available at <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html>.

143. ME. REV. STAT. ANN. tit. 20-A, § 6552(1) (2007) ("A person may not possess a firearm on public school property or discharge a firearm within 500 feet of school property. For purposes of this subsection, public school property includes property of a community college that adopts a policy imposing such a prohibition.") (emphasis added).

in, for example, a car at the school, but is instead at a home several miles away, the college or university stands a much higher chance of avoiding a tragedy. This argument was central in persuading the Maine Legislature to authorize Maine's community colleges to regulate firearm possession on campus and should withstand judicial scrutiny if challenged.

#### E. Track the Current Incorporation Cases

Another timely and important issue concerns the "incorporation" doctrine: Does the federal Bill of Rights offers protection from just federal law? Or does it also offer protection from state law? Before discussing the incorporation doctrine as applied to the Second Amendment, a brief background on the doctrine itself is helpful.

In 1833, forty years after the Bill of Rights was ratified, the Supreme Court held that the protections of the Bill of Rights applied only against acts of the federal government, and not also against the acts of state governments.<sup>144</sup> When the Fourteenth Amendment was ratified thirty-five years later, with both its Privileges and Immunities and Due Process clauses,<sup>145</sup> the question arose whether either or both of those clauses applied, or "incorporated," the individual rights accorded in the first ten Amendments<sup>146</sup> against the states because those rights were either "privileges," "immunities" or rights under "due process." In 1873, the Court narrowly interpreted "privileges and immunities" in a manner that effectively foreclosed incorporation through that clause.<sup>147</sup> By the 1920s, the Court began in earnest to address the degree to which certain parts of the Amendments were to be construed as incorporated through the Due Process clause.<sup>148</sup> In such cases the debates were forceful,<sup>149</sup> the results

---

144. *Barron ex rel. Tiernon v. Mayor of Baltimore*, 32 U.S. 243 (1833).

145. U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.").

146. While the issue is commonly discussed in terms of the first ten Amendments, the doctrine applies most practically to the first eight Amendments because the last two amendments are not sources of rights. The Ninth Amendment (non-enumerated rights) is a rule of construction and the Tenth Amendment (rights reserved to the states) is instead a reservation of powers. U.S. CONST. amends. IX, X. *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 776 n.14 (2nd ed. 1998).

147. *Slaughterhouse Cases*, 83 U.S. 36 (1873).

148. *See Gitlow v. New York*, 268 U.S. 652 (1925).

149. While the practice has been for the Court to select on a case-by-case basis those amendments that qualify for incorporation, there has been a significant debate about whether the doctrine should have a more uniform application. *Compare Adamson v. California*, 332 U.S. 46 (1947) (rejecting the argument that the Fifth Amendment right against self-incrimination applied to the states through the Fourteenth Amendment). *Compare id.* at 59–68 (Frankfurter, J., concurring) (arguing that some rights guaranteed by the Fourteenth Amendment may overlap with the

were selective,<sup>150</sup> and the standards for decision were relatively broad. For example, incorporation was reserved for those substantive rights “implicit in the concept of ordered liberty;”<sup>151</sup> for procedural rights “necessary to an Anglo-American regime of ordered liberty;”<sup>152</sup> or, borrowing from the law of substantive due process, for those rights “deeply rooted in the Nation’s history and tradition.”<sup>153</sup> Nonetheless, by the end of the 1960s, most provisions of the Bill of Rights had been incorporated.<sup>154</sup>

The path of the Second Amendment through questions of incorporation has, to date, been less searching. As long ago as 1876, the Supreme Court ruled in *United States v. Cruikshank* that the Second Amendment has “no other effect than to restrict the powers of the national government.”<sup>155</sup> Ten years later, the Court in *Presser v. Illinois*, again wrote that the Second Amendment is a “limitation only upon the power of congress and the national government, and not upon that of the state.”<sup>156</sup> Finally, in 1894, the Court affirmed *Cruikshank* and *Presser*, writing in *Miller v. Texas* that “it is well settled that the restrictions of [the Second Amendment] operate only upon the federal power, and have no reference whatever to proceedings in state courts.”<sup>157</sup>

---

guarantees of the Bill of Rights, but are not based directly upon such rights) *with id.* at 68–92 (Black, J. dissenting) (arguing that the Fourteenth Amendment incorporated all aspects of the Bill of Rights and applied them to the states).

150. Amendments have been incorporated entirely, partially and not at all. For example, the First (rights of speech, assembly, press, exercise and establishment) and Fourth (rights regarding warrants, searches and seizures) Amendments have essentially been entirely incorporated. The Fifth (rights against double jeopardy and self-incrimination, but not the right to Grand Jury) and Eighth (right against the imposition of cruel and unusual punishments, but not the right to be free from excessive bail and fines) Amendments have only been partially incorporated. The Seventh (right to a civil jury trial) Amendment has not been incorporated. U.S. CONST. amends. I, IV, V, VII, VIII. For a helpful summary of such a broad subject, see Ernest H. Schopler, Annotation: Comment Note, *What Provisions of the Federal Constitution’s Bill of Rights are Applicable to the States*, 23 L. Ed. 2d 985 (2008), available at LexisNexis. Note also that circuit courts have issued incorporation decisions that have not received Supreme Court review. *See, e.g.,* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (applying the Third Amendment to the states). This case is binding authority over Connecticut, New York and Vermont, but is only persuasive authority over the remaining states.

151. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

152. *Nordyke v. King*, 563 F.3d 439, 449 (9th Cir. 2009) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)) (stating that the “actual system bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country” should be incorporated).

153. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

154. *See generally* Schopler, *supra* note 150.

155. 92 U.S. 542, 553 (1876).

156. 116 U.S. 252, 265 (1886).

157. 153 U.S. 535, 538 (1894).

These three long-standing precedents have been consistently construed by state and federal courts around the country not to incorporate the Second Amendment.<sup>158</sup> However, *Heller* raises anew the question of whether these precedents are still valid. On the one hand, the *Heller* majority opinion expressly states that the Court was *not* deciding the incorporation question,<sup>159</sup> and recognized that the Court's decisions in *Presser* and *Miller* "reaffirmed that the Second Amendment applies only to the Federal Government."<sup>160</sup> On the other hand, the Court cast doubt on "*Cruikshank*'s continuing validity on incorporation" by "not[ing] that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."<sup>161</sup> Moreover, *Heller*, of course, also identified the protected individual right of possession as emanating from sources as early as Blackstone,<sup>162</sup> thereby establishing presumably that the right is "deeply rooted in this Nation's history and tradition."<sup>163</sup>

At least three recent cases have tested these new arguments. The first case, *Maloney v. Cuomo*, from the Second Circuit, relied on the *Cruikshank* precedents, rejected a claim to incorporate, and upheld a New York ban on possession of a martial arts weapon.<sup>164</sup> On the incorporation question, the Second Circuit reasoned that while *Heller* may have signaled an eventual change from the *Cruikshank* line of cases, *Heller* itself expressly reserved the question, and it was not for a circuit court to act on any such signal in light of that express reservation.<sup>165</sup>

---

158. See, e.g., Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. FED. 696 (2008). See also *State v. Friel*, 508 A.2d 123, 125 (Me. 1986) ("The Second Amendment . . . is simply inapplicable to the instant case. This Amendment operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms.") (citing *Miller*, 153 U.S. at 538; *Presser*, 116 U.S. at 265; *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269–70 (7th Cir. 1982)).

159. *Heller*, 128 S. Ct. at 2813 n.23.

160. *Id.*

161. *Id.*

162. *Id.* at 2798.

163. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

164. 554 F.3d 56 (2d Cir. 2009).

165. *Id.* at 58–59:

It is settled law . . . that the Second Amendment applies only to limitations the federal government seeks to impose on this right. And to the extent that *Heller* might be read to question the continuing validity of this principle, we "must follow *Presser* [because w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'"

*Id.* (citations omitted).

The second case, *Nordyke v. King*, from a Ninth Circuit panel, upheld a municipal ban on possession on government-owned, nonresidential property that prevented plaintiffs from holding gun shows on County property.<sup>166</sup> In doing so, however, the panel accepted the argument that the Second Amendment is incorporated against states and local governments. The panel concluded, for three primary reasons, that the *Cruikshank* line of reasoning was both obsolete and not controlling. First, *Cruikshank* did not fully examine an incorporation argument based on the Due Process clause.<sup>167</sup> Second, as the *Heller* majority suggested, *Cruikshank* was not, consistent with the Court's more recent incorporation jurisprudence.<sup>168</sup> Finally, *Heller's* recognition of an individual right as emanating from the Nation's founding yielded a newer and stronger basis for incorporation.<sup>169</sup> However, three months after the *Nordyke* panel rendered its decision, the full court agreed upon the request of a Ninth Circuit judge to rehear the case en banc.<sup>170</sup> After rehearing, the Ninth Circuit issued an order which places the case on hold until the Supreme Court makes a decision concerning three pending cases.<sup>171</sup>

The third case, *National Rifle Association v. City of Chicago*, from a Seventh Circuit panel, upheld two municipal ordinances banning possession of most handguns and, in doing so, rejected a claim to incorporate.<sup>172</sup> The panel agreed with the *Maloney* court rationale and sharply criticized the *Nordyke* panel decision for disregarding its obligation to follow precedent.<sup>173</sup>

If the Ninth Circuit en banc affirms its panel's decision in *Nordyke*, there will be a clear split in the circuits (Ninth versus Second and Seventh), increasing the chances that the Supreme Court may revisit the issue. If an incorporation case reaches the Court, *Heller* certainly provides a basis upon which to reconsider and even overrule the *Cruikshank* precedents, and apply the limitations of the Second Amendment to state and local entities, including public colleges and universities.<sup>174</sup> A decision to incorporate will

---

166. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

167. *Id.* at 448.

168. *Id.* at 449–50.

169. *Id.* at 451–57.

170. *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009).

171. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/9th-ca-gun-case-on-hold> (Sept. 24, 2009, 20:30 EST).

172. *Nat'l Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009).

173. The Seventh Circuit panel wrote that *Heller* did not “license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision.” *Id.* at 858.

174. Even if the Second Amendment is incorporated against the states, the



mean that all state actors will have to meet current and future minimal federal standards under the Second Amendment. Such actors, including public colleges and universities, are of course already subject to the standards permitted or set by state law. The question, therefore, about how significant a decision to incorporate will have on a public college or university seeking to regulate firearm possession on its campuses will depend on how protective state law currently is regarding personal possession rights. In states where the state law protects personal rights, the impact will be negligible. But in states where the state law provides less protection of personal rights, the impact will be more significant.

F. Understand the Distinction between Government as Regulator and Government as Proprietor

As just noted above, and as noted in the *Great Western* opinion quoted in Part IV.A, another important issue is that the First and Fourth Amendments often, though not always, apply differently to the government as proprietor from the way they apply to the government as regulator of what happens on private property.<sup>175</sup> For example, in the First Amendment context, the Supreme Court has discussed the regulator-proprietor distinction this way:

[I]t is . . . well settled that the government need not permit all forms of speech on property that it owns and controls. Where 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. Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district.<sup>176</sup>

---

Fourteenth Amendment applies only to state actors such as public colleges and universities and not, ordinarily, to private institutions. *See* *Sanford v. Howard Univ.*, 415 F. Supp. 23, 29 (D.D.C. 1976) (“A showing of general governmental involvement in a private educational institution is not enough to convert essentially private activity into governmental activity for purposes of a due process claim. [Howard] is not to be treated as a state university.”); *see also* *Harris v. Ladner*, 127 F.3d 1121, 1125 (D.C. 1997) (“[B]ecause Howard University is a private institution, the plaintiff must show more than ‘general governmental involvement’ in the University’s affairs before constitutional protections are implicated.”).

175. *See supra* Parts IV.A., IV.E.

176. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (citations omitted).

As observed in *Great Western*, this same rationale can apply to Second Amendment analyses and may help give public colleges and universities the room they need to uphold their restrictions, if that is what they want to do. Likewise, it is important to note that different uses may lead to different results. For example, it is “possible that there may be a right to possess a gun in self-defense on government property, but no right to possess a gun for purpose of selling it.”<sup>177</sup>

### G. Monitor Concealed Weapon Bills

Turning from legal issues to political issues, college and university counsel must be mindful of legislative efforts to have state concealed weapon laws trump campus regulations. As noted above, twenty states in 2009 considered various reforms to campus weapon laws, and many related to treatment of concealed weapons.<sup>178</sup> The American Association of State Colleges and Universities reported that recent efforts have not yielded any victories for gun-rights advocates in part because college and university administrators, law enforcement personnel, and students have all vehemently spoken out against the proposals.<sup>179</sup> Leading the effort to enact such bills authorizing gun possession on campus is a group called Students for Concealed Carry on Campus (“SCCC”)<sup>180</sup> SCCC’s stated goal is to enact state laws granting students the right to possess weapons—and more particularly, concealed weapons—on campus.<sup>181</sup> Their efforts, regarding both concealed and non-concealed weapons, are opposed by the International Association of Campus Law Enforcement Administrators.<sup>182</sup>

---

177. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/2008/09/12/briefs-on-whether-the-second-amendment-should-apply-to-the-states-via-the-fourteenth> (Sept. 12, 2008, 18:33 EST).

178. See NCSL Report, *supra* note 1.

179. HARNISCH, *supra* note 2, at 2.

180. Students for Concealed Carry on Campus (“SCCC”), <http://www.concealedcampus.org> (last visited Oct. 15, 2009).

181. *Id.* See also Paula Reed Ward, *Dead Student Talked of Police Career*, PITTSBURGH POST-GAZETTE, Feb. 16, 2009, available at <http://www.post-gazette.com/pg/09047/949492-85.stm> (reporting that the Facebook page of an armed student killed in a standoff at a private college in Pennsylvania indicated that the student supported SCCC).

182. See International Association of Campus Law Enforcement Administrators (“IACLEA”), <http://www.iaclea.org> (last visited Oct. 15, 2009). See also Revised Concealed Weapon Statement of August 2008, <http://www.iaclea.org/visitors/about/positonstatements.cfm> (last visited Oct. 15, 2009) (laying out IACLEA’s policy). Regarding the underlying law on concealed weapons, the core principles are clear.

The question now before us is whether requiring citizens to obtain permits to carry concealed firearms constitutes reasonable regulation. We hold that it does. Reasonableness in the exercise of the State’s police power requires that the purpose of the enactment be in the interest of the public welfare and that the methods utilized bear a rational relationship to the intended goals.

A less obvious approach by gun possession advocates would be to amend state law to define a college or university dorm or residence hall as a “home” for purposes of possession rights. If that occurred, and the Second Amendment was incorporated against the states, *Heller* could be argued to pre-empt dorm possession restrictions. Of course, the state can argue that the restriction is a reasonable and necessary exercise of its police power, but such a “dorm as home” statute would certainly help the advocates.<sup>183</sup>

College and university counsel whose institution opposes the “dorm as home” approach should keep three issues in mind. First, concealed weapon laws typically give a right to possess a concealed weapon only where weapon possession itself is allowed.<sup>184</sup> For example, a concealed weapon permit does not authorize a person to carry a firearm in a courthouse. So a concealed weapon rights bill should not be used to establish both the fundamental right of possession and the subsequent, narrower right of concealment. Second, counsel in these circumstances may want to remind the legislature of the propriety of deferring to the body—the Trustees—that the legislature previously charged to superintend the institution on difficult issues such as these.

Finally, the legislature will have competing pressure from sportsmen and other gun advocates not to restrict possession, and deference is often a “content-neutral” way for the legislature to act. Counsel may want to suggest that the State Police be allowed to speak at the hearing on just that subject. The State Police will also explain why, in their view, only trained law enforcement officers should be authorized to defend the citizens. The State Police may have more credibility with a legislative committee than would any college or university administrator, including college or

---

Recognizing the threat to public safety posed by the carrying of concealed weapons, state courts have held that statutes regulating the carrying of such weapons are constitutional. Maine’s concealed firearms statute is a reasonable response to the justifiable public safety concern engendered by the carrying of concealed firearms. The permit requirements pass constitutional muster as an acceptable regulation of the individual’s right to keep and bear arms.

*Hilly v. City of Portland*, 582 A.2d 1213, 1215 (Me. 1990) (citations omitted).

SCCC unsuccessfully sued the Regents of the University of Colorado for its restrictions on concealed possession. *See Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, No. 2008-CV-492, slip op. (D. Colo. 2008).

183. Sometimes this legislation does not target but nonetheless captures colleges and universities in other ways as well. For example, a recent statute in Oklahoma prohibits any “person, property owner, tenant, employer, or business entity” from “establish[ing] any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle.” OKLA. STAT. ANN. tit. 21, § 1289.7a(A) (2008). This provision, which appears to reach public and private colleges and universities, has survived challenge. *See Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

184. OKLA. STAT. ANN. tit. 21, § 1277(A)(3) (2009).

university security officers.

#### H. Track the Current Public Housing Authority Cases

Because colleges and universities are not the only public entities wrestling with these issues of gun regulation, another important task for a college or university lawyer who wants to protect his or her institution's gun-control laws is to keep track of the cases challenging the authority of public housing authorities to adopt and enforce such regulations.<sup>185</sup> Indeed, cases involving public housing authorities can be informative to college and university counsel for at least three reasons. First, they may provide insights into the reach and scope of state pre-emption law. Second, they may provide insights into development of the incorporation doctrine discussed above. And finally, they may foretell whether *Heller's* "defense of home" constitutional doctrine could implicate college and university housing.

Note that the pre-emption doctrine, discussed above in Section IV.A, is often at the heart of the analogous public housing authority cases. For example, the Maine Supreme Court ruled that Maine pre-emption law prevented a municipal housing authority from requiring, as a condition of a lease, a ban against tenants having firearms in the housing project.<sup>186</sup>

The Court did not reach the issue of whether the state constitution dictated the same result because the Court voided the lease provision on statutory pre-emption grounds.<sup>187</sup> No matter how styled, these public housing authority cases are worth watching.

#### I. Lobby for Legislation Strategically

Finally, if a public college or university does not currently have an express grant of statutory authority to regulate firearm possession on campus, the following legislative strategies may be helpful.

First, the bill need not amend the state's pre-emption statute and may, in fact, be more appropriate if it amends an education—even a K–12—statute instead. For example, state K–12 law typically prevents possession in "schools," and a bill could amend the defined term "school" to include a "post-secondary institution." In a case of this sort, colleges and universities

---

185. The San Francisco Housing Authority settled just such a suit. *See* Complaint for Declaratory and Injunctive Relief, *Doe v. San Francisco Hous. Auth.*, No. CV-08-03112 (N.D. Cal. June 26, 2008), available at <http://www.nraila.org/pdfs/sfha.pdf>; *see also* Stipulation re Settlement and Dismissal of Defendants San Francisco Hous. Auth. and Henry Alvarez III Without Prejudice, *Doe v. San Francisco Hous. Auth.*, No. CV-08-03112 (N.D. Cal. Jan. 12, 2009), available at <http://volokh.com/files/sfpublichousingguns.pdf>.

186. *Doe v. Portland Hous. Auth.*, 656 A.2d 1200, 1205 (Me. 1995).

187. *Id.* at 1201.

can argue that the interests served by a K–12 ban—protecting student safety—are the same in both secondary and post-secondary education. Second, college and university counsel may attempt to get the bills in question referred to an education committee and not to a governmental affairs or judiciary committee. An education committee may be more informed about and receptive to the college’s or university’s needs. Third, counsel might remind legislators that they have seen fit to ban weapons in their workplace—capitol complexes routinely do so—and that college and university employees and students should receive no less protection. Fourth, as stated previously, counsel could ask the State Police to testify in support of the bill, explaining why they support disarming, rather than arming, students and others. Finally, counsel need not be afraid to go it alone; that is, to draft a bill to apply only to one campus or system and not to all of the state’s higher education systems.<sup>188</sup> Although there is clear benefit to having colleagues join a bill, perhaps less opposition may be created by a more narrowly tailored measure.

#### V. CONCLUSION

*Heller* sets an important standard in recognizing personal firearm use and sets an analytical baseline for how state courts may construe the text and history of their own state constitutions. Whether *Heller* proves to have a direct or significant impact on college and university operations waits to be seen. In the interim, gun advocates continue their attempts to apply and/or expand *Heller* in legislation and litigation to advance their interests. To that end, proposed concealed weapons legislation, incorporation cases, and public housing challenges bear watching closely. Although we will see where these efforts, already underway, will lead, public colleges and universities that secure express statutory authority to regulate possession on campus should be able to withstand the challenges that *Heller* is likely to spawn.

---

188. Compare, e.g., ME. REV. STAT. ANN. tit. 20-A, § 6552(1) (2007) (applying only to Maine’s community colleges), with ME. REV. STAT. ANN. tit. 20-A, § 10009 (effective Sept. 12, 2009) (applying to all Maine public colleges).