

Campus Gun Control: Historical Bases for Second Amendment Rights and the Suggestive Force of Schools' First Amendment Restrictions

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Introduction

From 2000 to 2009, nearly sixty people were killed in college campus shootings in the United States. This number more than doubled similar killings during the previous twenty-five years.¹ The increased frequency of campus shootings, coupled with prominent exposure in the media, has highlighted an apparent inadequacy in colleges' responses to such incidents. Loyola University School of Law professor George Anastaplo argues that the individuals attacked in such situations should take matters into their own hands; he suggests that if students were to take a more offensive role when faced with "heavily-armed madmen" the shooters might think twice about embarking on their rampages. Anastaplo posits, "(The gunman) yearns for, and indeed depends upon, much more uncontested control of the situation than he should be permitted by properly-prepared fellow students to count on."²

But to what lengths can students go to protect themselves from would-be attackers? The recent wave of on-campus shootings has sparked a debate regarding students' rights to carry firearms at college. One question that permeates such discussions is whether universities may constitutionally prohibit students from possessing guns on their campuses. Although research does not reveal precedential cases that answer the precise question of whether colleges may constitutionally limit students' Second Amendment rights, a comparative analysis of cases deciding the constitutionality of schools' abrogation of other student rights suggests that restrictions on gun possession in the university context would likely pass constitutional muster.

¹ "Campus shootings: Since 2000, killings have occurred on 10 campuses." Associated Press interactive timeline. http://hosted.ap.org/specials/interactives/_national/campus_shootings/index.html. Accessed on May 14, 2009.

² Anastaplo, George. Chicago Tribune. Letters to the Editor. February 27, 2008.

Taking Sides: Arguments For and Against Gun Possession on College Campuses

Currently, every state other than Illinois and Wisconsin has a law or laws permitting citizens to carry concealed weapons in one way or another. Despite this overwhelmingly permissive trend, only Utah explicitly allows students to carry concealed weapons on college campuses. In 2004, the Utah legislature passed a law specifically providing that the state's public universities are covered by a preexisting law allowing concealed weapons on state property. When the University of Utah challenged the law that permits concealed weapons on its campus, the Utah Supreme Court upheld it.³ Out of the remaining states, thirty-eight have laws banning weapons at schools, with sixteen states explicitly prohibiting firearms on college campuses. In the jurisdictions that do not have state-sanctioned bans on carrying concealed weapons at universities, the schools themselves have been permitted to determine their own policies.⁴ To date, only Colorado State University and at Blue Ridge Community College have independently established rules allowing students to carry concealed weapons on their campuses.⁵

Proponents of the preservation of Second Amendment rights for college students believe that the deterrent effect of carrying weapons on college campuses will help to eliminate or minimize events like the Virginia Tech and Northern Illinois University shootings of 2007 and 2008, respectively. These supporters suggest that a presence of students with weapons could reduce the incidence of injury and fatality if and when a Virginia Tech-like shooting occurs. A concrete example of this theory in action can be

³ "Utah only state to allow guns at college." Associated Press. <http://www.msnbc.msn.com/id/18355953/>. Accessed on May 14, 2009.

⁴ "Utah only state to allow guns at college." Associated Press. <http://www.msnbc.msn.com/id/18355953/>. Accessed on May 14, 2009.

⁵ "Common Arguments." Students for Concealed Carry on Campus. http://concealedcampus.org/common_arguments.php. Accessed on May 14, 2009.

seen in the student response to a college shooting in 2002. On January 16 of that year, a man who had failed out of the Appalachian School of Law returned to the school's campus, opened fire, and killed three people. However, any further damage the shooter might have caused was curtailed when a student retrieved a handgun from his car, confronted the killer, and subdued the man.⁶

Those who support allowing students to carry weapons further argue that students and faculty who have already addressed and complied with the requirements to become licensed to carry concealed weapons should be allowed to do the same while on campus. Arguably, those people who have been licensed are some of the most law abiding citizens; if a person is trusted to carry a gun in his or her home town, what should keep that trust from being extended while they are in their college homes, where they are likely to stay for four or more years?

Despite convincing arguments in favor of permitting college students to have guns, there are equally compelling reasons to prohibit such behavior. For example, many argue that because of the logistical makeup of college campuses, where numerous people live in close quarters and deal with substantial academic and social pressures, the risks of allowing students to carry guns are severe. Combined with the fact that college students' experimentation with alcohol and drugs is moderate at best (and prevalent at worst), the threat of reckless student behavior under the influence of such substances is considerable.

Those confident that gun possession on campus is a bad idea claim that the authorized presence of additional guns could result in even more violence. They fear a scenario where a single shooter confronted by others with guns could escalate into a

⁶ Taranto, James. "Gun Stops Gunman." *The Wall Street Journal*. January 18, 2002. <http://www.opinionjournal.com/best/?id=95001749>. Accessed May 14, 2009.

shootout between multiple parties, potentially increasing the number of injuries and fatalities not only for the gun-wielding participants, but also for innocent bystanders.

Is The Second Amendment's Still Relevant?

The existence of polarized views regarding the appropriateness of sanctioned gun possession on college campuses is not surprising given the heated general debate as to the continued applicability of the Second Amendment in the modern United States. As an incorporated part of the Bill of Rights, the Second Amendment was ratified by all of the original thirteen colonies by 1791. The Constitutional 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." With the decline in citizen-organized armed forces in modern American society, many people question whether the right to bear arms as originally conceived is relevant today.

The drafters of the Bill of Rights determined that Americans' ability to bear arms was extremely important in light of the colonial history and founding principals of the country. Having recently escaped the oppressive rule of the British, the drafters believed that the presence of armed civilians was essential to keeping the newly formed United States government in check. The federalist structure of the nation is based on the concept of a limited centralized government in which the people have significant power.

Is a right premised upon protection from dictatorial takeover actually relevant today? Those who say that the right to bear arms is based on antiquated threats of overthrow argue that there is currently no threat of tyranny in the American government. On the other hand, those who insist on the continued significance of the Second

Amendment suggest that the United States feels so confident in the efficacy of its government because the right to bear arms has prevented the government from posing a threat to the citizens for such a long time.⁷ Ultimately, because the right to carry weapons remains a part of the United States Constitution, the debates for and against its current importance are merely academic; the right lives on, so the question becomes whether that right may be rightly limited.

Court Reactions to Previous Attempts to Limit Second Amendment Rights

Despite limited judicial commentary on the precise question of college students' right to bear arms, there have been several prominent court cases addressing other proposed limitations to Americans' gun arms since the inception of the Second Amendment. A brief review of two nineteenth century and one twentieth century cases helps to inform the question of whether gun rights may be constitutionally abrogated in modern times.

The first major case questioning the scope of the Second Amendment was *United States v. Cruikshank*, a post-Civil War case that arose in the context of Ku Klux Klan members attempting to deprive recently freed slaves of certain constitutional rights, including the right to bear arms. In *Cruikshank*, decided in 1875, the United States Supreme Court decided that the Second Amendment “means no more than that it shall not be infringed by Congress” and that it “has no other effect than to restrict the powers

⁷ “The Second Amendment of the Constitution of the United States of America.” *The Big Dog Gun Site*. http://www.alphadogweb.com/firearms/Second_Amendment.htm. Accessed on May 14, 2009.

of the national government”); this decision’s primary conclusion is that the Fourteenth Amendment does not prohibit states from limiting citizens’ right to bear arms.⁸

The second major case addressing the limitations of the Second Amendment was *Presser v. Illinois*. In the *Presser* case of 1886, the court was presented with a question of whether the right to bear arms was an individual right or one belonging to militias. The court ruled that the right belonged to individual citizens, and the being a part of a militia was not a prerequisite to owning a gun. The court’s ruling had the effect of permitting state laws prohibiting the formation of personal militias and military parades because doing so does not limit an individual’s right to keep and bear arms. The *Presser* court also reaffirmed the concept previously addressed in *Cruikshank*, stating that the Second Amendment “has no other effect than to restrict the powers of the national government.”⁹

Decided in 1939, *United States v. Miller* was the first Supreme Court case to *directly* address the Second Amendment. In *Miller*, the Court took up the validity of the National Firearms Act, passed in response to the Valentine’s Day Massacre, a law that required registration of certain types of firearms, such as sawed-off shotguns, with a governmental agency and also imposed a tax on the transfer of such weapons. The court held that, “In the absence of any evidence tending to show that possession or use of a (sawed-off) shotgun . . . at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”¹⁰ *Miller* has had lasting, albeit controversial, implications: proponents of gun control highlight the case’s holding as one

⁸ *United States v. Cruikshank*. 92 U.S. 542 at 553.

⁹ *Presser v. Illinois*. 116 U.S. 252 at 265.

¹⁰ *United States v. Miller*. 307 U.S. 174 at 178.

that explicitly allows federal limitations the right to bear arms while those in favor of broad rights to bear arms interpret the decision as one recognizing that ownership of weapons for efficiency or preservation of a well regulated militia unit of the present day is specifically protected.

More recently, laws regarding the right to bear arms within the city limits of major metropolises have been brought before the courts. In 2008, the United States Supreme Court, in a landmark Second Amendment case, addressed a Washington, D.C. limitation on the right to bear arms. The Firearms Control Regulations Act of 1975 restricted District of Columbia from owning handguns, with the exception of those grandfathered in by registration prior to the passing of the act and those possessed by active and retirement police officers. The Supreme Court ultimately upheld a federal appeals court ruling striking down the D.C. gun law as violative of the Second Amendment.¹¹ The *Heller* court refused to present the level of review that should be applied in cases bearing on the infringement of Second Amendment rights, but held that the Second Amendment protected individual rights to own and bear arms.

The decision's broad effect, however, is questionable because of its unique nature as a ruling on the validity of a Washington, D.C., law. Because the District of Columbia is governed by federal law, it is uncertain whether a similar statute enacted in a state context would be decided under the same terms. The *Heller* court acknowledged the issue of the incorporation of the Second Amendment by and through the Fourteenth Amendment, but refused to rule on its bearing for similarly situated state laws. The *Heller* opinion states, "With respect to *Cruikshank's* continuing validity on incorporation (which stated that the Second Amendment had only federal implications), a question not

¹¹ *District of Columbia v. Heller*. 128 S. Ct. 2783 at 2821-2.

presented by this case, we note that *Cruikshank* also said that the first amendment did not apply against the states and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”¹²

In the aftermath of *Heller*, numerous cases have been filed seeking to apply the ruling to state gun laws. In Illinois, the National Rifle Association has filed five related lawsuits. In four of the cases, the NRA has sought to have the Second Amendment incorporated by the Fourteenth Amendment. Three of these cases have been settled out of court, resulting in the repeal of the challenged gun ban ordinances. The fourth suit, *McDonald v. Chicago*, was rejected by the United States District Court for the Northern District of Illinois; however, the NRA has filed an appeal in the Seventh Circuit. Although the status of the acceptance of this case is still pending, the NRA has stated that the Seventh Circuit previously ruled adversely on a similar suit in 1982.¹³

Comparative Analysis: Schools’ Freedom of Speech Limitations and Gun Rights

Although courts have made few rulings on schools’ abilities to restrict students from bearing arms while on college campuses, a review of cases bearing on schools’ abilities to constitutionally limit students’ free speech is instructive.

Students’ free speech rights are constitutionally protected, with certain limitations. In *Tinker v. Des Moines Independent Community School District*, the court determined that the First Amendment applied to public schools, and that any regulation of speech in the classroom (and, conceivably, on campus) would have to be supported by a

¹² *District of Columbia v. Heller*. 128 S. Ct. 2783 at 2813.

¹³ “Statement from Chris W. Cox Regarding Chicago Lawsuit.” National Rifle Association Institute for Legislative Action. <http://www.nraila.org/News/Read/NewsReleases.aspx?id=11949>. Accessed May 14, 2009.

constitutionally valid reasons. In *Tinker*, the subject school attempted to punish a student for wearing a black armband as an anti-war protest. Because the court found that there was no evidence that the rule prohibiting the wearing of arm bands was necessary to avoid substantial interference with school discipline or the rights of others, the court found that the Des Moines school district had violated the constitutional rights of the students in question.

The *Tinker* court held that public school students don't "shed their constitutional right to freedom of speech or expression at the schoolhouse gate," but that students' free-speech rights can be limited when the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."¹⁴ One case in which a school abrogated a student's free speech rights is *Bethel School District v. Fraser*. In *Fraser*, a student was punished for giving a speech at a school assembly that was wrought with sexual innuendo. Although the speech contained no veritable obscenities, the student was found to be in violation of school rules governing disruptive behavior. When the student challenged his punishment as an unlawful infringement of his First Amendment rights, the Supreme Court eventually ruled that the First Amendment, as applied through the Fourteenth, allows public school to punish a student for giving a lewd and indecent, but not obscene, speech at a school assembly.¹⁵ Thus, the *Fraser* decision can be seen as a limitation on the *Tinker* ruling, in that schools may constitutionally limit students' otherwise protected speech when such speech contains sexual innuendo, despite not being obscene.

¹⁴ *Tinker v. Des Moines Independent Community School District*. 393 U.S. 503.

¹⁵ *Bethel School District v. Fraser*. 478 U.S. 675 at 685.

It is unquestionable that the right to free speech and expression is substantively and substantially different from the right to bear arms. Although both freedoms have potential to cause extensive injury, the physical damage that can result from a gunshot is more likely to be irreparable, its impact felt more immediately and drastically. Guns scare people, especially those who have no hands-on experience with them. Although intelligence and background may equip certain people with more effective expression skills, almost everyone has the opportunity to articulate and defend their beliefs. Such is not the case with respect to carrying fire-arms.

Assuming *arguendo* that the Second Amendment is incorporated by the Fourteenth Amendment, it would seem rather obvious that a court would find constitutional schools' limitations on students' right to bear arms. If schools' attempts to limit students' possess guns were analyzed under a *Tinker*-like test, it is nearly certain that such prohibitions would be sustained. It is hard to argue that the presence of firearms in a scholarly setting presents a situation with the potential to "materially disrupt classwork" or "involve substantial disorder". Some may argue that a person carrying a concealed weapon would not pose a disruption because others around him would not even know a gun was in their presence; however, it would seem reasonable to assume that at least some unarmed students would be in constant fear that they were the only gunless persons in a classroom full of gun-toters. It would not be difficult to find an unarmed student adversely affected by the presence of guns alongside him or her. The intense anxiety that such a situation would present could be considered nothing less than a "material disruption" in the learning environment.

Conclusion

Buying a gun through legal avenues in the United States requires less effort than acquiring a driver's license. Normally, all that is required is to fork over enough cash to pay for the weapon, present valid photo identification, and complete form ATF 4473, a document prepared by the Bureau of Alcohol, Tobacco and Firearms. A purchaser can complete the relatively simple form by filling in basic biographic information, as well as answering thirteen "yes or no" questions about his or her criminal background. Of course, two of these easily met requirements are unnecessary for illegal purchases of firearms.

With such minimal obstacles standing in the way of obtaining a gun, it is unquestionable that these weapons often end up in the wrong hands. Students are acutely aware that some of their classmates lack the stability to make good choices with respect to relatively easy decisions; it is certain that if the less stable individuals were permitted to carry guns that the overall level of anxiety in the school would increase dramatically. Considering the courts' treatment of less potentially violent freedoms, it seems most likely that challenges to colleges' prohibitions of weapons on campus would uphold the constitutionality of such rules. Only time will tell.