

# Fordham Urban Law Journal

---

Volume 39

Number 5 Symposium - Gun Control and the Second Amendment: Development and Controversies in the Wake of *District of Columbia v. Heller* and *McDonald v. Chicago*

Article 4

---

March 2016

## The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms

Michael B. de Leeuw

*Fried, Frank, Harris, Shriver & Jacobson LLP*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Jurisprudence Commons](#), [Legal History Commons](#), [Second Amendment Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 Fordham Urb. L.J. 1449 (2012).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss5/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## THE (NEW) NEW JUDICIAL FEDERALISM: STATE CONSTITUTIONS AND THE PROTECTION OF THE INDIVIDUAL RIGHT TO BEAR ARMS

*Michael B. de Leeuw\**

Introduction .....	1450
I. A Fine Mess: The Post- <i>Heller/McDonald</i> World .....	1451
A. What Is the Scope of the Second Amendment Post- <i>Heller?</i> .....	1455
B. Uncertainty Regarding the Scope of the Second Amendment Is Disappointing Whether One Is Pro-Gun Rights or Pro-Gun Control .....	1464
C. <i>Heller</i> and <i>McDonald</i> Have Left Open Many More Questions Than They Have Answered.....	1467
1. What Is the Proper Standard of Review for Gun Control Laws?.....	1467
2. Which Laws, if Any, Limiting Gun Rights Are Constitutional? .....	1469
II. Can State Constitutions Offer Better Clarity About Gun Rights? .....	1474
A. State Constitutions and the Right to Keep and Bear Arms .....	1476
B. What Would a Particularly Pro-Gun Rights State Constitutional Provision Look Like?.....	1479

---

\* Partner, Fried, Frank, Harris, Shriver & Jacobson LLP. I owe a debt of gratitude to Jesse Ryan Loffler and David S. Yellin, two Fried Frank associates and scholars, for their excellent work and creativity on this project. I thank Kimberly Carson, who deserves significant credit for her tireless and terrific work putting together the Symposium and keeping everyone on schedule (and for allowing a practitioner to participate on such a distinguished panel of experts). I also thank my co-panelists, Nelson Lund, David Kopel, and Adam Winkler, each of whom offered distinct and important voices on the topic of the scope of Second Amendment rights. Lastly, I would like to thank and remember my dear, departed friend Jeffrey D. Sullivan with whom I had endless enlightening debates on the Second Amendment (and every other topic under the sun); he will be greatly missed.

1450	<i>FORDHAM URB. L.J.</i>	[Vol. XXXIX
	C. Potential Sources of Federal Law that Could Counteract State Constitutional Provisions.....	1494
	D. Current Federal Laws that Would Limit the Ability for a State to Grant Broad Gun Rights Through Its State Constitution .....	1497
	E. If a State Did Amend Its Constitution, What Deference Would Other States Have to Pay to Constitutional Provisions of Sister States on, E.g., Carry Laws? .....	1501
	Conclusion.....	1502

### INTRODUCTION

Although the Supreme Court's decisions in *District of Columbia v. Heller*<sup>1</sup> and *McDonald v. City of Chicago*<sup>2</sup> were hailed as watershed moments for the gun rights movement as they resolved two major uncertainties, these cases also created scores of additional important questions regarding the scope of the protections that the Second Amendment affords. No one currently has any firm idea about *who* the Second Amendment protects, *what* the Second Amendment protects, *where* those protections exist, and—to the extent that they do exist—*why* they exist. Without question, we are at the very beginning of Second Amendment jurisprudence; the precise rights guaranteed by the Second Amendment will be debated, litigated, appealed, interpreted, re-debated, re-litigated and re-appealed for the next generation. There likely will be important Supreme Court opinions written on the Second Amendment by Justices who currently are still in high school, choosing prom dresses, or learning how to drive.

In the face of this uncertainty, an old idea, formerly championed by quite a different side of the political spectrum, may be of some use to the pro gun lobby in its desire to expand—or at least define the scope of—gun rights. A consequence of *Heller's* holding that the right to bear arms is an individual as opposed to a collective right is that state constitutions can at least theoretically confer greater protections of individual gun rights than the federal Constitution—though state constitutions cannot go below the guarantees afforded by the Second Amendment.<sup>3</sup> The idea that the federal Constitution creates a floor

---

1. 554 U.S. 570 (2008).

2. 130 S. Ct. 3020 (2010).

3. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (“Our reasoning . . . does not . . . limit the authority of the State to exercise its police power or its sovereign

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1451

but not a ceiling for individual rights was called “the new judicial federalism” when it took root in the mid-twentieth century.<sup>4</sup>

This Article, which is based on my portion of the panel discussion at the *Fordham Urban Law Journal* Symposium on Gun Control and the Second Amendment on March 9, 2012, begins with an overview of the post-*Heller/McDonald* world, arguing that there is no consensus on what rights the Second Amendment confers and analyzing the possible scopes of the Second Amendment. The second part of this Article examines the new judicial federalism to see if there is any potential for state constitutions to define, in a more substantial way, which rights are conferred by state constitutional gun rights provisions; and examines how, in the face of the Supremacy Clause, a state could confer greater individual gun rights than the federal Constitution.

### I. A FINE MESS: THE POST-*HELLER/MCDONALD* WORLD

Although the Supreme Court’s ruling in *Heller* has been analyzed ad nauseam in the popular press, in law review articles, and by the lower courts,<sup>5</sup> there are a few key points that bear repeating. First, although *Heller* is, and will remain, the lodestar for Second Amendment jurisprudence, the Court in essence decided one—and only one—major issue: it determined that the right to keep and bear arms is an individual—not a collective—right. Beyond that, the Court did little to delineate the scope of that individual right to bear arms.

---

right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

4. See, e.g., Ken Gormley, *The Silver Anniversary of New Judicial Federalism*, 66 ALB. L. REV. 797 (2003).

5. See, e.g., *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (considering the new District of Columbia regulatory scheme for firearms under *Heller*); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) (offering an extensive analysis of *Heller*, and upholding a ban on firearms in federal parklands, without deciding whether such parklands are “sensitive places” under *Heller*); *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011) (upholding the federal ban on felons in possession following an analysis of *Heller*’s dicta); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010) (upholding a federal ban on firearm possession by individuals convicted of domestic violence misdemeanors, based on analysis of *Heller* and analysis of the history behind felon and misdemeanant possession laws); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (upholding federal law against possession of handguns with obliterated serial numbers, noting “we cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms”).

In reaching the conclusion that the Second Amendment's right to keep and bear arms is an individual right, Justice Scalia attempts to chart the purpose and "core" of the Second Amendment. The opinion, at the outset, analyzes the use of the term "the people" in the Second Amendment and concludes that its use leads to the "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."<sup>6</sup> The opinion gradually buttresses this conclusion with additional historical evidence, including analogous state provisions,<sup>7</sup> drafting history,<sup>8</sup> and various post-ratification sources.<sup>9</sup>

In attempting to determine the "core" of the Second Amendment, Justice Scalia engages in a classic process of selective<sup>10</sup> reasoning. Starting with his "strong presumption that the Second Amendment right is exercised individually,"<sup>11</sup> he then concludes that "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."<sup>12</sup> The opinion then states that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons,'" and that certain historical sources support the idea that keeping arms was meant to be "an individual right unconnected with militia service,"<sup>13</sup> and that in other historical sources "'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia."<sup>14</sup>

Taken together, Justice Scalia concludes that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."<sup>15</sup> In a pivotal passage of the opinion, Justice Scalia writes, "the inherent right of self-defense has

---

6. *Heller*, 554 U.S. at 581.

7. *See id.* at 600–03.

8. *See id.* at 603–05.

9. *See id.* at 605–19.

10. As opposed to deductive or inductive reasoning.

11. *Heller*, 554 U.S. at 581. It is perhaps worth noting that defining the Second Amendment right as a "right of the people" may, *a fortiori*, lead to the conclusion that it is not limited only to "Americans." *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment did not apply to an alien outside of the United States, but acknowledging that "the people" refers to persons who are part of a "national community" but need not necessarily be citizens).

12. *Heller*, 554 U.S. at 582.

13. *Id.*

14. *Id.* at 584.

15. *Id.* at 592.

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1453

been central to the Second Amendment right.”<sup>16</sup> In this light, the District of Columbia’s prohibitions never stood a chance, as they “extend[ed], moreover, to the home, where the need for defense of self, family, and property is most acute.”<sup>17</sup> The opinion concludes that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ [*i.e.*, a handgun] would fail constitutional muster.”<sup>18</sup>

Justice Scalia takes this point even further, stating that because “handguns are the most popular weapon chosen by Americans for self-defense in the home, . . . a complete prohibition of their use is invalid.”<sup>19</sup> Putting aside (for the moment) the selective historical analysis and the fact that handguns were not in popular use in the founding era and would have been radically impractical as instruments for defending homes and families, the holding in the *Heller* case is actually quite narrow:

[T]he District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. 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.<sup>20</sup>

The majority reasons that, because the District of Columbia prevented Dick Heller from having an operable handgun *in his home* for the *purposes of self-defense*, it violated the Second Amendment. But this assessment says very little about what the Second Amendment actually means; it only defines one extreme case on the margins.<sup>21</sup> In fact, the *Heller* Court makes clear that even this narrow holding is not a complete and correct statement of the law. Rather,

---

16. *Id.* at 628.

17. *Id.*

18. *Id.* at 628–29 (footnote and citation omitted). Note that, although the opinion makes clear that the District’s handgun ban would fail under any standard of scrutiny, it does not say which standard is appropriate.

19. *Id.* at 629.

20. *Id.* at 635.

21. *But cf.* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (“[I]n [*Heller*], we held that the Second Amendment protects the right to keep and bear arms for the purpose of self defense . . .”).

the majority opinion excludes at least two areas from even this “core” Second Amendment coverage:

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.<sup>22</sup>

This statement is, itself, problematic. For example, bans on possession by convicted felons did not come into existence until the twentieth century and are therefore not clearly long-standing.<sup>23</sup> Indeed, as my distinguished co-panelist Nelson Lund has noted, Justice Scalia throws out this statement almost as an afterthought, without giving any real consideration to which of these “long-standing” restrictions should actually be permitted under the Second Amendment.<sup>24</sup>

Second, following the precedent in *United States v. Miller*,<sup>25</sup> the Court reaffirmed that prohibitions on “dangerous and unusual” weapons are permitted.<sup>26</sup> Justice Scalia admits that this seems to be a significant departure from the Second Amendment as the Framers likely conceived it, insofar as it was believed to enable “the body of all citizens capable of military service . . . [to] bring the sorts of lawful weapons that they possessed at home to militia duty.”<sup>27</sup>

---

22. *Heller*, 554 U.S. at 626–27.

23. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (citing C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 708 (2009)). In fact, the first time a ban on all “felons” possessing firearms arose only in 1961, when Congress amended the Federal Firearms Act of 1938. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009). The 1961 amendment forbade felons from receiving any firearm in interstate commerce, and in 1968, Congress extended the prohibition to include “any firearm that ever had traveled in interstate commerce.” *Id.* It is interesting to note that “longstanding” restrictions from 1961 are honored, while the District’s handgun ban—enacted only 14 years later—was not.

24. See, e.g., Nelson Lund, *Two Faces of Judicial Restraint (or Are There More?) in McDonald v. City of Chicago*, 63 FLA. L. REV. 487, 501–05 (2011).

25. 307 U.S. 174 (1939).

26. *Heller*, 554 U.S. at 627.

27. *Id.* It also bears mention that these limitations were lifted by Justice Alito’s plurality opinion in *McDonald*, and therefore should apply in equal force to the states. However, because Justice Alito did little more than echo the limitations on the Second Amendment that were listed in *Heller*, *McDonald* does not require independent consideration on these issues. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion) (noting that the Second Amendment does not protect “a right to keep and carry any weapon whatsoever in any manner

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1455

In fact, by upholding the *Miller* rule, Justice Scalia exposes a fundamental weakness in the Court's reasoning: the Court has now entirely de-coupled the right to bear arms from the prefatory clause of the Second Amendment. Indeed, "[t]he opinion itself even stipulated that its construction frustrated the purpose of the prefatory clause."<sup>28</sup> It is clear that, at the very least, the Supreme Court was not basing its holding on the actual full text of the Second Amendment.

It is this divorce from the actual language of the amendment itself that makes it all but impossible to predict what the future holds for gun rights. As my co-panelist Adam Winkler observed, lower courts are typically *not* doing historical analyses of the meaning of the Second Amendment.<sup>29</sup> This may be because the Supreme Court made it clear that adequate clues are simply unavailable to give us a clear idea of how the Second Amendment could apply in the twenty-first century.<sup>30</sup> Instead, we have to look for clues in the text of the *Heller* opinion itself.

#### A. What Is the Scope of the Second Amendment Post-*Heller*?

This brings us to the first piece of a thought experiment. If the rights guaranteed by the Second Amendment are not tethered to the actual text of the Second Amendment, what is the nature of that right?

One possibility, based on the broadest possible reading of *Heller*, is:

*The right of the people to keep and bear arms shall not be infringed.*

This version (Scope I) is simply the operative clause, stripped of the limitations of its prefatory clause and a comma. This reading is suggested at points in the *Heller* decision itself; Justice Scalia's opinion expressly rejects the importance of the prefatory clause as a limit on the right described by the Second Amendment, instead "begin[ning] our textual analysis with the operative clause" and only later considering "the prefatory clause to ensure that our reading of

---

whatsoever and for whatever purpose" and that therefore "incorporation does not imperil every law regulating firearms").

28. John Zulkey, Note, *The Obsolete Second Amendment: How Advances in Arms Technology Have Made the Prefatory Clause Incompatible with Public Policy*, 2010 U. ILL. J.L. TECH. & POL'Y 213, 214 (2010).

29. Fordham Urban Law Journal, *Gun Control and the Second Amendment—2 of 3* (Mar. 9, 2012), <http://vimeo.com/40479020>.

30. See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).



the operative clause *is consistent with* the announced purpose.”<sup>31</sup> Moreover, having adopted an interpretation that does not square neatly with the prefatory clause, Justice Scalia explains the discrepancy away, noting that “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”<sup>32</sup> The criticism in Justice Stevens’ dissent—that “the Court simply ignores the preamble” of the Amendment<sup>33</sup>—has been widely recognized.<sup>34</sup>

In the wake of *Heller*, several courts have interpreted the Second Amendment as providing a broader (though still undefined) right rather than simply providing the right to possess a firearm in the home for self-defense purposes. For example, the Seventh Circuit in *Ezell v. City of Chicago* held that the Second Amendment prevented Chicago from enacting a ban on firearm ranges within the city limits.<sup>35</sup> Although the court could have ruled that the combination of Chicago’s (newly adopted) requirement that any gun owner receive live-range instruction and the ban on firing ranges was a roundabout way to prevent gun *ownership* that was “too clever by half,”<sup>36</sup> the judges went further and unanimously found that the Second Amendment prevents a ban on firing ranges themselves, regardless of the right of an individual to possess a firearm.<sup>37</sup> Indeed, the majority ruled that a “right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use.”<sup>38</sup> Thus, the Seventh Circuit did not just recognize a right to self-defense in the home, but a right to keep and bear arms that is broad enough to include a right to gain proficiency in that right.

---

31. *Heller*, 554 U.S. at 578 (emphasis added) (footnote omitted).

32. *Id.* at 627–28.

33. *Id.* at 648 (Stevens, J., dissenting).

34. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267–68 (2009) (“Justice Scalia . . . dismissed quickly the possibility that the prefatory clause could restrict the operative clause, and concluded that the right in the operative clause need only be ‘consistent with the announced purpose’ in the prefatory clause.”); Zulkey, *supra* note 28, at 214 (“The opinion itself even stipulated that its construction frustrated the purpose of the prefatory clause.”).

35. *Ezell v. City of Chicago*, 651 F.3d 684, 690 (7th Cir. 2011).

36. *Id.* at 711 (Rovner, J., concurring).

37. See *id.* at 704 (majority opinion) (“The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use . . . .”); *id.* at 712 (Rovner, J., concurring) (“A complete ban on live ranges in the City, therefore, is unlikely to withstand scrutiny under any standard of review.”).

38. *Id.* at 704 (majority opinion).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1457

The Seventh Circuit relied on First Amendment principles to determine whether the right had been “infringed.” It noted that the ability to visit a firing range outside the city was no more acceptable an alternative than a prohibition on the “exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs.”<sup>39</sup> And, insofar as the firing-range ban prevented law-abiding citizens “from engaging in target practice in the controlled environment of a firing range,” the law was found to be “a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.”<sup>40</sup> This language essentially says nothing more than that the right to keep and bear arms—as broadly construed—has been infringed, even though the “core right” of self-defense in the home may not have been.<sup>41</sup>

Although Scope I would be the preferred reading of the Second Amendment for many gun rights advocates, it cannot be what *Heller* actually stands for. Indeed, *Heller* itself noted several instances in which the “right of the people to keep and bear arms” *could* be infringed. *Heller* expressly allowed not only infringement, but outright prohibitions, on the “weapons that are most useful in military service—M-16 rifles and the like”—in light of “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>42</sup> In addition, the Court stated that barring possession by certain persons, or carrying in certain places, was “presumptively lawful.”<sup>43</sup>

Although *Ezell* explained these exceptions as indistinguishable from certain categories of speech that—like “obscenity, defamation, fraud, [and] incitement—are categorically ‘outside the reach’ of the First Amendment,”<sup>44</sup> it also noted that those First Amendment exceptions were derived from “history and legal tradition.”<sup>45</sup> In contrast, as noted above, the two categories excluded from the “core”

---

39. *Id.* at 697.

40. *Id.* at 708.

41. Although, as the court noted, “[t]hat the City conditions gun possession on range training is an additional reason to closely scrutinize the range ban.” *Id.* There is, therefore, a basis to have found that the “core right” was also infringed; however, the court did not so find in light of its much broader holding.

42. District of Columbia v. *Heller*, 554 U.S. 570, 627 (2008) (citations omitted).

43. *Id.* at 627 n.26.

44. *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011).

45. *Id.* (citing *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010)).

Second Amendment coverage<sup>46</sup> that Justice Scalia enumerated have very little basis in history, and, according to some scholars, were made up from whole cloth.<sup>47</sup> Accordingly, it is difficult to argue that the Court truly applied the Second Amendment as written, but merely stripped it of its prefatory clause. And certainly the Court's analysis of the "core" right as being one of self-defense in the home seems to be its own limiting function.

Another possible reading of the Second Amendment might be the following:

*The right of the people to keep and bear arms, for the purposes of personal self-defense, shall not be substantially infringed.*

This possible scope of the Second Amendment (Scope II) entirely strips the relevance of the prefatory clause, and squares neatly with *Heller's* assertion that the "core" purpose of the Second Amendment is self-defense.<sup>48</sup> In fact, this version of the Amendment closely resembles the gun rights granted in several state constitutions.<sup>49</sup>

Depending on which infringements one considers "substantial," there are several cases that can be interpreted to rely on this reading of the Second Amendment. *United States v. Marzzarella* is a notable example.<sup>50</sup> In *Marzzarella*, the Third Circuit upheld a federal prohibition on the possession of a firearm where the serial number had been obliterated from the firearm.<sup>51</sup> The court found that intermediate, rather than strict, scrutiny was appropriate because the "burden imposed by the law does not severely limit the possession of

---

46. See *supra* notes 22–27 and accompanying text.

47. See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356–68 (2009) (demonstrating a lack of historical backing for each element of Justice Scalia's dicta).

48. See *Heller*, 554 U.S. at 630.

49. See, e.g., ALA. CONST. art. I, § 26 ("That every citizen has a right to bear arms in defense of himself and the state."); CONN. CONST. art. I, § 15 ("Every citizen has a right to bear arms in defense of himself and the state."); MICH. CONST. art. I, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state.").

50. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

51. *Id.* The law at issue in *Marzzarella* prohibited the transportation, shipment, or receipt of any firearm "which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(k) (2006). The *Marzzarella* court found that the statute, rather than regulating firearm possession per se, regulated only "the manner in which persons may lawfully exercise their Second Amendment rights." 614 F.3d at 97.

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1459

firearms”<sup>52</sup> and the intent behind the provision “was not to limit the ability of persons to possess any class of firearms.”<sup>53</sup> Moreover, the court noted that, “[b]ecause unmarked weapons are functionally no different from marked weapons, § 922(k) does not limit the possession of any class of firearms.”<sup>54</sup>

Interestingly, in arriving at its holding, the Third Circuit did not interpret *Heller* to specifically protect the possession of firearms for self-defense in the home. Rather, the court interpreted the right undergirding *Heller* as being potentially much broader, noting only that the Supreme Court “declined to fully define the scope of the right to possess firearms.”<sup>55</sup> Nevertheless, the court essentially found that the District of Columbia regulation at issue in *Heller* had failed strict scrutiny because a law that prevented a person from possessing firearms even in his own home would necessarily fail under “any form of means-end scrutiny applicable to assess the validity of limitations on constitutional rights.”<sup>56</sup> Thus the Third Circuit’s reasoning and its holding were consistent with a broad right to bear arms for self-defense, subject only to reasonable limitations.

There are numerous other cases that can be interpreted to approve a broad right to self-defense, only subject to certain reasonable limitations. For example, in 2011, the Middle District of Georgia found that banning guns in places of worship was presumptively permissible under intermediate scrutiny, adding that the regulation might also be a permissible restriction on carrying in “sensitive places,” under Justice Scalia’s dicta in *Heller*.<sup>57</sup> *Kuck v. Danaher*<sup>58</sup> also may demonstrate a similar view of the Second Amendment. In *Kuck*, the District of Connecticut found that the Second Amendment rights of two individuals were not violated when one individual’s firearms permit was temporarily revoked following an arrest for breach of the peace, and when the other was denied a renewed permit after he refused to submit a copy of his passport or birth certificate.<sup>59</sup>

---

52. 614 F.3d at 97.

53. *Id.*

54. *Id.* at 98–99.

55. *Id.* at 89.

56. *Id.* (citation omitted).

57. *See* *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1318–20 (M.D. Ga. 2011).

58. 822 F. Supp. 2d 109 (D. Conn. 2011).

59. *Id.* at 126, 129–30.

Similarly, *Woollard v. Sheridan* recently struck down a Maryland law for infringing on a right to bear arms outside of the home, and therefore could be seen as having been decided under this version of the Second Amendment.<sup>60</sup> The court relied on the reasoning of Judge Niemeyer in *United States v. Masciandaro*, who suggested that, “[c]onsistent with the historical understanding of the right to keep and bear arms outside the home, the *Heller* Court’s description of its actual holding also implies that a broader right exists” outside the home.<sup>61</sup> Based on that conception of the Second Amendment, the district court invalidated a Maryland requirement that an applicant for a carry permit demonstrate a “good and substantial reason” why he requires a gun, finding that the regulation was no more than “a rationing system.”<sup>62</sup> Accordingly, the court held, “A citizen may not be required to offer a ‘good and substantial reason’ why he should be permitted to exercise his rights. The right’s existence is all the reason he needs.”<sup>63</sup>

Arguably, however, Scope II would not support the total denial of the right to bear military-grade weapons; but the *Heller* majority expressly countenanced that restriction.<sup>64</sup> Thus, Scope II cannot be the reading of the Second Amendment that Justice Scalia was applying.

Yet another reading of the Second Amendment might proceed as follows:

*The right of the people to keep and bear those arms that are popular or preferable for self-defense in the home, for that purpose, shall not be infringed, notwithstanding the power of the government to restrict use and ownership of military weapons.*

This reading (Scope III) is substantially narrower than Scope I and Scope II. Scope III seems to be a little closer to the interpretation that Justice Scalia relied on in *Heller*, though it requires an express repudiation of the prefatory clause of the Second Amendment.<sup>65</sup> First of all, it may provide the closest fit with the right that *Heller*

---

60. *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 464 (D. Md. 2012).

61. *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011).

62. *Woollard*, 863 F. Supp. 2d at 474.

63. *Id.* at 475.

64. *See* *District of Columbia v. Heller*, 554 U.S. 570, 581–82, 626–27 (2008).

65. *See* *Zulkey*, *supra* note 28, at 214 (“The prefatory clause was drafted with the purpose of arming the populace of its time to fulfill a military role.”); *see also* Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 654 (1989) (discussing the Second Amendment’s link to militia service).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1461

described. As explained in *Heller* itself, “the inherent right of self-defense has been central to the Second Amendment right,” and “the home [is] where the need for defense of self, family, and property is most acute.”<sup>66</sup>

Second, this is the only reading of the Amendment so far considered that takes account of how Justice Scalia considered various classes of weapons. The Court put significant stock into the fact that, “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”<sup>67</sup> The opinion nevertheless found that a prohibition on “the carrying of ‘dangerous and unusual weapons,’” of a type “not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns” as well as “M-16 rifles and the like,” was permissible under the Second Amendment.<sup>68</sup>

Although some scholars have argued that this comports neatly with how the Framers would have understood the Second Amendment,<sup>69</sup> this is certainly not clear from the text of the actual Second Amendment, nor does it have a clear historical basis.<sup>70</sup> Indeed, the annual returns of the Militia of the United States suggest just the opposite—that several siege or artillery weapons and similar “weapons of mass destruction” by the standards of the day, such as cannons and howitzers, were classified as “arms” and regularly held in private hands.<sup>71</sup>

---

66. *Heller*, 554 U.S. at 628.

67. *Id.* at 629.

68. *Id.* at 625–27.

69. See, e.g., Richard A. Allen, *What Arms?: A Textualist's View of the Second Amendment*, 18 GEO. MASON U. C.R. L.J. 191, 203 (2008) (“In the case of the Second Amendment, however, it is *not* reasonable to conclude that the Framers used and understood the term ‘arms’ with the purpose and intent that it would encompass all the fearsome weapons that modern technology enables individuals to wield today, like Stinger missiles, rocket propelled grenades, .50-caliber machine guns and the like.”) (emphasis added).

70. See Lund, *supra* note 47, at 1362–67.

71. See, e.g., Thomas Jefferson, *Message Transmitting Returns of the Militia, March 22, 1804*, in 1 MILITARY AFFAIRS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, FROM THE FIRST SESSION OF THE FIRST TO THE SECOND SESSION OF THE FIFTEENTH CONGRESS, INCLUSIVE: COMMENCING MARCH 3, 1789, AND ENDING MARCH 3, 1819, at 171 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832), available at <http://lcweb2.loc.gov/ammem/amlaw/lwspink.html> [hereinafter MILITARY AFFAIRS] (noting two howitzers in South Carolina and dozens of cannons of assorted sizes throughout the United States); Thomas Jefferson, *Message Transmitting Returns of the United States'*

The primary concern for the right to self-defense in the home appears to have animated the majority in *United States v. Masciandaro*.<sup>72</sup> *Masciandaro* considered the validity of a regulation barring “‘carrying or possessing a loaded weapon in a motor vehicle’ within national park areas.”<sup>73</sup> In finding that the Second Amendment did not protect Masciandaro’s right to carry a loaded gun in his car, the majority noted that “[t]here may or may not be a Second Amendment right in some places beyond the home, *but we have no idea what those places are, what the criteria selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions.*”<sup>74</sup> This squares neatly with the notion that the right to bear arms may only apply in the home.

Indeed, the Maryland Court of Appeals in 2011 expressly adopted a similar reading of the Second Amendment in *Williams v. State*, in which it upheld Maryland’s “good and substantial reason” requirement for a carry permit, on the grounds that the regulatory scheme was “outside the scope of the Second Amendment” because it contained an “exception permitting home possession.”<sup>75</sup> According to the Maryland court, “it is clear that prohibition of firearms *in the home* was the

---

*Militia, February 28, 1805, in 1 MILITARY AFFAIRS 184, 187 (same); Thomas Jefferson, Message Transmitting a Statement of the Militia of the United States, April 11, 1806, in 5 MILITARY AFFAIRS 199, 203 (Asbury Dickins & John W. Forney eds., 1860) (same); Thomas Jefferson, Message Transmitting Returns of the Militia of the Several States, February 11, 1807, in 1 MILITARY AFFAIRS 210, 213 (same). At the time, howitzers were designed and used to inflict maximum damage and break enemy lines and entrenchment. See JEROME A. GREENE, THE GUNS OF INDEPENDENCE: THE SIEGE OF YORKTOWN, 1781, at 383 (2005) (“[Howitzers] could throw bombs at trajectories lower than mortars and higher than cannon, and were ideal for discharging bombs at an enemy en ricochet in the same manner as cannonballs. Indeed, their use in firing bombs in this fashion endeared them to siege artillerists of the 18th century. The bomb, or howitzer, ‘hops along the ground, and drops just over the enemy’s parapet, destroying them where they thought themselves most secure.’ Moreover, the howitzer was a light weapon and used in a short-trailed, two-wheel carriage. Thus, it was highly mobile, and could be used to fire grapeshot and cannister shot besides bombs.” (footnotes omitted)).*

72. 638 F.3d 458 (4th Cir. 2011).

73. *Id.* at 460 (quoting 36 C.F.R. § 2.4(b) (2011)).

74. *Id.* at 475 (emphasis added). *But see id.* at 468 (Niemeyer, J., writing separately) (stating that a “plausible reading of *Heller*” provides a “constitutional right to possess a loaded handgun for self-defense outside the home”).

75. *Williams v. State*, 10 A.3d 1167, 1178 (Md. 2011); *see also* *Hightower v. City of Boston*, 822 F. Supp. 2d 38, 63 (2011) (upholding a denial of a carry permit under Boston’s stringent regulatory scheme because, although the denial “may have some marginal impact on Hightower’s ability to use a gun to defend herself outside her home, it has no impact on her ability to defend hearth and home or to defend herself at home, which she can do adequately with a” lesser license).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1463

gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers.”<sup>76</sup>

In addition, the 2011 opinion of the District of Columbia Circuit in *Heller II* clearly contemplates a similar understanding of the specific types of weapons that the Second Amendment protects. In *Heller II*, the court looked skeptically at an attempt by the District of Columbia to ban assault weapons and large-capacity magazines.<sup>77</sup> Indeed, the majority in that case *rejected* the notion that such a ban was longstanding and entitled to a presumption of validity.<sup>78</sup> Although the court upheld the ban on such weapons, it nevertheless gave several pages worth of consideration to whether those weapons qualified as “dangerous and unusual,” or were, in fact, “in common use . . .” for lawful purposes like self-defense.<sup>79</sup>

As explained below, however, this reading of the Second Amendment cannot fully explain all of the things that have followed from *Heller*, suggesting that perhaps an even more precise wording would better explain Justice Scalia’s holding. For example:

*Each person has the right to keep and bear .22-caliber revolvers (and similar firearms)—those being particularly popular weapons for self-defense—within the confines of his or her own dwelling for the purpose of personal self-defense, provided that he or she is not a lunatic, drug user, fugitive, or convicted criminal.*

At first glance, the phrasing of this interpretation (Scope IV) seems, perhaps, absurdly narrow. It is, however, the only interpretation that follows, necessarily, from the holding in *Heller*. Scope IV supports the regulation of multiple classes of weapons and is certainly consistent with some of the more restrictive gun cases that followed *Heller*, such as *Kachalsky v. Cacace*, which upheld a regime in New York that requires a permit even to possess a handgun in the home.<sup>80</sup>

In addition, Scope IV echoes Justice Scalia’s dicta that it is permissible to bar possession of guns—potentially for life—by certain persons, and particularly by those who have been convicted of a felony.<sup>81</sup> Indeed, an overwhelming number of post-*Heller* cases have

---

76. *Williams*, 10 A.3d at 1177 (emphasis added).

77. *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2011).

78. *Id.*

79. *Id.*

80. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011).

81. *See* *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also* 18 U.S.C. § 922(g) (2006).



expressly upheld the ban on possession by convicted felons,<sup>82</sup> drug users,<sup>83</sup> and those convicted of domestic violence misdemeanors.<sup>84</sup> The courts' willingness to assume that Second Amendment rights may be wholly denied to certain persons based upon their criminal history is nearly unique among constitutional rights, most of which apply in some form even to those currently incarcerated.<sup>85</sup> The one other right that is frequently stripped from convicted felons—the right to vote—rests on specific constitutional text that authorizes its denial to felons.<sup>86</sup> By reading such a textual hook for the wholesale denial of gun rights into the penumbras of the Second Amendment, Justice Scalia can be seen to have placed such denials on far more solid footing.<sup>87</sup>

### B. Uncertainty Regarding the Scope of the Second Amendment Is Disappointing Whether One Is Pro-Gun Rights or Pro-Gun Control

In the wake of *Heller* and *McDonald*, gun rights activists predicted that those decisions would open the door to a radical shift in gun policy throughout the country.<sup>88</sup> Soon after *Heller* was decided, the Executive Vice President of the NRA declared that “[t]his is the

---

82. See, e.g., *United States v. Rhodes*, 423 F. App'x 336 (4th Cir. 2011); *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010).

83. See, e.g., *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

84. See, e.g., *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc).

85. See *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974) (“When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”).

86. See U.S. CONST. amend. XIV, § 2 (allowing the right to vote to be denied “for participation in rebellion, or other crime”); see also *Richardson v. Ramirez*, 418 U.S. 24 (1974) (interpreting the Fourteenth Amendment to authorize stripping convicted felons of the right to vote).

87. Indeed, the denial of the right to vote, the other right frequently denied to convicted felons, already has such a textual hook in Section 2 of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 2 (“[W]hen the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced [proportionally] . . .”) (emphasis added).

88. See Anna Stolley Persky, *Despite 2nd Amendment Cases, Firearms Codes Are Moving Targets*, ABA J. (Dec. 1, 2010, 1:20 AM), [http://www.abajournal.com/magazine/article/an\\_unsteady\\_finger\\_on\\_gun\\_control\\_laws\\_second\\_amendment\\_firearms/](http://www.abajournal.com/magazine/article/an_unsteady_finger_on_gun_control_laws_second_amendment_firearms/) (“Proponents hailed *Heller* and *McDonald* as setbacks for gun control advocates. They predicted a shift in gun policy throughout the country. But so far it hasn’t happened that way. While there have been challenges throughout the country to local, state and federal gun laws, few have been successful.”).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1465

opening salvo in a step-by-step process of bringing relief to people all over this country who have been deprived of access to Second Amendment freedom.”<sup>89</sup> The NRA trumpeted that “Justice Scalia’s 64-page Second Amendment opinion was remarkably clear and answered key, fundamental questions,”<sup>90</sup> but the post-*Heller* reality has not been so clear-cut. The Brady Campaign,<sup>91</sup> a staunch opponent of the NRA, emphasized in 2011 that “three years, 400 legal challenges, and ‘millions of dollars in [NRA] legal bills’ later, all the gun lobby has had to show for its efforts is a growing body of case law *affirming* the right of the people to have strong gun laws short of a total handgun ban.”<sup>92</sup>

While gun control activists may have had the second laugh, the tide may be turning. A number of cases in 2012 have invalidated gun regulations.<sup>93</sup> For example, in *Woollard v. Sheridan*, the United States District Court in Maryland held that a state law that required an applicant for a concealed carry permit to demonstrate “good and substantial reason” for the issuance of the permit was unconstitutional.<sup>94</sup> The court first held that the Second Amendment right enunciated in *Heller* was not limited to the home.<sup>95</sup> Then, applying intermediate scrutiny, the district court held that a “citizen may not be required to offer a ‘good and substantial reason’ why he should be permitted to exercise his rights.”<sup>96</sup> At the same time, the *Woollard* court, and others, have been cautious to rule narrowly:

---

89. Wayne LaPierre, *Standing Guard: An Individual Right Affirmed*, NRA-ILA (July 31, 2008), <http://nraila.org/news-issues/articles/2008/standing-guard-an-individual-right-aff.aspx>.

90. *Id.*

91. BRADY CENTER TO PREVENT GUN VIOLENCE, HOLLOW VICTORY? GUN LAWS SURVIVE THREE YEARS AFTER DISTRICT OF COLUMBIA V. HELLER, YET CRIMINALS AND THE GUN LOBBY CONTINUE THEIR LEGAL ASSAULT, at 1 (2011), *available at* [http://www.bradycenter.org/xshare/pdf/reports/Hollow\\_Victory.pdf](http://www.bradycenter.org/xshare/pdf/reports/Hollow_Victory.pdf).

92. Dennis Henigan, *How Many Second Amendment Cases Will the NRA Lose?*, BRADY CAMPAIGN BLOG (Oct. 6, 2011), <http://blog.bradycampaign.org/?p=3515&s=1>.

93. *See, e.g.*, *Woollard v. Sheridan*, 863 F.Supp.2d 462 (D. Md. 2012) (invalidating Maryland concealed carry permitting system); *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colo. 2012) (en banc) (holding that state concealed handgun permitting system preempted ability of Board of Regents to regulate handgun possession on campus; however, limiting its holding to avoid the state constitutional issue).

94. *See* *Woollard*, 2012 WL 695674, at \*1.

95. *Id.* at \*7.

96. *Id.* at \*12.

The Court wishes to emphasize the limits of this decision. While it finds Maryland's requirement that a permit applicant demonstrate "good and substantial reason" to be unconstitutional, the Court does not address any of the State's other regulations relating to the possession and use of firearms, many of which would qualify as presumptively lawful. Nor does the Court speculate as to whether a law that required a "good and substantial reason" only of law-abiding citizens who wish to carry a *concealed* handgun would be constitutional. Finally, the Court does not speak to Maryland's ability to declare that a specific applicant is unfit for a permit because of some particular aspect of the applicant's character or history.<sup>97</sup>

This limiting language, common in the cases, flows directly from the dicta in *Heller*, which suggested that some types of regulations may in fact be "presumptively" reasonable and comport with the Second Amendment.<sup>98</sup> These perhaps purposeful attempts to limit what became a groundswell of litigation after *Heller* have another, more practical, implication: the cost for states and local governments to defend against challenges to often long-standing gun regulations. For example, in January of 2012, Heller himself was awarded more than \$1.1 million in attorneys' fees and expenses.<sup>99</sup> Indeed, this was a concern of states and presumably cities prior to the *Heller* and *McDonald* decisions.<sup>100</sup>

The uncertainty in the wake of *Heller* and *McDonald* has been problematic for all involved. Advocates for the expansion of gun rights won a major victory that has not translated into consistent and significant results in the lower courts.<sup>101</sup> Proponents of gun control

---

97. *Id.* at \*12 (footnote omitted).

98. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 n.26 (2008).

99. See Ryan Abbott, *Defending Unconstitutional D.C. Gun Ban Will Cost \$1.1M*, COURTHOUSE NEWS SERV. (Jan. 5, 2012), <http://www.courthousenews.com/2012/01/05/42799.htm> ("Heller wanted \$3.1 million in fees and costs, while D.C. wanted to pay \$840,000, 'arguing that plaintiff's counsel should not be permitted to 'enrich themselves at the expense of taxpayers,' particularly during this time of 'financial crisis.'"); see also John Chase, *Mark Kirk Supports Court's Overturning of Gun Ban*, CHI. TRIB., Aug. 9, 2010, [http://articles.chicagotribune.com/2010-08-09/news/ct-met-mark-kirk-guns-20100809\\_1\\_gun-ban-gun-control-mark-kirk](http://articles.chicagotribune.com/2010-08-09/news/ct-met-mark-kirk-guns-20100809_1_gun-ban-gun-control-mark-kirk) ("I think the critical thing to do here is to make sure that we don't end up in endless, expensive litigation.").

100. See Malcolm MacLachlan, *Gun Rights Groups Could Challenge State Laws After Supreme Court 2nd Amendment Ruling*, CAPITOL WKLY., Feb. 7, 2008, <http://www.capitolweekly.net/article.php?xid=wvzra5xciovjk> ("[D]efining the Second Amendment as an individual right would lead to years of expensive litigation, just to defend gun laws already in existence.").

101. See *supra* notes 88-93 and accompanying text.

were left with a far tougher legislative and constitutional landscape in which they must defend old laws while crafting new ones. The federal government—and state and local governments in the post-*McDonald* era—have been faced with a tide of expensive litigation over their gun regulations, some of which have been on the books for a great many years, despite the *Heller* Court’s admonition that “long-standing” regulations may be presumptively reasonable. Finally, the courts themselves have had to expend judicial resources in deciding the waves of cases that poured out of the *Heller* floodgate—and which, for the most part, come out the same way as pre-*Heller* decisions, upholding the challenged regulations.

### C. *Heller* and *McDonald* Have Left Open Many More Questions Than They Have Answered

#### 1. *What Is the Proper Standard of Review for Gun Control Laws?*

Although the majority of courts seem to be settling on intermediate scrutiny for gun laws that affect guns outside the home, and strict scrutiny for the purported fundamental right of self-defense within the four walls of one’s home, it is unclear whether the Supreme Court would uphold that dichotomy.<sup>102</sup> The only thing that is clear about the *Heller* decision and the applicable standard of scrutiny is that “rational basis” is not the appropriate standard. Justice Scalia’s opinion explained that rational basis was simply not an appropriate standard for an “enumerated constitutional right[.]”<sup>103</sup> One of my co-panelists at the *Fordham Urban Law Journal* Symposium that prompted this Article, Nelson Lund, suggests that the federal courts of appeals “have quickly and fairly uniformly coalesced around an interpretation of *Heller*” that provides a framework for standard of review.<sup>104</sup> Lund summarizes the so-called “consensus” as follows: 1) “longstanding” regulations are presumed not to infringe the Second Amendment, 2) substantial restrictions of the “core right of self

---

102. See, e.g., Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 *FORDHAM URB. L.J.* 1617 (2012) (discussing standards of review).

103. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008); see *id.* at 628 n.27 (“Obviously, the same [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

104. Lund, *supra* note 102, at 1622–23.

defense” are subject to strict scrutiny, and 3) regulations that do not “severely restrict” this “core right of self defense” are subject only to intermediate scrutiny.<sup>105</sup>

But perhaps even Lund’s formulation of the “core” protection of the Second Amendment (and presumably any state constitutional analogues) is too broad. It ignores the home/public distinction, concealed/open carry issues, and what “arms” are captured within such a “core right.” One arguably has a core right to self-defense walking down the nighttime streets of New York City, as much as one has a core right in the home. Yet, the supposed “core right” is pretty clearly subject to greater restrictions outside the home.

Indeed, several cases uphold complete bans on carrying weapons in specific places that are outside the home. In *GeorgiaCarry.Org, Inc. v. State of Georgia*, for example, the Middle District of Georgia upheld a statute that forbade the carrying of guns into places of worship.<sup>106</sup> And, taking the principle even further, in *United States v. Masciandaro*, the Fourth Circuit held that the right to self-defense did not necessarily authorize an individual to bring a loaded handgun into a national park.<sup>107</sup>

Moreover, notwithstanding the District of Maryland’s opinion in *Woollard*, courts have opined that “according Second Amendment protection to the carrying of an unconcealed weapon *outside the home* would certainly go further than *Heller* did.”<sup>108</sup> Relying on that principle, the Southern District of New York declined to strike down New York’s stringent gun licensing regime.<sup>109</sup> Relying on similar grounds, the District of Massachusetts let Boston’s regime stand, noting that the license the plaintiff sought was not one to which she was entitled because it “ha[d] no impact on her ability to defend hearth and home or to defend herself at home.”<sup>110</sup> And even though it has been called into question by the District of Maryland in *Woollard*, the Maryland Court of Appeals expressly held that a law restricting handgun possession “outside of one’s home, is outside the scope of the Second Amendment.”<sup>111</sup> In none of these cases did a

---

105. *Id.*

106. 764 F. Supp. 2d 1306 (M.D. Ga. 2011).

107. 638 F.3d 458 (4th Cir. 2011).

108. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 265 (S.D.N.Y. 2011) (emphasis added).

109. *See id.*

110. *Hightower v. City of Boston*, 822 F. Supp. 2d 38, 63 (D. Mass. 2011).

111. *Williams v. State*, 10 A.3d 1167, 1169 (Md. 2011).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1469

court consider that the “core right” was simply the right of self-defense, unqualified by other concerns.

2. *Which Laws, if Any, Limiting Gun Rights Are Constitutional?*

The *Heller* Court appears to have announced, without deciding, that it did not intend to upset a number of laws including felon-in-possession, concealed carry, and other similar laws. However, it did not indicate whether those laws were constitutional or analyze why they were constitutional, leading to serious questions about the basis of their validity. Justice Scalia’s sprawling opinion took dozens of dizzying pages to come to the (perhaps textually unwarranted) conclusion that the Second Amendment right was an individual right entirely divorced from the first clause of the amendment. In contrast, a short fifty-two-word passage and an eighteen-word footnote proved to be perhaps the most important part of the opinion in terms of its impact on decisions by plaintiffs to litigate and the lower courts’ resolution of those claims:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>112</sup>

...

We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.<sup>113</sup>

These simple words, which may have been an attempt to keep closed the floodgates on Second Amendment litigation that would inevitably open after *Heller* was decided (or perhaps because some on the Supreme Court actually believed that these laws were consistent with the Second Amendment), are at the heart of much of today’s litigation over the right to bear arms.

If the passage was meant to prevent litigants from challenging this laundry list of gun laws, it failed. Nearly everything in this list other than the suggestion of the cessation of gun-rights for felons and

---

112. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

113. *Id.* at 627 n.26.

mentally ill has been challenged<sup>114</sup>—and, even there, it appears that the “felons” category has had significant attacks post-*Heller*.<sup>115</sup>

At the same time, gun rights advocates often target common state laws that permit individuals to carry concealed guns. The primary distinction among those states with such permitting systems is whether the system is a “shall issue” or a “may issue” system (or a system without a permitting requirement such as Alaska, or the lone outlier simply forbidding concealed carry, Illinois).<sup>116</sup> Under the “shall issue” system, the permitting authority *must* issue the permit if

---

114. See *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012) (en banc) (challenging ban on weapons on University of Colorado campus); Complaint at 3–4, *Lane v. Holder*, No. 1:11-cv-00503 (D. Va. May 10, 2011) (challenging Virginia and federal bans on sales to non-resident on behalf of D.C. resident who alleged there were no retail gun stores within the District of Columbia); see also Alia Beard Rau, *Arizona Senate Oks Bill on Guns in Public Buildings*, ARIZ. REPUBLIC, Apr. 12, 2012, <http://www.azcentral.com/arizonarepublic/local/articles/2012/04/12/20120412ariz-senate-oks-bill-guns-public-buildings.html> (“The Arizona Legislature has given final approval to a bill that could allow guns on public property, including city halls, police stations, county courts, senior centers, swimming pools, libraries and the state Capitol. . . . ‘I am a true believer in the statement that an armed citizenry is a safe citizenry,’ [State Senator Al] Melvin [R-Tucson] said. ‘Our founders, when they gave us the Second Amendment, knew what they were doing. With this type of legislation, we have a safer society.’”).

115. See, e.g., *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011) (felon in possession of and selling firearms including a handgun with an obliterated serial number challenged conviction on Second Amendment grounds); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010) (challenging felon in possession law); *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (holding statute prohibiting felons from possessing firearms was unconstitutional as applied to individual convicted of felony drug possession); *State v. R.P.H.*, 265 P.3d 890 (Wash. 2011) (holding that termination of a former juvenile sex offender’s obligation to register as such for a first degree rape was a procedure equivalent to a “certificate of rehabilitation,” thus restoring his right to possess a firearm).

116. Compare COLO. REV. STAT. § 18-12-203 (2012) (“shall issue” concealed carry permitting system), and Arnold Wyrick, *Illinois the Final Holdout on Concealed Carry*, KFVS12 (May 16, 2012), <http://www.kfvs12.com/story/18445132/illinois-the-final-holdout-on-concealed-carry> (“The Land of Lincoln is the only state in the nation where a person can not legally carry a concealed weapon.”), with CAL. PENAL CODE § 26150 (West 2012) (“may issue” concealed carry permitting system), and *Alaska Concealed Handgun*, ALASKA DEP’T PUB. SAFETY, <http://www.dps.state.ak.us/statewide/permitslicensing/concealedhandguns.aspx> (last visited Nov. 14, 2012) (“Alaska’s laws do not prohibit anyone 21 or older who may legally possess a firearm from carrying it concealed. A special permit is not required.”). Alaska does issue concealed carry permits, however, under a “shall-issue” system to those who request them for the purpose of reciprocal permit acceptance in other states. See ALASKA STAT. ANN. § 18.65.700 (2012).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1471

the applicant meets the enumerated statutory qualifications.<sup>117</sup> Under the “may issue” system, the permitting authority, usually a sheriff’s office, has much more discretion; these statutes typically include enumerated requirements (albeit fewer than in a shall issue jurisdiction) but imbue the decision-maker some discretion to refuse for “good cause” or if the applicant cannot prove that they have a “good” reason for the permit.<sup>118</sup>

Some states’ concealed carry laws have been challenged and upheld post-*Heller*. In California for example, the “may issue” concealed carry law has been challenged post-*Heller* and upheld under intermediate scrutiny review, although a Southern District of California court has stated that the concealed carry law undoubtedly burdens the Second Amendment Right.<sup>119</sup> Pursuant to the permitting law, each county sheriff publishes a policy that implements the permitting system and defines “good cause.”<sup>120</sup> It has been explained that the sheriff has “extremely broad discretion” in this implementation.<sup>121</sup>

---

117. *See, e.g.*, COLO. REV. STAT. § 18-12-203(1) (2012) (“[A] sheriff shall issue a permit to carry a concealed handgun to an applicant who: (a) Is a legal resident of the state of Colorado. . . . (b) Is twenty-one years of age or older; (c) Is not ineligible to possess a firearm pursuant to section 18-12-108 or federal law; (d) Has not been convicted of perjury . . . (e) . . . Does not chronically and habitually use alcoholic beverages to the extent that the applicant’s normal faculties are impaired. . . . (f) Is not an unlawful user of or addicted to a controlled substance. . . . (g) Is not subject to: . . . [various enumerated] protection order[s] . . . (h) Demonstrates competence with a handgun by submitting [evidence of experience, law enforcement or military background, handgun training certificate.]”); COLO. REV. STAT. § 18-12-203(2) (2012) (“Regardless of whether an applicant meets the criteria specified in subsection (1) of this section, if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others if the applicant receives a permit to carry a concealed handgun, the sheriff may deny the permit.”).

118. *See, e.g.*, CAL. PENAL CODE § 26150 (West 2012) (“When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following: (1) The applicant is of good moral character. (2) Good cause exists for issuance of the license. (3) The applicant is a resident of the county or a city within the county, or the applicant’s principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business. (4) The applicant has completed a course of training as described in Section 26165.”).

119. *See* *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1114-15 (S.D. Cal. 2010).

120. *See* *Gifford v. City of Los Angeles*, 106 Cal. Rptr. 2d 164, 168 (Cal. Ct. App. 2001); *see also* CAL. PENAL CODE § 12050 (West 2012) (repealed 2012).

121. *See* *Gifford*, 106 Cal. Rptr. 2d at 167.



In *Peruta v. County of San Diego*, however, the petitioner challenged one sheriff's regulation, which stated that "good cause" was "a set of circumstances that distinguishes the applicant from other members of the general public and causes him or her to be placed in harm's way."<sup>122</sup> The regulations further noted that "[g]eneralized fear for one's personal safety is not, standing alone, considered 'good cause.'"<sup>123</sup> Notably, the *Peruta* court upheld the law and the regulation against a Second Amendment challenge.<sup>124</sup> *Richards v. County of Yolo*, another California federal case, similarly held that there were "reasonable alternative means" to obtain and keep a firearm "sufficient for self-defense purposes" without construing the Second Amendment to "create a fundamental right to carry a concealed weapon in public."<sup>125</sup> Furthermore, because of state preemption, local ordinances or policies may not completely frustrate the carry permitting law and system.<sup>126</sup>

Colorado's "shall issue" concealed carry permitting law also has been challenged post-*Heller*.<sup>127</sup> In *Peterson v. LaCabe*, the plaintiff challenged the residency requirement of the shall issue law, and the court found that intermediate scrutiny applied and assumed without deciding that the statute fell within the scope of the Second Amendment.<sup>128</sup> Regarding the Privileges and Immunities inquiry, the district court similarly found that the statute met intermediate scrutiny.<sup>129</sup> Other challenges surrounded whether the sheriff denied the plaintiff's due process rights when the sheriff did not properly explain why he was denying a permit<sup>130</sup> and whether a set-aside

---

122. *Peruta*, 758 F. Supp. 2d at 1110.

123. *Id.*

124. *Id.* at 1114.

125. *Richards v. Cnty. of Yolo*, 821 F. Supp. 2d, 1169, 1174–75 (E.D. Cal. 2011).

126. *See Fiscal v. City & Cnty. of San Francisco*, 70 Cal. Rptr. 3d 324, 335 (Cal. Ct. App. 2008).

127. *See Peterson v. LaCabe*, 783 F. Supp. 2d 1167 (D. Colo. 2011) (holding that the concealed weapons permit statute did not violate the Equal Protection Clause as applied to an out-of-state resident, nor did it violate the Privileges and Immunities Clause or the Second Amendment).

128. *See id.*

129. *See id.* at 1176–78 ("I conclude that the state's interest in monitoring a potential licensee's eligibility for a concealed handgun permit, and the increased difficulty of doing so for out-of-state residents, also overcomes Plaintiff's Second Amendment challenge.").

130. *See Copley v. Robinson*, 224 P.3d 431, 437 (Colo. App. 2009) ("Accordingly, we conclude that the proceedings before the Sheriff deprived Copley of his basic procedural due process rights under the United States and Colorado Constitutions and under the concealed handgun statutes. In that regard, we note that our resolution

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1473

conviction under another state's laws would be interpreted as 'unconvicted' for purposes of the carry permit.<sup>131</sup>

On the other hand, the United States District Court in Maryland recently held in *Woollard v. Sheridan* that a state law that required an applicant for a concealed carry permit to demonstrate "good and substantial reason" for the issuance of the permit was unconstitutional.<sup>132</sup> The court first held that the Second Amendment right enunciated in *Heller* was not limited to the home.<sup>133</sup> Then, applying intermediate scrutiny, the district court held that a "citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights."<sup>134</sup> Moreover, on March 5, 2012, the Colorado Supreme Court in *Regents of the University of Colorado v. Students for Concealed Carry on Campus* held that the state's concealed carry permitting laws preempted the Regents' attempt to ban handguns on the university campus.<sup>135</sup> In short, the legislature had carved out several places where people could not carry their handguns, even if they had a permit, and public universities were not among them (but public high schools and elementary schools were).<sup>136</sup> Thus, the Regents could not—in light of the comprehensive nature of the legislature's system—also regulate in the area.<sup>137</sup>

---

of this case in no way relies on any substantive right to bear arms under either the United States or Colorado Constitutions. Accordingly, because our concern here is with errors of procedural due process committed by the Sheriff, we also conclude the appropriate remedy is a remand to the Sheriff for a new hearing and reconsideration of Copley's request for reissuance of his permit.").

131. *See Seguna v. Maketa*, 181 P.3d 399, 403 (Colo. App. 2008) ("We therefore conclude that, for purposes of section 18-12-108(1), Seguna was not convicted of a felony 'under . . . any other state's law.' This conclusion leads directly to two more conclusions: (1) under section 18-12-207(3), the Sheriff's Office did not establish, by a preponderance of the evidence, that Seguna was ineligible to possess a firearm; and (2) the district court erred when it concluded that the Sheriff's Office properly declined to renew Seguna's concealed weapons permit under section 18-12-203(1)(c) because he had been convicted of a felony in Michigan. . . . Because the set-aside Michigan conviction formed the only basis for denying Seguna's request to renew his concealed handgun permit, the case is remanded to the district court with directions to enter an order directing the Sheriff's Office to renew Seguna's permit.").

132. *See Woollard v. Sheridan*, 863 F. Supp. 2d 462, 475 (D. Md. 2012).

133. *Id.* at 469–70.

134. *Id.* at 475.

135. *See Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012) (en banc).

136. *Id.* at 500–01.

137. *See id.* at 500.

It is clear that this short passage did not dissuade the staunchest of gun rights advocates to use *Heller* as a license to challenge any gun regulation.

## II. CAN STATE CONSTITUTIONS OFFER BETTER CLARITY ABOUT GUN RIGHTS?

In his seminal 1977 *Harvard Law Review* article, *State Constitutions and the Protection of Individual Rights*, Justice William Brennan persuasively argued that, although the Supreme Court had slowed down significantly in its recognition and broadening of federal civil rights, “state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”<sup>138</sup> Justice Brennan noted that recent state court opinions that had expanded individual rights based on the texts of state constitutions resulted from the fact “that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend from the time being, the enforcement” of expansive federal constitutional rights.<sup>139</sup>

Justice Brennan noted that even where state constitutions recognize a substantially different right from that which the United States Constitution recognizes, “the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is *greater protection of individual rights under state law than under federal law*.”<sup>140</sup> That is to say, although the United States Constitution, as interpreted by the Supreme Court, necessarily establishes a floor below which no state may fall when guaranteeing individual rights, it by no means should be construed as setting a ceiling on those individual rights.<sup>141</sup> This recognition of the power of

---

138. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

139. *Id.* at 495.

140. *Id.* at 500 (emphasis added) (quoting *State v. Kaluna*, 520 P.2d 51, 58 n.6 (Haw. 1974)) (internal quotation marks omitted).

141. See, e.g., *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (noting the “authority [of the State] to exercise its police power or it[s] sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“[A] state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.”); *Cooper v.*

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1475

state constitutions came to be known as the New Judicial Federalism.<sup>142</sup>

As noted above, the key holding in *Heller* was that the right to bear arms that the United States Constitution guarantees is an *individual*—as opposed to a collective—right.<sup>143</sup> A necessary corollary to this observation is that state constitutions can, pursuant to New Judicial Federalism, confer broader individual gun rights than the United States Constitution.

Before getting too excited about the prospect of unfettered broad access to aircraft carriers and Pershing cruise missiles, one must account for the slight matter of the Supremacy Clause of the United States Constitution, which, of course, would act as a limit on a state's ability to offer the broadest possible gun right protections through its constitution. As Richard Fallon and his colleagues have noted, "the state courts are obliged under the Supremacy Clause to disregard state law if it conflicts with federal law, and that failure to do so is subject to review in the Supreme Court."<sup>144</sup> The Supremacy Clause provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>145</sup>

Of its own terms, then, the Supremacy Clause allows federal law and the U.S. Constitution to preempt not only state statutes, but state constitutions as well. Indeed, the Supreme Court has recognized this fact, not only noting that "[t]he nullity of any act . . . inconsistent with the [federal] constitution is produced by the declaration, that the constitution is the supreme law,"<sup>146</sup> but also striking down state

---

California, 386 U.S. 58, 62 (1967) (noting that states have the "power to impose higher standards on searches and seizures than required by the Federal Constitution").

142. See, e.g., Ken Gormley, *The Silver Anniversary of New Judicial Federalism*, 68 ALB. L. REV. 797 (2003).

143. See *District of Columbia v. Heller*, 554 U.S. 570, 595, 635 (2008).

144. RICHARD H. FALLON, JR. ET AL., *FEDERAL COURTS AND THE FEDERAL SYSTEM* 957 (6th ed. 2009).

145. U.S. CONST. art. VI, cl. 2.

146. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210–11 (1824).

constitutional provisions that conflict with federal laws, the U.S. Constitution, or the pronouncements of federal judges.<sup>147</sup>

Professor Stephen McAllister puts it well: “even if states were to recognize broader individual rights to possess and use firearms, such recognition may be rendered ineffective by the preemptive operation of federal statutory and regulatory law.”<sup>148</sup> McAllister points out that even if a state were to amend its constitution, the amendment may lack any meaning in the face of federal constitutional and/or statutory preemption.<sup>149</sup> But McAllister may be overestimating the zeal with which Congress would attempt to enact gun control laws to limit the scope of state constitutional protections—the gun lobby, as we all know, is very active in trying to remove politicians who enact pro-gun-control laws.<sup>150</sup> That minor inconvenience, along with the current legislative paralysis in Washington, makes it less likely that a *new* federal law would preempt specific, broader rights written into a state constitution.

#### A. State Constitutions and the Right to Keep and Bear Arms

States actually vary quite significantly in the extent to which their constitutions confer the right to bear arms. Some of the state constitutional provisions are identical (or nearly identical) to the Second Amendment; interestingly, these seem to include some of the first states, and the most recent states to enter the Union.<sup>151</sup> Others

---

147. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that an amendment to the Arkansas constitution preventing the desegregation of schools was of no effect because *Brown v. Board of Education* was the supreme law of the land).

148. Stephen R. McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 U. KAN. L. REV. 867, 886 (2011).

149. See *id.* at 868–71.

150. See, e.g., *NRA Lobbyists Hold Strong Influence Over Policy Agenda*, FOX NEWS (Mar. 30, 2009), <http://www.foxnews.com/politics/2009/03/30/nra-lobbyists-hold-strong-influence-policy-agenda/>.

151. See, e.g., ALASKA CONST. art. I, § 19 (“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. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.”); HAW. CONST. art. 1, § 17 (“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.”); N.C. CONST. art. I, § 30 (“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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.”) (emphasis

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1477

go quite a bit further. For example, Connecticut's constitution specifically conferred an individual right to bear arms (by contrast, of course, it took the *Heller* decision to determine that the Second Amendment's right to bear arms was an individual right).<sup>152</sup> The Connecticut constitution provides, "[e]very citizen has a right to bear arms in defense of himself and the state."<sup>153</sup> Kansas amended its constitution in 2010 to incorporate the individual view of the right and delineate the purposes for which the right was secured: "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose . . . ."<sup>154</sup> On the other hand, six state constitutions do not contain any reference to a right to bear arms, and citizens of those states currently can only rely on statutory and federal constitutional law.<sup>155</sup>

Perhaps most importantly, a number of state constitutions go so far as to limit the right explicitly, delegating authority to the legislature to enact laws covering concealed carry or the manner in which the arms may be borne. Eight states—Colorado, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, and New Mexico—expressly allow the legislature to regulate the concealed carrying of arms.<sup>156</sup> An

---

added); S.C. CONST. art. I, § 20 ("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.").

152. See CONN CONST. art. I, § 15.

153. CONN CONST. art. I, § 15; see also ALA. CONST. art. I, § 26 ("That every citizen has a right to bear arms in defense of himself and the state."); MICH. CONST. art. I, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state.").

154. KAN. CONST. Bill of Rights, § 4; see also DEL. CONST. art. I, § 20 ("A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.").

155. The states without rights to bear arms enshrined in their state constitutions are: California, Iowa, Maryland, Minnesota, New Jersey, and New York. Citizens of these states must rely on the federal Constitution and statutory regulation of arms. See, e.g., N.Y. CIV. RIGHTS LAW § 4 (McKinney 2012) ("A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed.").

156. See COLO. CONST. art. II, § 13 ("The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; *but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.*" (emphasis added)); IDAHO CONST. art. I, § 11 ("The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person . . . ."); KY. CONST. § 1 ("The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed

additional five states—Florida, Georgia, Oklahoma, Tennessee, and Texas—carve out a more general swath of permissible legislative regulation on how arms are “borne” or carried.<sup>157</sup>

There are a number of state constitutions with built-in limitations on the right to keep and bear arms (some of which ultimately may be found to be unconstitutional if they provide for less expansive individual rights that a theoretical future Supreme Court interpretation of the Second Amendment), but could states amend their constitutions either to remove existing limitations, or dramatically to expand gun rights? Although amending the federal Constitution currently may be next to impossible as a practical and political matter, amending state constitutions may not present the same roadblocks, depending on the state.<sup>158</sup> This leads to another thought experiment.

---

weapons.”); LA. CONST. art. I, § 11 (“The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.”); MISS. CONST. art. III, § 12 (“The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.”); MO. CONST. art. I, § 23 (“That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.”); MONT. CONST. art. II, § 12 (“The right of any person to keep and bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.”); N.M. CONST. art. II, § 6 (“No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons.”).

157. See FLA. CONST. art. I, § 8(a) (“The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.”); GA. CONST. art. I, § 1, ¶ 8 (“The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.”); OKLA. CONST. art. II, § 26 (“The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.”); TENN. CONST. art. I, § 26 (“That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.”); TEX. CONST. art. I, § 23 (“Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with the view to prevent crime.”).

158. See John Joseph Wallis, NBER/U. MARYLAND ST. CONST. PROJECT, <http://www.stateconstitutions.umd.edu> (last visited Nov. 14, 2012) (“There have been

### B. What Would a Particularly Pro-Gun Rights State Constitutional Provision Look Like?

The logical place to start seems to be captured in statements by the NRA's Institute for Legislative Action (NRA-ILA), the lobbying arm of the NRA.<sup>159</sup> The NRA-ILA relies not only on the importance to the framers that “the whole body of people always possess arms,”<sup>160</sup> but also suggests that many gun control measures, such as licensing, assault weapons bans, and even safety-training requirements, are of little real value in comparison to the degree to which they infringe on the right—and the ability—of law-abiding citizens to possess arms.<sup>161</sup>

It follows, at least according to the NRA-ILA, that the state constitutional measure most likely to preserve the right to bear arms to its maximum extent is one that prevents any of the myriad infringements and limitations on that right that have been constructed over the last two centuries. Such a proposal might look something like this:

*The State may not infringe on the individual right of any resident of the State, and all persons present therein, to keep and bear arms and weapons of any kind whatsoever for the security and defense of the person and property of one's self or of others, the common defense, hunting, recreation, or any otherwise-lawful purpose. No criminal penalty may work an infringement of the right to bear arms, and any person imprisoned shall have his full right to bear arms restored immediately upon release. The State may provide penalties for*

---

almost 150 state constitutions, they have been amended roughly 12,000 times, and the text of the constitutions and their amendments comprises about 15,000 pages of text.”); Edward L. Lascher, Jr. et al., Opinion, *It's Too Easy to Amend California's Constitution*, L.A. TIMES, Feb. 4, 2009, <http://www.latimes.com/news/opinion/la-oe-hodson4-2009feb04,0,2927280.story> (“[T]he nation's founders didn't make it easy to change the U.S. Constitution; they required amendments to gain approval by two-thirds of the Congress and three-fourths of the states. . . . By comparison, California's initiative amendment process is simple.”); Rex W. Huppke, *Lawsuits Filed in Cook County Claiming State's Same-Sex Marriage Ban Unconstitutional*, CHI. TRIB., May 31, 2012, [http://articles.chicagotribune.com/2012-05-31/news/ct-met-same-sex-marriage-lawsuit-20120531\\_1\\_marriage-ban-marriage-equality-marriage-rights](http://articles.chicagotribune.com/2012-05-31/news/ct-met-same-sex-marriage-lawsuit-20120531_1_marriage-ban-marriage-equality-marriage-rights) (noting that North Carolina became the thirty-first state to amend its state constitution to ban same-sex marriage; these thirty-one states amended their constitutions over a period of less than fifteen years).

159. *About NRA-ILA*, NRA-ILA, <http://www.nra-ila.org/about-nra-ila.aspx> (last visited Nov. 14, 2012).

160. *The Second Amendment*, NRA-ILA, <http://www.nra-ila.org/second-amendment/the-second-amendment.aspx> (last visited Nov. 14, 2012).

161. *See generally News & Issues*, NRA-ILA, <http://www.nra-ila.org/news-issues.aspx> (last visited Nov. 14, 2012).



*crimes committed by the unlawful use of arms, but may not provide additional penalties on the basis that a crime is committed by means of any arm. The State shall not in any way limit the right of any person to own arms for any reason; nor shall any limitation be placed on the right of any person not engaged in unlawful activity to stand one's ground and to use deadly force in defense of one's self or others if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to any person or to prevent the commission of a forcible felony; nor shall any limitations be placed on how arms may be carried in any public place or other property subject to the jurisdiction of the state, or by the proprietor of any public business. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms, and to the extent that the selling, manufacture, or use of arms occurs entirely within the state, it shall not be subject to regulation by any other authority.*

What is immediately striking about this proposed amendment is its length; to say the least, it lacks the pithiness of the Second Amendment to the United States Constitution. Although brevity is the soul of wit, over two centuries of debate over what is or is not included in the “right to keep and bear arms” makes clear that there is nothing to be gained by brevity in defining gun rights.

That said, although this proposed amendment is intended to capture the broadest possible right to bear arms, it is fairly complete: every clause addresses an actual issue that has arisen in the fight between proponents of gun rights and gun control. And while the people of a particular state might pick and choose among the many options embedded in this proposed language when amending their state constitution, the complete version appears to capture the full breadth that can be given to the right to bear arms. To demonstrate this, we will explain the background of each of the provisions above:

*The State may not infringe on the individual right of any resident of the State, and all persons present therein . . .*

The first clause of this proposed amendment sets the tone by eliminating some of the confusing grammatical structures of the Second Amendment. This proposed amendment does not bury its restrictions behind a prefatory clause, nor does it speak in the passive voice; rather this is set up out front as a clear restriction on something that the State *may not* do.

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1481

Second, the clause clearly protects an “individual right.” Although it would appear that *Heller* had already settled this question,<sup>162</sup> it is worth noting that the Supreme Court had previously denied that the Second Amendment necessarily protected any such individual right<sup>163</sup> and that even in *Heller*, this notion only carried a bare, 5-4 majority.<sup>164</sup> Judge Wilkinson has pointed out that “the textual ambiguity in *Heller* goes to the very existence of an individual right, not its scope; the case involved the creation of a new substantive constitutional right that had not been recognized in over two hundred years.”<sup>165</sup> In the absence of a clearer statement, it is entirely possible that a reinterpretation of the Second Amendment may see fit to limit this part of *Heller*’s holding. Moreover, the proposed language takes inspiration from several states that have left no doubt about whom the right to bear arms belongs to by expressly ascribing it to the “individual.”<sup>166</sup>

Third, this first clause wholly disassociates the right to bear arms from citizenship, proclaiming it to be a fundamental right of *all* persons resident in or present in the state. This disassociation severs the link between the right to bear arms and militia service that undergirded the holding in *Miller*.<sup>167</sup> This represents a significant

---

162. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an *individual* right to keep and bear arms.” (emphasis added)).

163. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (“[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’” (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939))).

164. *Cf. Heller*, 554 U.S. at 636 (Stevens, J., dissenting) (“Surely [the Second Amendment] protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.”).

165. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 272–73 (2009).

166. *See* ARIZ. CONST. art. II, § 26; ILL. CONST. art. I, § 22; N.D. CONST. art. I, § 1; UTAH CONST. art. I, § 6; WASH. CONST. art. I, § 24. Many other states use language of similar import, referring to “each citizen” or “every citizen” or words of similar import. *See* ALA. CONST. art. I, § 26 (“every citizen”); CONN. CONST. art. I, § 15 (“every citizen”); LA. CONST. art. I, § 11 (“each citizen”); ME. CONST. art. I, § 16 (“every citizen”); MICH. CONST. art. I, § 6 (“Every person”); MISS. CONST. art. III, § 12 (“every citizen”); MO. CONST. art. I, § 23 (“every citizen”); MONT. CONST. art. II, § 12 (“any person”); NEV. CONST. art. I, § 11, ¶ 1 (“every citizen”); TEX. CONST. art. I, § 23 (“every citizen”); W. VA. CONST. art. III, § 22 (“a person”).

167. *Cf. United States v. Miller*, 307 U.S. 174, 178 (1939) (“With obvious purpose to assure the continuation and render possible the effectiveness of such forces [*i.e.* the Militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.”).

expansion on many states' constitutional provisions, which expressly limit the scope of their right to bear arms to citizens only.<sup>168</sup> At the same time, it squares neatly with (and may even expand) *Heller*, which noted that the Second Amendment codifies a "right of the people," and therefore applies not only to citizens, but to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be part of that community."<sup>169</sup> By expressly protecting non-citizens, this proposal acknowledges that "[t]he right to bear arms is in part aimed at self-defense, something valuable to all people and not just to citizens."<sup>170</sup>

Finally, the first clause of the proposal expands the reach of the right to bear arms to "all persons *present*" in the state. This is intended to expand upon the Second Amendment right; current case law (though pre-dating *Heller*) permits states to bar possession of a firearm by out-of-state residents.<sup>171</sup> Not only is there a colorable argument that (notwithstanding the Second Circuit's holding to the contrary in *Bach v. Pataki*<sup>172</sup>) such provisions may conflict with the Privileges and Immunities Clause of Article IV,<sup>173</sup> but such restrictions also deprive residents of the same ability to defend themselves as is afforded to state residents.<sup>174</sup>

*... to keep and bear arms and weapons of any kind whatsoever . . .*

As described above in Scope III and IV in the first part of this Article, the *Heller* majority attempted to distinguish between various classes of weapons, although it is far from clear whether such dicta makes for good law when it comes to the "arms and weapons" the

---

168. See sources cited *supra* note 166.

169. *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). *But see Heller*, 554 U.S. at 580–81 (noting that "the people" is a broader category than the militia, and that therefore the use of the phrase "the people" supported a finding of a right to bear arms unconnected with militia service). To the extent that the use of the phrase "the people" disconnected the Second Amendment right from militia service, expanding the class of persons covered must, *a fortiori*, suggest such separation at least as strongly.

170. 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, 1514 (2009).

171. See *Bach v. Pataki*, 408 F.3d 75, 95 (2d Cir. 2005) (upholding New York's denial of gun licenses to non-residents under the Second Amendment and Privileges and Immunities Clauses).

172. *Id.*

173. See Nelson Lund, *Have Gun, Can't Travel: The Right to Arms Under the Privileges and Immunities Clause of Article IV*, 73 UMKC L. REV. 951 (2005).

174. See *id.* at 962.

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1483

State may not restrict or prohibit.<sup>175</sup> Justice Scalia put particular emphasis on the “popularity” of handguns as an “arm” useful for self-defense in the home in overturning the D.C. law at issue in *Heller*,<sup>176</sup> even as the Court attempted to limit the Second Amendment right to prevent individuals from carrying “dangerous and unusual weapons” of a type “not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns” and “M-16 rifles and the like.”<sup>177</sup> More important, Scope IV points out that the challenge in *Heller*, and the decision therein, in fact may be further limited to the type of handgun at issue in that challenge: a .22 caliber revolver and similar small bore handguns.

This phrase of the proposed amendment, therefore, eliminates the uncertainty surrounding Justice Scalia’s homage to the popularity of small arms and the dicta disapproving those substantially larger arms. Not only does the expansion of the right to “arms and weapons of any kind whatsoever” comport with the historical record—where various cannons, howitzers and other “weapons of mass destruction” of the 18th and early 19th century were classified as “arms” and held by private parties for use in the militias,<sup>178</sup> but also grants citizens the freedom to possess and use any firearm of their choice.

Of course, existing federal firearms law, operating through the Supremacy Clause, will necessarily limit this phrase in the proposed amendment—“any kind whatsoever” will come with the caveat causing the phrase to read thus, “of any kind not presently prohibited by federal law.” Nonetheless, considering the (relatively) narrow prohibitions of federal firearms laws, the proposed amendment provides broad availability of numerous arms and weapons which would otherwise be banned under existing state laws and which are not restricted by federal law.<sup>179</sup> The sunseting of the Federal Assault

---

175. See *District of Columbia v. Heller*, 554 U.S. 570, 619–26 (2008).

176. The Court put significant stock into the fact that, “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” *Heller*, 554 U.S. at 629.

177. *Id.* at 625–27.

178. See sources cited *supra* note 71.

179. For example, California bans an extensive list of weapons and ammunition including: cane guns, wallet guns, undetectable firearms or firearms not immediately recognizable as a firearm, any ammunition which contains or consists of any fléchette dart, any bullet containing or carrying an explosive agent, ballistic knives, nunchaku, short-barreled shotguns or rifles, metal, wood, or hard plastic composite knuckles, belt buckle knives, leaded canes, zip guns, shuriken, lipstick case knives, cane swords, shobi-zue, writing pen knives, and weapons colloquially known as a blackjack,

Weapons Ban in 2004<sup>180</sup> and Congress's failure to pass similar legislation in the past decade<sup>181</sup> open the door to virtually any legally procurable weapons including a broad variety of military-style weapons such as semi-automatic AK-47s, Uzi carbines, TEC-DC9s (a semi-automatic pistol with a thirty-two round magazine), and any number of other semi-automatic weapons with high-capacity magazines, to name just a few.<sup>182</sup>

*... for the security and defense of the person and property of one's self or of others, the common defense, hunting, recreation, or any otherwise-lawful purpose.*

The purpose undergirding the right to bear arms has been at the foundation of the Supreme Court's Second Amendment jurisprudence. The *Miller* Court upheld a ban on short-barreled shotguns entirely on the basis that it lacked "some reasonable relationship to the preservation or efficiency of a well-regulated militia."<sup>183</sup> Conversely, *Heller* and *McDonald* invalidated handgun restrictions primarily because the Court held that the Second Amendment protects a right to self-defense in the home, for which handgun possession was necessary.<sup>184</sup>

At the same time, the perceived purpose of the Second Amendment has been used to narrow its scope considerably. Justice Scalia freely acknowledged that the *Heller* opinion dissociates the

---

slungshot, billy, sandclub, sap, or sandbag. *See* CAL. PENAL CODE §§ 16000–24790 (West 2012).

180. Violent Crime Control and Law Enforcement Act of 1994, §§ 110101–06, Pub. L. No. 103-322, 108 Stat. 1796.

181. All attempts to reinstate the assault weapons ban since the sunset of the original ban have failed. *See* Assault Weapons Ban Reauthorization Act of 2008, H.R. 6257, 110th Cong. (2008); Assault Weapons Ban and Law Enforcement Protection Act of 2007, H.R. 1022, 110th Cong. (2007); Assault Weapons Ban and Law Enforcement Protection Act of 2005, H.R. 1312, 109th Cong. (2005); H.R. 5099, 108th Cong. (2004); H.R. 3831, 108th Cong. (2004); Assault Weapons Ban and Law Enforcement Protection Act of 2003, H.R. 2038, 108th Cong. (2003).

182. *See* Violent Crime Control and Law Enforcement Act of 1994, § 110102, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

183. *United States v. Miller*, 307 U.S. 174, 178 (1939).

184. *See* *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."); *see also* *McDonald v. Chicago*, 130 S. Ct. 3020, 3036 (2010) (plurality opinion) (finding that the Second Amendment was incorporated against the states because "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day").

right to bear arms from militia service,<sup>185</sup> which flies in the face of the Framing-era view that the right to arms was essential to the protection of the populace from foreign invasion or insurrection—core justifications for militias rather than individuals. The Gun Control Act of 1968 provides privileged treatment specifically to sporting weapons, carving out an exception in import prohibitions.<sup>186</sup> At least one scholar has argued that it is unlikely that the Second Amendment was drafted with personal self-defense in mind.<sup>187</sup>

Indeed, once the right to bear arms is given a single “core” purpose, then the scope of that right may become similarly limited. Emphasizing the importance of military weapons diminishes the significance of self-defense, emphasizing self-defense decreases the need for assault rifles, and so forth. The most expansive possible state amendment, however, would necessarily define the right as non-exclusively as possible. The text above draws its inspiration from the full panoply of state constitutional provisions, the vast majority of which clearly protect the right to defend one’s self or others,<sup>188</sup> and, in some cases, expressly grant the right to defend property.<sup>189</sup> As in several other states, this amendment would also proclaim hunting, recreation, and other uses of firearms to be fundamental rights.<sup>190</sup>

---

185. See *Heller*, 554 U.S. at 627–28 (“But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of that right.”).

186. 18 U.S.C. § 925 (2006) (permitting the importation of weapons “generally recognized as particularly suitable for or readily adaptable for sporting purposes”).

187. See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHI.-KENT L. REV.* 103, 110 (2000) (“Theirs was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers.”).

188. See ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights § 4; KY. CONST. art. I, § 1; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11; N.H. CONST. part I, art. II; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. art. I, § 16; WASH. CONST. art. I, § 24; W. VA. CONST. art. I, § 24; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24.

189. See COLO. CONST. art. II, § 13; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.D. CONST. art. I, § 1; OKLA. CONST. art. II, § 26.

190. Cf. DEL. CONST. art. I, § 20; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; UTAH CONST. art. I, § 6; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25.

Finally, this proposal would maximize liberty while diminishing any limitations on liberty. The amendment would expressly codify a right to bear arms in the “common defense”—a term that may codify the view that “when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”<sup>191</sup> At the same time, this does not pair the freedom to bear arms with the responsibility to do so in defense of the state, as would be required by several states that provide a right to bear arms “in aid of the civil power when thereto legally summoned,”<sup>192</sup> which seems to expressly codify a power on behalf of the states to enlist their armed populace into service. This proposal does not, however, go so far as to bar any of the militia-regulating measures that often required service by all residents of a state.<sup>193</sup> It could be argued that, to truly codify the maximum scope of a right to bear arms, the government would necessarily be debarred from requiring any service whatsoever as an incident of that right.

*No criminal penalty may work an infringement of the right to bear arms, and any person imprisoned shall have his full right to bear arms restored immediately upon release.*

This passage addresses one group for which the right to bear arms is curtailed nationally: convicted criminals. Although this denial of gun rights is textually dubious under the Second Amendment (which, unlike the voting provisions in the Fourteenth Amendment, does not expressly exempt convicted criminals from its ambit),<sup>194</sup> it has also been repeatedly upheld as a reasonable restriction on gun rights by myriad courts.<sup>195</sup>

The effect of this restriction is to allow a single indiscretion—albeit often a regrettable and violent one—to curtail wholly a fundamental right to self-defense. It is clear how this leaves a convicted criminal

---

191. See *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

192. COLO. CONST. art. II, § 13; see also MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; OHIO CONST. art. I, § 4.

193. For a discussion of these laws, see, for example, *Heller*, 554 U.S. at 650–51 (Stevens, J., dissenting).

194. See U.S. CONST. amend. XIV, § 2 (allowing for the right to vote to be abridged for “participation in rebellion, or other crime”).

195. See, e.g., *United States v. Rhodes*, 423 F. App’x 336 (4th Cir. 2011); *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); see also *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010) (upholding restrictions on gun possession by drug users); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (same); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (upholding restrictions on gun ownership by those convicted of domestic violence misdemeanors).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1487

unable to defend himself or herself against a would-be attacker or even a domestic abuser. What is less well-known is the degree to which this may expose a convicted felon—and his or her neighbors—to frequent police searches.<sup>196</sup> And in some places, such a draconian deprivation of rights may even leave convicted criminals unable to defend themselves against non-human assailants, such as Alaskan bears and wolverines.<sup>197</sup>

Allowing for reinstatement of gun rights takes full advantage of a 1986 provision of the Firearm Owners Protection Act that allows for a convicted felon to own a gun if he has had his civil rights restored.<sup>198</sup> This is consistent with a general trend of states allowing for the restoration of gun rights by all convicted felons in recognition of the fact that past violent conduct is not necessarily a valid reason to infringe upon fundamental gun rights.<sup>199</sup>

*The state may provide penalties for crimes committed by the unlawful use of arms, but may not provide additional penalties on the basis that a crime is committed by means of any arm.*

It is clear that violent crime deserves punishment—and that guns can be used to kill or injure. The first portion of this provision makes clear that the use of a gun or other weapon to commit an assault, murder, or any other crime—violent or non-violent—may be punished.

What this provision does do, however, is eliminate two kinds of discrimination. The first is discrimination against gun owners. For example, the Supreme Court has held that the exchange of a gun for drugs—without the gun having ever been fired or even brandished—is subject to a mandatory sentencing enhancement simply because of

---

196. See Al Baker & Joseph Goldstein, *2 Opinions on Stop-and-Frisk Report*, N.Y. TIMES, May 10, 2012, at A27 (noting that the New York Police Department's controversial "stop-and-frisk" policy is part of "the department's steadfast commitment to going after illegal guns").

197. See, e.g., *The Essentials for Traveling in Bear Country*, ALASKA DEP'T FISH & GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=livingwithbears.bearcountry> (last visited Nov. 15, 2012) ("A .300-Magnum or a 12-gauge shotgun with rifled slugs are appropriate weapons if you have to shoot a bear. Heavy handguns such as a .44-Magnum may be inadequate in emergency situations, especially in untrained hands."); see also 5 ALASKA ADMIN. CODE tit. 5 § 92.410 (2012) (allowing any person to shoot an animal "in defense of life or property," and providing specific provisions for "a black bear, wolf, wolverine, or coyote" or a "brown bear").

198. 18 U.S.C. § 921(a)(20) (2006).

199. See Michael Luo, *Felons Finding it Easy To Regain Gun Rights*, N.Y. TIMES, Nov. 14, 2011, at A1.



the presence of a gun in the transaction.<sup>200</sup> Justice O'Connor reasoned in that case that using a gun "momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon."<sup>201</sup> This reasoning alone shows a bias against those who choose to arm themselves.

There is a second type of discrimination that this provision also prevents: punishing gun offenses more severely than otherwise-identical crimes committed without a gun. For example, in New York, assault in the third degree, *inter alia*, can consist of intentionally causing physical injury to a person.<sup>202</sup> That crime is elevated to second-degree assault if the individual intends to cause and causes "serious physical injury."<sup>203</sup> But, the only difference between second- and first-degree assault is the use of a "deadly weapon or dangerous instrument."<sup>204</sup> This does not punish the degree of culpability or the harm caused, then, but merely tacks on penalties for the mere use of a weapon, notwithstanding that having a weapon is a fundamental right.

This provision is also one of a relative handful that may be substantially implemented by the passage of this amendment, since it will immediately alter the nature of the state's criminal law, even if it is unable to overcome federal laws like those at issue in *Smith*.<sup>205</sup>

*The state shall not in any way limit the right of any person to own arms for any reason . . .*

The *Heller* majority also attempted to carve out restrictions on the possession and use of arms by certain individuals—namely, felons and the mentally ill—as "presumptively lawful."<sup>206</sup> As the majority noted, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . ."<sup>207</sup> Although a significant number of the post-*Heller* cases have expressly upheld the possession ban by

---

200. See *Smith v. United States*, 508 U.S. 223, 231 (1993).

201. *Id.* at 240.

202. See N.Y. PENAL LAW § 120.00 (McKinney 2012).

203. *Id.* § 120.05.

204. *Id.* § 120.10.

205. See *Smith*, 508 U.S. 223.

206. *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

207. *Id.* at 626.

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1489

convicted felons,<sup>208</sup> drug users,<sup>209</sup> and those convicted of domestic violence misdemeanors,<sup>210</sup> successful challenges to these “presumptively lawful” bans on classes of individuals have occurred.<sup>211</sup> Indeed, a number of states expressly permit ex-felons to petition for the restoration of their right to bear arms by statute.<sup>212</sup>

Thus, rather than force any of the restricted classes of individuals—which restrictions the Supreme Court has expressly denoted “presumptively lawful”—to endure statutory and administrative processes for the reinstatement of rights, this clause in the proposed amendment gives states the ability to broadly expand the right to keep and bear arms. Although objection may be lodged on account of the extremely broad nature of this clause—granting rights to ex-felons and the mentally ill for example—federal legislation already prevents certain undesirable individuals from firearm possession.<sup>213</sup> The states may therefore continue the commitment to a broad right to bear arms, limiting any negative implications of the capacious definition of the right in the state constitution by operation of federal law via the Supremacy Clause.

---

208. *See, e.g.*, *United States v. Rhodes*, 423 F. App'x 336 (4th Cir. 2011); *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010).

209. *See, e.g.*, *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

210. *See, e.g.*, *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010) (upholding federal ban on firearm possession by individuals convicted of domestic violence misdemeanors, based on analysis of *Heller* and historical analysis of the history behind felon and misdemeanor possession laws); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc).

211. *See, e.g.*, *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (holding statute prohibiting felons from possessing firearms was unconstitutional as applied to individual convicted of felony drug possession); *State v. R.P.H.*, 265 P.3d 890 (Wash. 2011) (holding that termination of a former juvenile sex offender's obligation to register as such for a first degree rape was a procedure equivalent to a “certificate of rehabilitation,” thus restoring his right to possess a firearm).

212. *See, e.g.*, MINN. STAT. § 609.165 (2012); OHIO REV. CODE ANN. § 2923.14 (West 2011); OR. REV. STAT. § 166.274 (2012); TENN. CODE ANN. §§ 40-29-101 to -105 (2012); WASH. REV. CODE § 9.41.040 (2012).

213. *See, e.g.*, 18 U.S.C. § 922(d) (2006) (“It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to any controlled substance . . . (4) has been adjudicated as a mental defective or has been committed to any mental institution; (5) who, being an alien . . . is illegally or unlawfully in the United States; . . . (9) has been convicted in any court of a misdemeanor crime of domestic violence.”).

*... nor shall any limitation be placed on the right of any person not engaged in unlawful activity to stand one's ground and to use deadly force in defense of one's self or others if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to any person or to prevent the commission of a forcible felony; . . .*

This provision is now well-known as the stand-your-ground provision, lifted, with some modifications, directly from the Florida Statutes.<sup>214</sup> As the NRA-ILA observes, this is truly a codification of the common law rule that imposes no “duty to retreat from criminal attack”<sup>215</sup> and recent polls have found that, notwithstanding the Trayvon Martin shooting, such laws remain popular.<sup>216</sup>

Indeed, this provision would “endorse the idea of self-empowerment and standing with victims of violent attacks.”<sup>217</sup> As one commentator points out, the right to self-defense carries with it the necessity that “[c]itizens must be able to protect themselves without fear that self-defense will be legally problematic.”<sup>218</sup> And that, conversely, without the unfettered right to shoot first and ask questions later, the law would unduly favor those who wish to do harm to others by curtailing the right of citizens to use deadly force on any suspicion that they might be in danger.

Indeed, we have adopted a similar rule for police officers: “There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.”<sup>219</sup> There is even less reason why a civilian—neither trained in self-defense nor charged

---

214. See FLA. STAT. § 776.013 (2012).

215. “Stand Your Ground” Laws Attacked Despite Broad Public Support, NRA-ILA (May 11, 2012), <http://www.nra-ila.org/legislation/state-legislation/2012/stand-your-ground-laws-attacked-despite-broad-public-support.aspx>.

216. Marc Caputo, *Poll: Majority of Florida's Registered Voters Favor Stand Your Ground Law*, MIAMI HERALD, May 25, 2012, <http://www.miamiherald.com/2012/05/24/2815692/poll-majority-of-flordas-registered.html>; Anthony Man, *Stand Your Ground Enjoys Strong Support, Opinion Poll Finds*, SUN SENTINEL, May 10, 2012, [http://articles.sun-sentinel.com/2012-05-10/news/fl-trayvon-stand-your-ground-poll-20120510\\_1\\_florida-voters-opinion-poll-independents-favor](http://articles.sun-sentinel.com/2012-05-10/news/fl-trayvon-stand-your-ground-poll-20120510_1_florida-voters-opinion-poll-independents-favor).

217. Caputo, *supra* note 216 (quoting State Rep. Dennis Baxley) (internal quotation marks omitted).

218. Rich Mortland, *'Stand Your Ground' Laws Protect the Innocent*, U.S. NEWS: DEBATE CLUB (Mar. 28, 2012), <http://www.usnews.com/debate-club/are-stand-your-ground-laws-a-good-idea/stand-your-ground-laws-protect-the-innocent>.

219. *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J. concurring).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1491

with protecting the safety of anyone but himself—should be held to a higher standard.

*. . . nor shall any limitations be placed on how arms may be carried in any public place or other property subject to the jurisdiction of the state, or by the proprietor of any public business.*

The Supreme Court in *Heller* also all but stated that concealed carry restrictions are permissible under the Second Amendment.<sup>220</sup> Further, most states have some form of concealed carry permitting laws.<sup>221</sup> The primary distinction, among the vast majority that have a permitting system, is whether the system is “no issue,” “shall issue,” “may issue,” or without any requirement for a concealed carry permit.<sup>222</sup> Under the “shall issue” scheme, the permitting authority *must* issue the permit if the applicant meets the enumerated statutory qualifications.<sup>223</sup> Under the “may issue” scheme, the permitting authority, usually a sheriff or his or her office, has much more discretion; these statutes typically include enumerated requirements (albeit fewer than in a shall issue jurisdiction) but imbue the decision-maker some discretion to refuse for “good cause” or if the applicant cannot prove that they have a “good” reason for the permit.<sup>224</sup>

Some states’ concealed carry laws have been challenged and upheld post-*Heller*.<sup>225</sup> It appears then, in light of the Supreme Court’s dicta in *Heller* and state court decisions post-*Heller*, that concealed carry restrictions are likely to be upheld. Therefore, the inclusion of this clause in the proposed amendment will constitutionally protect the right to bear arms on one’s own property and public property whether carrying openly or concealed. While private property owners may restrict the ability for an individual to bring weapons or arms upon their land, the proposed constitutional amendment will ensure that a state government is not able to burden the right,

---

220. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[T]he right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”).

221. *Right-to-Carry 2012*, NRA-ILA (Feb. 28, 2012), <http://www.nraila.org/gun-laws/articles/2012/right-to-carry-2012.aspx>.

222. *See supra* note 116 and accompanying text.

223. *See supra* note 117 and accompanying text.

224. *See supra* note 118 and accompanying text.

225. *See supra* notes 119, 125 and accompanying text; *see also supra* notes 127–29, 131 and accompanying text.

especially given that the Second Amendment seems not to protect the right to carry (perhaps at all, outside the home).

*No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms . . .*

Even if a local government were able to enact a measure consistent with the earlier clauses of the broad proposed amendment, this clause clarifies and “constitutionalizes” the preemption of local legislation surrounding the right to keep and bear arms. Indeed, many state legislatures have enacted laws pre-empting local governments from enacting more restrictive firearms regulations than those prescribed by the state government.<sup>226</sup> Recent news coverage has shown that such a restriction vests a significant amount of power in the state government over any local efforts—even time, place, and manner-type restrictions—on the carrying of firearms. For example, in advance of the 2012 Republican National Convention in Tampa, Florida, Tampa Mayor Bob Buckhorn sought executive approval from Florida Governor Rick Scott to circumvent the recently enacted

---

226. See, e.g., CAL. GOV'T CODE § 53071 (West 2012) (“It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in Section 1721 of the Labor Code.”); COLO. REV. STAT. §§ 18-12-201 to -216 (2012) (preempting local regulation of concealed carry of firearms); FLA. STAT. § 790.33 (2012) (“[T]he Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition . . . [and] [a]ny such existing [local] ordinances, rules, or regulations are hereby declared null and void.”); MONT. CODE ANN. § 45-8-351(2) (2012) (“[A] county, city, town, consolidated local government, or other local government unit may not prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any weapon, including a rifle, shotgun, handgun, or concealed handgun.”); VA. CODE ANN. § 15.2-915 (2012) (“No locality shall adopt or enforce any ordinance, resolution or motion, as permitted by § 15.2-1425, and no agent of such locality shall take any administrative action, governing the purchase, possession, transfer, ownership, carrying, storage or transporting of firearms, ammunition, or components or combination thereof other than those expressly authorized by statute. . . . Any local ordinance, resolution or motion adopted prior to the effective date of this act governing the purchase, possession, transfer, ownership, carrying or transporting of firearms, ammunition, or components or combination thereof, other than those expressly authorized by statute, is invalid.”); *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012) (en banc) (holding that state concealed handgun permitting system preempted ability of Board of Regents to regulate handgun possession on campus; however, limiting its holding to avoid the state constitutional issue).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1493

state preemption statute.<sup>227</sup> Governor Scott turned down the request—limited to the few days surrounding the convention and to the downtown area in which the convention will be held—citing the Second Amendment as justification for the denial.<sup>228</sup>

Although Florida's and other states' statutory preemption effectively limits the ability of local governments to regulate firearms more strictly than any given state, the clause included in the proposed amendment would put the right to keep and bear arms on more solid constitutional ground (especially should the interpretation of the federal Constitution's Second Amendment change) and prevent local governments from enacting laws that may not necessarily be explicitly or impliedly preempted by statute.

*... and to the extent that the selling, manufacture, or use of arms occurs entirely within the State, it shall not be subject to regulation by any other authority.*

This provision draws its inspiration from the proliferation of "Firearms Freedom Acts" around the United States. These laws seek to free guns that are manufactured, sold, and used wholly in-state from regulation under any federal laws.<sup>229</sup> These provisions rely on the fact that the Federal Firearms Act and the Gun Control Act rely primarily on the Commerce Clause of the U.S. Constitution for the assertion of federal jurisdiction.<sup>230</sup>

The status of these laws is currently unclear, however. In *Montana Shooting Sports Association v. Holder*,<sup>231</sup> the District of Montana rejected the assertion that such a law could exempt local arms from federal regulation, holding that "the fact that federal firearms laws 'ensnare some purely intrastate activity,' such as the manufacturing and sales activity purportedly exempted from regulation by the Act, 'is of no moment.'"<sup>232</sup> However, the case has been appealed to the Ninth Circuit, although it is currently stayed pending the outcome of

---

227. *Florida's Gov. Scott: No Gun Ban for Downtown Tampa During GOP Convention*, MSNBC (May 2, 2012), [http://usnews.msnbc.msn.com/\\_news/2012/05/02/11507172-floridas-gov-scott-no-gun-ban-for-downtown-tampa-during-gop-convention?lite](http://usnews.msnbc.msn.com/_news/2012/05/02/11507172-floridas-gov-scott-no-gun-ban-for-downtown-tampa-during-gop-convention?lite).

228. *See id.*

229. *See, e.g.*, MONT. CODE ANN. § 30-20-102 (West 2009).

230. *See* Joseph Luppino-Esposito, Comment, *Four Shots at the Commerce Clause: The Firearms Freedom Act and the Unarticulated Products Category of the Commerce Power*, 7 SETON HALL CIRCUIT REV. 229, 242-44 (2010).

231. No. CV-09-147-DWM-JCL, 2010 WL 3926029 (D. Mont. Aug. 31, 2010).

232. *Id.* at \*17 (quoting *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)).

*Nordyke v. King*.<sup>233</sup> The outcome depends on the complex interplay among *Gonzales v. Raich*,<sup>234</sup> *United States v. Lopez*,<sup>235</sup> *Wickard v. Filburn*,<sup>236</sup> and *National Federation of Independent Business v. Sebelius*.<sup>237</sup> Accordingly, it is difficult to predict whether this provision can effectively insulate intrastate guns from federal jurisdiction.

### C. Potential Sources of Federal Law that Could Counteract State Constitutional Provisions

The Supreme Court has long recognized the new judicial federalism, that “a state is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”<sup>238</sup> Thus, whether the provision of a state’s constitution is broader than the federal Constitution on its face, or achieves that result by the interpretation of that state’s courts, it is widely recognized that the United States Constitution is the floor, and states are free to embrace expansive rights not recognized in the federal Constitution.<sup>239</sup> Moreover, the Supreme Court has embraced a laissez-faire approach in allowing the States to interpret their own constitutions: “It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.”<sup>240</sup> Taking this power to heart, states routinely grant broader rights, whether it is with respect to search and seizure, police behavior, due process, or even suspect classifications for gender discrimination.<sup>241</sup>

---

233. Order at 1, No. 10-36094 (9th Cir. Dec. 20, 2011).

234. 545 U.S. 1 (2005).

235. 514 U.S. 549 (1995).

236. 317 U.S. 111 (1942).

237. 132 S. Ct. 2566 (2012).

238. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982).

239. *See supra* note 141 and accompanying text.

240. *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940).

241. *See, e.g.*, *Koire v. Metro Car Wash*, 707 P.2d 195, 202 (Cal. 1985) (applying strict scrutiny for gender discrimination claims under the California constitution); *Ryan v. Cal. Interscholastic Fed’n-San Diego Section*, 114 Cal. Rptr. 2d 798, 814 (Cal. Ct. App. 2001) (“Our state due process constitutional analysis differs from that conducted pursuant to the federal due process clause in that the claimant need not establish a property or liberty interest as a prerequisite in invoking due process protection . . . [it] is ‘much more inclusive’ and protects a broader range of interests.” (citations omitted)).

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1495

In the case of gun rights, however, there is a substantial field of existing federal legislation that conflicts with the broad amendment described above. It is clear that the Supremacy Clause would be a limitation on any state constitutional amendment. But it is well-settled that the federal government is supreme only when it acts within its enumerated powers.<sup>242</sup> It is currently unclear precisely how far the federal government can go in regulating firearms. The Supreme Court made it clear in *United States v. Lopez* that the federal government cannot simply regulate intra-state activity, and, specifically, cannot ban gun possession near schools under the enumerated powers of Congress.<sup>243</sup> Of course, the Gun-Free School Zones Act invalidated in *Lopez* was re-enacted shortly thereafter, with the sole difference being the requirement that the firearm in question “has moved in or that otherwise affects interstate . . . commerce.”<sup>244</sup>

If, in fact, this type of jurisdictional hook is all that is required to give Congress nearly plenary power to regulate gun use, then there are effectively no constitutional limits on the powers of Congress. Indeed, the vast majority of federal gun regulations already rely on similar jurisdictional hooks: for example, the Federal Firearms Act regulates dealers of guns that move in commerce.<sup>245</sup> Under the logic of *Gonzales v. Raich*,<sup>246</sup> it is extremely easy for Congress to use broad regulation of commerce to impose extremely restrictive regulations on firearms possession.<sup>247</sup>

Thus, under the Commerce Power, Congress may indeed have the power to legislate weapons right down to the floor set by the Supreme Court with respect to the Second Amendment or any other constitutional right. Yet, the question of whether they will move to block a state’s attempt to ratchet up the right to bear arms via a state

---

242. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”); see also *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”).

243. See *United States v. Lopez*, 514 U.S. 549 (1995).

244. 18 U.S.C. § 922(q)(2)(A) (2006).

245. See *United States v. Stewart*, 451 F.3d 1071, 1073 (9th Cir. 2006).

246. 545 U.S. 1 (2005).

247. Applying *Raich*, the District of Montana recently invalidated a state law that purported to insulate intrastate firearms sales from federal regulation. See *Mont. Shooting Sports Ass’n v. Holder*, No. CV-09-147-DWM-JCL, 2010 WL 3926029 (D. Mont. Aug. 31, 2010). That case has been appealed to the Ninth Circuit, however, and is currently stayed pending the outcome of *Nordyke v. King*, which was reargued recently en banc. See *supra* note 233 and accompanying text.



constitution is as speculative as suggesting how broadly a state might try to go.<sup>248</sup>

It is also possible that Congress could try to limit state constitutional provisions of the right to bear arms by exercising its Taxing and Spending Powers, but that power is also subject to its own limitations.<sup>249</sup> However, as long as courts continue to recognize public safety as a compelling interest validly served by gun regulation, it is likely that any regulations of weapons, short of actual bans, would have the required nexus to funding for Congress to impose restrictions.

Additionally, gun regulations also potentially could be enacted as “Necessary and Proper” to the exercise of legitimate federal power. It is clear that the federal government may restrict gun possession on federal land, for example.<sup>250</sup> But they may also enact restrictions on persons who come into federal jurisdiction by other routes, as well. The felon-in-possession regulations of § 922, for example, do not only impact those convicted of state felonies—whose rights may be restored under the Firearm Owners Protection Act<sup>251</sup>—but also apply to federal felons.<sup>252</sup> The Supreme Court has acknowledged that Congress has broad power to protect the public from those who legitimately come into federal custody,<sup>253</sup> and Justice Scalia’s *Heller* opinion spoke favorably of restrictions on firearms ownership by convicted felons and the mentally ill.<sup>254</sup> There is no clear limiting

---

248. It is, however, perhaps noteworthy that a recent attempt to increase state gun rights, the National Right-to-Carry Reciprocity Act of 2011, relied on Section 5 of the Fourteenth Amendment for its jurisdiction, not the Commerce Power. See National Right-to-Carry Reciprocity Act of 2011, H.R. 822, 112th Cong., § 2 (2011).

249. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589 (1937))).

250. See *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011).

251. See 18 U.S.C. § 921(a)(20) (2006).

252. See Scott Christiansen, *Hidden Punishment—In Rural Alaska, Where Gun Rights Matter Most, There’s No Way for Reformed Felons—Even Non-Violent Ones—to Get Them Back*, ANCHORAGE PRESS, Oct. 28, 2009, [http://www.anchoragepress.com/news/hidden-punishment---in-rural-alaska-where-gun-rights/article\\_fb2e8d5f-cf56-5a02-a71f-b49935d4573c.html](http://www.anchoragepress.com/news/hidden-punishment---in-rural-alaska-where-gun-rights/article_fb2e8d5f-cf56-5a02-a71f-b49935d4573c.html).

253. See *United States v. Comstock*, 130 S. Ct. 1949 (2010) (upholding indefinite federal civil commitment of “sexually dangerous federal prisoner[s]”); see also *Greenwood v. United States*, 350 U.S. 366, 375 (1956) (upholding federal power to commit persons who “came legally into the custody of the United States” where the federal authority “is not exhausted”).

254. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

principle on what restrictions the Congress may place on those otherwise under federal jurisdiction, in the interest of public safety.

In addition, the Second Amendment itself seems to allow Congress significant power to limit the types of guns that are permitted—including those that are imported under an undeniably legitimate exercise of the Congressional power to regulate foreign commerce. Thus far, *Heller* has made clear that handguns are protected,<sup>255</sup> whereas *Miller* has held that sawed-off shotguns are not.<sup>256</sup> But it is unclear whether Congress may bar the importation of any types of weapons, and to the extent such limits could be imposed, there would likely be some domestic impact.

#### **D. Current Federal Laws that Would Limit the Ability for a State to Grant Broad Gun Rights Through Its State Constitution**

Current federal gun regulations—most notably the National Firearms Act,<sup>257</sup> the Gun Control Act of 1968,<sup>258</sup> and the Firearm Owners Protection Act of 1986<sup>259</sup>—rely primarily on the Commerce Power for their claim of federal power. Although all of these laws pre-date the Court's recent jurisprudence on the Commerce Power that began with *United States v. Lopez*, the Ninth Circuit has—with the apparent blessing of the Supreme Court—approved broad authority to regulate the types of arms that any individual can possess, upholding a federal law that makes it illegal to “transfer or possess a machinegun”<sup>260</sup> that was not lawfully possessed before 1986, as an exercise of the Commerce Power.<sup>261</sup> The Ninth Circuit initially held that such a restriction exceeded the power of Congress in *United States v. Stewart (Stewart I)*<sup>262</sup> when applied to machineguns that were “entirely homemade” and had never moved in interstate commerce.<sup>263</sup> The Supreme Court, however, subsequently vacated

---

255. *See id.* at 628-29.

256. *See* *United States v. Miller*, 307 U.S. 174 (1939).

257. 26 U.S.C. §§ 5801–5872 (2006).

258. 18 U.S.C. §§ 921–931 (2006).

259. Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 921–926, 926A, 929(a)).

260. 18 U.S.C. § 922(o) (2006).

261. *See* *United States v. Stewart (Stewart II)*, 451 F.3d 1071, 1073 (9th Cir. 2006).

262. 348 F.3d 1132 (9th Cir. 2003).

263. *Id.* at 1135. This holding distinguished *Stewart I* from an earlier case in which the Ninth Circuit had upheld § 922(o) as applied to weapons that were, in fact, illegally transferred in interstate commerce—the aptly-named *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996).

this opinion and remanded for reconsideration in light of *Gonzales v. Raich*.<sup>264</sup> On remand, the Ninth Circuit reversed itself, holding that “Congress had a rational basis for concluding that in the aggregate, possession of homemade machineguns could substantially affect interstate commerce,” and banning such possession was therefore within the Commerce Power.<sup>265</sup> This would seem to suggest that there are few limits on what Congress can do to regulate firearms under the Commerce Power.

Recent attempts to circumvent the Federal Firearms Act by the enactment of “Firearms Freedom Acts”—laws that purport to create a wholly intra-state market for guns and declare it immune from federal regulations—have attempted to draw a boundary on the breadth of federal regulatory power over guns. However, the nearly-plenary nature of federal Commerce Power has been upheld recently in *Montana Shooting Sports Association v. Holder*.<sup>266</sup> In that case, the Montana Shooting Sports Association sought a declaratory judgment that the Montana Firearms Freedom Act<sup>267</sup> was effective notwithstanding Federal firearms laws. The Montana Firearms Freedom Act, in essence, declared certain firearms manufactured wholly or almost wholly within the state of Montana to be beyond the reach of the Federal government under the Commerce Clause.<sup>268</sup> Relying heavily on *Gonzales v. Raich*,<sup>269</sup> the District Court found that “Montana’s attempt to . . . excise a discrete local activity from the comprehensive regulatory framework provided by federal firearms laws cannot stand.”<sup>270</sup> The court also found that, so long as Congress is validly exercising its Commerce Power, the Tenth Amendment cannot bar that exercise.<sup>271</sup>

Yet on the other hand, the Supreme Court has expressed a potential interest in rolling back some of Congress’s power to regulate certain arms, and recently cast doubt on federal laws against chemical weapons in *Bond v. United States*.<sup>272</sup> Pro-gun organizations

---

264. See *United States v. Stewart* (*Stewart I*), 545 U.S. 1112 (2005).

265. *Stewart II*, 451 F.3d at 1078.

266. No. CV-09-147-DWM-JCL, 2010 WL 3926029 (D. Mont. Aug. 31, 2010).

267. MONT. CODE ANN. §§ 30-20-101 to -106 (2011).

268. See *id.*

269. 515 U.S. 1 (2005).

270. *Mont. Shooting*, 2010 WL 3926029, at \*16.

271. See *id.* at \*23.

272. 131 S. Ct. 2355 (2011). Although the actual holding in *Bond* related to the standing of individuals to assert the Tenth Amendment as a defense to federal criminal charges, the underlying issue was the validity of the Chemical Weapons

have recognized this issue and have submitted briefs on behalf of Ms. Bond.<sup>273</sup> Although the issues underlying *Bond* have been the subject of a long-standing academic debate,<sup>274</sup> the fact that the Supreme Court may be poised to invalidate a federal ban on chemical weapons makes it difficult to predict how it will view federal regulation of more traditional weapons.<sup>275</sup> Or this interplay may allow Congress to ban the types of guns that they typically regulate, but leave many activities that are not otherwise regulated under the Commerce Power—including, apparently, chemical weapons—outside of the reach of Congress.

And there is considerable factual support for insulating certain areas of the gun market from federal control. Many weapons manufacturers are located within U.S. States, including (but by no means limited to): Alexander Arms, which manufactures .50 Beowulf rifles (Virginia);<sup>276</sup> ArmaLite, which manufactures M16 assault rifles and the M4 carbine (Illinois);<sup>277</sup> Barrett Firearms, which manufactures sniper rifles and machine guns (Tennessee);<sup>278</sup> Bushmaster Firearms,

---

Convention Implementation Act as an exercise of the federal Treaty Power, pursuant to *Missouri v. Holland*. See United States v. Bond, 581 F.3d 128, 132 (3d Cir. 2009); see also 18 U.S.C. § 229(a)(1) (2006). Rather than simply remanding for consideration of the merits, the Supreme Court added in dicta, “[t]he ultimate issue of the statute’s validity turns in part on whether the law can be deemed ‘necessary and proper for carrying into Execution’ the President’s Article II, § 2 Treaty Power. The Court expresses no view on the merits of that argument. It can be addressed by the Court of Appeals on remand.” *Bond*, 131 S. Ct. at 2367. (citations omitted). This language raises the possibility that the Supreme Court may be poised to reconsider the broad powers of Congress to legislate under the Treaty Power. See, e.g., Brief for Amici Curiae of the Cato Institute and the Center for Constitutional Jurisprudence Supporting Defendant-Appellant/Cross-Appellee and Reversal, *United States v. Bond*, No. 08-2677 (3d Cir. Sept. 23, 2011).

273. See, e.g., Brief Amicus Curiae of Gun Owners Foundation et al. in Support of Petitioner, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227), 2010 WL 5087869 (arguing that Bond had standing to challenge the Chemical Weapons Act as exceeding the enumerated powers of Congress).

274. Compare Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (arguing that the Treaty Power cannot extend the powers of Congress), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (arguing for a broadly construed Treaty Power).

275. Nor is this a mere academic question, insofar as there are states in which the use of some chemical weapons is expressly legal. See, e.g., VA. CODE ANN. § 18.2-312 (2012) (“Nothing herein contained shall prevent the use of tear gas or other gases . . . by any person or persons in the protection of person, life or property.”).

276. See ALEXANDER ARMS, <http://www.alexanderarms.com> (last visited Sept. 18, 2012).

277. See ARMALITE, INC., <http://www.armalite.com> (last visited Sept. 18, 2012).

278. See BARRETT, <http://www.barrett.net> (last visited Sept. 18, 2012).

which manufactures AR-15 pistol and rifle variants (North Carolina);<sup>279</sup> Charter Arms, which manufactures several types of handguns (Connecticut);<sup>280</sup> Colt's Manufacturing Company, which manufactures the Colt line of revolvers and rifles (Connecticut);<sup>281</sup> Henry Repeating Arms, which manufactures lever action long guns (New Jersey);<sup>282</sup> Hi-Point Firearms, which manufactures low-cost pistols and carbines (Ohio);<sup>283</sup> Kahr Arms, which manufactures semi-automatic pistols (Massachusetts);<sup>284</sup> Les Baer, which manufactures M1911 pistols and AR-15 rifles (Iowa);<sup>285</sup> Olympic Arms, which manufactures Colt 1911 series pistols and AR-15 and M-16 rifles (Washington);<sup>286</sup> Remington Arms, which makes a number of handguns, rifles, and shotguns (North Carolina);<sup>287</sup> Smith & Wesson, which manufactures a number of types of firearms (Massachusetts);<sup>288</sup> STI International, which manufactures M1911 pistols (Texas);<sup>289</sup> and Taser International, manufacturer of the taser electroshock gun (Arizona).<sup>290</sup> And at least one person has expressed an interest in manufacturing a gun specifically for intra-state sales and use in Montana: the Montana Buckaroo, a .22 caliber rifle intended for use by children.<sup>291</sup>

If these weapons are only sold in the state and are not fungible with other, similar weapons (the Montana provision requires every such

---

279. See BUSHMASTER FIREARMS INT'L, <http://www.bushmaster.com> (last visited Sept. 18, 2012).

280. See CHARTER ARMS, <http://www.charterfirearms.com> (last visited Sept. 18, 2012).

281. See COLT'S MANUFACTURING COMPANY LLC, <http://www.coltsmfg.com> (last visited Sept. 18, 2012).

282. See HENRY REPEATING ARMS, <http://www.henryrepeating.com> (last visited Sept. 18, 2012).

283. See HI-POINT FIREARMS, <http://www.hi-pointfirearms.com> (last visited Sept. 18, 2012).

284. See KAHR ARMS, <http://www.kahr.com> (last visited Sept. 18, 2012).

285. See LES BAER CUSTOM, INC., <http://www.lesbaer.com> (last visited Sept. 18, 2012).

286. See OLYMPIC ARMS, INC., <http://www.olyarms.com> (last visited Sept. 18, 2012).

287. See REMINGTON ARMS CO., LLC, <http://www.remington.com> (last visited Sept. 18, 2012).

288. See SMITH & WESSON, <http://www.smith-wesson.com> (last visited Sept. 18, 2012).

289. See STI INT'L, INC., <http://www.stiguns.com> (last visited Sept. 18, 2012).

290. See TASER INT'L, INC., <http://www.taser.com> (last visited Sept. 18, 2012).

291. See Nathan Koppel, *The Battle Over Buckaroo: Suit Challenges Congress' Right To Regulate Guns*, WALL ST. J.L. BLOG (July 14, 2011, 8:31 AM), <http://blogs.wsj.com/law/2011/07/14/the-battle-over-buckaroo-a-suit-challenges-congress-right-to-regulate-guns>.

2012] *THE (NEW) NEW JUDICIAL FEDERALISM* 1501

weapon to be stamped with “Made in Montana”),<sup>292</sup> there is at least a colorable argument that Congress cannot reach them through the Commerce power.

**E. If a State Did Amend Its Constitution, What Deference Would Other States Have to Pay to Constitutional Provisions of Sister States on, E.g., Carry Laws?**

It is unlikely that any state can have a direct impact on the gun laws of any other state, although states may form compacts among themselves (with the consent of Congress)<sup>293</sup> to provide reciprocity to residents of other states, or may unilaterally choose to allow any person to own a gun without requiring a permit.

Congress may be able to require states to grant reciprocity to residents of other states. For example, the National Right-to-Carry Reciprocity Act of 2011 (H.R. 822) recently passed the House of Representatives.<sup>294</sup> Due to the operation of federal preemption, any state law (or constitutional provision that may be passed) which forbids the recognition of another state’s permits would be rendered ineffective. Interestingly, although this would seem to impact commerce among the several states, the authority cited in the National Right-to-Carry Reciprocity Act is actually Section 5 of the Fourteenth Amendment.

The state constitutions already vary, and neighboring states are able to legislate in any manner they see fit. In the absence of federal preemption, it is unlikely that New York could do anything if New Jersey decided to allow everyone within its borders to carry a loaded handgun on their person, openly or concealed, at all times.

Congress could, perhaps, impose restrictions though, and attempt to limit the concealed carry of weapons across state lines. This would clearly be permissible under the Commerce Power, as Congress already regulates several areas that involve conduct that crosses state lines (such as gambling and prostitution, to name two). However, depending on the nature of the right that courts develop, it may be found that such a regulation would run afoul of the Second

---

292. *See id.*

293. *See* U.S. CONST. art. I, § 10.

294. *See* Amy Bingham & John Parkinson, *House Passes Bill Making Concealed Carry Permits Valid Across State Lines*, ABC NEWS (Nov. 16, 2011), <http://abcnews.go.com/blogs/politics/2011/11/houses-passes-bill-making-concealed-carry-permits-valid-across-state-lines/>.

Amendment or even the Privileges and Immunities Clause of the Constitution.<sup>295</sup>

### CONCLUSION

Even if the Supreme Court's decisions in *District of Columbia v. Heller*<sup>296</sup> and *McDonald v. City of Chicago*<sup>297</sup> failed to produce the result expected by the gun rights advocates who hailed both cases as tipping points in their battles against those holding an anti-rights approach to firearms (pro-gun control), they nonetheless pointed out scores of issues which gun-rights advocates may take up in the state constitutional arena. As the federal Constitution is likely impossible to amend in the current environment, the state constitutions are perhaps lower-hanging fruit when it comes to the amendment process, and the ease with which one may "constitutionalize" their *raison d'être*. At the very least, this Article looks at the holes left in the nascent Second Amendment jurisprudence of the Supreme Court, and through a few thought experiments, points out what might be amongst those states with the desire to offer broad rights to keep and bear arms. In the face of uncertainty in the scope of a federal right to bear arms, the old friend of the gun control side of the political spectrum may just prove to be a new friend to the gun rights side of the political spectrum. Only time will tell whether the gun rights advocates can make that dog hunt.

---

295. Cf. Nelson Lund, *Have Gun, Can't Travel: The Right to Arms Under the Privileges and Immunities Clause of Article IV*, 73 UMKCL. REV. 951 (2005).

296. 554 U.S. 570, 581 (2008).

297. 130 S. Ct. 3020 (2010).