Does the Second Amendment Protect a Citizen's Right to Carry a Firearm on Nevadan Colleges and Universities in a post-*Heller* and *McDonald* World?

Casey J. Nelson

Preface

- Early Monday morning on April 16, 2007, Seung-Hui Cho entered the West Ambler Johnston dormitory located on the Virginia Polytechnic Institute and State University campus in Blacksburg, Virginia, and shot and killed two students. The first phase of his mission accomplished, he simply walked away.[1] Just two and a half hours later, Cho then entered the engineering building at Norris Hall, chained the doors shut from the inside so that nobody could enter or leave the building, and then proceeded to walk from classroom to classroom, shooting every student he could find before taking his own life.[2] By the time it was over, 32 students and professors who had come to school expecting an ordinary day lay dead, with another 17 wounded from the shooting.[3]

- Just 9 months later, on a chilly Thursday afternoon on February 14, 2008, approximately 120 students were attending the class, Geology 104- Introduction to Ocean Science, which was held in the Cole Hall Auditorium at the Northern Illinois University DeKalb Campus.[4] As the class instructor discussed the results of a recent test he had just handed back to his students, Steven Phillip Kazmierczak kicked in the door to the classroom and began firing a 12 gauge shotgun at those in the lecture hall.[5] Some students tried to escape the room. Others simply hunkered down behind the desks and chairs in an attempt to hide. Kazmierczak emptied his shotgun into the crowd of students, and only pausing from time to time to reload his weapons, began to move up and down the aisles, shooting at point blank range those students still

[1] Alex Johnson with Chris Jansing and Alison Stewart, *Worst U.S. Shooting Ever Kills 33 on Va. Campus*, MSNBC.com and NBC News (April 17, 2007) (on file with author), *available at* http://www.msnbc.msn.com/id/18134671/ns/us_news-crime_and_courts/.
[2] *Id.*
[3] *Id.*
[4] Northern Illinois University, *Report of the February 14, 2008 Shootings at Northern Illinois University*, at pg 1, *available at* http://www.niu.edu/feb14report/Feb14report.pdf.
[5] *Id.*

cowering on the floor.[6] It took approximately 5 minutes before university police were able to respond to the scene, but by that time the damage was done. Kazmierczak had killed 5 students and wounded 18 others before he turned his gun on himself and ended his life.[7]

- On Thursday, November 5, 2009 U.S. Army Major and psychiatrist Nidal Malik Hasan, entered the Soldier Readiness Center located on the Fort Hood U.S. Army Base near Killeen, Texas.[8] After sitting down at a desk as if to help a fellow soldier with some paper work, Hasan suddenly stood on top of his desk, shouted "Allahu Akhbar!", and began firing at the unarmed soldiers and civilian workers inside the center. Hasan managed to kill 13 and wounded 30 before he was shot by responding police officers.[9]

- On February 12, 2010, Professor Amy Bishop stood up during a routine faculty meeting, pulled out a handgun, and began shooting her fellow faculty members in the head, execution style. [10] Completely defenseless and unable to stop the attack, those present dove to the floor in an attempt to hide underneath the table. Professor Debra Moriarity managed to crawl out the door into the hallway, all the while pleading for Bishop to stop the shooting rampage and to spare her life. Bishop calmly followed her out the door into the hallway, pointed the gun directly at her head and pulled the trigger. *Click*. In a lucky twist of fate, the gun had malfunctioned. As Bishop attempted to get the firearm back into action, Professor Moriarity quickly rushed back into the room and with the help of the other faculty members, barricaded the door shut, locking

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[6] Northern Illinois University, *Report of the February 14, 2008 Shootings at Northern Illinois University*, 1, *available at* http://www.niu.edu/feb14report/Feb14report.pdf.
[7] ***Id.*** at 3.
[8] The Telegraph, *Fort Hood Shooting: inside story of how massacre on military base happened*, November 7, 2009 *available at* http://www.telegraph.co.uk/news/worlnews/northamerica/usa/6521578/Fort-Hood-shooting-inside-story-of-how-massacre-on-military-base-happened.html. Retrieved January 4, 2011.
[9] *Id.*
[10] CNN *Alabama shooting survivor: 'There was no way to ever anticipate this.* February 18, 2010, *available at* http://www.cnn.com/2010/CRIME/02/17/alabama.shooting.witness/index.html. Retrieved December 22, 2010.

Bishop outside. Only a weapons malfunction stopped the shooting, which had left 3 dead and 3 seriously wounded.[11]

What do all of these tragedies have in common? They all occurred at public universities or government facilities where laws strictly prohibit ordinary citizens from carrying firearms on the premises.

[1] *Id.*

Introduction

It happens over and over again. Across the nation, somber news anchormen and women interrupt our regular broadcasting to bring us images of what was once a beautiful university square, now occupied by ambulances, heavily-armed law enforcement officials, and horrified groups of college students huddled behind crime scene tape. An armed individual has entered a classroom, pulled out a gun, and started shooting people. Severe depression? Religious fanaticism? Hate-filled rage? No matter the reason, the results are usually the same: multiple dead and twice as many wounded. And although law enforcement was quick to respond to the scene, the shooter had already finished his deed and taken his own life. Because he only needed seconds, while law enforcement was minutes away. The above hypothetical scenario could occur at just about any U.S. college or university. In fact, it already has. And unfortunately, in the majority of these colleges and universities, students and faculty are at the complete mercy of the deranged killer because they lack the means to effectively stop the imminent attack with equal force. Welcome to the mythical "gun free zone."

Nearly every state legislature has (with good intentions, of course) enacted statutes prohibiting citizens from lawfully possessing firearms on campus. Most of these prohibitions also prevent those citizens who have been granted concealed carry licenses or permits from carrying on campus as well. Yet the truth is that these supposed "gun free zones" sometimes end up being "free-fire zones" instead, where mass killers are granted unmitigated freedom to open fire on innocent and *defenseless* civilians. This is because these prohibitions cause those law-abiding students and faculty members to leave home the very weapons they are authorized and qualified to carry in other public places such as malls, shopping centers, parks, restaurants and movie theaters. They do so because they obey the law, while the criminally-insane killers simply

ignore the "No Weapons Allowed" sign as they walk through the front door. And why would these individuals care about a firearm restriction? Murder and assault with a deadly weapon are also against the law, and they don't seem to have a problem in violating those statutes.

The Nevada legislature has similarly attempted to create "gun free zones" on university and college campuses throughout the state. NRS 202.265 prohibits a person from carrying or possessing a "dangerous weapon"- most notably firearms- "while on the property of the Nevada System of Higher Education, a private or public school or child care facility, or while in a vehicle of a private or public school or child care facility."[12] The statute does allow the president of each university and college to grant written permission to individuals to carry firearms on campus,[13] but requests for this permission, at least by students possessing concealed carry licenses for the state of Nevada, are simply ignored or summarily denied. And while it appears that the statute, both on its face and as its applied, strips citizens of their firearms while on campus, the question remains as to whether it also strips them of a constitutional right? In other words, does NRS 202.265 infringe a constitutionally protected right to bear arms?

It is well-known that the Second Amendment to the United States Constitution speaks of the "right to bear arms,"[14] but what is the extent of that right? In 2008, the United States Supreme Court held in *Heller v. District of Columbia* that the Second Amendment protects a fundamental individual right to possess a readily operational handgun in the home for the purposes of self-defense. But does this right to bear arms, which seems inextricably connected to the concept of self defense, extend beyond home and hearth? Does it extend to the edge of the street? To the workplace? To the classroom? In writing the opinion for *Heller*, Justice Scalia suggests that the right to keep and bear arms is a fundamental right, but just like all of the other

[12] Nev. Rev. Stat. § 202.265 (2007).
[13] *Id.*
[14] U.S. CONST. amend. II, § 2.

rights found in the Bill of Rights, it isn't an absolute right, and is therefore subject to some restrictions. But what is the extent of these restrictions? What analytical framework should the courts employ to determine what the Second Amendment right is? To be certain, *Heller* left us with a lot more questions than answers. Further complicating things is the holding in *McDonald v. Chicago*, in which in 2010 the United States Supreme Court held that the Fourteenth Amendment incorporated the Second Amendment to apply against the states and other local governments, meaning that Nevada and all of its municipalities must comply with the holding in *Heller*.[15]

Furthermore, not only must the state of Nevada ensure that its firearm laws do not run afoul of the federal Constitution, but Nevada's state constitution also has what could be called it's very own "right to bear arms" provision. And although *McDonald* makes it now clear that at a minimum Nevada's laws must meet the Federal Constitution's limits with respect to "the right to bear arms," the state constitutional provision begs the question of whether Nevada grants a more expansive right than the federal Constitution does. Or will the Nevada Supreme Court simply determine that the two constitutional provisions are essentially one and the same? This article seeks to answer the question of whether Nevada's ban on firearms on university and college campuses is constitutional, either under the federal Constitution or the Nevada's Constitution and how the courts will go about determining the answer to this question.

I. History of Federal Gun Rights

"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."[16] Such is the text of the Second Amendment to the United States Constitution which was adopted by Congress on September 17,

[15] 130 S.Ct. 3020, 3026 (2008).
[16] U.S. CONST. amend. II, § 2.

1787 and later ratified by the several states.[17] And although discussing the complete and complex legal history of the Second Amendment is far beyond the scope of this paper, a brief historical summary of major turning points in the Second Amendment's history leading up to *District of Colombia v. Heller* and *McDonald v. Chicago* is in order.

A. Leading up to *Heller*

Before the Supreme Court began selectively incorporating specific constitutional rights as applying to the states via the Due Process Clause, the United States Constitution and its accompanying Bill of Rights only applied to the federal government. State courts have universally shied away from interpreting the meaning of the Second Amendment. Courts consistently refused to construe the Second Amendment because the amendment only restricted federal infringement of the right, and not state or local gun laws.[18]

The first major Supreme Court case involving the Second Amendment was *United States v. Cruikshank*[19] which involved members of the Ku Klux Klan (operating under state law) depriving freed slaves of basic rights, including the ability to bear arms for the purpose of self defense. There the court ruled that the Second Amendment did not limit the power of state governments to regulate the possession of firearms of its own citizens, and that it only operated to restrict the powers of the federal government.[20]

The next major Supreme Court case, *Presser v. Illinois*[21] considered the meaning of the Second Amendment right as it related to individuals and militias. Yet once again, the Court

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[17] Library of Congress. *Primary Documents in American History: The United States Constitution* http://www.loc.gov/rr/program/bib/ourdocs/Constitution.html. Retrieved December 22, 2010.
[18] Tracy Bateman Farrell; *Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons*; 33 A.L.R. 6th 407, §5 (2008).
[19] 92 U.S. 542, 543 (1875).
[20] ***Id.*** at 553-555.
[21] 116 U.S. 252 (1886).

pointed out that the Second Amendment was only a restriction on the federal government's power to regulate firearms, and not the states.[22]

The meaning of the Second Amendment was not really examined directly until much later in *United States v. Miller*.[23] There the Court considered the constitutionality of the National Firearms Act of 1934, (NFA) which, in part, required that owners of certain types of firearms pay a $200 tax (which was approximately $3056.77 at the time if adjusted for inflation[24]) and register the firearms with a tax unit, which has now morphed into the Bureau of Alcohol, Tobacco, Firearms, and Explosives. The Court found the NFA constitutional, holding that the Second Amendment does not guarantee the right to keep and bear some firearms, most notably those firearms which have no "reasonable relationship to the preservation or efficiency of a well regulated militia…"[25] Thus, it appeared that the Court was backtracking prior case law, by tying the Second Amendment back to militia membership and its needs, although only in the context of what firearms could and could not be regulated. The true meaning of the Second Amendment after *Miller* was elusive, to be sure, but the issue remained mostly untouched for nearly six decades until the Supreme Court once again examined the extent of the Second Amendment in 2008 in *District of Columbia v. Heller*.

B. District of Columbia v. Heller: A Summary

In 2003,six residents of Washington D.C. challenged the constitutionality of the Firearms Control Regulations Act of 1975.[26] This law placed an outright ban on all handguns within the federal enclave's city limits.[27] Additionally, the law required all other firearms, such as shotguns

[22] 116 U.S. 252, 266 (1886).
[23] 307 U.S. 174 (1939).
[24] The Inflation Calendar, *available at* http://www.westegg.com/inflation/. Retrieved December 28, 2010.
[25] 307 U.S. 174 (1939).
[26] *Parker v. District of Columbia*, 478 F.3d 370, 401 (2007)
[27] *District of Columbia v. Heller*, 554 U.S. 570, 575-576 (2008)

and rifles, to be stored unloaded and disassembled or, alternatively, bound by a trigger lock.[28] The District Court dismissed the lawsuit, which was then heard on appeal in the U.S. Court of Appeals for the D.C. Circuit. There, the Court of Appeals held that the ban on possessing a handgun within the home "amounts to a complete prohibition on the lawful use of handguns for self-defense…" and as such was unconstitutional.[29] The District of Colombia appealed the ruling. The Supreme Court framed the question to be decided as being whether the firearm restrictions violated 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?[30] Justice Scalia delivered the majority opinion of the court, and was joined Chief Justice Roberts, Kennedy, Thomas, and Alito.[31]

The Supreme Court ultimately held that the Second Amendment protects an individual right, unconnected with militia service, to possess a firearm for lawful purposes, such as self-defense within the home.[32] The court reached this conclusion based upon the following rationale:

1) The Amendment's prefatory clause concerning a "well regulated militia" announces a purpose, but does not limit or expand the scope of the operative clause of "the right to keep and bear arms shall not be infringed."[33]
2) That the militia in the Framing Era consisted of all males physically able of taking up arms for the common defense. The entire purpose of the Antifederalist push for a Bill of Rights was that they feared the federal government would disarm individuals, which would, in effect, destroy the citizen militia.[34]

[28] *District of Columbia v. Heller*, 554 U.S. 570, 575-576 (2008).
[29] *Id.* at 576.
[30] *Id.* at 573.
[31] *Id.* at 572.
[32] *Id.* at 636.
[33] *Id.* at 570-527.
[34] *Id*.

3) The very fact that 44 states have right-to-bear-arms provisions in their constitutions supports the Court's interpretation.[35]

4) Scholars, courts and legislators from the Founding Era throughout the 19th century all supported the Court's conclusion.[36]

5) Finally, none of the other Supreme Court decisions forecloses the Court's interpretation.[37]

Additionally, the court held that the Second Amendment, like other constitutional rights, is not an unlimited right. It does not "guarantee the right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[38] Herein lies, perhaps, the most important issue arising from *Heller*, (at least as far as this paper is concerned) as Justice Scalia goes on to state in *obiter dicta* what these restrictions might mean:

> "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[39]

Notably, the court did not proffer the level of judicial review that courts should undertake in the future to determine the scope of the Second Amendment right. Justice Scalia wrote that "[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." But he went on to say that "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no

[35] *District of Columbia v. Heller*, 554 U.S. 570, 570-527 (2008).
[36] *Id*.
[37] *Id*.
[38] *Id.* at 626.
[39] 554 U.S. 570, 626 (2008).

effect."[40] In response to Justice Breyer's argument that courts should adopt a "judge-empowering 'interest-balancing inquiry'", the Court stated that "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[41]

Finally, the court found that the handgun ban and the trigger-lock requirement violated the Second Amendment, because it amounts to a complete ban on an entire class of arms that our society has deemed essential for the lawful purpose of self-defense.[42] In summary:

> The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition- in the place where the importance of the lawful defense of self, family, and property is most acute- would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D.C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement.[43]

Interestingly, the Court noted that for a remedy, "assuming 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…"[44]. This indicates that the Court would have at least considered the remedy that would have eliminated the license requirement altogether. But Heller admitted at oral argument that he didn't have a problem with the licensing provision as long as it legitimately allowed qualified individuals to obtain and possess handguns within the home.

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[40] *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).
[41] *Id.* at 634.
[42] *Id.* at 571.
[43] *Id.*
[44] *Id.* at 635.

Heller leaves us with more questions unanswered that answered. What we're left with is a somewhat confusing holding in that we know that a citizen has an individual right, unconnected with militia service, to keep and bear arms, and notably, not just long rifles and shotguns, but also handguns. This is because this right to bear arms is inextricably connected with a right to defend oneself, and citizens have traditionally chosen handguns for the job. We also know that this right is "most acute" in the home.[45] Additionally, the Court states that a complete ban of handguns makes it impossible for citizens to use them for the "core lawful purpose of self-defense and is hence unconstitutional."[46] Yet, we also have dicta stating that government can place reasonable restrictions on the right, and that there may be areas in which the right to keep and bear arms can be lawfully prohibited, such as schools and government buildings. This dictum begs the question of whether the right to lawful self-defense can be limited to certain locations. Does the thrust of *Heller* really imply that a ban on firearms, which makes it impossible for citizens to defend themselves in the home is unconstitutional, while a complete ban on firearms which makes it impossible for citizens to defend themselves on open campuses and schools *is* constitutional? How will the courts reconcile these conflicting propositions when the very scope of the right seems to hinge on the ability of citizens to lawfully defend themselves with firearms?

C. *McDonald v. Chicago*: Applying *Heller* to the states

For years, Chicago had implemented an ordinance which banned the registration of handguns, yet required that handguns be registered prior to their acquisition by Chicago residents. Additionally, the ordinance mandated that guns be re-registered annually and if any

[45] *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).
[46] *Id.* at 630.

firearm's registration lapsed, it was rendered permanently non-registrable.[47] Although *Heller* had been decided just two years prior, its holding only applied to federal jurisdictions, as the Second Amendment, unlike most of the Bill of Rights, had not yet been incorporated as applying against the states. This all changed on June 28, 2010, when in a 5-4 decision the Supreme Court held that the Second Amendment was, in fact, incorporated under the Fourteenth Amendment.[48] Although the subject of selective incorporation is beyond the scope of this article, it deserves mention that rights are incorporated when a court is convinced that a right is fundamental and implicit in the concept of ordered liberty or so "deeply rooted in our nation's history and traditions" as to merit protection.[49] Because the right to bear arms met this requirement, the Supreme Court found that the "Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[50] Again, the Court re-affirmed that certain firearm restrictions mentioned in *Heller*, such as those restrictions on possession of firearms by felons or the mentally ill, as well as restrictions on carrying of firearms in sensitive places such as schools and government buildings are, for the moment assumed permissible, although they were not directly dealt with in this case.[51]

II. Does the Nevada State Constitution Grant a more Expansive Right than the Federal Constitution?

The Supreme Court in *Heller* indicates that, at least under the federal Second Amendment, government may restrict or even prohibit the carrying of firearms in "sensitive places", such as schools and government buildings.[52] As such, the federal right to keep and bear arms for the purpose of self defense may very well end at the campus boundary. But what about the right to

[47] *McDonald v. Chicago*, 130 S.Ct. 3020, 3026 (2010).
[48] *Id.* at
[49] *Duncan v. Louisiana*, 391 U.S. 145, 180 (1968).
[50] *McDonald v. Chicago*, 130 S.Ct. 3020, 3050 (2010).
[51] *Id.* at 3047.
[52] 554 U.S. 570, 630 (2008).

keep and bear arms under a state constitution? It is well-known that states cannot contract or restrict incorporated rights past the scope of the federal constitution. But states can extend a greater right to its residents than that granted by the federal constitution. In the case where a state has adopted a constitutional provision to keep and bear arms, does the scope of this state right extend a further than the federal right, say, to the constitutional guarantee of the ability to keep and bear arms for the purpose of self defense on schools, government buildings, and campuses?

A. Nevada's Constitutional "Right to Bear Arms" Provision

Although the Second Amendment of the United States Constitution is widely-known, many forget that forty-four states, including Nevada, have similar "right to bear arms" provisions within their own constitutions.[53] The very fact that many of them have adopted provisions with language similar to that of the federal Second Amendment may tell us a few things. First, it may be that these states, especially those that adopted Second Amendment language verbatim, were trying to match the federal constitution's "right to bear arms" provision tit-for-tat in a pre-*McDonald* world. Second, there are instances in which the state's constitutional language is quite different than that offered by the Second Amendment. Does this mean that these states intended to grant a right with a different scope than that of the federal constitution? I suggest that the answer depends on the language.

Nevada's constitutional provision is one of those provisions that has "right to bear arms" language different from the Second Amendment. Article 1of the Nevada Constitution, entitled "Declaration of Rights," outlines many of the rights that are protected by the state constitution.[54] Section 11 of Article 1 states that "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes."

[53] David B. Kopel, *What State Constitutions Teach About The Second Amendment*, 847, (2002).
[54] Nev. CONST. Art. I. § 11(1).

Interestingly, this amendment was only approved and ratified by Nevadan citizens fairly recently, in the 1982 general election by a vote of 162,460 to 66,385.[55] A review of the legislative history of the constitutional provision, while not dispositive, does provide insight as to what those who drafted and passed the proposed amendment had in mind. According to the 1979 Summary of Legislation, the proposed amendment's purpose was to:

> … amend the Nevada constitution to guarantee citizens the right to keep and bear arms. Nevada is presently on of the 13 states with no constitutional provision guaranteeing the right to keep and bear arms. The resolution proposes an amendment that attempts to guarantee a right without creating any sort of protection for the use of firearms for an unlawful purpose. The purposes for which the right would be guaranteed are limited to security and defense, lawful hunters, and recreation and other lawful purposes. The proposed amendment is modeled on a provision of the New Mexico Constitution.[56]

Much of the debate centered on whether the language of the provision would grant convicted felons the right to keep and bear arms. Those sponsoring the bill assured the legislature that federal statutes already in place would make it illegal for felons to claim such a right under the Nevada constitution and that even if such claims were brought forth, other state courts throughout the nation had already held that the right to bear arms did not protect the right of ex-felons to do so, per long-standing traditions, current laws on the books, etc.[57] Yet, despite this concern, as well as several questions concerning the meaning of the phrase "unlawful purposes", there was no equivocation amongst the legislatures concerning the clear language of "for security and defense". It was well understood within the legislature that Nevada's constitutional right to bear arms was inseparably tied to the right to self-defense.

While the legislative intent is insightful, the more important question should focus on what the people of Nevada understood the right to bear arms to mean. Clearly, the right was also

[55] Nev. Const. Art. I. § 11(1); David B. Kopel, *What State Constitutions Teach About The Second Amendment*, 840, (2002).
[56] Nev. A. Jt. .Res. No. 6, 60st Sess. 1 (January 16, 1979).
[57] Nev. A. Jt. .Res. No. 6, 60st Sess. 3 (February 25, 1981).

understood by the people of Nevada to be explicitly tied to the right of self-defense. Within the ballot booklet, the proposed amendment appeared as Question No. 2, which, after reciting the specific language of the proposed amendment, asked the question "Shall the Nevada constitution be amended to confer a right upon private citizens to keep and bear arms for their defense and security and other lawful purposes?"[58] The explanation to Question No. 2 continued:

> This amendment, if approved, will add to the declaration of the rights of citizens of this state a specific provision for keeping and bearing arms for security and defense, lawful hunting and recreation, and other lawful purposes. *The legislature could not restrict the enumerated purposes, but could make others lawful*. Similar language in other state constitutions has not been interpreted by the courts to prevent prohibiting (1) the carrying of concealed weapons or (2) the possession of weapons by convicted felons.[59]

The average Nevadan who read this question at the voting booth would reasonably have understood that by voting in favor of the provision, the legislature would thenceforth be unable to restrict Nevadans' ability to keep and bear arms for the purpose of "security and defense" and that, at most, concealed weapons laws and possession of weapons by convicted felons would be the only restrictions they would face. Notably, bans and restrictions of firearms on universities and campuses did not exist at this time. NRS 202.265 wasn't passed until 1989, and was largely directed towards the growing gang violence in middle schools and high schools in Reno and Las Vegas.[60]

B. Nevada Case Law on "Right to Bear Arms"

Unsurprisingly due to Nevada's lack of an intermediate appellate court, Nevada has very few cases on the meaning of the "right to bear arms" under either the Second Amendment or Nevada's constitution. Only a few Nevada Supreme Court cases discussed the right directly, and

[58] Nev. A. Jt. .Res. No. 6, 60st Sess. (March 3, 1981). *Questions to Be Voted Upon in State of Nevada at General Election, November 2, 1982*. 5.
[59] *Id.* at 6 (emphasis added).
[60] Nev. A. B. 346, 65th Sess. 11 (June 5, 1989).

none involved discussion of the right to bear common arms, such as handguns, in restricted places. All of these cases were decided before the 1982 constitutional amendment, and therefore were decided by refusing to apply, the federal Second Amendment because it did not restrict state police power to place restrictions on firearms.[61] But it must be noted that these Nevada Supreme Court cases also mentioned in dicta that even should the states have power to apply the Second Amendment, under *Miller* they would hold that the right was a collective right,[62] clearly a misinterpretation of *Miller* now that *Heller* has clarified the Second Amendment guarantees an individual right.

C. Free Speech By Analogy

Because of the lack of relevant Nevada case law on the subject, it is unclear how a Nevada court would look the scope of the Nevada constitutional provision. But we may find some answers from a similar scenario that occurred with regards to the free speech provision in Nevada's state constitution. Article 1, Section 9 of the Nevada state constitution, similar to the First Amendment of the United States Constitution, also grants a free speech right which states:

> "Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for libels, the truth may be given in evidence to the Jury; and if it shall appear to the Jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted or exonerated."[63]

In *S.O.C., Inc. v. Mirage Casino-Hotel*, the Nevada Supreme Court held that free speech protections of the state constitution are coextensive to, *but no greater than*, those of the First Amendment to the United States Constitution. The issue in *Mirage Casino-Hotel* stemmed from S.O.C. distributing leaflets, flyers, and brochures advertising erotic services on the sidewalks

[61] *Harris v. State*, 83 Nev. 404, 407 (1967).
[62] *Id.*
[63] Nev. Const. Art. I. § 9

directly in front of one of the Mirage and Treasure Island casinos on the strip in Las Vegas.[64] Because Mirage Casino-Hotel owned two sections of sidewalk on which these leaflets were passed out, it filed suit against S.O.C. for trespass.[65] The court found that the First Amendment did not extend to governing private action against free speech, to which the defendant's, S.O.C. argued that the protections of Article 1, Section 9 of the Nevada Constitution should be interpreted more broadly than the protections of the First Amendment to the United States Constitution because to do so would grant Nevada residents greater protection to the type of speech at issue in the case, or that the Nevada constitution would prevent private parties from abridging free speech on their quasi-public property.[66] The court disagreed. It found that the language of the Nevada free speech provision had remained untouched since 1864, and that there was nothing from the Nevada Constitutional Convention that indicated the delegates wanted to "enlarge the scope of the protections of the speech clause beyond those afforded by the federal counterpart."[67] Additionally, the court looked at the other jurisdictions that had similar or identical language to that of Nevada's, finding that nearly all of them had "interpreted the free speech provisions of their constitutions as coextensive to, but no greater than, that of the First Amendment to the United States Constitution."[68]

But just because the court refused to expand the scope of one state constitutional provision does not mean that they should nor would automatically do so if presented with a similar question. First, Nevada's free speech provision is very similar to that of the First Amendment's provision in wording. The First Amendment of the United States Constitution reads: "Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise

[64] 117 Nev. 403, 406 (2001).
[65] *Id.*
[66] *Id.*
[67] *Id.* at 415.
[68] *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 415 (2001).

thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (emphasis added)."[69] Nevada's provision states that "every citizen may freely speak, write and publish his sentiments on all subjects…" and that "*no law shall be passed* to restrain *or abridge the liberty of speech or of the press*."[70] The operative clauses of each provision is practically the same, the major difference being that Nevada's provision replaces "freedom" with "liberty".[71] Textually, they are one and the same. Additionally, the court placed emphasis on the fact that Nevada's provision was adopted in 1864 and was left unchanged for the last 130 years or so.[72] This is significant because much of the meaning of the First Amendment was hammered out over a century of United States Supreme Court decisions, and apparently Nevada's Supreme Court assumed that had Nevadan's felt their state provision granted a different and more expansive right, that they would have made it clear since then via the amendment process. Additionally, the fact that other jurisdictions had made similar decisions with regards to their constitutions meant that deferring to the federal meaning of the right put them in good company. No state supreme court wants to become the red-headed step-child of the nation. Moreover, absent any clear difference or indication that the right should be expanded, it has been just simply easier for state supreme courts to follow, in lockstep, the decisions of the United States Supreme Court.

With regards to Nevada's "right to bear arms" provision, there are significant textual differences. Unlike the Second Amendment, which has a prefatory clause that states a purpose (i.e, "a well regulated militia being necessary to the security of a free state…") of the right, Nevada's provision has no such prefatory clause. But Nevada's provision still gives qualifying

[69] U.S. CONST. amend. I.
[70] Nev. CONST. Art. I. § 9 (emphasis added).
[71] *Id.*
[72] *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 415 (2001).

purposes for which the right exists. "Security and defense"[73] are the first stated purposes, followed by "lawful hunting", "recreational use", and "other lawful purposes."[74] It could be argued that "security" is similar to the "security of a free state" clause in the Second Amendment, and to that extent, Nevada's provision is simply a re-worded Second Amendment, deferring to whatever scope the United States Supreme Court determines the Second Amendment protects.

Alternatively, "security" could simply be a synonym of "defense". Either way, it would seem that these purposes are the most important, as they are listed first. But this analysis draws us no closer to the question of whether Nevada's constitution protects a greater right than the Second Amendment does, because the central theme in *Heller* was that the Second Amendment protects a right to self-defense as well.[75] It's unclear whether Nevada's Supreme Court would be inclined to expand the "right to bear arms" provision as being greater than that of the federal Constitution's, but I'm inclined to believe that it would not do so. While textually the two provisions are different, substantively they seem to state the same thing, just in different language. And even though the Second Amendment is just embarking on its 100 year journey that the First Amendment has already gone through, I can see the Nevada Supreme Court taking the easy way out, absent any other compelling evidence indicating Nevada's provision is greater.

D. The "Lockstep Doctrine":

When the Nevada Supreme Court held *S.O.C., Inc. v. Mirage Casino-Hotel* that the scope of Nevada's constitutional free speech provision is exactly equivalent to that of the federal Constitution, the court employed what is commonly known as the "lockstep doctrine". The United States Supreme Court has unambiguously held that state supreme courts may make

[73] Nev. CONST. Art. I. § 11(1).
[74] *Id.*
[75] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

decisions regarding the scope of state constitutional provisions that are analogous to federal constitutional provisions wholly independent from prior United States Supreme Court decisions.[76] And while the various state courts have taken different approaches towards interpreting their state constitutions, some have taken the view that they "should give 'primacy' to state constitutional guarantees, to provisions that should be construed 'independently' of decisions of the Supreme Court."[77] And yet others have taken the "lockstep doctrine" approach, wherein the court will simply defer to the United States Supreme Court's decisions, despite the fact that they are supposed to engage in an independent analysis of state constitutional provisions.[78] Professor Barry Latzer refers to this approach as engaging in "unreflective adoptionism."[79] Proponents of the "lockstep" approach rightly contend that argue that under a federal system such as ours, it is "difficult to tell where national identity ends and state identity begins".[80] Furthermore, while state courts should jealously maintain their independence, "there is little doubt that one of the grounds for state courts to 'choose to follow federal doctrine' is precisely the judicial conclusion that federal law adequately secures the liberty protected by the rights provision under consideration."[81] Yet, one problem with this "lockstep" approach is that not only does it potentially limit state constitutional provisions that were intended to be greater than federal constitutional provisions, but it also effectively negates the very purpose of federalism and separation of powers. Furthermore, it invariably relies on the questionable

[76] *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).
[77] Thomas B. McAffee, John P. Lukens, Thaddeus J. Yurek III, *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 Nev. L.J. 622, 639 (2008).
[78] *Id.*
[79] Barry Latzer, *New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 Rutgers L.J. 863, 864 (1991).
[80] James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 Wm. & Mary L. Rev. 1245, 1258, 1260 (2005).
[81] Thomas B. McAffee, John P. Lukens, Thaddeus J. Yurek III, *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 Nev. L.J. 622, 641 (2008).

premise that the United States Supreme Court always has the best answer and should therefore be followed.

Interestingly, Nevada courts have at times, employed both a "lockstep doctrine" approach as well as a "selective independence" approach. And thus far it is unclear when and where the courts will decide to use which. For example, the Nevada Supreme Court had traditionally followed in "lockstep" the decisions of the United States Supreme Court with regards to "construing the constitutional limitations to searches and seizures.[82] But in *Fletcher v. State*[83] and *Hughes v. State*[84], the courts suddenly asserted their independence and expanded the scope of privacy with regards to the automobile exception.[85] Yet within just a short time the Nevada Supreme Court once again fell into "lockstep" in *S.O.C., Inc. v. Mirage Casino-Hotel*, deciding that Nevada's constitutional free speech provision was the "mirror-image" of the federal constitution. Thus, whether Nevada courts will do likewise with the "right to bear arms" remains a mystery.

But, regardless of whether Nevada courts decide to march in "lockstep" with the United States Supreme Court, or whether they (correctly) make an independent analysis of Nevada's right to bear arms, the primary concern is that they do so from the "right to bear arms *for the purpose of self-defense*" perspective. Not only does *Heller* tie the right to bear arms with the right of self-defense, but Nevada's own constitutional provision textually and historically *demands* it.

[82] Thomas B. McAffee, John P. Lukens, Thaddeus J. Yurek III, *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 Nev. L.J. 622, 641 (2008).
[83] 990 P.2d 192 (Nev. 1999).
[84] 12 P.3d 948 (Nev. 2000).
[85] Thomas B. McAffee, John P. Lukens, Thaddeus J. Yurek III, *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 Nev. L.J. 622, 641 (2008).

III. How Should Nevada Courts Interpret The Scope of the Right?

Assuming that Nevada courts would construe Nevada's "right to bear arms" provision as being one and the same, we are left with the questions of how Nevadan courts will interpret the scope of the "right to bear arms" with respect to NRS 202.265 under the holding in *Heller*.

A. *Obiter Dictum*

NRS 202.265 on its face prohibits the possession of firearms on university and college campuses throughout Nevada, unless the president of the individual university or college grants written permission to carry a firearm.[86] In the author's personal experience and from anecdotal evidence gained from others who have requested permission from different university presidents throughout Nevada, requests for written permission are either simply ignored or summarily denied. Yet, Justice Scalia, in *Heller*, was quite deferential when he stated in dicta that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[87] At first glance, it would seem Justice Scalia's statement would completely foreclose an argument that a prohibition of firearms on a government campus is unconstitutional. But it must be noted that Justice Scalia's statement was made in *obiter dictum*, and although strongly persuasive, is not binding under the doctrine of *stare decisis*.

Obiter dictum, the Latin phrase for those statements in court opinions which are stated "by the way", do not constitute an integral part of a court's decision.[88] Opposite of *rationes decidendi*, which are essential components of an opinion's holding, *obiter dicta* are not the

[86] Nev. Rev. Stat. § 202.265 (2007).
[87] *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).
[88] Black's Law Dictionary, 967 (5th ed. 1979).

central subject of the decision.[89] This is not to say that they are not strongly persuasive. In fact, in many instances *obiter dicta* ends up influencing the outcome of future cases. The most famous example being the Footnote 4 in *United States v. Carolene Products Co.* which paved the way for the development of "fundamental right" analysis, strict scrutiny, and racial, religious, and sexual-discrimination cases.[90]

In the case at hand, *Heller*, the question presented before the court definitely did not include an examination of the history and scope of the Second Amendment as it applies to prohibitions of firearms in schools or government buildings. Instead, the question presented before the court merely examined whether a prohibition of handguns in the home was unconstitutional. The court found that it was, primarily because it so severely burdened an individual's right to self defense as to make the Second Amendment nugatory. Thus, although Justice Scalia's statement will undoubtedly carry a great deal of weight in future cases dealing with gun bans on campuses in the future, it does not technically bar the mounting of a future argument that such bans do, in fact, violate the Second Amendment. What will decide the scope and meaning of the Second Amendment, including what restrictions are permissible, will ultimately be the analytical framework courts choose to employ, because "how" courts get to where they are going is much more important than "what" they finally decide. And interestingly, should a court employ some of the very rationale that Justice Scalia used in deciding *Heller*, it very well may find itself reaching a much different conclusion about complete prohibitions of firearms on campuses and government buildings.

B. Professor Eugene Volokh's framework for analyzing "right to bear arms" restrictions

[89] Black's Law Dictionary, 967 (5th ed. 1979).
[90] *United States v. Carolene Products Co.*, 304 U.S. 144, footnote 4 (1938).

Because *Heller* does not set forth a clear test or analytical framework for courts to employ in determining the scope of the Second Amendment and what restrictions are permissible, we are dealing with uncharted territory. *Heller* left the field of "reasonable restrictions" wide open for courts to fill in the gap. And because *Heller* and *McDonald* are so recent, very little has been written on how courts should proceed in analyzing specific firearm restrictions.

The question remains as to how should a court go about doing so? A court could adopt a strict scrutiny test in which it would presume a gun restriction unconstitutional unless the government is able to provide a "compelling state interest" and that the restriction is "narrowly tailored" to meet that state interest. Additionally, the court could apply an intermediate scrutiny test. Because *Heller* found that the right to bear arms is a fundamental right, a mere rational basis test could not be implemented. Doing so would almost always result in a court finding the government entity's firearm restriction constitutional because it is easy to make the argument that because firearms are inherently dangerous and states have the responsibility to promote public safety, any form of regulation on firearms is rationally related to that purpose, even if that regulation effectively undermined the ability to bear firearms for the purpose of self defense. And *Heller* made it clear that firearms restrictions may reach the point of making that right substantially meaningless. So a rational basis test is likely out of the picture. Additionally, even Justice Scalia himself is not a fan of the unscientific randomness of the rational basis, intermediate scrutiny, and strict scrutiny tests.[91] To be sure, there is a great deal of skepticism when it comes to these three tests, as predictability of results is almost non-existent. Can courts be convinced to use a more in-depth analysis with respect to the scope of the Second Amendment right?

[91] *United States v. Virginia*, 518 U.S. 515, 567-568 (1996).

Eugene Volokh, professor of law at the UCLA School of Law in Los Angeles, a leading Second Amendment scholar, in response to the holding in *Heller*, examined the tests that courts should use in interpreting the scope of the Second Amendment right. He also invited others to consider and apply these principles to specific statutes and restrictions. Considering Professor Volokh's thoroughness in setting forth the different tests a court may use, there is no need to reinvent the wheel. What follows is a brief summary of the means by which courts can determine the scope of the Second Amendment "right to bear arms'. After setting forth Volokh's tests, this paper will apply each of these tests to NRS 202.265 in an attempt to see what the outcome would be under each scenario.

Volokh believes that tests to determine the constitutionality of statues such as "strict scrutiny", "intermediate scrutiny", and "rational basis" really don't work in the Second [92]Amendment analysis world.[93] He argues that this is mostly due to the fact that "strict scrutiny", "intermediate scrutiny" and "rational basis" tests really don't make sense in the other Constitutional rights analysis either.[94] Instead, Volokh presented 4 categories or tests that would justify the firearm restrictions and that presumably could be applied to all other Constitutional rights as well: 1) scope justifications, 2) burden justifications, 3) danger reduction justifications, and 4) government as proprietor justifications.[95]

One might ask why it is necessary for a court to distinguish scope-justified restrictions from burden-justified restrictions, or reducing-danger-justfied restrictions from government-as proprietor-justified restrictions. Volokh contends that it matters why a restriction is found to be

[92] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda,* 56 UCLA L. Rev. 1443 (2009).
[93] *Id.*
[94] *Id.*
[95] *Id.*

unconstitional.[96] The means to an end matters. In many instances, how a court arrives at a particular legal conclusion is much more important than the actual outcome or result because the rationale sets the precedent for other restrictions down the road.[97]

1) Scope Justifications

By "scope justification", Volokh explains that the validity of a particular firearm restriction may be determined solely by the "constitutional text, the original meaning of the text, the traditional understanding of what the text covers, or the background legal principles establishing who is entitled to various rights."[98] Meaning, justification of the restriction is either supported by textual, historical, and societal legal traditions, or it is not.

Volokh would have courts first look to the clear text. In many cases, the text of a provision is unequivocally clear, such as in Volokh's example of Connecticut's right to bear arms constitutional provision, which limits the right to bear arms to "citizens" only. So textually, non-citizens have no right.

Volokh would then have a court look to the original understanding of a constitutional provision where a pure textual reading is unclear. And while the merits of original meaning interpretation are beyond the scope of both Volokh's argument and the present article, laws typically should be interpreted as they were intended to be understood and applied. Of course the original meaning of a particular provision is not always clear in and of itself. Often a court must look to the traditions of society at the time, and Volokh agrees.[99] Although traditions are not dispositive, they do sometimes serve as evidence of original meaning.[100] In the words of Justice

[96] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1447 (2009).
[97] *Id.*
[98] *Id.* at 1446.
[99] *Id.* at 1450.
[100] *Id.*

Scalia, "[Traditions]… are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out."[101]

Finally, Volokh considers the background legal principles of a society as being important in determining "scope justifications". Other constitutional provisions, rights, and common law, all provide a diverse backdrop in which the analysis of a particular right should occur. For example, "the right to bear arms doesn't apply to possession of arms on private property against the property owner's wishes" as this would violate private property and trespass principles.[102]

2) Burden Justifications

In his explanation of "burden justification", Volokh acknowledges that no fundamental right is absolute (think of the several exceptions to free speech). Yet, there is a point at which a restriction so undermines or "burdens" a civilian's ability to exercise a right that the right loses any substance. Thus, under a "burden justification", a court would look at the degree to which a particular firearm restriction interferes with a rightholder's ability to enjoy the benefits of the right. The lesser the burden is, the more likelihood that the restriction doesn't rise to the level of "unconstitutionally 'infring[ing]' the right."[103]

Admittedly, under this regime, a court would have to develop a scale to determine just what the amount of permissive "burdening" of a right is. For example, according to Volokh a "mildly burdensome law would be presumed to be constitutional as long as it's not outright irrational."[104] He goes on to states that courts have utilized this approach in other constitutional tests such as the implementation of marriage licenses. There, the government is permitted to require people to obtain marriage licenses and charge them for the pleasure, because such

[101] *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 95-96 (1990) (Scalia, J., dissenting).
[102] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1451 (2009).
[103] *Id.* at 1446.
[104] *Id.* 1454.

restrictions do not infringe the right to marry. The burden is not a substantial burden.[105] Volokh provides another example in that states are allowed to pass statutes requiring women to be given certain information prior to having an abortion because such laws do not create a "substantial obstacle" to exercise the right of obtaining an abortion.[106] "Similarly, with restrictions on free speech we see the courts utilize a 'substantial burden' threshold in the lower scrutiny applied to content-neutral restrictions that regulate time, place, and manner of speech and leave open 'ample alternative channels' for expression"[107] Volokh argues that it is "the availability of ample alternative channels [that] makes the restrictions into lesser burdens than a broader ban would be."[108]

So how would this substantial burden analysis play out with regards to firearms restrictions? We have a prime example in *Heller* itself. The dissent in *Heller* argued that since the framing era firearm safety laws were quite burdensome, an outright ban on firearms was permissible.[109] Justice Scalia vehemently disagreed and utilized a substantial burden analysis in by arguing that the existence of some firearm regulations in the past, while representing a burden on the right to bear arms, did not "remotely burden the right of self-defense as much as an absolute ban on handguns."[110] Additionally, the Court in *Heller* used a material burden test in its analysis of the District of Colombia's handgun ban, stating that even though long guns were not

[105] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda,* 56 UCLA L. Rev. 1443, 1454 (2009).
[106] *Id.*
[107] *Id.* at 1454-1455.
[108] *Id.* at 1455.
[109] 554 U.S. 570, 631 (2008).
[110] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda,* 56 UCLA L. Rev. 1443, 1456 (2009).

banned the ban on handguns substantially burdened the right of self-defense because handguns were easiest to use and were the preferred method of self-defense.[111]

Volokh's larger point is that although the Supreme Court didn't come out and say just exactly what test or analysis courts should use in the future to determine the extent of the Second Amendment right, its very use of a substantial burden analysis demonstrates that the severity of a restriction's burden is important.[112]

Volokh does caution here, pointing out that in the past, some courts have utilized a burden analysis, but that it more closely resembles a simple question of "is this a reasonable restriction."[113] Because the reasonableness of a particular restriction is often in the eye of the beholder, and because many judges place a high degree of importance on respecting the legislature's duty and power to protect the public's health and safety, most restrictions (sans an outright ban) maybe found to be constitutional under this loose and undefined test.

But Volokh asserts that courts have often utilized a more explicit test which will find a restrictions constitutional unless they "materially burden" or result in "frustrating the purpose of the right to bear arms", which means the regulation or restriction cannot completely frustrate the ability people to defend themselves.[114] Volokh suggests that it may be helpful to analogize to the reasonable restrictions of time, place, and manner in the free speech right, in which the critical inquiry is whether an individual has "ample alternative channels" in which to exercise his fundamental right.[115] The fundamental right as described in *Heller* wasn't so much just a right to "bear arms" for the mere sake of bearing them. The fundamental right to bear arms was

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[111] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1456 (2009).
[112] *Id.*
[113] *Id.* at 1458.
[114] *Id.*
[115] *Id.* at 1455.

explicitly tied to the right of bearing them for individual self-defense. Thus, under a free speech analogy, where ample alternative channels to defend oneself using handguns (which "our society has deemed essential for the lawful purpose of self-defense")[116] are nonexistent, the logical conclusion must be that a restriction that substantially and materially burden an individual's ability to defend themselves through the use of handguns should be struck down.

Is this burden justification analysis a good test for determining what restrictions on firearms are constitutional? Volokh sees several disadvantages with this test. First, people will most definitely disagree at which point a burden becomes substantial.[117] Yet, although this test most definitely employs a degree of subjectivity, it would seem that this would be a much better test than trying to arbitrarily determine what is "reasonable" and what is not. Such a purely subjective test would likely lead to largely unpredictable results. And given that we are talking about the right to carry tools that a large portion of society does not understand and therefore fears, judges would often just assume that most regulations are reasonable. Yet, this could substantially hinder a peoples' ability to defend themselves. Moreover, people may disagree in how to establish empirically just how much a particular restriction may burden an individual.[118] Volokh's response is that it would be easier than people think. For example, courts could easily consider a realistic and probable self-defense scenario and ask how it would play out under the regulatory scheme in question.[119] If it seems that the restriction would substantially impair or burden the individual's ability to protect himself, that would be much more predictable than a particular judge's arbitrary assumption of what is reasonable. Finally, there exists the possibility of a "death by a thousand cuts". Volokh worries that legislature's could impose many "small,

[116] *District of Columbia v. Heller*, 554 U.S. 570, 571 (2008).
[117] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1459 (2009).
[118] *Id.*
[119] *Id.* at 1460..

less-than substantial burdens [that] will aggregate into a substantial burden."[120] To avoid such a scenario, courts would have to look at the complete picture in order to determine whether there remain "ample channels for self-defense that are as good as those that would have been offered without the regulation."[121]

3) Danger Reduction Justifications

Volokh also explains that another justification for placing certain restrictions on rights is that the restriction may mitigate certain dangers to society to the degree that even a substantial burden on a particular right is justified and therefore, is constitutional.[122] And it is in this category of justification "tests" that Volokh believes talk of "strict scrutiny" and "intermediate scrutiny" comes in to play, as both tests necessarily look at compelling and important government interests. In a firearm restriction scenario the government has an interest in public health and safety, and courts might determine whether the restriction is narrowly tailored to meet that interest.[123]

When a court opts to utilize a danger-reduction justification analysis, it is implicitly acknowledging that there may or may not be a substantial burden on a right, but it really doesn't matter to the court. All that matters is that the burden "significantly reduces some kind of grave danger."[124] Because of this danger-reduction justification, the government must only show that the restriction is necessary to serve a compelling government interest, or that the restriction is substantially related to an important government interest.[125]

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[120] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1460 (2009).
[121] *Id.*
[122] *Id.* at 1460-1461.
[123] *Id.* at 1461.
[124] *Id.*
[125] *Id.*

But Volokh contends that the real inquiry should be as to "whether and when a right may be substantially burdened in order to materially reduce the danger flowing from the exercise of the right, and into what sort of proof must be given to show that the substantial restriction will indeed reduce the danger."[126] Furthermore, in some situations, a restriction may meet the unconstitutional threshold even when it seems likely to substantially reduce some grave danger.[127] Volokh points to the right to a criminal jury, right to counsel, and free speech rights that are protected from restrictions even the face of grave danger. These restrictions violate what Volokh refers to as the "per se" rule, when restrictions are especially severe burdens on a right, even if they restrict some grave danger, because to uphold such restrictions would be to gut the very substance of the right.[128]

Volokh believes that *Heller* adopted a rule of per se invalidation of such harsh restrictions by finding the ban unconstitutional.[129] Quoting Justice Scalia, Volokh emphasizes the fact that the very "enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."[130] But this test seems, unwittingly, to take us right back to a substantial burden test, in that certain restrictions are so burdensome on their face that no substantive right would really remain if it is upheld.

As mentioned, it is within this danger-reducing justification that Volokh believes strict and intermediate scrutiny analysis truly lies.[131] According to Volokh, under a strict scrutiny

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[126] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda,* 56 UCLA L. Rev. 1443, 1461 (2009).
[127] *Id.* at 1462.
[128] *Id.*
[129] *Id.*
[130] *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).
[131] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda,* 56 UCLA L. Rev. 1443, 1446 (2009).

analysis "rights may indeed be substantially burdened… so long as the burden is genuinely necessary to serve a compelling government interest."[132] The key inquiry is whether there exists other, less restrictive means to serve the compelling interest equally as well. If such alternative means exist, then the more restrictive means would be completely unnecessary, and therefore unconstitutional. Conversely, where the more restrictive means is absolutely the only method to meet the compelling state interest, then it will be held to be constitutional.[133]

And according to Volokh, herein lies the problem with a strict scrutiny analysis. It is very difficult to know for sure if a particular restriction on firearms is absolutely necessary to meet the government interest, which is usually crime reduction and injuries resulting from firearms.[134] This really an empirical one, and people on both sides of the debate simply disagree about whether gun control laws actually reduce injury and crime.[135] Those supporting gun bans always argue that taking guns out of the hands of citizens prevents crime, and that average citizens using guns in self-defense is less effective than measures that stop criminals from obtaining firearms in the first place.[136] Opponents of gun restrictions, such as myself, argue that restrictions, bans, and prohibitions really don't disarm those who actually misuse guns, a prime example being the numerous mass shootings in supposed "gun free zones." And if gun restrictions were actually proven to prevent some injuries or crime, opponents of gun control argue that these benefits are immediately offset by the "lost opportunities for effective self-defense" by lawful citizens.[137]

Given the unending empirical battle over the effectiveness of firearm restrictions, Volokh observes that the application of strict scrutiny will necessarily turn on how courts decide to

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[132] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1464 (2009).
[133] *Id.*
[134] *Id.* at 1465.
[135] *Id.*
[136] *Id.*
[137] *Id.*

approach the evidence presented in support of danger reduction justifications.[138] One option is that courts could implement would be to require a level of "substantial scientific proof" that shows a particular restriction will actually reduce crime and injury and that no other means exists to accomplish the same goal.[139] Another approach courts could take to apply strict scrutiny would be to only require a "logically plausible theory of danger reduction that many reasonable people believe."[140] Yet, the latter test would seem destined to find almost any restriction constitutional, including a complete ban on all guns, because many people believe that gun bans would result in danger reduction. As Volokh points out, this type of strict scrutiny would be no different than a rational basis test.[141] Finally, Volokh believes that courts could resort to relying on their own "common sense judgments" as to when a restriction will "likely reduce danger".[142]

a. Intermediate Scrutiny

As far as an intermediate scrutiny analysis goes, Volokh believes that it would face the same difficulties that strict scrutiny faces.[143] An intermediate scrutiny test differs in two ways, in that it allows government entities to restrict constitutional rights that "serve merely important and not compelling government interests."[144] But according to Volokh, this is irrelevant because laws restricting firearms are always considered compelling because they attempt to prevent crime and injury.[145] Additionally, intermediate scrutiny allows restrictions on rights that are "merely substantially related to the government interest rather than narrowly tailored".[146] So while these

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[138] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1467 (2009).
[139] *Id.*
[140] *Id.* at 1468.
[141] *Id.*
[142] *Id.* at 1469.
[143] *Id.* at 1470.
[144] *Id.*
[145] *Id.*
[146] *Id.*

differences do make it easier for a government entity to justify certain restrictions, Volokh's point is that these differences still run into the empirical difficulties of proof. Data may be unavailable, inconclusive, or unpersuasive.[147]

b. Different Levels of Danger-Reduction Showings for Different Levels of Burden

Yet courts may still wish to operate under the heightened scrutiny analysis, despite the inherent difficulties in doing so. Volokh suggests that in this case, restrictions which create a substantial or severe burden should be analyzed under a strict scrutiny test, and that restrictions which create only a modest burden should be analyzed under an intermediate scrutiny test. Alternatively, the court could adopt a *Casey*-like undue burden test, under which substantial burdens would be struck down but less-than substantial burdens are upheld.[148] Volokh also suggests that courts could decide cases in which substantial burdens are struck down but less-than-substantial burdens are still evaluated under a mild form of intermediate scrutiny, or that courts could use a test in which "very serious burdens are categorically struck down, substantial but less serious burdens are evaluated under some demanding form of strict scrutiny."[149] Finally, a court could adopt some other mix.[150]

4) Government as Proprietor Justifications

Finally, Volokh argues that analysis of other constitutional rights (such as free speech rights) indicates that government entities sometimes have "special power stemming from its authority as proprietor, employer, or subsidizer to control behavior on its property or behavior by

[147] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda,* 56 UCLA L. Rev. 1443, 1470 (2009).
[148] *Id.* at 1471-1472.
[149] *Id.* at 1472.
[150] *Id.*

recipients of its property."[151] This power to restrict is unique in that the government is not acting as a sovereign, such as "outlawing, taxing, or imposing liability on private citizens' behavior".[152] Volokh uses the example of free speech rights, in which a government entity may not imprison an individual for wearing a jacket imprinted with vulgarity, but still retains the power to fire the individual as an employer, or it can prohibit the jacket in "nonpublic forum" areas and property.[153] He goes on to explain that many of these restrictions are best explained by the rationale that especially severe restrictions are okay when the government is acting in a different role, that as proprietor, instead of sovereign even though it is the same government interest in question.[154] Essentially, it depends on how the government frames its position. But Volokh is quick to point out that contrarily even some restraints on this proprietorship power should be proper, "since people's need for self-defense can remain even on government property".[155] And this is what should distinguish an analysis concerning government-as-proprietor restrictions on the right bear arms verses government-as-proprietor restricting free speech. While similar in many aspects, this ultimately leads us back to a substantial burden analysis. Restricting time, place, and manner of speech does restrict a right. But alternative means exist for citizens to get their message out. They can move across the street. Or they can utilize a different medium, etc. Additionally, the harm occurring from the restriction is very minor. Perhaps there is a delay in the message being delivered, or some small inconvenience in having to move locations. It is hard to imagine serious bodily injury, harm, or death resulting in the permitted restrictions on freedom of speech. Yet that is the very harm that can result from restricting an individual's ability to bear

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[151] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1474 (2009).
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*

arms in the place that they are at. Furthermore, it is a well established rule that private proprietors can rightfully restrict the possession of firearms on their property. For example, a Stanford or Brigham Young University can lawfully exercise their private property rights by banning all firearms on campus because they are private entities. While government may assert a similar claim of being a "private proprietor", it isn't directly analogous for the following reason: government is owned and run "by the people", at least conceptually. And while private proprietors, in many cases, assume liability for the safety of those invited on the premises, government should be required to do so as well.

C. Volokh's suggested analysis for certain kinds of bans

In addition to Volokh's articulation of the four aforementioned justifications for restricting or limiting constitutional rights, he then looked at seven categories of common firearm restrictions and analyzes the "constitutional thresholds" that justifications for the restrictions must meet.[156] Volokh's categories include restrictions on "what" firearms citizens can possess, "who" restrictions limited those who can possess them, "where" restrictions such as bans on carrying on university and campus campuses, "how" restrictions that limit the method of storing or carrying firearms, "when" restrictions such as waiting periods imposed on newly purchased firearms, "who knows" regulations that require licensing and registration, and finally "taxes and other expenses" that laws impose on gun owners.[157] As our Nevada statute in question primarily involves a restriction on *where* firearms can be lawfully possessed, we will only examine Volokh's suggestions with regard to "where" restrictions under the four justification rationales.

1. "Where" Bans: Prohibition on Possession in Certain Places

[156] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443 (2009).
[157] *Id.*

One of the most common restrictions on the "right to bear arms" is a law that prohibits the possession of firearms in established locations. Volokh's opinion is that these laws are lesser burdens than total bans on possession of firearms are (such as the Chicago and D.C. bans) because they don't prevent possession of firearms in the home.[158] Yet, they still burden the right because individuals are barred from protecting themselves in the prohibited places- "places where they have a right to be and often have a practical need to be in".[159] Volokh explains that individuals' ability to defend themselves from deadly attack in the home is "no substitute for their ability to protect themselves where they are."[160] The key to this analysis is alternative means. Do individuals have alternative means to exercise the Second Amendment right?[161] By prohibiting firearms in a particular location, the answer is, of course, no. Volokh analogizes the Second Amendment to the right of free speech rights, where although banning speech in one location presents a burden, it is only a small burden as the individual has other channels in which to get his message out by moving to another place.[162] But Volokh is correct, I believe, in his assessment that self-defense must take place "wherever the person happens to be."[163]

2. Bans on all gun carrying

The holding in *Heller* reasoned that historically, courts have permitted bans on concealed carry of firearms and that because of this long-standing tradition, the Court must consider them as being constitutional restrictions.[164] Volokh rightfully points out that while it is true that there is a long-standing tradition of upholding concealed carry laws, it is not the case about total bans

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[158] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*

on carrying firearms in public.[165] *Heller* held that the "right to keep and bear arms" included more than just the right to have a firearm in the home, locked in storage, but that it meant an individual should be able to actually carry it in other places.[166] Volokh points out that this makes sense, as individuals are often in more need of the ability to defend themselves outside their homes from criminals, as statistically most violent crimes against individuals occur outside of the home rather than inside the home.[167] Thus, an outright prohibition of carrying weapons outside the home, "especially in places that one practically needs to frequent, such as the streets on the way to work or to buy groceries, is a serious burden on the right, more so than the ban on handgun possession struck down in *Heller* (which would have at least left open some possibilities of self-defense with shotguns or rifles).[168] Volokh goes on to question whether bans on carrying is justified by a danger-reduction argument such that the limiting the means and ability of self-defense is worth the cost.[169] Bans on carrying firearms in general strips individuals of the very tools that are best used in self-defense scenarios and appears to be an "unacceptable burden on a constitutionally protected right, even if one in principle accepts some power to substantially burden self-defense in order to reduce danger of crime or injury."[170]

D. Is NRS 202.265 a permissible restriction on the "right to bear arms"?

Should a the Nevada Supreme Court exercise their right and duty to independently construe Nevada's constitutional provisions, it very well may find that Nevada's right to bear arms protects a greater right than the federal Constitution does and that NRS 202.265 may

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[165] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1516 (2009).
[166] *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).
[167] Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1518 (2009).
[168] *Id.*
[169] *Id.* at 1519.
[170] *Id.* at 1520.

violated that right. First, the very text of Nevada's provision enumerates the purpose of "security and defense" for which the right to bear arms exists. When the amendment was ratified by the people, the explanation on the ballot sheet clearly stated that the legislature would be unable to restrict any of the enumerated rights listed within the provision, with the only caveats being that courts in other states have construed such language to mean that convicted felons could be restricted from firearm ownership and that concealed carry laws could be regulated. Second, the fact that the NRS 202.265 was not in existence at the time only furthers the proposition that the average Nevadan had no such ban in mind when ratifying the provision, so such bans could not have possibly been part of the "agreement" or scope of the provision when ratified. Should the Nevada courts reject this originalist analysis, they must still consider the strong textual clauses that reference the enumerated purposes for which the right to bear arms exists: security and self-defense.

Professor Volokh's article outlined the framework of permissible regulations of the "right to bear arms" and how government entities can legitimately justify them according to the holding in *Heller*. Additionally, Volokh invites additional research and application of these principles to specific statutes to test his observations. NRS 202.265 bans the possession and carrying of all firearms on university campuses in Nevada, except by law enforcement officers and security guards. Although the statute grants the university president authority to give written permission to individuals to carry, in practice requests for permission are simply ignored or denied. Under a scope justification, a court would have to look at the history of complete bans on firearms in specific locations, particularly in Nevada. This is because a purely textual analysis would foreclose *any* restriction on the right to bear arms. Should a court find a strong historical record

of allowing such a ban to exist, it would give greater strength to the justification that such a ban is indeed constitutional.

Courts would be well advised to use a burden analysis to test the constitutionality of NRS 202.265. Under this analysis, the court would look to see whether the complete ban on firearms on university campuses reaches the level of so burdening an individual's ability o exercise the right to bear arms, that the right loses its substance. The statute at hand seems to do so. Individuals who are already qualified and authorized to carry firearms, either concealed or in an open-carry manner, can do so in a myriad of public places, such as parks, sidewalks, shopping centers, malls, movie theaters, etc. Many do this for the purpose of being prepared to defend themselves should the need arise. Yet, as soon as they step foot on a university campus (which many individuals must do on a daily basis for work or to further their education), they must leave their best means for self-defense at home. Thus NRS 202.265 places a very severe burden and interference on an individual's ability, to exercise his Second Amendment rights. Even though the law permits them to carry firearms elsewhere, the substance of the right is the ability to defend oneself *where that person actually is*, not just where one may alternatively go.

Should an individual successfully convince a court to solely undertake a burden analysis, it would seem that a court would necessarily have to reach the conclusion that NRS 202.265 is an impermissible restriction on the right to bear arms, at least as it is applied. Despite Justice Scalia's dicta concerning schools, there is nothing so unique or "sensitive" about a university campus that should give it special consideration with regards to the ability to carry. All of Nevadan universities are open campuses, meaning that individuals may freely enter or leave the campus, without entering through security check points where backpacks, purses, and individuals can be checked for firearms. For all intents and purposes, a university is no different than a

shopping mall or movie theater where individuals are not stripped of their ability to legally carry firearms for the purpose of self-defense. Purely utilizing this burden analysis and ignoring Justice Scalia's *obiter dictum* (which a court is perfectly free to do) concerning schools, it would be difficult to reach the conclusion that NRS 202.265 does not substantially burden an individual's "right to bear arms" for self-defense.

Courts are likely to employ a danger reduction analysis, under which strict scrutiny, intermediate scrutiny, and rational basis would fall. As discussed early, rational basis would probably not be used as *Heller* did find that the Second Amendment right is fundamental. Instead, a heightened scrutiny analysis would likely be employed where the government would argue that Nevada has a compelling state interest to prevent crime and firearm-related injuries on Nevadan university and college campuses. Again, if a court could look solely at the holding in *Heller* and ignore Justice Scalia's deferential dicta concerning schools, NRS 202.265 could be held to be an impermissible restriction on the "right to bear arms." To meet the strict scrutiny standard, then the law must be narrowly tailored to meet that end, with no alternative means existing to do so. For many of the above stated reasons, there is much empirical data indicating that such complete bans of firearms on campus will not actually reduce crime and injury. One forgotten fact is that proponents of concealed carry on campus are not arguing to expand the "who-can-carry" category, but are only concerned with the "where-I-can-carry" category. Given that there is little difference between a university setting and any other public setting, the same 28 year old law student who can carry a firearm everywhere else does not increase the danger-level by carrying a firearm while he is on campus. Thus the argument that firearms should not be allowed on campus logically must conclude that *nobody* should be able to carry firearms at all, which we know would not pass constitutional muster under *Heller*.

Finally, under a government-as-proprietor analysis, it is unclear where NRS 202.265 would fall. Is there something unique and special about a public building that either permits or forbids government from banning firearms? This becomes even more interesting when you consider other fundamental rights and their place in the public setting. It is undisputed that private universities are free to restrict the possession of firearms on their campuses for whatever reason. Is it too a stretch to hypothesis that public universities may do the same, if, for any reason, to protect its students, staff, and teachers under a government-as-proprietor argument? I would think not. Private universities and entities are different animals altogether. Whereas private universities are governed under traditional private property laws, government is beholden to a higher standard. It is, after all, conceptually owned by "we the people". Within the free speech analogy, even private and public proprietors are treated differently. Private entities may restrict speech far more than government entities. It would seem that it would be similar with bans on firearms on public campuses. Where private universities can place greater restrictions on firearms, public universities may not. One might ask about other public buildings. Must airports, and court houses now allow the concealed carry of firearms? Not necessarily. Especially if the right to carry is tied to the ability to defend oneself. Public buildings such as airports and courts do severely restrict the right to bear arms. But the key here is that they enforce their bans. Where the right to bear arms is significantly diminished, armed security guards, metal detectors, x-ray machines, etc. counter any loss in the ability to defend oneself. And while these safeguards are still no guarantee of safety (people are still killed by weapons in prisons), the risk is so substantially lowered to the point of perhaps justifying the ban. The "alternative means" to defend oneself exist in the increase in security. Open campuses and universities lack these measures. Additionally, in many instances private entities are liable for the safety and well-being

of those legitimately on their premises, with remedies available to potential victims for failure to provide adequate security. This begs the question of whether government is similarly liable for the safety of those legitimately on government premises while government claims authority as "proprietor" in lieu of "sovereign", and thus sovereign immunity.

Conclusion

Ultimately, the meaning of the "right to bear arms" in Nevada hinges on how the courts decide to approach the subject. A court's analysis under any of the aforementioned tests could yield different outcomes. It really does matter *how* a court goes about deciding a case as much as what the ultimate decision is. Based upon all the foregoing, it would seem that NRS 202.265 would likely be held to a permissible restriction on the right to bear arms. Nevada courts probably would find that Nevada's constitution does not grant a greater right than that which the Second Amendment grants. Additionally, dicta carries a lot of weight in future cases. Judges don't want to be overturned, and therefore may be reluctant to look solely at the holding in *Heller*, and may simply apply Justice Scalia's *obiter dictum* with regards to restrictions and prohibitions on the possession of firearms in schools. But should a court brave the tide and simply apply a burden analysis (which even *Heller* applied) or a even a danger reduction analysis, there is a possibility that NRS 202.265 could be found to be unconstitutional in that it severely burdens individuals' ability to defend themselves and it is not narrowly tailored enough to survive strict scrutiny.