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Guns, Campus and the Courts

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GUNS, CAMPUS AND THE COURTS

by Joseph Cernik, PhD

Abstract

The Newtown shooting opened up (again) the issue of guns on school grounds, both at the K-12 level and university level, and whether teachers and administrators should be armed. The Newtown shooting also focused attention again on the shootings at the Virginia Polytechnic Institute and State University in Blacksburg. In that incident, 32 people were killed and 17 wounded on April 2007. The shooter, Seung-Hui Cho, a senior, ended his killing spree by committing suicide. Following Cho's shooting spree, the National Rifle Association (NRA) created NRA-U, or National Rifle Association University, an organization that reaches out to college students interested in having guns on campus or learning about having guns on campus. In addition to NRA-U, an organization called Students for Concealed Carry was established to promote the cause of students, or more specifically students 21 and over, who want to have a concealed gun on campus. This organization has chapters on various campuses in a number of states. Since 2007, they have held Open Holster protests on campuses, which is as it sounds—students wearing open holsters to demonstrate their desire to carry guns on campus. The push to allow students 21 and over to have guns inevitably involves court cases. The point is that school administrators and teachers are not the only focus of who should be allowed to have guns on campus: There is a broad-based push to allow many to have concealed guns on campus, even people who are not students, administrators, or faculty members, as will be noted in a case from Virginia. This article looks at federal court cases (two United States Supreme Court cases and one Court of Appeals case) and briefly examines how they open ways to examine the issue of guns and schools.

1. The Shadow of the United States Supreme Court

Listen to Joseph Cernik, Professor of Political Science and Public Administration; Chair, Department of Political Science Lindenwood University discuss guns on campus and our court system.

In 1972, Supreme Court Justice William O. Douglas wrote, "A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment. . . . There is no reason why all pistols should not be barred to everyone except the police" (*Adams v. Williams*, 1972, p. 150). Douglas was on firm

ground at the time. In 1939, the Supreme Court in *United States v. Miller* addressed the Constitutionality of the Firearms Act of 1934 and noted that with regard to a 12-gauge double-barrel shotgun, less than 18-inches long, "We cannot say that the Second Amendment guarantees the right to keep and bear such an instrument" (*United States v. Miller*, 1939, p. 178). Even earlier in 1886 in *Presser v. Illinois* the Supreme Court stated, "The [Second] amendment is a limitation only upon the power of congress and the national government, and not upon that of the state" (*Presser v. Illinois,* 1886, p. 265). In other words, it would be hard pressed to find legal support for the notion that the Federal government could be turned to as the source for the right to keep and bear arms.

Relatively recent Supreme Court cases and a Court of Appeals case out of Chicago, however, can, and no doubt will, have an impact on how we begin to understand the Second Amendment. It is not just that one reads the opinions of these cases, but also reads into the cases, since more often than not, the impact of Supreme Court cases unfolds over a number of years as additional court cases (within both Federal and state courts) give more substance to what we understand are the ramifications of rights under the Second Amendment.

In a significant 2008 case, the Supreme Court in *District of Columbia v. Heller* recognized that individuals have the right of gun ownership. But this was the District of Columbia, and not a state, so it was not clear whether this right was now recognized as extending to citizens living in the states. Furthermore, this case addressed a District of Columbia ban on guns in the home and added, "[The] District [of Columbia] must permit [Heller] to register his handgun and must issue him a license to carry it in the home" (*District of Columbia v. Heller,* 2008, p. 64). A door was opened slightly with individual gun rights recognized but limited to home possession and limited to a non-state. It was inevitable, and certainly no surprise, that challenges would mount to extend the boundaries of what constitutes the right to keep and bear arms under the Second Amendment.

In 2010 in *McDonald v. Chicago*, the court extended the right of individual gun ownership to people living in states. The process of extending that right took place through linking (incorporating) the Second Amendment to the Fourteenth Amendment, since the Fourteenth Amendment starts with the words, "No state shall. . . ." So states had to now pay attention to a part of the Bill of Rights that previously had little impact on them. As they did in previous cases incorporating the First, Fourth, Fifth, and Sixth Amendments into the Fourteenth Amendment, the court used the Due Process Clause in the Fourteenth Amendment.

It is perhaps instructive to point out to readers who do not spend countless hours poring over the opinions written in Supreme Court cases that it is normal for the average citizen to refer to "the Constitution" and assume that means something, whereas the more precise method is to refer to specific clauses (groups of words) that exist within the Constitution. For example, the 45 words that comprise the First Amendment can

really be seen as six different clauses (establishment of religion, freedom of religion, freedom of speech, freedom of the press, right of assembly, right of petition).

Again, in *McDonald v. Chicago* (2010) the Court incorporated the Second Amendment within the Fourteenth Amendment using the Due Process Clause and not the Privileges or Immunities Clause, as Justice Clarence Thomas had wanted. Thomas wrote a concurrent opinion, which meant he agreed with the other four justices in the majority that the Second Amendment should be incorporated, just not the way they all agreed. This issue of how to incorporate the Second Amendment, through the Due Process Clause or Privileges or Immunities Clause, has the potential to cause much heartburn to states, local governments, school districts, and universities in the future. As with the Court cases of *Heller* and *McDonald*, where the impact they will have on gun laws and gun ordinances is unclear, the notion of some case eventually giving substance to the Privileges or Immunities Clause and causing the Court to look at the Second Amendment with reference to this clause could bring about a wide variety of challenges to gun regulations, gun ordinances, and gun prohibitions.

If the Privileges or Immunities Clause of the Fourteenth Amendment were used as the basis to incorporate the Second Amendment, then some indication of the potential problems to state government gun regulations, local government gun ordinances, and state university policies prohibiting guns on campus is indicated by a law review article in which the author voiced support for using the Privileges or Immunities Clause to incorporate the Second Amendment (this written prior to the *Heller* case). As the author wrote: "Like it or not, the Second Amendment protects the people's right to keep and bear arms - as well as other enumerated and unenumerated rights, privileges, liberties and immunities - from infringement by American government, federal and state alike" (Lawrence, 2007, p. 3). "Enumerated" refers to spelled-out rights, while "unenumerated" refers to implied rights or rights possessed but not spelled out by the Constitution. The way to understand this is that the Due Process Clause recognizes that governments and governing bodies (such as school districts and Boards of Education) still have a role in gun regulation, while the Privileges or Immunities Clause can be seen as opening up more challenges to that role. In the *Heller* case, Justice Antonin Scalia, writing for majority (hence, the Opinion of the Court), wrote: "[W]e do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose" (*District of Columbia v. Heller,* 2008, p. 22). Elsewhere in this case he wrote: "Many early 19th-century state cases indicated that the Second Amendment right to keep and bear arms was an individual right unconnected to militia service, though subject to certain restrictions" (p. 38). Finally, Justice Scalia wrote: "Like most rights, the right secured by the Second Amendment is not unlimited. . . .[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" (p. 54). Contrasting what Justice Scalia wrote with Justice Thomas's support for using the Privileges or Immunities Clause gives an indication of the degrees of difference that a local government, school board, or state university would have regarding gun regulations. In

Justice Thomas's concurrent opinion in the *McDonald* case, for example, some insight into the greater degree of challenges that local governments and school boards could face can be understood: "The question in this case is whether the Constitution protects [an individual right to bear arms] against abridgment by the States" (*McDonald v. Chicago,* 2010, p. 2).[1] Furthermore, Justice Thomas called upon Natural Law thinking - which is a way of saying that citizens possess certain rights that pre-date the creation of the United States government (although it is never clear what these rights are): "[T]he reasons the Framers codified the right to keep and bear arms in the Second Amendment - its nature as an inalienable right . . . pre-existed the Constitution's adoption. . . ." (pp. 4-5). Furthermore, Justice Thomas in his opinion indicated that the Due Process Clause was more limiting on individual rights: "[A]ny serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does" (p. 8). Finally, he wrote: "A separate question is whether the privileges or immunities of American citizenship include any rights besides those enumerated in the Constitution" (p. 51).

These nuances, whether the Due Process Clause or Privileges or Immunities Clause are used to incorporate the Second Amendment within the Fourteenth Amendment, do matter and can have an impact on school districts and state universities and how they approach the issue of gun regulations on their school grounds and campuses. School officials need to be cognizant of this issue, and that now that it has been opened up, they should not be satisfied that the Due Process Clause has triumphed. One law review article referred to the Privileges or Immunities Clause as the "Doctrine of Unenumerated Rights" (Blackman & Shapiro, 2009, p. 69, 87). Its potential to seriously challenge school gun regulation policies is a real possibility.

2. Heller and McDonald in Lower Court Cases

The impact of the *Heller* and *McDonald* cases can be seen in a December 2012 case decided before the Seventh Circuit United States Court of Appeals in Chicago (*Moore v. Madigan,* 2012). In this case, the Appeals Court said that Illinois needs to allow the carrying of concealed handguns. Illinois was the last state to not allow individuals to carry concealed guns; the other 49 states had laws allowing concealed weapons. The Court noted that New York has, perhaps, the most restrictive access to concealed guns when it stated, "New York places the burden on the applicant to show that he needs a handgun to ward off dangerous persons" (*Moore v. Madigan,* 2012, p. 17). In this case, the Court referred to a case a year earlier which raised the issue of degrees of restrictions on where handguns could be allowed. The Court cited the language from *United States v. Masciandaro* (2011) that:

It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that ‘self-defense has to take place wherever [a] person happens to be,' appears to us to portend all sorts of litigation over

schools, airports, parks, public thoroughfares and various government facilities. . . ."(pp. 30-31)

Elsewhere the Court stated:

[T]he Supreme Court would deem it presumptively permissible to outright forbid the carrying of firearms in certain public places, but that does not mean that a self-defense need never arises in those places. The teacher being stalked by her ex-husband is susceptible at work, and in her school parking lot, and on the school playground to someone intent on harming her. (*Moore v. Madigan,* 2012, p. 32)

Language in this case might serve to open the cracks to approach the issue of guns on campus in federal courts or state courts.

The issue of guns on campus has already been addressed in several state supreme court cases (Utah prior to *Heller* and *McDonald*, Colorado, and Oregon). In the Colorado and Oregon cases, the *Heller* and *McDonald* cases were not addressed. One case out of the Virginia Court of Appeals did rely (somewhat) on the *Heller* and *McDonald* ruling.

Rudoph DiGiacinto filed a complaint that he wanted the right to carry his concealed gun into the library at George Mason University (GMU) in Fairfax County. DiGiacinto was neither a student nor employee of the university but as the court case stated, "he visits and utilizes the university's resources, including its libraries" (*DiGiacinto v. The Rector and Visitors of George Mason University,* 2011, p. 2). While most of this case addressed the statutory authority of the university to regulate guns on campus and whether that authority resided with the state legislature (issues similar to those addressed in Utah, Colorado and Oregon), there is reference and reliance on the *Heller* and *McDonald* cases. In fact, DiGiacinto referred to the Second and Fourteenth Amendment as part of the reasons why he had the right to carry his gun into the school's libraries. This case does not refer to the use of the Due Process Clause or the Privileges or Immunities Clause, but addresses the Second Amendment limitations when it stated: "In *Heller*, the Second Amendment does not prevent the government from prohibiting firearms in sensitive places" (p. 5).

In this case, the term "sensitive places," which was brought up in the *Heller* case, is given some substance. The court noted that more than 350 incoming freshmen were under the age of 18 and that approximately 50,000 elementary and high school students attend summer camps at the university. Furthermore, the court added, "parents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm" (*DiGiacinto v. The Rector and Visitors of George Mason University,* 2011, p. 10). While the case seemed to be a victory for the university, the court stated:

The regulation does not impose a total ban of weapons on campus. Rather, the regulation is tailored, restricting 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 campus of GMU and in other places on campus not enumerated in the regulation. (p. 11)

That a state court case began the process of interpreting the term "sensitive places" with much wiggle room where guns can be allowed on a campus would indicate we might see reference to this case in future legal action. The Virginia Supreme Court heard the case on appeal and agreed with the lower court ruling.

3. Conclusion

Four points are important to consider. First, for many, the Second Amendment is read often disassociated from the rest of the United States Constitution. We are led to believe that an incredibly broad and expansive reading of the Second Amendment exists. It is doubtful whether those who take this approach to interpreting the Second Amendment are going to be equally as supportive of an atheist group that files legal action against a municipal government when it uses public funds to display a nativity scene at Christmas because they read the words in the First Amendment: "Separation of church and state." Or, it is as equally doubtful they will support a gay organization that refers to Article 4, Section 1, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof" (U.S. Const. art. IV, § 1). In fact, the reason for the Defense of Marriage Act coming into existence was because a number of people were uncomfortable with having to live with what "full faith and credit" meant after a court in Hawaii looked as though it would legalize gay marriage (Hawaii recognizes a civil union). So, the argument that the words in the Second Amendment matter to many is nonsense; it is just a way to rationalize incredibly unlimited access to guns and not having to reasonably approach gun regulations. When you address the implications of what a very broad reading of the Second Amendment means in relationship to broadly reading other parts of the Constitution - and that other individuals and groups have as much right to their freedom to liberally read the Constitution anyway they want - then you begin to look at the Second Amendment with a different perspective.

Second, the term "gun control" is a problem. The notion of being forced to choose "for" or "against" gun control may make sense when examined from the perspective of a silly cable television news show where "liberal" and "conservative" are at loggerheads with each other and what is created is an either/or distinction that is completely false and as far removed from in-depth policy analysis as you can get. Using the expression "degrees of gun regulation" might be a mouthful (and less conducive to a short television news segment) but is closer to what is needed to develop an understanding about issues raised in this article. The term "gun control" helps to avoid a substantive way of examining gun regulations. Television news (despite 24-hour channels) is more

like old computers with no hard drives, where everything was lost once the computer was turned off. The next time the computer was turned on, everything had to be re-loaded again. You cannot build from one news segment the night before and have the news person say, "We will begin where we left off last night." As a result, the nuances and complexities addressed here cannot be discussed easily on a television news show segment. How do you advance the discussion of gun regulations when television news (through which most people get their news as opposed to reading) cannot help to advance the level of conversation?

Third, as can be understood from the George Mason University case, a state court can rely upon United States Supreme Court opinions - and expand upon them. The term "sensitive places" was not really developed in the *Heller* case the way it was in the GMU case: A state court expanded upon what the United States Supreme Court said. As can be seen from the GMU case, simply saying "no guns on campus" is not enough. Addressing guns in dorm rooms, administrative and faculty offices, classrooms, within parked cars, and while walking across campus - each may need to be approached separately, and might well be through future court cases. The differences between a tailored ban and total ban will become important - and can matter when public universities examine their gun regulation policies (Kozlowski, 2011).

Robert Warden sued the City of Seattle over whether he could carry his concealed gun. In fact, no doubt like DiGiacinto, he deliberately wanted to push the limits of where he could try to carry his weapon. In Warden's case, he told people at city hall that he was bringing his gun into the Seattle Southwest Community Center. When he entered the building he was asked to leave after it was determined he was carrying a weapon. In this case, the federal district court stated: "*Heller* provides limited guidance as to how to evaluate the constitutionality of gun regulations under the Second Amendment" (*Robert C. Warden v. Gregory J. Nickels and City of Seattle,* 2010, p. 9). Moreover, the court added, "the Court sees no logical distinction between a school on the one hand and a community center where educational and recreational programming for children is provided on the other" (p. 10).

If future federal court cases (whether at the district, court of appeals, or Supreme Court level) begin to lean more toward Justice Thomas's desire to link parts of the Bill of Rights to the Fourteenth Amendment through the Privileges or Immunities Clause - particularly the Second Amendment - then expect a variety of challenges to all sorts of gun regulations (state and local government, schools). Furthermore, the words "sensitive places" will matter and, as can be understood from this article, it is beginning to be developed as more than just vague words in a United States Supreme Court case. It is advisable that public universities not feel comfortable with their blanket bans regarding guns on campus and that they learn to address the tailored ban versus total ban distinction that, most likely, can arise in future court challenges.

Finally, insurance is an issue. In Texas, a state seen as the "big prize" by the Students for Concealed Guns on Campus because of its more than 500,000 students at 38 public universities, the possibility of higher insurance premiums stopped the momentum that

looked likely to allow guns on campus in 2011. The Houston Community College Board of Trustees passed a resolution urging state legislatures to not allow guns on campus. The possibility of premiums going up by $780,000-to $900,000 a year was cited as a "fiscal burden" (Gonzalez, 2011). If state universities or community colleges were required to let students bring concealed guns into the classroom (which in the Texas situation was being considered), this began to look like an "unfunded mandate" where the cost allowing guns on campus would be passed along to every student in higher tuition costs. Even the Students for Concealed Guns on Campus estimated few students would actually possess a gun. For example, a statement from their own web site indicated what they expected:

At the University of Texas - a major university with over 50,000 students - a quick comparison of campus housing statistics and concealed handgun licensing statistics reveals that there would likely be no more than ten to twenty concealed handgun license holders living in on-campus housing. (Students for concealed carry, n.d.)

In others words - the many paying for the few. How this might lead to lawsuits can be understood once tuitions were seen as rising because of guns on campus. This appears to be more of a state court issue than a federal court issue but, as can be seen from the George Mason University case, Supreme Court cases can impact a state court case.

Furthermore, regarding insurance, it might seem inevitable that insurance companies might "rate" campuses and students in particular when it comes to them possessing a gun on campus (whether remaining in their cars, in a dorm room, or carried into a classroom or other facility on campus). After the Virginia Tech shootings, the U.S. Department of Education awarded the school a $960,685 grant to help the university develop efforts to identify troubled students. In the case of Seung-Hui Cho, he had displayed a long history of serious problems. For example, in high school he praised the April 1999 shootings by two Columbine High School students that lead to 15 dead and 23 wounded. Cho called the two shooters "martyrs." While at Virginia Tech, a well-known poet from whom he was taking a class threatened to resign if Cho was not taken out of her class since she stated his behavior in class was "menacing." He eventually withdrew from the course. The police told Cho to stop contacting a woman he seemed to be stalking. A campus police prescreener evaluated him as a danger to himself and others (Green & Cooper, 2012).

Gun liability insurance is being debated in the aftermath of the Newtown shootings, and it seems to be gaining some support (Wasik, 2013). Assuming this notion gains no immediate traction, the idea of insurance companies rating individuals or universities might develop out of this thinking. For example, one study that examined students who own guns stated: "[S]tudents with guns were more likely than students without guns to have alcohol-related problems, such as getting into fights attributed to drinking alcohol and being arrested for drinking while intoxicated" (Miller, Hemenway, & Wechsler, 2002, p. 57). Elsewhere, a different study examined the relationship of gun possession to gun assault and concluded, "[A] gun may falsely empower its possessor to overreact. . . ."

(Culhane, 2009, p. 4). This study noted there was an increased likelihood that someone with a gun was more likely to be shot than someone without a gun during an assault.

The California Supreme Court ruled in a 1976 case that there is a duty-to-warn. Mental health professionals have an obligation to warn of potential dangerous actions by a patient - the patient-doctor privilege does not appear to apply (*Tarasoff v. Regents of University of California,* 1976). If students with guns are rated differently for insurance purposes than other students, how much more vigilance on the part of the university is called for?

Training, despite the process to obtain a concealed gun permit, is questionable. The chancellor of the University of Arkansas at Little Rock, in testimony before the Committee on Education in the Arkansas House of Representatives, stated:

There was a recent example-not hypothetical-of a shooting at a gasoline station in West Little Rock. A person nearby with a concealed weapon decided to take out his handgun and fire it, no doubt with the intent to be helpful, but this person's bullet hit the wrong car. (Anderson, 2013)

Questioning the actual depth of the training to receive a concealed gun permit might be raised from an insurance perspective. A law professor noted the dubious level of training she went through to receive a concealed gun permit:

You can have little-to-no- knowledge about a firearm and obtain a [Concealed Handgun License]. To prove this point, I applied for a [license], in Texas, having never touched a handgun in my life. In fact, I did not even own one. Despite knowing very little about a firearm, including how to load or fire one, I passed the multiple-choice and shooting proficiency tests required to obtain a [license]. In Mississippi, a person need only pass a criminal background check, ‘Vouch' that they do not suffer from substance abuse or mental illness, and pay a fee to obtain a [license]. No gun-handling or safety class is required. (Lewis, 2011, p. 9)

While universities may have security committees that address all aspects of security on campus, from lighting to locks on dorm entrances to call boxes for emergencies, would administrators, faculty, and students with concealed guns be required to be addressed by such a committee? The above quote raises serious concerns about how well trained individuals are to actually react with a gun in situations where they face live fire. In Texas, a police officer was fired after he shot at a fleeing suspect in a car chase 41 times. The suspect died after being hit three times, with 38 bullets landing elsewhere. The officer, a seven-year veteran, said he feared for his life (CBSNews.com, 2013). In New York City, police training changed after the Columbine High School shootings in April 1999. A former chief with the New York City police department said, "Training, from the brass on down, was, ‘Slow down when you get to these scenes. Don't rush in. We'll talk them out.' That all changed after Columbine" (Wilson, 2012). The SWAT team in Littleton, Colorado, was seen as moving too slowly through Columbine High School. What type of liability would universities be held to if they failed to address guns on

campus? Would administrators, faculty, and students with guns be required to receive some regular training - beyond the basics required to obtain a concealed gun license - imposed by insurance standards? (Binder, 2008). In the aftermath of the Virginia Tech shootings, the university made significant changes regarding its mental health evaluation of students, public safety, and emergency alert system. All told, one report estimated the cost, not just to the university but to the state of Virginia and to taxpayers, as approximately $48.2 million (Green & Cooper, 2012). Assuming public universities might need to undertake certain precautions before guns are on campus, not after a tragedy, the degree and depth of those actions might be determined by what university insurers would require.

The conflict between perceived Second Amendment rights, in their broadest sense, and insurance standards is a possibility. Ironically, while extreme supporters of the Second Amendment might be thinking in terms of guns as protection from potential threats to themselves and maybe others, insurance companies might be approaching them as an insurance risk. Here is where the push to allow guns on campus, whether by administrators, teachers, students, or just those passing through, can lead to unintended consequences: The insurance perspective. The reason for this, say, reverse thinking is because of something known as premises liability. The thinking behind this is: "If you let guns onto your campus, then you could reasonably foresee that they would go off by accident" (Shaikh, 2011). Usually this might be associated with someone slipping or falling, but a standard applied in court cases is the foreseeability of an accident or injury. Does a university then warn students and visitors of the presence of guns on campus?

The range of legal - if not Constitutional - issues that exist to complicate guns on campus is only beginning.

[1]The Opinion of the Court and Thomas's quotations are from his concurrent opinion. Also useful to read are: Durst,The Opinion of the Court and Thomas's quotations are from his concurrent opinion. Also useful to read are: Durst, D. C. (2011). Justice Clarence Thomas's interpretation of the privileges or immunities clause: McDonald v. City of Chicago and the future of the Fourteenth Amendment. University of Toledo Law Review, (42)4. No hyperlink is provided for this article. See also: Blackman, J., & Shapiro, I. (2009). Keeping Pandora 's box sealed: Privileges or immunities, The Constitution in 2020, and properly extending the right to keep and bear arms to the states. The Georgetown Journal of Law & Public Policy, (8)1, 1-90. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503583

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