GUN CONTROL ON COLLEGE AND UNIVERSITY CAMPUSES IN THE WAKE OF DISTRICT OF COLUMBIA V. HELLER AND MCDONALD V. CITY OF CHICAGO

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ABSTRACT

From the Constitution’s ratification in 1791 until the 2008 District of Columbia v. Heller decision, the Supreme Court had never held that a statute violated the Second Amendment. In invalidating Washington, D.C.’s extensive gun control prohibitions, which extended into the home, the Court declared that the Second Amendment protects citizens’ right to keep and bear arms in the home for the purpose of self-defense, so long as the weapon was of the kind used for such purposes at the founding. Moreover, in contrast to precedents going back to the nineteenth century, the Court stated that this right was independent of any militia service by the gun user. In 2010 in McDonald v. City of Chicago, the Court declared that the Second Amendment was incorporated into the Fourteenth Amendment’s Due Process Clause and therefore enforceable against the states. This meant that as of 2010 a new protection was incorporated into the Bill of Rights, and the Second Amendment joined its constitutional cousins, including, for example, the First Amendment Free Speech and Religion Clauses, as rights limiting states’ power.

This Article examines the capacity of public colleges and universities to enact campus gun control policies affecting students, faculty, staff, and others, in light of the landmark Heller and McDonald decisions and judicial interpretations of those cases, along with state constitutional and statutory constraints on the ability of public college and university officials to act autonomously in fashioning campus gun control policies. Through this examination, this Article derives principles to guide campus officials in the quest to fulfill their policy goals, while remaining faithful to citizens’ individual Second Amendment right to “keep and bear arms,” and state limitations on campus institutional power. The Article makes observations about areas in which campus officials should feel secure in enacting firearm controls, as well as where ambiguities remain, and concludes that the political branches of state government, rather

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than lofty constitutional principles, may determine who prevails in this contentious policy debate.

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I. INTRODUCTION

This Article examines the capacity of public colleges and universities to enact campus gun control regulations affecting students, faculty, staff, and others, in light of: (1) individual citizens’ Second Amendment right to keep and bear arms under the United States Supreme Court’s District of Columbia v. Heller and McDonald v. City of Chicago decisions and (2) state constitutional and statutory constraints. Through this

1 Although the merit of firearm control has been vigorously debated, it is outside the scope of this article. The literature on the subject is voluminous. For articles favoring the right to carry concealed weapons, see, for example, Riley C. Massey, Bull’s-Eye: How the 81st Texas Legislature Nearly Got It Right On Campus Carry, and the 82nd Should Still Hit the X-Ring, 17 TEX. WESLEYAN L. REV. 199, 223-26 (2011) (arguing, among other things, against prohibition of right to conceal-carry on campus in light of constitutional right to defend oneself and lack of empirical evidence that regulation reduces campus gun assaults); John R. Lott, Jr. & David B. Mustard, Crime, Deterrence, and Right-to-Carry Concealed Handguns, 26 J. LEGAL STUD. 1, 4 (1997) (asserting that empirical evidence demonstrates the right to carry concealed weapons deters crime because, among other reasons, criminals will be risk averse in assaulting someone when they do not know whether the person carries a gun or not). For commentary favoring campus prohibition of firearms, see, for example, DARBY DICKERSON, NAT’L BEHAVIORAL INTERVENTION TEAM ASS’N, WHITE PAPER – GUNS ON CAMPUS 8-9 (Feb. 17, 2011), available at http://www.nabita.org/documents/WhitePaperGunsonCampus.pdf. Professor Darby concludes: Allowing guns and other weapons on campus will not advance the goal [of making campuses as safe as possible]; indeed, it will have the opposite effect and lead to additional deaths and injuries. The best way to keep our campuses safe is to retain colleges and universities on the list of places where individuals may not bring firearms .... Id. at 9; see also THOMAS L. HARNISCH, AM. ASS’N STATE COLLS. AND UNIVS., CONCEALED WEAPONS ON STATE COLLEGE CAMPUSES: IN PURSUIT OF INDIVIDUAL LIBERTY AND COLLECTIVE SECURITY (Nov. 2008), http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolyicAndAdvocacy/PolicyPublications/pmdec08(1).pdf (exploring the potential impact of guns given the dynamics of college campuses; the impact on law enforcement officials who respond to emergencies where students, faculty and staff carry weapons; the reality of actual deterrence by permissive concealed carry opportunities; and the potential liability and administrative costs of opening campuses to concealed carry, among other things); LEGAL CMTY. AGAINST VIOLENCE, 10 MYTHS ABOUT GUN VIOLENCE IN AMERICA, http://www.lcav.org.publications-briefs/reports_analyses/Ten_Myths.pdf (last
examination this Article derives principles to guide campus officials in the quest to fulfill their policy goals, while remaining faithful to citizens’ individual Second Amendment right to “keep and bear arms,” and state limitations on campus institutional power.

In furtherance of this Article’s goals, Part II examines the Supreme Court’s District of Columbia v. Heller and McDonald v. City of Chicago decisions. Part III analyzes post-McDonald cases involving Second Amendment challenges to statutes that curtailed citizens’ ability to keep and bear arms. This Part considers personal and location restrictions on the right to possess firearms, as well as the methods courts use to evaluate Second Amendment challenges, including the level of scrutiny to which courts have subjected gun control measures.² Although virtually all of the post-McDonald cases discussed in Part III arose in the context visited Mar. 31, 2011); Jesum M. Villahermosa, Jr., Guns Don’t Belong in the Hands of Administrators, Professors, or Students, 54 CHRON. HIGHER EDUC., Apr. 18, 2008, at A56; Gun Violence Statistics, Guns on Campus, LEGAL CMTY.
² Depending on the constitutional interest infringed, courts apply strict, intermediate, or rational basis scrutiny to the governmental regulation under review. Strict scrutiny requires that the regulation further a compelling governmental interest and be narrowly tailored to achieve that end. See, e.g., Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 VAND. L. REV. 793, 800-01 (2006) (“Narrow tailoring requires that the law capture within its reach no more activity (or less) than is necessary to advance those compelling ends. An alternative phrasing is that the law must be the ‘least restrictive alternative’ available to pursue those ends. This inquiry into ‘fit’ between the ends and the means enables courts to test the sincerity of the government's claimed objectives.”). Intermediate scrutiny requires that the classification imposing a burden serve “important governmental objectives” and that the discriminatory means employed are “substantially related” to the achievement of those objectives. See, e.g., United States v. Virginia, 518 U.S. 515, 531-34 (1996) (rejecting state-supported Virginia Military Institute’s men only policy under intermediate scrutiny); Orr v. Orr, 440 U.S. 268, 279-83 (1979) (striking down an Alabama law which imposed alimony obligations on husbands, but not wives on intermediate scrutiny review). Rational basis review is the least demanding among the three. It only demands a conceivable legitimate reason for the challenged classification whether or not it was the actual purpose that motivated the legislature. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 959 (1973) (holding that since education was not a fundamental right protected by the United States Constitution, only rational basis review would be applied to Texas’s public school funding scheme, notwithstanding the allegation that it disadvantaged poor students); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988) (holding that school bus fees which adversely affected poor students neither burdened a fundamental interest nor violated the Equal Protection Clause under rational basis scrutiny).
of post-conviction criminal proceedings, they help define the permissible scope of regulation under the Second Amendment, including those that may be imposed by colleges and universities.

Part IV examines in detail University of Utah v. Shurtleff (Shurtleff) decided in 2006, and DiGiacinto v. The Rector and Visitors of George Mason University (GMU), decided in 2011. These are the only two state supreme court cases to date that have examined the authority of state colleges and universities to establish campus gun regulations under state constitutional provisions and statutory enactments. In this Part, a case from an intermediate appellate court in Colorado is also considered closely. That case, Students for Concealed Carry on Campus, LLC v. the Regents of the University of Colorado, examined similar questions to Shurtleff and GMU.

Part V derives lessons from the foregoing review and attempts to provide principled guidance to college and university officials in their efforts to adopt campus firearm policies. Part VI examines the exposure public colleges and universities and their officials to civil rights liability for violations of students’ and faculty and staff members’ right to keep and bear arms under the Second Amendment, pursuant to 42 U.S.C. § 1983. Section 1983 is the principal vehicle for bringing claims in federal court for violations of federal constitutional and statutory rights. In this Part the Article also comments on areas which will serve as safe harbors for campus regulations, in the absence of intervention by state legislatures forbidding such activities. It also predicts the most likely areas where constitutional litigation over firearm regulation on college and university campuses will ensue. Part VII concludes with a brief

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3 This article does not address challenges arising under Article I, § 8, Clause 3, the Commerce Clause of the United States Constitution. In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court held that the Gun-Free School Zones Act [making it a federal offense for any individual to knowingly possess a firearm within 1000 feet of a school which the individual knows or has reasonable cause to believe is a school zone], exceeded Congress’ Commerce Clause authority, since possession of a gun in a local school zone was not an economic activity that substantially affected interstate commerce. The court emphasized that such activity was truly local, had nothing to do with any sort of economic enterprise, and the statute contained no jurisdictional element to insure, through case-by-case inquiry, that possession of a firearm had a concrete tie to interstate commerce. Id. at 557-68. This decision will not affect state and local efforts to regulate firearms.

retrospective of the legal landscape and observes that the political
branches more than the judiciary will play the decisive role in this
ongoing controversy.

II. THE FEDERAL CONSTITUTIONAL LANDSCAPE

A. DISTRICT OF COLUMBIA v. HELLER

The Second Amendment states: “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.” On June 26, 2008, Justice
Antonin Scalia, writing for the five-person majority in District of
Columbia v. Heller, declared that the Second Amendment protects an
individual’s right to possess a firearm, unconnected with militia service,
and the right to use firearms for traditionally lawful purposes, including
self-defense, within the home. In so doing, the Court struck down a
nearly 35-year-old ordinance promulgated by the District that prohibited
private ownership or possession of handguns.

From the Constitution’s ratification in 1791 until Heller issued, the
Supreme Court had never held that a law violated the Second
Amendment. Moreover, until Heller every decision from the Court
concerning the Second Amendment had concluded that it protects the
right to have firearms solely for the purpose of militia service. Since the

The overwhelming share of regulatory action involving possession, use, and sale
of firearms exists at the state and local level. While the federal government
clearly possesses the power to preempt this field, except for truly local concerns,
see, e.g., Lopez, 514 U.S. 549, it has largely acquiesced to the exercise of
regulatory power by local constituencies. See U.S. CONST. art. VI, § 2.
5 U.S. CONST. amend. II.
7 Id. at 608, 628-29, 635. The Court was divided along ideological lines. Justice
Scalia was joined by Chief Justice John Roberts and Justices Anthony Kennedy,
Clarence Thomas and Samuel Alito. Justices John Paul Stevens, David Souter,
8 The precise question framed by the Court in its grant of certiorari was:
“Whether the following provisions-D.C. Code §§ 7-2502.02(a)(4), 22-4504(a),
and 7-2507.02-violate the Second Amendment rights of individuals who are not
affiliated with any state-regulated militia, but who wish to keep handguns and
other firearms for private use in their homes?” District of Columbia v. Heller,
478 F.3d 370 (D.C. Cir. 2007), cert. granted, 552 U.S. 1035 (Nov. 20, 2007)
(No. 07-290).
9 The Supreme Court’s last pre-Heller ruling on the Second Amendment was in
that the Second Amendment confers on individuals the right to have guns. The
District of Columbia is a part of the federal government. *Heller* left open the question of whether the Second Amendment could be applied against states and localities.  

*Heller v. District of Columbia*’s prolix analysis considered historical, drafting, and commentary sources from scholars and others, in concluding that the Second Amendment grants citizens the individual right to keep and bear arms. Notably, *Heller* is narrow in scope. The decision confers on individuals the right to possess a handgun within the home for the purpose of immediate self-defense, but does not veer beyond this central tenet.  

The Court stated that “nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.” In this vein, the Court noted that the Second Amendment right to bear arms only extends to a limited class of weapons that were “in common use at the time [of the founding].” The Court saw this as representing a significant and permissible limitation on the weapons that are protected by the Second Amendment. The Court said that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.” This limitation, according to the Court, “is fairly supported by the historical traditions of prohibiting carrying of ‘dangerous and unusual weapons, . . .’” The Court implied that high-powered rifles would not be permissible, since the militia contemplated under the Second Amendment was essentially a citizen army that would employ the sorts of weapons the members possessed at home when called to duty. Indeed, this home-to-militia limitation would apply even

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*Miller* Court emphasized that the purpose of the amendment was to protect state militia and assure “the continuation and render possible the effectiveness of the [Militia]”.

10 In the nineteenth century, the Court had ruled that the Second Amendment applied only to the federal government. *See*, e.g., *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

11 *Heller*, 554 U.S. at 635. In *Heller*, the Court stressed that “the need for defense of self, family, and property is most acute” in the home, and found a Second Amendment right to possess handguns because they are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.” *Id.* at 628-29 (citation omitted).

12 *Id.* at 625.

13 *Id.* at 627.

14 *Id.* at 625.

15 *Id.* at 627 (stating that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes) (citation omitted). The Court did comment, however, that “the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582.

16 *Id.* at 627-28.
if the result would be to ban weapons that would make the militia more effective.\textsuperscript{17} Nevertheless, the Court left open the question of which firearms would enjoy Second Amendment protection, even in the home.

Although the \textit{Heller} Court characterized this Second Amendment right as “fundamental,”\textsuperscript{18} it indicated the Amendment’s scope was not unlimited; the Court did not, however, define or specify those limitations.\textsuperscript{19} That said, the Court indicated that nothing should cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, the carrying of firearms in “sensitive places,” such as schools and government buildings, or regulations imposing conditions or qualifications on the commercial sale of arms.\textsuperscript{20} Indeed, the Court stated that such measures were “presumptively lawful.”\textsuperscript{21} Moreover, the Court indicated that its list of presumptively lawful measures was not an exhaustive enumeration of permissible regulations.\textsuperscript{22} Notably, the \textit{Heller} Court did not identify the level of scrutiny that applied to Second Amendment challenges.\textsuperscript{23} It concluded that under any standard of review,\textsuperscript{24} the handgun ban in issue would fail as unconstitutional.\textsuperscript{25}

\begin{thebibliography}{99}
\bibitem{17} Id.
\bibitem{18} Broadly speaking, the Supreme Court has determined that “some liberties are so important that they are deemed to be ‘fundamental rights’ and that generally the government cannot infringe upon them unless strict scrutiny is met.” \textsc{Erwin Chemerinsky}, \textsc{Constitutional Law Principles and Policies} 792 (3d ed. 2006). The concept of fundamental rights originated in \textit{United States v. Carolene Prods. Co.}, 304 U.S. 144, 152 n.4 (1938) (stating that the judiciary will defer to the legislature unless there is discrimination “against discrete and insular minorities” or infringement of a fundamental right).
\bibitem{19} \textit{Heller}, 554 U.S. at 626-28.
\bibitem{20} Id.
\bibitem{21} Id. at 627 n.26
\bibitem{22} Id.
\bibitem{23} The Court indicated only that the rational basis test is not appropriate for assessing Second Amendment challenges to federal laws. \textit{Id.} at 628 n.27 (“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.”). This view leaves heightened scrutiny of an intermediate or strict kind, to be applied.
\bibitem{24} \textit{Id.} at 635 (observing that it would not be prudent to set a standard since this was the first in-depth examination of the Second Amendment by the Court).
\bibitem{25} Following the Supreme Court’s \textit{Heller} decision, the district court in \textit{Heller v. District of Columbia (Heller II)}, 698 F. Supp. 2d 179 (D.D.C. 2010), considered the challenge to new restrictions passed by the council of the District of Columbia in response to the holding in \textit{Heller}. The \textit{Heller II} plaintiffs challenged new laws containing: “(1) the firearm registration procedures; (2) the prohibition on assault weapons; and (3) the prohibition on large capacity

Since the District of Columbia is a federal entity, the Second Amendment applies directly to it. The *Heller* court declined to resolve whether the Second Amendment applied to the states, since the issue was not included in the grant of certiorari. Two years later, *McDonald* answered that question left unresolved by *Heller*.

**B. *McDonald v. City of Chicago***

On June 28, 2010, the Court, in another 5-4 decision, *McDonald v. City of Chicago*, held that the Second Amendment applies to state and local governments. *McDonald*, written by Justice Samuel Alito, opened the door to Second Amendment challenges to state and local gun control laws, including those that involve firearms on college and university campuses. In upholding all of the provisions, it applied intermediate scrutiny to the alleged infringement on Second Amendment rights. It cautioned that intermediate scrutiny would only apply “in cases in which the law implicates the core Second Amendment right, namely, ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” *Id.* at 187-88 (quoting *Heller*, 554 U.S. at 635).

27 See *Heller*, 554 U.S. at 620 n.23.
28 For interesting discussions about *Heller*, see, for example, Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of The Second Amendment*, 18 GEO. MASON U. C.R. L.J. 167, 174-76 (2008) (raising questions about the legality of gun prohibitions and confiscations, types of firearms which receive Second Amendment protection, and whether the right is fundamental, among other issues); Derek P. Langhauser, *Gun Regulation on Campus: Understanding Heller and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63 (2009) (examining the principal legal issues raised by *Heller*, but focusing on significance of state constitutional and statutory provisions on the ability of colleges and universities to adopt campus firearm policies); and Cameron Desmond, Comment, *From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1050 (2008). For an analytic framework for considering “decision rules” resulting from *Heller*, see Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1431 (2009) (observing that “[t]here are at least five aspects of decision rules [resulting from *Heller*] that must be confronted by courts. First, the constitutionally operative right must be precisely defined. Second, those who are entitled to assert the right must be identified. Third, any special situations that qualify the right in any fashion must be specified. Fourth, the burden upon the right that constitutes a presumptive infringement of it must be articulated. Finally, the level of scrutiny to be employed by courts must be phrased in a useable manner.”).
29 130 S. Ct. 3020, 3026 (2010). These entities include public colleges and universities.
The *McDonald* Court held that the Fourteenth Amendment incorporates the Second Amendment right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense. Since the vast majority of firearm regulations exist at the state and local level, the question of the Second Amendment’s application to the states is of enormous import. After reviewing the history of the Bill of Rights, starting with the famous case of *Barren v. Baltimore*, which limited the application of the Bill of Rights to the Federal government, the *McDonald* Court examined the evolution of the doctrine of incorporation. According to the *McDonald* Court, the modern view is that the Fourteenth Amendment selectively incorporates particular rights contained in the first eight Amendments under standards that have evolved over time.

The Court stated that whether a particular Bill of Rights protection is incorporated depends on whether it is fundamental to our Nation’s particular scheme of ordered liberty or whether it is “deeply rooted in this Nation’s history and tradition.” The *McDonald* Court observed that under standards it established in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the individual right to keep and bear arms is “deeply rooted in the Nation’s history and traditions.” Moreover, the *McDonald* majority asserted that a survey of the contemporaneous history demonstrated that the Fourteenth Amendment’s framers and ratifiers

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30 Five Justices agreed that the Second Amendment was applicable to the states. *Id.* Associate Justices Alito, Kennedy, Scalia and Chief Justice Roberts agreed that the Second Amendment was incorporated into the Fourteenth via the Due Process Clause. *Id.* at 3050. Justice Thomas concluded that § 1 of the Fourteenth Amendment, the Privileges and Immunities Clause (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”), was more straightforward and more faithful to the Second Amendment’s text and history in concluding that the Second Amendment was applicable to the states than use of a Fourteenth Amendment incorporation approach. *Id.* at 3058-59. (Thomas, J. concurring in part and concurring in judgment).

31 *McDonald*, 130 S.Ct. at 3026.


33 *McDonald*, 130 S.Ct. at 3028-29 (discussing Barren ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243 (1833)).

34 *Id.* at 3034-36.

35 *Id.* at 3034 (citing Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)).

36 *Id.* at 3036 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

37 *McDonald*, 130 S.Ct. at 3036 (quoting *Glucksberg*, 521 U.S. at 721).
counted the right to keep and bear arms among those fundamental rights necessary to the Nation’s system of ordered liberty. The *McDonald* Court also emphasized that Bill of Rights protections must “all be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”

In reliance on *Heller*, the *McDonald* Court found it unmistakable that *Heller* considered self-defense to be a basic right and individual self-defense to be “the central component” of the Second Amendment. The *McDonald* Court observed that under *Heller* “the need for defense of self, family, and property is most acute” in the home and handguns are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.” This, the *McDonald* Court observed, is what led the *Heller* Court to conclude that citizens must be permitted “to use [handguns] for the core lawful purpose of self-defense.”

Thus, the *McDonald* Court established an individual right to keep and bear arms, at least in one’s home, under the Second Amendment as applied to the states and localities, and appears to give its approval to limitations on such a right for convicted felons or mentally ill persons. The Court in *McDonald* did not explain how far from the

38 Id. at 3037, 3040-42 (discussing Fourteenth Amendment’s adoption, ratification and post-civil war Congressional activity, including debates referring to the right to keep and bear arms as fundamental).
39 Id. at 3035 (emphasis added) (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964)).
40 Id. at 3036 (citing Dist. of Columbia v. Heller, 554 U.S. 570, 599 (2008)).
41 Id. at 3036 (quoting *Heller*, 554 U.S. at 628).
42 Id. at 3036 (quoting *Heller*, 554 U.S. at 628-29).
43 Id. at 3036 (quoting *Heller*, 554 U.S. at 630).
44 Id. at 3047. Whether the Supreme Court’s statement in *Heller* about the presumptive lawfulness of felon gun dispossession statutes, 554 U.S. at 626, is mere dicta or an enforceable declaration, is not free from doubt, as indicated by the division in the circuits. See, e.g., United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010); United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009). These courts determined that the statement was dicta, but nevertheless relied on *Heller’s “dicta”* in declaring the challenged statutes lawful. See *Scroggins*, 599 F.3d at 451; *Skoien*, 614 F.3d at 640-41; *McCane*, 573 F.3d at 1047. However, three circuit courts of appeals have recognized that “[t]o the extent that this portion of *Heller* limits the Court’s opinion to possession of firearms by law-abiding and qualified individuals, it is not dicta.” See, e.g., United States v. Barton, 633 F.3d 168, 171-72 (3d Cir. 2011); United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010).
45 *McDonald*, 130 S.Ct. at 3047.
home this right extended, or under what conditions such a right might exist. *McDonald* signaled the Court’s likely approval of firearm regulation in “sensitive places,” such as schools and government buildings, but it did not furnish specifics on this exclusion from Second Amendment rights. Finally, the *McDonald* Court declined to announce the scrutiny standard to apply when courts review state firearm regulations under the Second Amendment. This was the constitutional landscape as of June 28, 2010.46

III. SECOND AMENDMENT ANALYSIS OF GUN REGULATIONS AFTER HELLER AND MCDONALD

A. DEFINING THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS AFTER HELLER AND MCDONALD

There has been no shortage of Second Amendment litigation following the *Heller* and *McDonald* decisions. These cases have arisen mostly in post-conviction challenges to penal statutes. They map the constitutional landscape for legislatures enacting campus gun control statutes and for colleges and universities that enjoy the freedom to adopt such measures.47

United States Courts of Appeals have been highly uniform in their construction of *Heller* in terms of individual restrictions on firearm possession that fell into *Heller’s* presumptively lawful category as against Second Amendment attack. Such courts have upheld restriction on firearm possession by convicted felons,48 involuntarily committed mentally ill individuals,49 illegal drug users,50 domestic violence

46 For thoughtful examinations of the incorporation doctrine as it relates to Second Amendment jurisprudence, see Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007); Michael P. O’Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 215-217 (2008).

47 The Second Amendment’s incorporation into the Fourteenth Amendment has little or no bearing on firearm control policies promulgated by private institutions. See, e.g., *Harris v. Ladner*, 127 F.3d 1121, 1125 (D.C. Cir. 1997) (holding that actions of the university did not implicate constitutional rights since there was only “general governmental involvement” with the institution).

48 See, e.g., *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010); *United States v. Davis*, 406 F. App’x 52, 53-54 (7th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir. 2010); *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010); *United States v. Stucky*, 317 F. App’x 48, 50 (2d Cir. 2009) (per curiam).

misdemeanants,\textsuperscript{51} and juveniles.\textsuperscript{52} Moreover, they have upheld bans on handguns with obliterated serial numbers,\textsuperscript{53} as well as weapons which are inherently dangerous, possess exceptional destructive capacity,  

\begin{footnotesize}
\begin{enumerate}
\item[50] See, e.g., United States v. Jacobson, 406 F. App’x 91, 92-93 (8th Cir. 2011); United States v. Yancey, 621 F.3d 681, 687 (7th Cir. 2010); United States v. Seay, 620 F.3d 919, 924-25 (8th Cir. 2010).  
\item[51] See, e.g., United States v. Chester, 628 F.3d 673, 681-83 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800 (10th Cir. 2010). In Reese, defendant attacked, on Second Amendment as applied grounds, a statute which prohibited the possession of all types of firearms while subject to a domestic protection order. \textit{Id.} at 799-800. The Reese court concluded that the challenged statute imposed a burden on Reese’s possession of otherwise legal firearms that generally fell within Second Amendment protection. \textit{Id.} at 801. Applying intermediate scrutiny, the court held the legislation was valid, even though the weapons were retrieved by police in the defendant’s residence. \textit{Id.} at 801-02. The court concluded that the domestic relations order was substantially related to the government’s objective in preventing armed domestic violence, as required under intermediate scrutiny. \textit{Id.} at 802-03. Moreover, the objective was advanced by means substantially related to it, since the provisions ensure that only persons who were subject to specific types of domestic relations orders had their Second Amendment rights burdened. \textit{Id.} at 803-04. See also United States v. White, 593 F.3d 1199, 1205-06 (11th Cir. 2010) (affirming defendant’s conviction for possession of firearm by persons convicted of domestic violence, concluding that this type of offense under \textit{Heller} was presumptively lawful).  
\item[52] See, e.g., United States v. Rene E., 583 F.3d 8, 14-16 (1st Cir. 2009). In Rene E, the court affirmed defendant’s conviction for illegal possession of a handgun as a juvenile, concluding that no Second Amendment violation occurred. It noted that there is a longstanding tradition of prohibiting juveniles from receiving and possessing handguns and that the statute contained an exception for self- and other-defense in the home, among other places. \textit{Id.} This restriction is merely “part of a longstanding practice of prohibiting certain classes of individuals from possessing firearms – those [whose] possession poses a particular danger to the public.” \textit{Id.} at 16; see also Washington v. Sieyes, 225 P.3d 995, 1005 (Wash. 2010) (holding that juvenile failed to demonstrate that statute which limited the circumstances in which children under the age of 18 could lawfully possess firearms violated his right to bear arms under either the United States or State of Washington Constitution, but refusing to apply a particular level of scrutiny to its determination).  
\item[53] See, e.g., United States v. Marzzarella, 614 F.3d 85, 93-94 (3d Cir. 2010). 
\end{enumerate}
\end{footnotesize}
and/or are not typically used in the home for self-defense. Finally, district courts have confronted claims that asserted that states have unlawfully extended Heller’s “sensitive places” doctrine beyond its intended reach. None of these location-based challenges has been successful.

54 See, e.g., Hamblen v. United States, 591 F.3d 471, 474 (6th Cir. 2009) (affirming convictions for possession of machine guns and unregistered firearms); United States v. Fincher, 538 F.3d 868, 873-74 (8th Cir. 2008) (holding that possessing a machine gun and sawed-off shotgun is not protected by the Second Amendment). Id. at 874; see also, Kodak v. Holder, 342 F. App’x 907, 908-09 (4th Cir. 2009) (affirming dismissal of plaintiff’s complaint that ban of armor-piercing ammunition violated his Second Amendment rights to self-defense; such apparatus was not in common use by law-abiding citizens and therefore did not fall within constitutional protection under Heller). State courts have also concluded that individuals who possess weapons not typically used for self-defense in the home are not Second Amendment-protected. See, e.g., Wilson v. Cook Cnty., 943 N.E.2d 768, 780-81 (Ill. App. Ct. 2011) (upholding a county ordinance banning assault weapons because the law did not impose a blanket weapons ban but focused only on a limited subcategory of firearms); People v. James, 94 Cal. Rptr.3d 576, 580, 586 (Cal. Ct. App. 2009) (upholding ban on assault weapons and observing that the weapon “has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings’ . . . These are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather, these are weapons of war.” (citation omitted)).

55 See, e.g., Georgiacarry.org, Inc. v. Georgia, 764 F. Supp. 2d 1306, 1317-19 (M.D. Ga. 2011). In Georgiacarry.org, Georgiacarry, a non-profit religious organization, challenged provisions of Georgia’s firearms laws which regulated firearms in places of worship. Id. at 1307. The court held that the law bore a substantial relationship to the important governmental interest of protecting the free exercise of religion, because it sheltered attendees from the fear or threat of intimidation or armed attack, and therefore upheld the statute from Second Amendment attack. Id. at 1317-19; see also United States v. Dorosan, 350 F. App’x 874, 875-76 (5th Cir. 2009) (concluding that a parking lot owned by the United States Post Office was a “sensitive place” subject to governmental regulation); United States v. Davis, 304 F. App’x 473 (9th Cir. 2008) (affirming defendant’s conviction for carrying a firearm on an airplane in violation of federal law); United States v. Masciandaro, 648 F. Supp.2d 779, 790 (E.D. Va. 2009) (holding that National Park lands fall within meaning of sensitive places whereby gun regulation does not offend the Second Amendment protections). To date state appellate courts have uniformly upheld “sensitive” location restrictions on gun possession. See, e.g., Williams v. State, 10 A.3d 1167, 1178 (Md. 2011); People v. Dawon, 934 N.E.2d 598 (Ill. App. Ct. 2010) (holding that the statute under which defendant was convicted, prohibiting the wearing, carrying or transporting a handgun, without a permit, outside of the home, fell outside of the scope of the Second Amendment right to keep and bear arms; under Maryland law defendant could not have been prosecuted where he possessed a gun on the premises of real estate which he owns or leases).
Although challenges to gun control measures have consistently been rebuffed,\(^{56}\) the methodology courts have used to arrive at their results has varied somewhat. Their three principal approaches are considered next.

In *United States v. Marzzarella* the Third Circuit used a two-part test to evaluate Second Amendment challenges.\(^{57}\) Under *Marzzarella*, the threshold question “is whether the challenged law imposes a burden on conduct falling within the scope of this Second Amendment guarantee.”\(^{58}\) If the answer to that inquiry is “no,” the analysis is complete.\(^{59}\) If the answer is “yes,” the court must then “evaluate the [statute] under some form of means-end scrutiny.”\(^{60}\) In *United States v. Barton*,\(^{61}\) the Third Circuit applied *Marzzarella’s* two-pronged approach and recognized a categorical exclusion to Second Amendment rights under a felon-in-possession statute.\(^{62}\) For persons excluded under this categorical approach, no Second Amendment right to keep and bear arms exists; therefore, a second-prong means-ends inquiry becomes unnecessary.\(^{63}\)

\(^{56}\) No post-*Heller* Second Amendment facial challenge to a gun control statute has yet succeeded. See, e.g., *United States v. Seay*, 620 F.3d 919, 924-25 (8th Cir. 2010) (collecting cases).

\(^{57}\) 614 F.3d 85, 89 (3d Cir. 2010).

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id. Under *Heller* this necessarily meant “intermediate” or “strict” scrutiny. See supra pp. 7-9 and note 23.

\(^{61}\) 633 F.3d 168 (3d Cir. 2011).

\(^{62}\) Id. at 175.

\(^{63}\) Id. at 174-76. In *Barton* the court addressed a facial and “as applied” attack under the Second Amendment. Defendant was convicted on a guilty plea to being in possession of a firearm and ammunition, and was sentenced to a term in prison and supervised probation. The *Barton* defendant had prior felony convictions for possession of cocaine with intent to distribute and for receipt of a stolen firearm. Defendant had recently admitted to selling a firearm with an obliterated serial number to a confidential police informant. On the facial attack the court concluded that since lawful prohibition on gun possession falls outside the scope of the Second Amendment and the defendant could not establish that all aspects of the statute were unconstitutional, it was not facially invalid. *Id.* at 172. On the as applied claim, the court concluded that the defendant was unable to establish he suffered a burden on his Second Amendment rights since as a convicted felon he was disabled from asserting such rights. *Id.* at 173-75. The court observed that felons were categorically different from individuals having a fundamental right to bear arms. Moreover, the court found that despite the breadth of the exclusion, it was entirely consistent with the purpose of the
The trend in the Eleventh Circuit, like that in the Third Circuit in *Barton*, is to avoid applying means-end testing where the challenged statute falls on *Heller’s* list of presumptively valid restrictions, or can be subsumed under them by strong analogy. Using *Heller’s* “presumptively lawful regulatory measures” standing alone as ground for its decision, the Eleventh Circuit has upheld categorical exclusions for possession of firearms by persons who were convicted of the misdemeanor crime of domestic violence or felonies. Joining the Third and Eleventh Circuits in recognizing categorical exclusions from Second Amendment protection based on felony convictions, are the Second, Fourth, Second Amendment to maintain the security of a free state. Notably, the fact that defendant possessed these weapons at home did not affect the case’s outcome even though it limited his ability to defend hearth and home. *Id.* at 174-75. The court’s analysis in *United States v. Ross*, 323 F. App’x 117 (3d Cir. 2009) was similar to its analysis in *Barton*. In *Ross*, the court affirmed the conviction for possession of a firearm in furtherance of drug trafficking, and possession of a machine gun, in the face of a Second Amendment challenge, noting that *Heller* limited Second Amendment rights to law-abiding citizens. 232 F. App’x at 120. The Fourth Circuit has drawn upon *Marzzarella’s* two-pronged approach in analyzing Second Amendment claims. See, e.g., *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010). In *Chester*, the court determined expressly to follow the *Marzzarella* approach. *Id.* at 680. It observed that “unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law.” *Id.* In *Chester*, the defendant was convicted of possessing a firearm at his home, after being convicted of a misdemeanor crime of domestic violence. *Id.* at 676-77. Because of the lack of evidence as to whether the Second Amendment as historically understood would have applied to the defendant, the court assumed that the defendant’s Second Amendment rights were intact and he was entitled to some measure of Second Amendment protection to keep and bear arms in his home. *Id.* at 681. This meant that *Marzzarella’s* second prong would control. The court applied intermediate scrutiny whereby it was the government’s burden to demonstrate that there is a “reasonable fit” between the challenged regulation and a “substantial” government objective. *Id.* at 683. Applying this standard, the court concluded that the government had not shouldered its burden of proof. *Id.* It remanded the case to the district court for further development of a factual record. *Id.* at 693. In this regard the court noted: “The government has offered numerous plausible reasons why the disarmament of [all] domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient evidence to establish a substantial relationship between § 922(g) (9) and an important government goal.” *Id.* at 683 (emphasis added).

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64 United States v. White, 593 F.3d 1199, 1205 (11th Cir. 2010).
65 United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam).
Fifth, Sixth, Ninth, and Tenth Circuits. The First Circuit has recognized categorical bans on juvenile possession of handguns, in the face of Second Amendment challenges, as has the Eighth Circuit for unlawful drug users.

The Seventh Circuit in United States v. Williams took a different approach than the courts in the foregoing cases. Williams involved a challenge to a felon-in-possession statute. The Williams court took note of Heller’s statement that, “[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.” Relying on this language, the Williams court developed a two-part inquiry for Second Amendment challenges. The court (1) initially asks whether the defendant is qualified to possess a firearm; and (2) determines that if the defendant falls within one of the categorical bans, he would enjoy no Second Amendment right to keep and bear arms, provided the government could make the necessary “strong showing.” Williams’ second-prong flowed from Heller’s statement that such bans were only “presumptively lawful.” The Williams court sensibly

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68 United States v. Anderson, 559 F.3d 348, 352, 352 n.6 (5th Cir. 2009).
70 United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010).
71 See United States v. McCane, 573 F.3d 1037 (10th Cir. 2009), cert. denied, 130 S.Ct. 1686 (2010); United States v. Richard, 350 F. App’x 252, 260 (10th Cir. 2009).
72 See United States v. Rene E., 583 F.3d 8 (1st Cir. 2009) (recognizing prohibition in face of statute’s being narrowly drawn, with “exceptions for self- and other-defense in the home, national guard duty and hunting, among other things”). Id. at 16.
73 See United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010).
74 Williams, 616 F.3d 685 (7th Cir. 2010), followed the Seventh Circuit’s decision in United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (en banc). Skoien involved a conviction for gun possession by a misdemeanant with a prior conviction for domestic violence. 614 F.3d 639. In eschewing an approach which required a historical analysis, the en banc court concluded that “some categorical disqualifications are permissible” and that the test for categorical exclusion would be whether the government could make a “strong showing.” Id. at 641. The Skoien court held the government had met its burden in this regard.
75 Id.
76 The challenged law prohibited the possession of a firearm by anyone convicted of a felony. Williams, 616 F.3d at 691.
77 Id. at 692 (emphasis added) (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).
78 Id.
79 Id. (emphasis added) (quoting Skoien, 614 F.3d at 641).
80 Id. (emphasis added) (quoting Heller, 554 U.S. 570 at 627 n.26).
concluded that this language implied that such restrictions could be unconstitutional in specific cases.\footnote{Id.}

In \textit{Williams}, the government’s stated objective under the challenged statute was to keep firearms out of the hands of violent felons, who the government believed were often those most likely to misuse firearms.\footnote{Id. at 693.} Under this view, the court concluded it could not say the “objective [was] not an important one.”\footnote{Id.} On the “substantially related” prong of intermediate scrutiny, the court concluded that the government had met its burden on this “as applied” challenge of establishing a substantial relationship between its objective of preventing felons’ access to guns, and the application to the defendant.\footnote{Id.} Williams’ prior conviction for felony robbery involved his beating the victim so badly that the victim required sixty-five stitches.\footnote{Id. at 693.} Since “Williams was convicted of a violent felony, that fact defeats any claim he has that [the challenged statute] is not substantially related to preventing him from committing further violence.”\footnote{Id. at 694. However, the court observed that the categorical exclusion might be subject to an overbreadth challenge by persons who were non-violent. \textit{Id.} at 693.}

In sum, although the methodology applied by appellate courts reviewing Second Amendment challenges to firearm control statutes has varied somewhat, there has been a high degree of consistency in their approval of statutory disabilities from firearm possession and carrying by felons, the mentally ill, and domestic violence misdemeanants.\footnote{See \textit{supra} pp. 12-13 and accompanying notes.} Moreover, restrictions on types of weapons that may be lawfully possessed, other than handguns used for self-defense in the home, have been uniformly upheld.\footnote{See \textit{supra} note 55 and accompanying text.}

These presumptively valid restrictions on possession and carrying recognize a strong governmental interest in public safety. This interest is manifest in the college and university environment. Nevertheless, colleges and universities should be mindful of tying firearm restrictions that they adopt to specific governmental interests (such as safety or maintaining a proper environment in which exchange of ideas may occur, free of intimidation) and then carefully tethering the means they
select to achieving those objectives. This will enable campus leaders to meet the “substantial relationship” test used uniformly by the courts. Given campus officials’ overwhelming opposition to campus concealed and open carrying, the danger in fashioning such policies on the Second Amendment front is one of overbreadth, that is, sweeping too broadly in the restrictions they impose.\textsuperscript{89} Whatever campus officials’ predilections might be, a more fundamental question arises: do colleges and universities possess the regulatory power under state constitutions or statutory enactments to enact gun control measures? The leading cases involving this question are examined in the next Part.

IV. STATE CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

Noting that its data would fluctuate somewhat from year to year, a comprehensive report issued in 2008 revealed that twenty-six states and the District of Columbia ban concealed weapons on college and university property\textsuperscript{90} and twenty-three states allow individual campuses to decide.\textsuperscript{91} Until 2011, Utah stood alone in allowing citizens with concealed weapon permits to carry their weapons on campus.\textsuperscript{92} In 2010, Kansas and Mississippi passed laws that allow concealed weapon permit holders to carry loaded, concealed firearms in or on the grounds of elementary and secondary schools. The Kansas statute affects public and private K-12 school settings and allows permit holders to carry firearms at school-sponsored activities and events, while the Mississippi provision allows permit holders to carry in K-12 buildings, and at college, professional and K-12 athletic events, among other settings.\textsuperscript{93} Utah has recently expanded permit holders’ right to carry in buildings which house

\textsuperscript{89} This issue is addressed in Parts V and VI.
\textsuperscript{90} HARNISCH, supra note 1, at 2. This total will ebb and flow with individual state enactments. The 26 states with legislation that banned guns from campus as of November, 2008 are: Arkansas, California, Florida, Georgia, Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, and Wyoming. Id.
\textsuperscript{91} Id. The 23 states that permit colleges and universities to establish their own policies regarding firearms on campus are: Alabama, Alaska, Arizona, Colorado (litigation pending), Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Missouri, Montana, New Hampshire, Pennsylvania, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Id.
\textsuperscript{93} Id.
preschools and daycare centers, and allows permit holders to carry in stadiums being used for K-12 school activities.\textsuperscript{94}

The effort to enact pro-gun on campus legislation is ongoing. States with such bills introduced in 2011 include: Arizona, Arkansas, Colorado, Florida, Georgia, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.\textsuperscript{95} These bills have essentially been aimed at preventing colleges and universities from exercising authority over guns on campus. They are of two types: (1) prohibitive, that is, the bill states expressly that colleges and universities may not regulate firearms on campus property, and (2) affirmative, that is, expressly allowing concealed carry licensees to carry firearms on college or university property.\textsuperscript{96} Although legislation permitting open-carry of weapons has been promoted recently in a few states, including Arizona, Arkansas, Oklahoma, Texas, and Utah, no legislature to date has authorized such provisions on college or university campuses.\textsuperscript{97}

On the state constitutional front, the most important issues for colleges and universities to consider are the following: express provisions granting citizens the individual right to keep and bear arms for self-defense or other lawful purposes, and the autonomy of public colleges and universities to regulate firearms on campuses, independent of state oversight.\textsuperscript{98} On the state legislative front, the most important

\textsuperscript{94} Id; see also, Recent Developments in State Law – 2011, LEGAL CMTY. AGAINST VIOLENCE, http://www.lcav.org/content/recent_developments_2011.asp#Utah (last updated July 26, 2011).
\textsuperscript{96} Id. This web-site displays a chart which includes the bill number, the legislative chamber in which the bill was introduced, and a brief summary of the bill’s content. Links to each bill are provided. For an overview of current state legislative activity in a news report format, see Derek Quizon, Legislative Proposals in 9 States Would Allow Guns on Campus, CHRON. HIGHER EDUC. (Feb. 16, 2011), available at http://chronicle.com/article/Legislative-Proposals-in-9/126392/.
\textsuperscript{97} DICKERSON, supra note 1, at 8.
\textsuperscript{98} Id. For a thoughtful discussion of state level statutory and constitutional provisions affecting firearm regulation of college and university campuses and suggestions for achieving institutional goals, see Langhauser, supra note 28, at 83–85. For a recent article considering the constitutional authority of colleges and universities to manage their internal affairs relative to state oversight, see Neal H. Hutchens, Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities, J.C. & U.L. 271 (2009). Among other things, Professor Hutchens rank orders states in six categories, stated in the degree of
consideration for public colleges and universities is preemption of campus decision making by state legislatures. These constitutional and statutory issues were paramount in the outcomes of the cases reviewed in this Part.

A. UNIVERSITY OF UTAH V. SHURTELLF

1. Statutory Interpretation

In University of Utah v. Shurtleff, the University sued the state attorney general in state court seeking a declaration that its firearms policy violated neither of two of the state’s firearm statutes. Arguing alternatively, the University contended that the Utah constitution guaranteed it institutional autonomy over firearms regulation, thereby allowing it to continue to enforce its firearms policy, notwithstanding any contrary state law.

After the trial court’s decision in favor of the University (but before any appeal was heard), the legislature enacted § 63-98-102 of the Utah Code (the “Preemption Act”). It provides:

Unless specifically authorized by the Legislature by statute, a local authority or state entity may not enact, establish, or enforce any ordinance, regulation, rule, or policy pertaining

constitutional autonomy enjoyed by their colleges and universities as recognized by affirmative judicial decrees. Those enjoying “Substantial Recognition, Extensive Constitutional Autonomy” are colleges and universities in Michigan, California and Minnesota. Id. at 282-293, 311. Those states granting the least autonomy (“Judicial Rejection of Constitutional Autonomy”) are Arizona, Colorado, Missouri, and Utah. Id. at 309-311. With respect to the latter group, Professor Hutchens characterizes those states as places where constitutional autonomy does not appear to exist as a viable legal doctrine. Id. at 309. States which grant “Moderate-Limited Recognition, Varying Degrees of Constitutional Autonomy” are Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma. Id. at 311. Those states which judicially recognize institutional autonomy but are subject to “Extensive Legislative Control” are Nebraska and South Dakota. Id. Professor Hutchens rates the colleges and universities of Florida, Georgia and Hawaii as having attained “Ambiguous Recognition” of constitutional autonomy. Id. He rates colleges and universities in Alabama, Alaska, Mississippi as “Unsettled, but Unlikely” to receive judicial recognition of autonomy. Id.

99 144 P.3d 1109 (Utah 2006). The University had for many years enforced a policy that prohibited students, faculty, and staff from possessing firearms on campus. Id. at1111.

100 Id. at 1112.
to firearms that in any way inhibits or restricts the possession or use of firearms on either public or private property.\textsuperscript{101}

The statutory definition of the phrase “local authority or state entity” included “state institutions of higher education,” such as the University.\textsuperscript{102}

Prior to passage of the Preemption Act, the University had argued that its firearms policy was not contrary to either the state’s Uniform Firearms Act or its Concealed Weapons Act, since the Uniform Firearms Act was established to impose uniform \textit{criminal} penalties for persons who violated Utah’s gun control statute and the Concealed Weapons Act concerned itself with weapons \textit{permitting}, and circumstances under which permit holders may still be subject to criminal penalties.\textsuperscript{103} Thus, the University previously argued, its campus gun regulations fell outside the reach of those statutes and were not contrary to Utah law.\textsuperscript{104} The passage of the Preemption Act mooted the University’s argument, rendering it clear that Utah's firearms statutes are universally applicable, rather than merely criminal in nature as the district court had concluded, and that the University's firearm policy did, in fact, violate Utah statutory law.\textsuperscript{105} The legislature’s unmistakable intervention clarifying the reach of its firearm policy obviated the need for further judicial action on this issue and the parties so stipulated.\textsuperscript{106}

2. The Applicability of Article I § 6 of the Utah Constitution

In \textit{Shurtleff}, the State of Utah had argued that by the University passing its own legislation regulating guns on campus, it usurped powers delegated to the legislature under the constitution.

Article I § 6 of the Utah Constitution provides:

\begin{quote}
The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.
\end{quote}

\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Shurtleff}, 144 P.3d at 1112.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 1113.
\textsuperscript{106} \textit{Id.}
Although the Shurtleff court observed that the first clause of Article I § 6 seemingly limited the legislature’s power to infringe on the right to keep and bear arms, the second clause (“nothing herein shall prevent the legislature from defining the lawful use of arms”) assigned to the legislature the authority to define what that right was.\(^{106}\) According to the court, this meant the legislative act defining the lawful use of arms does not infringe on the lawful right to bear arms.\(^{107}\) Since the “whole lawmaking power” (on this issue) was vested in the legislature, only the legislature could “define[e] the lawful use of arms” as provided in the state constitution, unless it delegated that power to another government entity.\(^{108}\) Under the Preemption Act, no such delegation occurred and in fact the legislature had clearly occupied this field.\(^{109}\) This rendered colleges and universities impotent in this regard.\(^{110}\)

3. Institutional Autonomy under Article X § 4 of the Utah Constitution

Next, the University argued that Utah Code § 63-98-102 was an unconstitutional infringement of its right to institutional autonomy guaranteed by the Utah Constitution.\(^{111}\) That provision states:

> The general control and supervision of the higher education system shall be provided for by statute. All rights, immunities, franchises, and endowments originally established or recognized by the constitution for any public university or college are confirmed.\(^{112}\)

The Shurtleff court began its analysis presuming that the legislature

\(^{106}\) Id. at 1115.

\(^{107}\) Id. (citing to its precedents distinguishing between defining a right and infringing on a right, and recognizing that although the principle “may seem almost tautological” it had great importance in establishing the legislature as the only entity with authority to define the “lawful use of arms”).

\(^{108}\) Id.

\(^{109}\) Using similar reasoning, the Court of Appeals of Oregon recently held that a rule promulgated by the State Board of Higher Education respecting concealed carry on campus was preempted by a statute which vested exclusive authority to regulate firearms in the legislature. Oregon Firearms Educ. Found. v. Bd. of Higher Educ., 2011 WL 4469920 (Or. Ct. App. Sept. 28, 2011).

\(^{110}\) The Shurtleff court characterized with little analysis the University’s firearm policy as a contract with its students and employees. 144 P.3d at 1117. This conclusion seems dubious since the policy flies in the face of legislative directives and is probably in violation of Utah’s public policy.

\(^{111}\) Id. at 1115. If true, it necessarily followed that it was free to promulgate firearms policies in contravention of legislative enactments.

\(^{112}\) UTAH CONST. art. X § 4.
possesses plenary power to regulate the University, unless a constitutional provision provides to the contrary.\footnote{Shurtleff, 144 P.3d at 1117.} It observed that the language granting “general control and supervision” over the state’s higher education system means that the legislature has the ability to generally manage all aspects of the University of Utah.\footnote{Id. at 1117-18} It noted that there was no other constitutional language which restricted the legislature from exercising this power and that the legislature had not enacted statutes that cede any of this authority to others.\footnote{Id. at 1118.}

Finally, the court reviewed its prior decision in University of Utah v. Board of Examiners, 295 P. 2d 348 (Utah 1956), which extensively examined the historical record and outlined the scope of the University’s rights at the time of statehood.\footnote{Id. at 1118.} According to the Shurtleff court, Board of Examiners established that although the University retained certain rights, “it was never exempt from the obligation of all Utah citizens and entities to follow Utah law. [The University’s] authority was subject to general legislative oversight, even as to legislative enactments relating to its core academic functions.”\footnote{Id. at 1119.} The Shurtleff court noted that when Utah became a state the University was subject to the laws of Utah, from time to time enacted, relating to its purposes and government.\footnote{Id. at 1118-19.} Thus, the territorial legislature never gave the University the power to act in contravention of legislative enactments. This provision was incorporated into the Utah constitution.\footnote{Id. at 1119.}

In Board of Examiners, the court distinguished the Utah constitution from those of states that granted autonomy to their institutions of higher learning.\footnote{Id. at 1119-20.} It observed that since these constitutions were available to the Utah framers and the framers declined to use them, the framers did not intend to make the University immune from legislative control.\footnote{Id. at 1119.} Accordingly, the Shurtleff court stated:

\begin{quote}
We simply cannot agree with the proposition that the Utah Constitution restricts the legislature’s ability to
\end{quote}
enact firearms laws pertaining to the University. The plain language of article X section 4 and this court’s prior pronouncements on the issue of university governance compel the conclusion that the University is subject to legislative control, and therefore cannot enforce its firearms policy in contravention of state law.  

4. Policy Concerns

Finally, the University had argued that its firearms policy was necessary to achieve its educational mission and, in the absence of autonomy, undesirable results would follow. These included: enhanced risks to safety, a burden on the free exchange of ideas, and potential disruption to work and school discipline. The court readily dismissed this argument as falling outside its purview. The Shurtleff court observed that its role was not to decide which policies are better than others, but merely to interpret Utah’s constitutional and statutory scheme. Since it had performed its interpretive function, its work was at an end: it would simply not enter this policy debate.  

122 Id. at 1121.
123 Id.
124 Id.
125 Id. Since Utah is the only state which prohibits public institutions of higher education from precluding the carrying of concealed handguns on their premises, it is the sole source of data on the effects of such legislation. Following Utah’s 2006 enactment “not one murder, manslaughter, or robbery occurred on campus.” Riley C. Massey, Bull’s-Eye: How the 81st Texas Legislature Nearly Got It Right On Campus Carry, and the 82nd Should Still Hit the X-Ring, 17 TEX. WESLEYAN L. REV. 199, 217 (2011) (citing UNIV. OF UTAH, ANNUAL SECURITY REPORT FOR 2009: STATISTICS OF SECURITY ACT OFFENSES, http://www.facilities.utah.edu/static-content/facilitiesmanagement/files/pdf/2009%20Clery%20Report.pdf (last visited Sept. 4, 2010) (noting latest available data is for year 2008)). In addition, The Supreme Court of Colorado has granted a petition for certiorari from the Regents of the University of Colorado. Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC, 2010 Colo. App. LEXIS 541 (Colo. App. April 15, 2010), cert. granted, 2010 Colo. LEXIS 781 (Colo. Oct. 18, 2010) (No. 10SC344). The Colorado Supreme Court will examine the question of whether in passing the Concealed Carry Act the legislature intended to divest the Board of Regents of its constitutional and statutory authority to enact safety and welfare measures for the University of Colorado campuses, and what the standard of review is for state constitutional challenges to statutes or ordinances regulating the right to bear arms. Id. To date no decision has issued in this important case. Id.
In DiGiacinto v. The Rector and Visitors of George Mason University ("GMU"), a campus visitor filed a complaint seeking a declaratory judgment and injunctive relief against GMU, a state university.\(^{126}\) The plaintiff alleged that the university’s regulation prohibiting the possession of firearms on campus violated his right to carry a firearm under the United States Constitution’s Second Amendment and the Virginia Constitution, that GMU lacked statutory authority to regulate firearms, that GMU’s regulations conflicted with state law, and that GMU’s policy violated the Virginia Constitution’s uniform government provision.\(^{127}\) The court rejected each of these contentions.\(^{128}\) The GMU regulation, 8 VAC § 35-60-20, stated:

Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.\(^{129}\)

The Virginia Supreme Court framed the issue as whether VAC § 35-60-20 violated the Virginia or United States Constitution.\(^{130}\) Like the United States Constitution, the Constitution of Virginia also protects the right to bear arms. It states:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.\(^{131}\)

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\(^{126}\) DiGiacinto was not a student or employee of GMU, but visited and used GMU’s resources, including its libraries. He asked the court for an order that would permit him to carry a firearm onto the campus and into its buildings at GMU sponsored events. 704 S.E.2d 365, 367 (Va. 2011).

\(^{127}\) Id. at 367, 371-72.

\(^{128}\) Id. at 370-72.

\(^{129}\) Id. at 367 (citation omitted).

\(^{130}\) Id. at 370-72.

\(^{131}\) Id. at 368 (citing VA. CONST. art. I § 13).
At the outset, the court rejected DiGiacinto’s argument that Article I § 13 affords greater protections than the Second Amendment of the United States Constitution. Relying on scholarly research on Article I § 13, the court noted that the Virginia provision had incorporated the specific language of the Second Amendment (“the right of the people to keep and bear arms shall not be infringed”) into the existing framework of the Article. This led the court to view the right to bear arms as “substantially identical to the rights founded in the Second Amendment.” The court then noted its rule that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution are given the same meaning. On these grounds the GMU court held that “the protection of the right to bear arms expressed in Article I § 13 is co-extensive with the rights provided by the Second Amendment of the United States Constitution, concerning all issues in the instant case.” Thus, it analyzed DiGiacinto’s state constitutional rights and his federal constitutional rights concurrently.

The GMU court noted the United States Supreme Court’s statement in District of Columbia v. Heller that “nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .” In this regard it observed that GMU is a public educational institution and an agency of the Commonwealth of Virginia and that the Commonwealth owns GMU's real estate and personal property. In considering whether GMU was a “sensitive place” within the meaning of Heller, the court stated:

It was stipulated at trial that GMU has 30,000 students enrolled ranging from age 16 to senior citizens and that over 350 members of the incoming freshman class would be under the age of 18. Also approximately 50,000 elementary and high school students attend summer camps at GMU and approximately 130 children attend the child study center preschool there. All of these individuals use GMU's buildings and attend events on
These factors made GMU a “school” whose buildings are owned by the government, and a “sensitive place” within the meaning of Heller.\footnote{Id. at 370.}

In further support of its conclusion that GMU was a “sensitive place,” the GMU court contrasted the University with public streets or parks as venues typically open to the public.\footnote{Id.} It observed that Virginia created GMU as an “‘institute of higher learning that is devoted to its mission of public education’ … [where] parents who send their children to [the] university have a reasonable expectation that the university will maintain a campus free of foreseeable harm.”\footnote{Id. (citation omitted). Since large numbers of elementary, high school and pre-school students attended summer camps at GMU, the court’s conclusion that GMU was a “sensitive place” was made a lot easier. This begs the question of whether the same conclusion would follow where students on campus are virtually all adults.}

In examining GMU’s governance structure, the court noted that the legislature created the Board of Visitors of GMU as a corporate body with the power to direct GMU’s affairs.\footnote{Id. (citing V.A. CODE ANN. §§ 23-91.24, 23-91.29 (1972)).} Among the Board of Visitors’ powers are control and expenditure of university funds and safeguarding the university’s property and the people who use it by making “all needful rules and regulations concerning the University.”\footnote{Id.} The court concluded that “[s]uch necessary rules and regulations include policies that promote safety on GMU’s campus.”\footnote{Id. (citing V.A. CODE ANN. § 23-91.29(a)).}

The court noted that 8 VAC § 35-60-20 did not impose a total ban of weapons on campus; rather, it restricted weapons: “only in those places where people congregate and are most vulnerable inside-campus buildings and at campus events. Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation.”\footnote{Id. (citing V.A. CODE ANN. § 23-91.29(a)).} On the foregoing grounds the court held: “8 VAC § 35-60-20 is constitutional and does not violate Article I § 13 of the Constitution of Virginia or the Second Amendment of the federal Constitution.”\footnote{Id.}
Finally, the plaintiff argued that GMU’s promulgation of the firearm regulation violated the uniform government provision contained in the Virginia State Constitution. That provision, Article I § 14, states:

That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

The court rejected this argument as well. It concluded that the university was not attempting to function as a separate government, but had statutory authority under Va. Code § 23-91.24 to make regulations concerning itself. Moreover, the court observed that GMU was at all times subject to the control of the state legislature and that body did not improperly delegate its powers to GMU.

C. The Regents of the University of Colorado v. Students for Concealed Carry on Campus, LLC.

In The Regents of the University of Colorado v. Students for Concealed Carry, students challenged the Colorado Board of Regents’ campus firearm prohibitions on both state statutory and constitutional grounds. After losing in the trial court, the students appealed to the Colorado Court of Appeals. That court framed the issues as whether: (1) the Colorado Concealed Carry Act (“CCA”) applied to universities and (2) the University of Colorado’s Weapons Control Policy 14-I (“Policy 14-1”) violated the Colorado Constitution’s Article II, § 13, which afforded individuals the right to bear arms in self-defense. The Court of Appeals reversed, holding that the CCA was intended to create statewide standards for carrying concealed handguns and that CCA applied to the university. The Court of Appeals further held that the plaintiffs stated a claim for relief under the Colorado Constitution. It therefore reversed the trial court’s decision, reinstated the complaint, and remanded for further proceedings.

1. The Weapons Control Policy

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149 Id.
150 Id.
151 Id. at 371-72.
153 Id. at *5.
154 Id. at *1-2.
155 Id. at *29.
156 Id.
157 Id.
Policy 14-I prohibited “‘the possession of firearms or other
dangerous or illegal weapons on or within any University of Colorado
campus, leased building, other area under the jurisdiction of the local
campus police department or areas where such possession interferes with
the learning and working environment.’”\textsuperscript{158} However, it allowed firearms
and dangerous weapons possession on campus “‘for peace officers or
others who have written permission from the Chief of Police . . . or from
the Chancellor after consultation with the Chief of Police.’”\textsuperscript{159} The
policy permitted that “‘[f]irearm storage may be provided by campus
police as a service to students or employees residing in campus
housing.’”\textsuperscript{160}

The policy provided that an individual found to have intentionally or
recklessly used or possessed a firearm or weapon in a way that would
intimidate, harass, injure, or otherwise interfere with the learning and
working environment, “‘shall be banned from the University campus,
leased building, or other area under the control of University campus
police.’”\textsuperscript{161} The minimum disciplinary sanction for a student who
violated this provision was expulsion and for an employee, termination
of employment.\textsuperscript{162} The Regents’ justification for the policy included the
finding that the proscribed activities interfered with learning and with the
work environment and were inconsistent with and undermined the
school’s academic mission.\textsuperscript{163} Moreover, among other things, the
Regents found that possession of firearms threatened the tranquility of
the educational environment and contributed to an unacceptable climate
of violence.\textsuperscript{164}

2. The Concealed Carry Act (“CCA”)

In examining the CCA’s language, the court noted that a principal
purpose of the Act was to continue the state’s practice of state control
over concealed handguns and to ensure consistent rules throughout the
state.\textsuperscript{165} Moreover, the court observed that the legislature expressly
declared, “‘it is necessary that the state occupy the field of regulation of
the bearing of handguns.’”\textsuperscript{166} The legislative concern was based on a
person’s constitutional right of self-protection and on ensuring that no

\begin{footnotes}
\item 158 Id. at *2 (citation omitted).
\item 159 Id. (citation omitted).
\item 160 Id. (citation omitted).
\item 161 Id. at *2-3 (citation omitted).
\item 162 Id. at *3.
\item 163 Id.
\item 164 Id.
\item 165 Id. at *8.
\item 166 Id. at *7 (quoting COLO. REV. STAT. § 18-12-201(1)(a)-(b), (d)-(e) (2011))
(emphasis added).
\end{footnotes}
citizen is arbitrarily denied a concealed handgun permit.\textsuperscript{167} The court noted that a goal of the CCA was to achieve a uniform standard for issuing concealed carry handgun permits and mandatory procedures for sheriffs to follow in issuing permits.\textsuperscript{168} The court found that these provisions revealed an unmistakable legislative intent to create uniform statewide standards regarding concealed weapon carrying.\textsuperscript{169} This conclusion was solidified by the Act’s declaration that “[a] local government does not have authority to adopt or enforce an ordinance or resolution that would conflict with any provision of this part . . .”\textsuperscript{170}

The Students for Concealed Carry court then examined exceptions to the CCA’s concealed carry permission.\textsuperscript{171} It observed that a concealed carry permit did not authorize the permittee to carry a concealed weapon in the areas specifically enumerated in the CCA.\textsuperscript{172} These areas included: a place where carrying a firearm is prohibited by federal law, public elementary, middle, junior high and high schools, and public buildings where security personnel and electronic weapons screening devices are permanently in place at each entrance to the building.\textsuperscript{173} The court noted that the CCA further provides the following:

A permit to carry a concealed handgun authorizes the permittee to carry a concealed handgun in all areas of the state, except as specifically limited in this section. A permit does not authorize the permittee to use a handgun in a manner that would violate a provision of state law.\textsuperscript{174}

Since the CCA had a goal of achieving uniform application of its provisions throughout the state to cure widespread inconsistency among Colorado jurisdictions and did not specify public universities in its list of exceptions, the court concluded that the student plaintiffs’ allegations

\textsuperscript{167} Id. at *7-8.
\textsuperscript{168} Id. at *7.
\textsuperscript{169} Id. at *8.
\textsuperscript{170} Id. (quoting COLO. REV. STAT. § 18-12-214(1)(a)).
\textsuperscript{171} Id. at *8-9.
\textsuperscript{172} Id.
\textsuperscript{173} Id. (citing COLO. REV. STAT. § 18-12-214).
\textsuperscript{174} Id. at *8 (emphasis in original). The Act further states: “Nothing . . . shall be construed to limit, restrict, or prohibit in any manner the existing rights of a private property owner, private tenant, private employer, or private business entity.” Id. at *9 (citing COLO. REV. STAT. § 18-12-214).
against the Regents that they met the CCA’s permit requirements and Policy 14-I violated the CCA, stated a claim for relief.\textsuperscript{175}

3. Constitutional Claim

On their state constitutional claim, plaintiffs argued that Policy 14-I was an unreasonable restriction on their right to bear arms in self-defense.\textsuperscript{176} During oral arguments, plaintiffs narrowed their constitutional claim’s scope to possession of a firearm in a motor vehicle traveling on a University of Colorado campus.\textsuperscript{177} Article II § 13 of the Colorado Constitution provides,

The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be

\textsuperscript{175}Id. at *17. The court also rejected the University’s contention that the CCA’s prohibition of local governments adopting or enforcing regulations that conflict with the CCA did not apply to it since the University was not a local government, but an arm of the state. Id. at 10. In rejecting the logic of this assertion, the court stated, “[T]he prohibition on local governments adopting or enforcing regulations does not necessarily mean that the statute authorizes an entity other than a local government to enact regulations that conflict with the CCA.” Id. at *10-11. The court further rejected the Regents’ argument on the ground that the limitations of a local government’s right to act in this field were preempted by the CCA and its goal of uniform application and enforcement of regulating the bearing of concealed handguns. Id. at *11-12. Colorado Constitution article VIII, section 5(1) provides that state institutions of higher education shall be established and managed subject to the control of the state, under the provisions of the constitution, and such laws and regulations as the general assembly may provide. Article VII, section 5(2) describes the extent of the Regents’ authority. It states, “The governing boards of the state institutions of higher education, whether established by this constitution or law, shall have the general supervision of their respective institutions and the exclusive control and direction of all funds of and appropriations to their respective institution, unless otherwise provided by law.” Id. at *12 (citing COLO. CONST. art. VIII § 5(2)) (emphasis added). The court concluded that the “unless otherwise required by law” provision did not exempt the Regents from the control of the CCA. Id. at *16-17. Rather, the CCA satisfied the “unless otherwise required by law provision” in light of the statute’s “‘clear and unmistakable intent to subject’ the entire state to a single statutory scheme regulating concealed handgun carry, subject to specified exceptions.” Id. at *17 (citation omitted).


\textsuperscript{177}Id. at *18 (emphasis added).
construed to justify the practice of carrying concealed weapons.\textsuperscript{178}

Relying on Colorado Supreme Court precedent, the \textit{Students for Concealed Carry} court applied a “reasonable exercise of the state’s police power” test to this Colorado Article II § 13 challenge.\textsuperscript{179} That test states that an act is within the state’s police power if it is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare.\textsuperscript{180} Under this test,

\begin{quote}
[a] governmental purpose to control or prevent certain activities, which may be constitutionally subject to . . . regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.\textsuperscript{181}
\end{quote}

Expressing no opinion about the merits of the case, the Court of Appeals concluded that the “plaintiffs’ allegations that [Policy 14-I] unreasonably infringes on their right to bear arms in self-defense under article II, section 13 states a claim for relief concerning the ability to carry a firearm in a motor vehicle when traveling on or through a University of Colorado campus.”\textsuperscript{182} The judgment was accordingly

\begin{footnotesize}
\begin{enumerate}
\item Id. at *18-19 (quoting COLO. CONST. art. II, § 13).
\item Id. at *19 (citing Robertson v. City & Cnty. of Denver, 847 P.2d 325, 329, 331 (Colo. 1994) (examining the state’s police power test as applied to constitutional challenges to firearms regulation and expressly declining to decide whether the right to bear arms was “fundamental”)).
\item Students for Concealed Carry, 2010 Colo. App. LEXIS at *26, (citing Robertson v. City & Cnty. of Denver, 847 P.2d at 329, 331).
\item Id. at *26-27 (quoting City of Lakewood v. Pillow, 501 P.2d 744, 745 (1972) (invalidating a local ordinance which prohibited possessing, using, or carrying all firearms types outside of one’s home on ground that ordinance was overly broad and even prohibited an individual from transporting a weapon from a gun store to his or her home)). The \textit{Students for Concealed Carry} court explained that “[r]ational basis review and the reasonable exercise test are distinguishable. The reasonable exercise test ‘focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare.’” Id. at *27-28 (quoting Bleiler v. Chief, 927 A.2d 1216, 1223 (N.H. 2007)). Whether a reasonable exercise of police powers occurred is a mixed question of fact and law, whereas rational basis questioning is purely legal. Id. at *28.
\item Id. at *29.
\end{enumerate}
\end{footnotesize}
“reversed and the case remanded for reinstatement of plaintiffs’ claims and further proceedings.”

V. CAMPUS GUN REGULATION INITIATIVES IN THE POST-MCDONALD ERA

This Part considers the effects of legal developments in federal and state courts on the development of campus firearm policies.

A. SECOND AMENDMENT CONSTRAINTS

In *McDonald*, the Court observed that Bill of Rights protections must “‘all . . . be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’” This stricture compels states and their subdivisions to adhere scrupulously to *Heller-McDonald* requirements in their design of campus gun policies. Paramount among *Heller-McDonald*’s teachings is that the Second Amendment right to keep and bear arms is an individual one. Since *Heller* and *McDonald* were weapons-in-the-home cases, it is unclear how far outside of the home, and under what conditions, the Second Amendment right to keep and bear arms for self-defense extends.

Nevertheless, tentative observations about the development of college and university gun control policies under the Second Amendment are possible. Until the Supreme Court rules definitively on the framework for analyzing firearm restrictions under the Second Amendment: (1) The most sensible test to use in the course of policymaking is *Marzzarella*’s two-part test which asks the following: (a) “does the regulation fall within the scope of the Second Amendment guarantee?” and if the answer is “yes,” (b) “does the regulation satisfy a

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183 Id. The Supreme Court of Colorado in *Students for Concealed Carry* granted the Regents’ petition for Writ of Certiorari on the issues of “[w]hether the General Assembly intended the Concealed Carry Act to divest the Board of Regents of its constitutional and statutory authority to enact safety and welfare measures for the University of Colorado campuses” and “[w]hether a constitutional challenge to a statute or ordinance regulating the right to bear arms is governed by the deferential rational basis standard of review or a more stringent reasonable exercise standard of review.” Regents of Univ. of Colorado v. Students for Concealed Carry on Campus, 2010 Colo. App. LEXIS 541 (Colo. App. Apr. 15, 2010), *cert. granted*, 2010 Colo. LEXIS 781 (Colo. Oct. 18, 2010) (No. 10SC344). No decision has issued in that case.


185 To a large degree this ambiguity has been obviated by state statutory enactments, which, to varying degrees, have expanded this right beyond the home, albeit subject to many conditions defined by state laws.
(2) Where a Second Amendment right is regulated, the college or university will bear the burden of proving the applicable test for Second Amendment scrutiny because it is a federal constitutional right which is being burdened.\textsuperscript{187}

(3) The means-end test that will be applied if litigation ensues will almost certainly be \textit{intermediate scrutiny}, which asks whether the statute under review serves important governmental objectives and whether the means employed were substantially related to achieving that purpose.\textsuperscript{188}

(4) Since the Second Amendment extends to a \textit{limited class of weapons} that were in common use at the time of the founding or contemporary analogues to those weapons, possession of handguns of that ilk will be protected, assuming that the would-be user can satisfy other lawful regulatory requirements; on the other hand, weapons such as high powered rifles and sawed-off shotguns will not be protected.

(5) Prohibitions on the right of convicted felons and the mentally ill

\textsuperscript{186} United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). Indeed, the safer course would be to \textit{assume} that Second Amendment rights obtain and develop strong justifications for each rule based on current social science, including criminal justice expertise. Colleges and universities are in a unique position to employ their own faculties in performing such research and applying the scientific methodology applicable to each discipline. As an approach to this newly discovered civil right under \textit{Heller} and \textit{McDonald}, it is better to furnish more process than is due rather than risk violating a citizen’s Second Amendment right.

\textsuperscript{187} In light of the divergence of approaches in the circuits it may not always be clear whether a Second Amendment right is being regulated at all. In those circuits where categorical exclusions from Second Amendment protection have been recognized, it would appear the individual challenging the legislation would bear the burden of proof. In those cases where a Second Amendment right is regulated it would seem the burden would be carried by the state.

\textsuperscript{188} A university’s interests will include safety and health, and pedagogical and expressive freedom concerns. Unquestionably this is a substantial, if not a compelling interest. During the policy development phase each interest should be explained and anchored to the state constitutional and statutory enabling acts in terms of objectives related to the institution’s existence. In regard to the “substantially related” test, expert testimony should again be obtained and placed in the record. That record should reflect how each particular goal is advanced by the regulatory control. The more quantitatively based in social science literature the expert testimony is, the easier it will be for the institution to meet challenges alleging the policy is not sufficiently related to the governmental purpose which the college or university is attempting to achieve. One commentator argues that without showing the requisite statistical relationship between the regulation and safety, the state will not be able carry its burden of proof and with only eleven schools nationally allowing concealed carrying, there is insufficient data to draw upon to make the case for strong regulation. Lindsay Craven, \textit{Where Do We Go From Here? Handgun Regulation in a Post-Heller World}, 18 WM. & MARY BILL RTS. J. 831, 851 (2010).
to carry firearms will be treated as presumptively lawful; however, where appropriate, such prohibitions should contain durational requirements so that the person who is precluded from firearm possession may be reconsidered for the right to carry, and the disability is not automatically made permanent.\(^{189}\)

(6) When a college or university drafts weapons regulations a record should be made, supported by facts which underlie the need for the policy (health and safety and academic environment, for example), so that an important governmental interest is plain to see: in this regard, securing expert testimony in policy development is an important, if not necessary step to follow.

(7) Since *Heller* expressly referred to schools and government buildings as “sensitive places” where gun regulations are presumptively enforceable, it is likely that campus regulations will withstand Second Amendment scrutiny; public colleges and universities will very likely be considered “schools” and campus structures “government buildings,” under *Heller*, for purposes of permissible regulatory controls.\(^{190}\)

(8) Since *Heller* expressly stated that its list of presumptive lawful areas of regulation was not exhaustive, there may be other areas that could be subject to lawful regulation; enlargement of the scope of regulation could include internship sites such as hospital settings for student doctors and nurses and schools for teachers, for example.

\(^{189}\) See, e.g., *Britt v. North Carolina*, 363 N.C. 546 (2009). In *Britt*, the claimant brought an action which challenged the constitutional validity of a statute under which he, as a convicted felon, was prohibited from possession of a firearm. *Id.* at 547-49. The court held that the statute unreasonably prevented the claimant from purchasing, owning or possessing any firearm under the North Carolina Constitution, as applied to the claimant. *Id.* at 550. In the 30 years since he was convicted of a non-violent drug crime, he had not been charged with any other crime, had not misused a firearm in any way, and had not been adjudicated or otherwise accused of being violent, potentially dangerous, or more likely than the general public to commit a crime involving a firearm. *Id.* Although the *Britt* court decided the case under the North Carolina constitution, its keep and bear arms provision is identical to the Second Amendment. Moreover, the court concluded that since the statute as applied was unreasonable, it did not have to determine whether a higher level of scrutiny was appropriate in deciding such cases. *Id.* at 549 n.2.

\(^{190}\) District of Columbia v. *Heller*, 554 U.S. 570, 571 (2008). Since Second Amendment challenges may assert that colleges and universities are not schools in the usual sense, officials enacting gun control rules may wish to develop legislative facts which recite the various uses of campuses, including pre-school and day care activities and K-12 on-campus education, field trips, and health-related services for senior citizens and other non-students. Moreover, it seems more likely that the institution will be deemed “sensitive” within the meaning of the Second Amendment if the number of participants is substantial, so that the schooling is deemed essential, or at least an important function that the university performs.
(9) It seems likely that a challenge will ensue under the Second Amendment as to whether a college or dormitory room is a “home” in which the occupant enjoys the right to keep and bear arms under Second Amendment protection; a categorical prohibition of students’ right to possess firearms in a dormitory-home might eviscerate their fundamental right to possess weapons typically used for defense of hearth and home under Heller-McDonald.191

(10) Where colleges’ and universities’ policies allow concealed-carry on campus to licensees, but firearm access is denied based on prior criminal code convictions, the grade of the offense, felony or misdemeanor, should be spelled out, along with the relationship between the particular offense and the interest protected by the regulation.192

(11) After developing the list of crimes which exclude the right to carry on campus, a “catch all” phrase could be included which states that “other offenses which bear a substantial relationship to the applicant’s potential to visit violence upon others, disrupt the peace and harmony of the educational environment or suppress exchanges of ideas on campus and at off-campus college and university sponsored events, will disqualify students, faculty, staff or visitors from carrying concealed firearms.”193

(12) Any college or university policy that allows concealed carry on its campus should address the problem of persons who have been merely charged with a covered offense.194

191 See, e.g., Craven, supra note 188, at 854. Craven argues that blanket prohibitions of firearm possession in college dormitories would be unconstitutional because they would render the right to self-defense nugatory. Id. at 854. Craven observes that, in addition to living on campus, students who reside in campus dormitories attend classes and often work on campus. In effect, the campus encompasses substantially all of their lives. Craven suggests that, under those circumstances, a rule completely prohibiting firearms possession would place significant burdens on the students’ Second Amendment rights. Id. at 850. As a result, the regulation would probably not survive strict scrutiny. Id.

192 Where a conviction for a felony grade crime works an automatic carry disqualification, the means chosen to achieve otherwise valid goals could successfully be challenged. For example, assume the felon was convicted of a non-violent crime such as tax fraud or embezzlement. Since these offenses do not bear an obvious relationship to violence visited upon others, the potential to interfere with on-going pedagogy or disrupt the kinds of expression valued in the university community, they might be found to violate Second Amendment protections as overly broad, or even irrational.

193 This type of language may allow firearms controls to be implemented, where desired, over persons who have been convicted of crimes not listed in the regulatory scheme, but fall within its intendment and the interests the college or university seeks to protect. Each restriction should be supported by its relationship to the institutional mission and how the particulars of the policy substantially advance that purpose.

194 This policy should include applicants and students, as well as faculty and
(13) Firearms regulations promulgated by colleges and universities should account for student, faculty and staff code infractions and should be spelled out with particularity in a disciplinary code, along with the consequences for the code violator, including any durational limitations on the suspension or prohibition of the right to conceal-carry, as well as when dismissal from the institution is required.

(14) The current federal age 21 requirement for firearm purchases from licensed gun sellers should allay, to some degree, campus concerns over wide-scale carrying by undergraduate students; however, loopholes respecting this age requirement will hardly make gun-control advocates sanguine.

B. STATE CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

The interpretation of state constitutional and statutory provisions, as they relate to campus gun control by colleges and universities, entails a detailed study of the pertinent provisions, including the enactments of territorial legislatures, prior to statehood, which were incorporated into

staff who are already enrolled or employed or have applied for jobs, and require that when criminal indictment or information is filed, such persons inform officials of that fact. An accelerated hearing could be held and a temporary order issued by the college or university denying the individual the right to conceal-carry until a disposition occurred in the criminal proceeding. Alternatively, the institution could conduct a full-blown administrative hearing before the criminal proceeding occurs and make a final determination. This approach may make more sense since the college’s or university’s burden of proof in determining the individual’s fitness to carry on campus would be less than the “beyond a reasonable doubt” standard applied in criminal matters. In all likelihood the accused individual’s attorney would advise the individual not to testify at the institution’s hearing, since he may invoke his Fifth Amendment right not to testify during the criminal trial and testimony he gives at the administrative hearing might be used against him in the criminal trial.

195 18 U.S.C. § 922 (b)(1), (c)(1) (2010) (prohibiting dealers from selling or delivering firearms other than shotguns or rifles, or ammunition for those firearms, to any person the dealer knows or has reasonable cause to believe is under the age of 21).

196 See, e.g., 18 U.S.C. § 922(x)(1) (“[P]ersons may not sell, deliver or otherwise transfer a handgun or handgun ammunition to any person the transferor knows or has reasonable cause to believe is a juvenile.”). For these purposes, a juvenile is defined as a person less than 18 years of age. 18 U.S.C. § 922(x)(5). Exceptions are made for temporary transfers for specified activities, including employment, ranching, farming, target practice and hunting. 18 U.S.C. § 922(x)(3). Federal law prohibits, with certain exceptions, the possession of a handgun or handgun ammunition by a juvenile. 18 U.S.C. § 922(x)(2). Federal law provides no minimum age for the possession of long guns or long gun ammunition. 18 U.S.C. § 922(b)(1), (c)(1)(2010) (excluding shotguns and rifles from dealer sales or deliveries to persons under age 21); 26 U.S.C. § 5845 (2010) (excluding long guns from federal regulation).
state constitutions. It also involves study of the enabling acts that created the particular institution(s). Since constitutions and statutes are sometimes written in general terms, their meaning as applied to colleges’ and universities’ authority to enact firearms policy may be unclear. That said, some general rules of construction may be derived from the leading cases.

1. State Constitutions

In construing state constitutions with respect to campus gun regulation, the following rules will generally apply:

(1) Although all state constitutions contain provisions concerning the right of the people to keep and bear arms, the article granting the right may or may not confer on the legislature the authority to define its scope; where such delegation of power exists, it is imperative to examine the discretion granted to the legislature in this regard.\(^{197}\)

(2) Where there is total delegation to the legislature in the field of gun regulation, and where the legislature expressly occupies that field, college and university policies which regulate in this area may, at most, be deemed as contracts between the college or university and its students, faculty and staff, rather than as enforceable enactments.\(^ {198}\)

(3) Where constitutions confirm colleges’ and universities’ powers as originally established prior to statehood, reference to historical sources will be necessary to determine whether autonomy is granted to these institutions.\(^ {199}\)

(4) Where state constitutions incorporate specific language from the Second Amendment such as “the right of the people to keep and bear arms shall not be infringed,” it is more likely than not that the state and federal provisions will be interpreted as co-extensive.\(^ {200}\)

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\(^{197}\) For example, a provision may grant to the legislature virtual *carte blanche* in defining the lawful use of arms under that constitution. In such circumstances the legislature becomes the arbiter of what the right to keep and bear arms means under the constitution, absent a constitutional amendment which limits legislative authority. In the absence of such an amendment it will be extremely unlikely that a court would find that a legislature acted outside of its powers in defining lawful gun use.

\(^{198}\) There is, however, doubt about the enforceability of the “agreements” since they may run afoul of the public policy of the state. Indeed, the institution’s enactment may be void *ab initio*.

\(^{199}\) This is sometimes referred to as a “retention of rights provision.” Depending on the state, this could mean that the college’s or university’s decision-making stands free of particular legislative encroachments.

\(^{200}\) This has the potential to harmonize state constitutions with the Second Amendment right to keep and bear arms. This approach has the virtue of establishing a uniform definition of the right to keep and bear arms and enabling college and university officials to contend with only one set of constitutional
2. State Statutes

In interpreting state statutes concerning the right to keep and bear arms, the following rules will usually apply:

(1) Where statutory law expressly forbids localities, including colleges and universities, from enacting, establishing, or enforcing regulations, rules, or policies pertaining to firearms (in the absence of legislative authority to do so), courts will give such provisions full force and effect.\(^{201}\)

(2) Where total preemption statutes exist, the remedy for college and university officials is political, unless a serious argument can be made that the statutory enactment is inconsistent with state constitutional requirements.\(^{202}\)

(3) Any examination of state statutes addressing gun possession must consider the purpose of the law, and whether the legislature intended to include campuses in its regulatory scheme;\(^{203}\) where the legislative purpose does not include control of college and university campuses, this may provide an opportunity for colleges and universities to establish their own policies.

(4) Where the statute(s) creating the college and university rules.

\(^{201}\) In examining the statute(s) under scrutiny it will be especially important to parse the meaning of terms such as “local government” or “state subdivisions”, since the definition may, or may not, include colleges and universities. Where such definitions do not include colleges and universities, it is possible to suggest that legislators intended to exclude colleges and universities from the reach of the prohibition.


\(^{203}\) Many gun control statutes are penal in nature, aimed at law-breakers or the permitting process, and do not appear concerned with limiting the authority of colleges and universities to adopt campus gun control policies. See supra pp. 12-14 and accompanying notes. Indeed, this argument was advanced by the University of Utah in *Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006) prior to the legislature’s enactment of the statute preempting the university’s authority to adopt campus gun control provisions. Id. at 1112-13. The university had posited that the state’s firearm and concealed carry statutes were concerned respectively with imposition of criminal penalties and firearm licensing and not campus gun control and, therefore, fell outside the reach of the statute. Id. Because the university conceded that state preemption mooted this argument, the court did not decide this issue. See supra pp. 21-22.
governance structure assigns broad powers to the board of directors with language such as “safeguarding of the university’s property and the people who use it” by making “all needful rules and regulations concerning the university,” the court will most likely construe these powers to include campus firearm regulations, where no limitation on this power is expressed in that or other legislation.\(^{204}\)

(5) In the absence of state constitutional provisions which make colleges and universities autonomous, state statutes will be upheld which expressly declare that it is necessary for the state to occupy the field, especially where they are grounded in protecting citizens’ right to keep and bear arms, the right of self-protection, and curing wide-spread divergence in local policies by maintaining uniform statewide rules.

(6) Where a statute lists statewide location prohibitions on the right to carry concealed firearms, but colleges and universities are not listed among those exceptions, colleges and universities will be deemed places where carrying is permitted.\(^{205}\)

(7) Colleges and universities which present arguments based on policy, that is, whether it is desirable to allow or forbid weapons on campus, will fail in court. This is because the question is not one of policy, but rather of where legal authority resides.

\section*{C. Local Campus Considerations}

Since no campuses are identical, the following measures could be considered in tailoring local policies, keeping in mind the principles discussed in Parts V.A and V.B:

(1) Campus gun regulations which are focused on locations where people congregate and which are most vulnerable to attack, such as inside campus buildings and campus events, will likely be upheld, where the university otherwise enjoys the power to adopt them.\(^{206}\)

(2) Arguments to the effect that public colleges’ and universities’ gun regulations violate state constitutional uniform government provisions will fail, where the legislature has delegated authority to the campus communities to regulate in that area.

(3) A highly nuanced approach is required for the development of campus firearm policies for security operations; this will necessarily

\begin{itemize}
\item \(^{204}\) \textit{Shurtleff}, 144 P.3d at 1116-22.
\item \(^{205}\) For example, if a statute expressly lists public elementary, junior high and high schools, but not public colleges and universities or private schools as places where firearms are prohibited, courts will not engraft onto the statute another exception.
\item \(^{206}\) This is because the regulations are tailored to safeguard people and property and do not unduly restrict the right to keep and bear arms, where the need may be less apparent. Moreover, where the college or university maintains programs such as rifle teams or recognizes ROTC on campus, storage of dismembered weapons at designated locations will be required as a practical matter.
\end{itemize}
require addressing such items as: the functions of campus police as compared to local police, campus officers’ compliance with applicable licensing legislation; the training which security officials are required to receive, periodic retraining and removal of security officials for inappropriate conduct; and regular criminal violations checks for the campus security officers themselves.

(4) Where campus rules permit concealed or other carrying, policies should be in place to ensure that students, faculty, or staff who have behaved irresponsibly with weapons, or otherwise pose a threat to the safety of others, such as those convicted of campus alcohol or drug offenses, or other persons, such as those who have criminal convictions or mental illness, are prevented from gun possession.

(5) Violations of campus gun regulations should have prescribed penalties such as suspension or expulsion from the university’s academic programs, or termination from employment, as applicable.

(6) Even where authority is delegated to colleges and universities to enact health, safety and welfare measures for their campuses, and the gun regulations are deemed a legitimate exercise of the police power under the state’s constitution or statutes, the enactment may be unlawful if it sweeps too broadly and unnecessarily invades the constitutionally protected right to keep and bear arms.

VI. CIVIL RIGHTS LIABILITY FOR VIOLATING THE RIGHT TO KEEP AND BEAR ARMS

Since McDonald established that the Second Amendment is enforceable against the states and their subdivisions, a new campus civil rights era has begun. Heller-McDonald should raise campus officials’ level of consciousness about this component of the Bill of Rights with which heretofore they had little reason to be concerned. This Part considers public colleges’ and universities’ and their officials’ civil rights liability for violations of individuals’ right to keep and bear arms. This requires an examination of 42 U.S.C. § 1983, the principal vehicle for

207 In a post-Heller, pre-McDonald article providing a historical perspective about 50 years of higher education law, guns on campus received only a passing reference. See Barbara A. Lee, Fifty Years of Higher Education Law: Turning the Kaleidoscope, 36 J.C. & U.L. 649, 675 (2010).

208 This section states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action
enforcing federal rights against states and localities, and the Eleventh Amendment, the United States Constitution’s state sovereign immunity provision, before turning to the emerging area of Second Amendment claims against public colleges and universities.

A. SECTION 1983 CLAIMS AGAINST MUNICIPALITIES

Section 1983 authorizes claims for relief against any person who, acting under color of state law, violates an individual’s federally protected rights.\(^{209}\) The Supreme Court has determined that there are two elements of a Section 1983 claim.\(^{210}\) The plaintiff must allege: (1) a deprivation of a federal right; and (2) “that the person who has deprived him of that right acted under color of state . . . law.”\(^{211}\) Unquestionably, Section 1983 liability may be imposed for violation of an individual’s Second Amendment rights.

Municipalities are subject to liability under Section 1983 when the violation of the plaintiff’s federally protected rights was caused by enforcement of a municipal policy, custom, or practice, or a decision of a final policymaker.\(^{212}\) Under Section 1983, liability may be imposed on defendants in personal capacity suits, irrespective of any showing that the violation of federally protected rights was caused by enforcement of a policy or practice.\(^{213}\) Municipal defendants subject to personal capacity suits may assert they are qualifiedly immune from suit.\(^{214}\) When qualified immunity is asserted as a defense, the central issue is whether the law was clearly established at the time the defendant acted.\(^{215}\) “Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”\(^{216}\) The test for qualified

\(^{209}\) Id.
\(^{210}\) Id.
\(^{211}\) Gomez v. Toledo, 446 U.S. 635, 640 (1980).
\(^{212}\) Id.
\(^{215}\) Id. at 28-29.
immunity is one of objective reasonableness; subjective motives play no part in whether a defendant will benefit from this immunity from suit.\footnote{Harlow, 457 U.S. at 818-19.}

The Supreme Court has characterized the qualified immunity doctrine as a “fair warning” standard: that is, when the constitutional or statutory law is clearly established it puts the official on notice that a violation may lead to personal monetary liability.\footnote{Pearson, 555 U.S. at 231 (qualified immunity “protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known’” (quoting Harlow, 457 U.S. at 818)).} Arguably, qualified immunity may well be the most important issue in Section 1983 litigation, since it is asserted in virtually all personal capacity suits, will dispose of the individual claim early in the lawsuit, and will save the government or the individual substantial sums of money in legal fees.

\textbf{B. Section 1983 Suits against States and Agencies: Eleventh Amendment Immunity.}\footnote{The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.}

In stark contrast to municipalities, state governmental liability under Section 1983 may be defeated by Eleventh Amendment state sovereign immunity.\footnote{See Quern v. Jordan, 440 U.S. 332 (1979) (reasoning that Congress in enacting the original version of § 1983, did not intend to abrogate the states’ Eleventh Amendment immunity).} Although it may appear axiomatic that public colleges and universities are arms of the state for Eleventh Amendment purposes, this is not always the case. Some federal courts have declined to grant state post-secondary educational institutions immunity from suit,\footnote{See, e.g., Hander v. San Jacinto Junior Coll., 522 F.2d 204, 205 (5th Cir. 1975); Boensch v. Delta Coll., 2011 WL 1233301, *7-10 (E.D. Mich. March 30, 2011); Durham v. Parks, 564 F.Supp. 244, 248-49 (D. Minn. 1983); Gordenstein v. Univ. of Del., 381 F.Supp. 718, 722 (D. Del. 1974).} while most others have allowed such entities to invoke the Eleventh Amendment to prevent litigation in federal court.\footnote{See, e.g., Sturdevant v. Paulsen, 218 F.3d 1160, 1170-71 (10th Cir. 2000); Hadley v. N. Ark. Cmty. Coll., 76 F.3d 1437, 1442 (8th Cir. 1996); Clay v. Texas Women’s Univ., 728 F.2d 714, 716-17 (5th Cir. 1984); Jackson v. Hayakawa, 682 F.2d 1344, 1349-51 (9th Cir. 1982); Korgich v. Regents of N.M. Sch. of Mines, 582 F.2d 549 (10th Cir. 1978).}

The most important factors in determining whether a public college or university is protected by Eleventh Amendment immunity are:
whether a judgment against the entity will be satisfied with funds from the state treasury; the extent of state control exercised by the entity’s decisions and actions; whether the entity’s policymakers are appointed by the executive or legislative branch; and whether state law characterizes the entity as an agency of the state, rather than as one of its subdivisions.\footnote{Among these factors, the effect of a judgment on the state treasury is most important.\footnote{Public universities are usually considered part of the state for Eleventh Amendment purposes because the state treasury usually funds them and the governor appoints members of the governing board.}} Among these factors, the effect of a judgment on the state treasury is most important.\footnote{See, e.g., Ernst v. Rising 427 F.3d 351, 359 (6th Cir. 2005); see also John R. Pagan, \textit{Eleventh Amendment Analysis}, 39 Ark. L. Rev. 447, 461 (1986).} Public universities are usually considered part of the state for Eleventh Amendment purposes because the state treasury usually funds them and the governor appoints members of the governing board.\footnote{See, e.g., Id. at 461-62.}

The Supreme Court has interpreted the Eleventh Amendment as granting sovereign immunity protection when a state is sued in federal court by one of its own citizens, as well as by citizens of other states.\footnote{See Hans v. Louisiana, 134 U.S. 1 (1890); Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (reaffirming \textit{Hans}).} The most significant effect of Eleventh Amendment immunity is that federal courts may not award retrospective monetary damages (for injuries arising prior to commencement of the suit)\footnote{Note that where a § 1983 plaintiff prevails on his claim for prospective-injunctive relief against the state or its agencies, he can obtain a judgment for the reasonable attorney’s fees incurred in the suit. Such relief is deemed “incidental” to the main action, and the Eleventh Amendment will not be a bar to recovering such fees from the state treasury. See, e.g., Hutto v. Finney, 437 U.S. 678 (1978).} against a state, state agency, or state official sued in an official capacity.\footnote{See Edelman v. Jordan, 415 U.S. 651 (1974); see also Will v. Mich. Dep’t of State Police, 491 U.S. 58, 71 (1989) (clarifying that suits against state officials in their official capacities are no different from suits against the state itself).} Therefore, where a public college or university is deemed to be a state agency, plaintiffs alleging a violation of their federally protected rights may not recover retrospective money damages from those institutions under Section 1983.\footnote{See, e.g., Papasan v. Allain, 478 U.S. 265, 276 (1986) (holding that the Eleventh Amendment jurisdictional bar applies regardless of the nature of the relief sought and extends to state instrumentalities or entities).}

According to a 1908 Supreme Court case, Eleventh Amendment immunity does not bar Section 1983 plaintiffs from suing the state to obtain injunctive relief when the remedy will enjoin an official state
policy.\textsuperscript{230} To obtain such relief the plaintiff must name as a defendant the state official, in his or her official capacity, who is responsible for implementing the policy violating his federally protected rights\textsuperscript{231} since a claim for prospective-injunctive relief against the state itself, or a state agency, will be barred by the Eleventh Amendment.\textsuperscript{232} The prospective relief exception to Eleventh Amendment immunity was born of necessity to ensure enforcement of federal law against the states.\textsuperscript{233}

Courts will carefully parse injunctive relief claims from those seeking retrospective relief, even if the claim is framed as one seeking a retrospective injunction for past violations of federal rights.\textsuperscript{234} To obtain

\textsuperscript{230}See \textit{Ex parte Young}, 209 U.S. 123 (1908). \textit{Ex parte Young}’s rationale was that a state official who violated federal law did not act for the state but acted as an individual. \textit{Id.} at 159. Of course, this is a wholly fictional legal construct because the prospective relief operates against the state and its agencies, including its colleges and universities, and may substantially affect the state treasury. Although \textit{Ex parte Young} is frequently credited with establishing this principle, several earlier cases had held that the Eleventh Amendment did not preclude suits against state officers. See, e.g., \textit{Tindal v. Wesley}, 167 U.S. 204 (1897); \textit{Osborn v. Bank of the United States}, 22 U.S. (9 Wheat.) 738 (1824). See also \textit{Papasan}, 478 U.S. at 277-78.

\textsuperscript{231}The state official named as a defendant on an \textit{Ex Parte Young} claim must have specific authority to enforce the contested state statute. See, e.g., \textit{Okpalobi v. Foster}, 244 F.3d 405 (5th Cir. 2001).

\textsuperscript{232}See \textit{Alabama v. Pugh}, 438 U.S. 781 (1978). This approach is merely a continuation of the legal fiction emanating from \textit{Ex parte Young} and its predecessors. See \textit{Pearson v. Callahan}, 555 U.S. 223, 231 (2009) (qualified immunity “protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

\textsuperscript{233}See, e.g., \textit{Graham v. Richardson}, 403 U.S. 365 (1971) (holding that state officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens).

\textsuperscript{234}See, e.g., \textit{Edelman}, 415 U.S. 651 (1974). In \textit{Edelman}, plaintiffs sued Edelman, the state commissioner of the Illinois Department of Public Welfare, objecting to the state’s failure to comply with federal standards for processing welfare applications. They sought two types of relief: an injunction requiring the state to comply with federal guidelines in the future and an injunction requiring the state to give back payments of all of the funds that were previously improperly withheld. The Court held that the Eleventh Amendment does not bar the order compelling state compliance in the future, even though it would cost the state treasury substantial sums. However, the Court refused to allow the injunction ordering payment of the previously owed money. In the Court’s view, the Eleventh Amendment bars the latter form of relief even though the officer, and not the state, was named as the defendant, since the money would obviously come out of the state’s coffers. \textit{Id.} Under \textit{Edelman}, then, a federal court may order future compliance by state officials, but it may not compel payment of
injunctive relief against the state, the plaintiff must allege an ongoing violation of federal law and assert that the relief plaintiff wishes to obtain is prospective in nature.\(^\text{235}\) Similarly, to obtain declaratory relief against the state, the plaintiff must allege that there are ongoing or threatened violations of federal law.\(^\text{236}\) The prospective relief exception to Eleventh Amendment immunity has been an invaluable tool in watershed civil rights decisions, such as those involving public school desegregation.\(^\text{237}\)

Notwithstanding its constitutional immunity from suit, a state may, through legislative enactments, waive its Eleventh Amendment immunity. To constitute a legislative waiver, the statute “must specify the State’s intention to subject itself to suit in federal court.”\(^\text{238}\) Another way for states to waive their Eleventh Amendment immunity is by voluntarily bringing a suit into federal court. Where, for example, a state is sued on a federal claim in state court and then removes the case to federal court (as the federal rules of procedure permit), it will be deemed to have waived its Eleventh Amendment immunity.\(^\text{239}\) If a state waives its Eleventh Amendment immunity, it may be required to respond in retroactive monetary damages to be paid out of the state treasury.\(^\text{240}\) Finally, Eleventh Amendment immunity may be abrogated by appropriate Congressional action. Congressional abrogation is an extremely limited power, since the Court must conclude that the law was enacted under Section 5 of the Fourteenth Amendment\(^\text{241}\) and was narrowly tailored to preventing and remediying constitutional violations.\(^\text{242}\)

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\(^\text{235}\) See also Cory v. White, 457 U.S. 85 (1982).
\(^\text{238}\) See, e.g., Milliken v. Bradley, 433 U.S. 267 (1982) (upholding a school desegregation order requiring the expenditure of state funds for educational aspects of desegregation plan, including several remedial and compensatory education programs).
\(^\text{241}\) Atascadero State Hosp., 473 U.S. at 241.
\(^\text{242}\) This provision states: “The Congress shall have power to enforce by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.
\(^\text{243}\) See City of Boerne v. Flores, 521 U.S. 507 (1997). This important subject is beyond the scope of this article.
C. PERSONAL CAPACITY SUITS UNDER SECTION 1983 AGAINST STATE OFFICIALS

The Eleventh Amendment does not encompass § 1983 claims against state officials in their personal capacities.243 Relief awarded on such a claim would not be payable out of the state treasury.244 This means that college and university officials would be required to personally pay to a plaintiff any monetary judgment that might ensue.245 However, a state’s policy or agreement to indemnify the state official for a personal capacity money judgment does not violate Eleventh Amendment strictures, because indemnification would be a voluntary policy choice of the state government, not compelled by the mandate of a federal court.246 Since such indemnification policies or agreements do not run afoul of the Eleventh Amendment, they are enforceable by the indemnitee against colleges and universities.

D. SECOND AMENDMENT CLAIMS AGAINST COLLEGES AND UNIVERSITIES UNDER § 1983: LOOKING OVER THE HORIZON

Since McDonald is of such recent vintage, cases addressing the Second Amendment right to keep and bear firearms under § 1983 are few. However, the contours of this constitutional right, and the potential exposure of public colleges, universities and their officials, may be drawn, albeit without a bright line.

1. Retroactive Application of McDonald

Assuming for the sake of argument that a public college or university official violated a student’s, faculty member’s, or staff member’s Second Amendment right to keep and bear arms prior to McDonald’s issuance on June 28, 2010, and the official was subject to a personal capacity suit by a plaintiff claiming the official violated his Second Amendment rights, that official would be qualifiedly immune from the suit, so long as he timely asserted such protection in the course of the litigation. This is because not only was the Second Amendment’s incorporation into the

244 See, e.g., Ford Motor Co. v. Dep’t of the Treasury, 323 U.S. 459, 464 (1945) (suits for money damages to be paid from the state treasury are barred even if the officer is named as a defendant since the court looks to the “essential nature of the proceeding”).
245 A government official is personally liable when the plaintiff demonstrates “that the official, acting under color of state law, caused the deprivation of a federal right.” Kentucky v. Graham, 473 U.S. 159, 166 (1985) (citing Monroe v. Pape, 365 U.S. 167 (1961)).
246 See Stoner v. Wis. Dept. of Agric., Trade & Consumer Prot., 50 F. 3d 481 (7th Cir. 1995).
Fourteenth Amendment not well established prior to *McDonald*; it was not established at all.\textsuperscript{247} Moreover, even assuming the particular action by the defendant was propelled by an official custom, policy or usage of the institution, the plaintiff would be barred from recovering retrospective monetary damages against the college or university by reason of the institution’s Eleventh Amendment immunity, even if the violation had occurred post-*McDonald*.

2. Qualified Immunity Post-*McDonald*

College and university officials enacting campus firearm control measures currently have little to fear regarding personal liability under § 1983 for Second Amendment violations. Although it is now established law for qualified immunity purposes that the Second Amendment is enforceable against states, that does not mean that if a campus official

\textsuperscript{247} See Anderson v. Creighton, 483 U.S. 635, 640 (1987) (finding that for a constitutional right to be clearly established, the contours of the right “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right”); see also Estate of Hickman v. Moore, 2011 WL 11968, at *4-5 (E.D. Tenn. Jan. 4, 2011) (granting qualified immunity to police officer against gun owner’s right claim which arose from pre-*McDonald* events); Holder v. Town of Newton, 2010 WL 5185137, at *6-7 (D. N.H. Dec. 15, 2010) (finding that qualified immunity granted to sheriff who unlawfully denied applicant a permit in 2007 on ground that Second Amendment right was not clearly established at the time of the violation); Hain v. DeLeo, 2010 WL 4514315, at *5 (M.D. Pa. Nov. 2, 2010) (finding that qualified immunity granted to sheriff who revoked, without notice, a woman’s license to carry after she openly carried firearm in holster at children’s soccer game in 2008, concluding it is still not clear whether Second Amendment applies to that situation); Hansen v. Nieves, 2010 WL 3119167, at *5 (D. Nev. Aug. 6, 2010) (finding that qualified immunity granted to police officers who arrived at a highly volatile scene outside of plaintiffs’ home and among other actions, took possession of a plaintiff’s unregistered handgun); Stevenson v. Kwiecinski, 2010 WL 2927964, at *1, *3-4 (W.D. Va. July 23, 2010) (finding that qualified immunity granted to police officer who continued to detain plaintiff after a routine traffic stop in May, 2009, when plaintiff refused to answer officer’s questions about whether plaintiff had a firearm in his car; although state law required plaintiff to respond to officer’s questions about whether he held a firearms permit [which he did], the statute did not authorize the officer to inquire about a permit holder’s actual possession of a weapon; although the officer was mistaken about his authority under state law, his conduct was not objectively unreasonable); Emerson v. City of New York, 740 F.Supp.2d 385, 388-89, 394 (S.D.N.Y. 2010) (finding that since father’s right to possess guns for purely civilian purposes was not clearly established in 2006-2007 time frame, father’s allegations that police officers unconstitutionally removed his firearms and revoked his firearms license during a child abuse investigation against father failed to state a claim for violation of his Second Amendment rights).
mistakenly adopts or enforces a campus firearm regulation, the official will be held personally liable for the violation. Since the qualified immunity protection may only be pierced if: (1) the facts show that the officer’s conduct violated a constitutional right and (2) the right was clearly established “in light of the specific context of the case” (and not as a generalized abstraction), claims of Second Amendment infringements by students, faculty and staff should have little success. Indeed, it seems likely colleges and universities will, under Heller and McDonald, be deemed “sensitive” places where firearm possession may be regulated or even prohibited. And perhaps more important for qualified immunity purposes, no judicial decision has issued which provides the requisite notice to institutional officials that they would be infringing a Second Amendment right belonging to their campus constituents. Necessarily, the Second Amendment right will not be clearly established until a decision anchored to campus regulation, or a closely analogous situation, issues from the Supreme Court or the United States Court of Appeals with jurisdiction over the particular campus. Finally, college and university officials should take some solace in the discernable trend at the Supreme Court of expanding qualified immunity to personal capacity defendants employed by government agencies.

3. Level of Scrutiny Applied to Second Amendment Claims

The post-Heller-McDonald courts have been left with the choice of applying strict or intermediate scrutiny to Second Amendment claims.  

249 Although there may be cases where “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though “the very action has not previously been held unlawful,”” Hope v. Pelzer, 536 U.S. 730, 741 (2002) (citation omitted), the current status of decisional law on campus gun control does not remotely approach that level of clarity.  
250 See, e.g., Stafford Unified Sch. Dist. No. 1 v. Redding, 129 S.Ct. 2633 (2009). In Redding the Supreme Court concluded that a junior high school student was subject to an unconstitutional strip search in violation of her Fourth Amendment rights. However, the Court in a 5-4 split granted qualified immunity to the administrator who violated the student’s rights, finding the law was not sufficiently established to provide the requisite notice to school officials. Id. It can be seen that as qualified immunity protection expands, students, college and university faculty and staff will have fewer opportunities to bring personal liability claims to vindicate violations of their Second Amendment rights. Since a public college or university will be immune from damages suits by the Eleventh Amendment, plaintiffs may be left without a practical remedy for such infringements.  
251 Since the Heller majority eschewed the use of a rational basis test, District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (“[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second
The *Heller* dissenters suggested that in light of the majority-supplied list of presumptively lawful regulatory measures, such limitations on the Second Amendment right are inconsistent with strict scrutiny analysis.\(^{252}\) In other words, the dissenters contend that a right that had so many exceptions to it, by definition, could not be subject to strict scrutiny, since narrow tailoring of regulatory measures would be unfeasible. Moreover, the dissenters reasoned that where gun possession is regulated outside of the home, it is at least one level removed from the right recognized in *Heller* and *McDonald* for law-abiding individuals to keep and carry a firearm in the home for the purpose of self-defense.\(^{253}\) The majority did not enter into this discussion, since it concluded that the D.C. and Chicago measures were unconstitutional under any standard.\(^{254}\)

Although the dissent’s conclusion about the applicability of intermediate scrutiny may be correct, at least in case-specific instances where a regulation is challenged, its methodology is flawed. The dissenters’ approach confuses the standard to be applied in regulating a right with the threshold question of whether the governmental action infringes a protected right at all, and if it does, the context in which the burden arises. For example, it is entirely feasible that under *Heller* and *McDonald* the Second Amendment right to keep and bear arms in the home is not only *fundamental* (which *Heller* said it was),\(^ {255}\) but subject to *strict scrutiny* as well, since it goes to the core purpose of the Amendment to protect home and hearth. As legislatures regulate Second Amendment activity outside the home, however, including on public college and university campuses, this constitutional right may lawfully be subject to more regulation and less intense scrutiny, just as the First Amendment Free Speech rights are when content-neutral time, place and manner restrictions are implemented.\(^ {256}\)

Amendment would be redundant with the separate constitutional provision on irrational laws, and would have no effect”), courts have been left to select either intermediate or strict scrutiny as the standard of review.\(^ {252}\) See, e.g., id. at 688 (Breyer, J., dissenting) (noting that “the majority implicitly, and appropriately, reject[ed]” a strict scrutiny standard through its list of presumptively lawful measures); see also *Heller II*, 698 F. Supp.2d 179, 187 (D.D.C. 2010) (observing that the *Heller* dissent and other courts and scholars have concluded that “a strict scrutiny standard of review would not square with the majority’s references to ‘presumptively lawful regulatory measures’” (citation omitted)).\(^ {253}\) *Heller*, 554 U.S. at 608, 628-29, 635.\(^ {254}\) See supra pp. 7-8.\(^ {255}\) *McDonald*, 130 S.Ct. 3020, 3036-48 (2010) (explaining why the Second Amendment is incorporated into the Fourteenth Amendment as a fundamental right).\(^ {256}\) See, e.g., United States v. Marzzarella, 614 F.3d 85, 95-99 (3d Cir. 2011)
If the Supreme Court applies a more relaxed standard of review when firearm regulations are directed at persons and places which fall outside of the Amendment’s “core” purposes, such an approach would be consistent with its treatment of other protections contained in the Bill of Rights, and constitute a logical extension of its established methodology.\textsuperscript{257} Heller’s list of presumptively lawful restrictions certainly invites treating campuses as “sensitive places” for more intense regulation.

It would seem, then, that state statutory schemes or college and campus regulations would be on safe Second Amendment ground by imposing fairly strict regulations, or even prohibitions, on firearm possession by students, faculty and staff. They would enjoy the benefit of Heller’s and McDonald’s presumptively lawful regulations furthering the important, if not compelling, state interest in maintaining student, faculty and staff safety, and ensuring a climate in which students may learn and faculty may teach without fear. The Virginia Supreme Court’s decision in DiGiacinto v. The Rector and Visitors of George Mason University\textsuperscript{258} may foreshadow similar outcomes in other jurisdictions. The Virginia Supreme Court’s reliance on Heller’s “sensitive place” language, its characterization of the university’s campus as a “school,” and the fact that GMU was “government property” all pushed the GMU court toward validating the disputed regulations; it all portends the likelihood that federal appellate and state supreme courts will reach the same conclusion as the GMU court with respect to Second Amendment challenges to campus firearm regulations.

If the Supreme Court determines that the Second Amendment right to keep and bear arms extends outward from the home to include public college and university campuses, the litmus test for firearm regulation under the Second Amendment will turn on the means they select to achieve their objectives, and its close cousin overbreadth.\textsuperscript{259} The answer

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\item \textsuperscript{257} See, e.g., New Jersey v. T.L.O., 469 U.S. 325 (1985) (applying reasonable cause rather than probable cause to searches of public school students under the Fourth Amendment’s search and seizure clause in light of the special characteristics of the school setting and the custodial and tutelary duties of school officials).
\item \textsuperscript{258} 704 S.E.2d 365 (Va. 2011).
\item \textsuperscript{259} See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that colleges and universities have a compelling interest in creating a diverse student body and
\end{itemize}
to whether the regulation will be deemed sufficiently narrow should be found in empirical research anchored in the conduct of college and university students, faculty, and staff. It is wholly feasible that a regulation which permits faculty and certain staff to possess firearms on campus, but not students, for example, would pass constitutional muster, based on demonstrated group differences in maturity, judgment, self-control\(^{260}\) and, where applicable, individual differences on such characteristics as criminal records, mental illness, and history of campus alcohol, assault or other disciplinary infractions. Finally, an additional consideration in the mix is the judgments rendered by academics about the effects of a concealed or open-carry environment on teaching effectiveness, the comfort level of faculty and students, and the chilling effect on the ability of students and faculty to exchange ideas on controversial subjects and conflicts, such as grading disputes. In light of the historical deference granted to academicians under the rubric “academic freedom,” this is hardly an insignificant consideration.\(^{261}\)

\(^{260}\) See, e.g., Petitioner’s Writ for Certiorari at 12-14, Patterson v. Texas, 541 U.S. 1038 (2004) (No. 03-10348) (“The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable . . . . Indeed, age 21 or 22 would be closer to the ‘biological’ age of maturity.”). Based on this type of evidence the Supreme Court has concluded that imposition of the death penalty for crimes committed by a mentally retarded person was unconstitutional. Atkins v. Virginia, 536 U.S. 304, 318 (2002) (recognizing that while limitations in cognitive reasoning, impulse control, and understanding the reactions of others did not warrant an exception from criminal sanctions, since such defendants know the difference between right and wrong, defendants’ limited capacity diminishes their personal culpability). See also Graham v. Florida, 130 S. Ct. 2011 (2010) (holding that the Eighth Amendment’s cruel and unusual punishment provision prohibits imposition of a life sentence without parole on a juvenile offender who did not commit a homicide). It would seem to follow that if scientific evidence such as that produced by Ruben C. Gur was marshaled in support of on-campus gun control respecting undergraduate students, they would fit well into the Supreme Court’s recognition of diminished capacity as a basis of public policy decisions, if college and university officials chose to make that argument.

\(^{261}\) See, for example, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985), in which the Court dismissed a student’s challenge to his ouster from a graduate medical program on the basis of a failing grade in an examination integral to the academic program, under a substantial deference standard. The Court stated:

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s judgment. Plainly, they may not override it unless it is such a
The experience in Utah supports the argument that licensed gun holders who have been subjected to rigorous pre-licensing screening have not posed a danger to students, faculty and staff, and the common assumption by many about the threat of violence posed by lawful carriers should at least be examined objectively. This is not a call for promoting guns on campus, but rather for applying scientific methodology in examining this issue. Intuition, no matter how compelling, may sometimes be wrong.262

Whatever policy may be promulgated, campus officials should be mindful of applying the rules they choose to adopt in a non-discriminatory fashion to each student, faculty and staff member. This means that felony or violent misdemeanor, mental illness and location restrictions, for example, should be applied uniformly irrespective of the individuals’ immutable characteristics. Even if the regulation is valid for Second Amendment purposes, the campus officer’s exercising his discretion in denying the right to keep and bear arms to the individual may be subject to constitutional liability under the Equal Protection or Due Process Clauses of the Fourteenth Amendment pursuant to § 1983.263 Moreover, college and university officials should be mindful of the expressive rights of students, faculty and staff concerning firearms on campus, regardless of the viewpoints of those constituencies.264

substantial departure from accepted norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225. See also Robert M. O’Neil, Judicial Deference to Academic Decisions: An Outmoded Concept?, 36 J.C. & U.L. 729 (2010) (tracing judicial deference to judgments made in college and university settings and observing heightened levels of deference related to core academic concerns).

Professor Adam Winkler keenly observes that the warfare between gun advocates and their opponents is more about the gun advocates’ cleansing the stigma associated with firearm carrying. He argues that gun violence accounts for fewer than 20 homicides on campus per year and that allowing campus carry will not make much of a difference one way or the other on this statistic. Adam Winkler, Editorial, The Guns of Academe, N.Y. TIMES, Apr. 15, 2011, at A27.

See, e.g., Park v. Trustees of Purdue Univ., 2011 WL 1361409 (N.D. Ind. April 11, 2011) (denying qualified immunity defense to various faculty members who participated in dismissal of South Korean–Asian plaintiff from graduate program for plagiarism, based on allegations of unequal application of plagiarism standards).

See, e.g., Smith v. Tarrant Cnty. College Dist., 2010 U.S. Dist. LEXIS 108973, *6-7 (N. D. Tex. 2010) (finding First Amendment violation by college officials, and permanently enjoining community college officials from, among other things, prohibiting plaintiff on-campus gun advocates, and any other student, from wearing empty holsters in classrooms, on campus streets and sidewalks and campus outdoor common areas, such as lawns and plazas).
Since legislation restricting campus gun possession where it is supported by scientifically-based legislative facts will likely satisfy Second Amendment strictures, the real battle will be at the state level. Derek P. Langhauser has cogently commented on campus-level gun control measures: “The lesson is that specifically delegated authority and/or specific exercises of broadly delegated authority [by decision makers] may be more secure than broad delegations and broad exercises.” Most important, however, will be the political strength of the constituencies advocating for their particular position. In this area of public policy where people are strongly divided, politics is king.

VII. CONCLUSION

Public college and university governing bodies or state legislatures which thoughtfully adopt campus firearm regulations grounded in scientifically-based research will have little chance of violating the individual’s Second Amendment right to keep and bear arms, especially when they implement presumptively lawful restrictions announced by the Supreme Court in \textit{Heller} and \textit{McDonald}. The presumptively lawful restrictions are those regulating felons or mentally ill persons and inherently dangerous firearms, and those implementing location restrictions on such places as campus, pre-kindergarten through grade twelve schools, undergraduate and graduate instructional centers, other buildings owned or operated by the institution, and other “sensitive” places where campus-affiliated persons tend to congregate.

The most important questions for non-autonomous colleges and universities are what power state legislatures are willing to confer on their governing boards, and the related question of the degree to which legislatures choose to occupy the firearm regulation field. The legislative efforts by pro- and anti-gun organizations will continue unabated. Although the lion’s share of college and university officials stand on the anti-gun side, in some states the pro-gun factions may have the wind at

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\item \textit{Dorr v. Weber}, 741 F.Supp.2d 1010, 1021 (N. D. Iowa 2010) (holding sheriff’s denial of plaintiff’s application for nonprofessional concealed carry permit was made in retaliation to exercise of plaintiff’s freedom of speech and associational rights and therefore unconstitutional, ordering sheriff to immediately issue plaintiff a nonprofessional permit to carry a weapon).
\item Legislative facts explain a particular law’s rationality and help a court or agency determine the law’s content and application. \textbf{BLACK’S LAW DICTIONARY} 670 (9th ed. 2009).
\item Langhauser, \textit{supra} note 28, at 83.
\item There are 24 states that expressly prohibit concealed carry on college campuses by persons with a valid concealed handgun license/permit. Fifteen “right-to-carry” states leave the decision of concealed carry on college campuses entirely to each college/university. The consequence to individuals who are...}

caution carrying on campus in these states is not criminal liability, but rather discipline by such means as expulsion, if a student, or termination, if an employee. These states are: Alaska, Colorado, Idaho, Indiana, Kansas, Kentucky, Minnesota, Missouri, Montana, Oregon, Pennsylvania, South Dakota, Virginia, Washington, and West Virginia. State Laws Pertaining to Concealed Carry on College Campuses. STUDENTS FOR CONCEALED CARRY ON CAMPUS, http://www.concealedcampus.org/state-by-state.php (last visited July 27, 2011).

Almost none of the campuses that have been delegated the authority to permit campus concealed carry have elected to do so. Exceptions are Colorado State University in Fort Collins, Colorado, and Ridge Community College in Weyers Cave, West Virginia. Utah is the only state that allows concealed carry at all public colleges and universities by prohibiting those entities from adopting their own gun-carrying restrictions. Id. The resistance to on-campus carry by college and university officials has been strongly endorsed by the International Association of Campus Law Enforcement Officers which has concluded, among other things, that there is no credible statistical evidence to suggest that allowing campus carry of concealed weapons reduced crime. Lisa A. Sprague, Position Statement, President, Int’l Ass’n of Campus Law Enforcement Officers, IACLEA Position Statement: Concealed Carrying of Firearms Proposals on College Campuses (Aug. 12, 2008).

See supra notes 90-94. See, for example, State Laws Pertaining to Concealed Carry on College Campuses, supra note 268, which reports that after allowing concealed carry for a combined total of 120 semesters at 12 public colleges and technical schools comprised of 30 campuses, none of these schools has seen a single incident of gun violence (including threats and suicides), a single gun incident, or a single gun theft. See also John Lott & David Mustard, Crime, Deterrence, and the Right-to-Carry Concealed Handguns, 26 J. LEGAL STUD. 1, 19 (1997) (studies showed that when state concealed handgun laws went into effect in a county, murders fell by 7.65 percent and rapes and aggravated assaults fell by 5 and 7 percent). The International Association of Campus Law Enforcement Officers contends, however, that there are substantial risks attendant to permitting campus carrying. These include: the potential for accidental discharge, or misuse of firearms at on-campus or off-campus parties where alcohol or drugs are consumed as well as use of guns to settle disputes among students. Moreover, the IACLEA has expressed concern that its members will be unable to distinguish between a shooter and others with firearms when responding to an emergency. State Laws Pertaining to Concealed Carry on College Campuses, supra note 268. A study produced by scholars at the Harvard School of Public Health found a statistically significant positive relationship between gun ownership with driving after binge drinking, being arrested for driving under the influence of alcohol and damaging property as a result of alcohol ingestion. The investigators concluded that students with guns at college were more likely than others to engage in activities that put themselves at risk for injury. David Hemenway, Henry Wechsler & Matthew Miller, Guns at College, 48 J. AM. COLL. HEALTH 7 (1999), available at http://www.hsph.harvard.edu/cas/Documents/guns-article. The study’s authors acknowledge that it contains no data that
rationally choose from in their fact-finding, as they develop schemes that expand, or contract, campus gun carrying rights. At bottom, this makes effective lobbying the weapon of choice, regardless of whether one likes weapons or not.

links alcohol use and deadly or other dangerous effects of firearm carrying, and that their study does not determine whether guns constitute a growing campus menace. Id. Although they conclude it is likely that gun owners may engage in riskier behavior, that observation does not ineluctably lead to the conclusion that gun-specific behavior will be implicated. I could locate no study establishing causation between campus weapons-related violence and licensed concealed carrying by students or college and university employees.