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# Back to the Basics: Restoration of Our Right to Keep and Bear Arms Through a National Reciprocity Act

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**BACK TO THE BASICS: RESTORATION OF OUR RIGHT  
TO KEEP AND BEAR ARMS THROUGH A  
NATIONAL RECIPROCITY ACT<sup>1</sup>**

JULIE MORGAN<sup>★</sup>

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**I. INTRODUCTION**

Just a few days before Christmas, Meredith Graves made a mistake that could end her medical career and send her to prison for at least 3 1/2 years. The 39-year-old fourth-year medical student was carrying a permitted concealed handgun when she saw the sign at

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<sup>1</sup> The latest version of this type of legislation was the National Reciprocity Act of 2011, which was passed by the House and introduced to the Senate as S.2188, “National Right-to-Carry Reciprocity Act of 2012” on March 13, 2012. The bill was referred to Committee but ultimately died. *S.2188 (112th): National Right-to-Carry Reciprocity Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s2188#overview> (last visited May 1, 2013).

the 9/11 Memorial saying “No guns allowed.” She did the responsible thing and asked a security guard where she could check her weapon. Unfortunately, while her Tennessee concealed carry license is recognized in 40 states, New York isn’t one of them. Meredith was arrested.<sup>2</sup>

Similarly, decorated former Marine, Ryan Jerome, was carrying a legally registered concealed handgun while visiting the Empire State Building.<sup>3</sup> The gentleman asked the ticket taker where he could check his handgun, but rather than touring the building, the Marine was arrested for weapons possession as his Indiana license was not valid in New York.<sup>4</sup> Stories such as these frequently reoccur as states are the predominate regulators of firearms, and there is confusion as to whether states recognize out-of-state permits. Accordingly, “[l]aw-abiding gun owners can easily run afoul of handgun carry laws in other states despite having a valid carry permit in their home state.”<sup>5</sup> Reciprocity of concealed weapon permits is merely a voluntary act of individual states.<sup>6</sup>

Nearly seven million Americans hold concealed weapon permits.<sup>7</sup> States and almost every jurisdiction, with the exception of Illinois and the District of Columbia, allow residents to carry handguns outside of their homes with the issuance of permits.<sup>8</sup> A number of states offer voluntary reciprocity of permits.<sup>9</sup> The National Right-to-Carry Reciprocity Act of 2011 (“National Reciprocity Act” or “Act”), sponsored by Florida

<sup>2</sup> John Lott, *Should New York Tourists Have Their Lives Destroyed Because of Concealed Carry Laws?*, FOXNEWS.COM (Jan. 17, 2012), <http://www.foxnews.com/opinion/2012/01/17/should-new-york-tourists-have-their-lives-destroyed-because-concealed-carry/#ixzz1kJBq6WRz>.

<sup>3</sup> James Ford, *Drop Case Against Marine Who Brought Loaded Pistol to Empire State Bldg: Supporters*, CHI. TRIB. (Jan. 16, 2012, 8:34 PM), <http://www.chicagotribune.com/news/wpix-letter-campaign-for-marine-with-gun-at-empire-state,0,6737906.story>.

<sup>4</sup> *Id.*

<sup>5</sup> Bob Aldridge, *Gun-Carry Licenses Constitutionally Unneeded*, JOURNALGAZETTE.NET (Jan. 26, 2012, 3:00 AM), <http://www.journalgazette.net/article/20120126/EDIT05/301269992/1147/EDIT07>.

<sup>6</sup> “Forty states currently grant some form of reciprocity for out-of-state concealed carry permits and all of the states are subject to the Firearms Owners Protection Act’s Safe Passage Provision, which provides a process by which non-residents can transport lawful firearms through states where they could not otherwise carry the firearm.” *Legislative Digest: H.R. 822*, GOP.GOV, <http://www.gop.gov/bill/112/1/hr822> (last visited Feb. 1, 2012) [hereinafter *Legislative Digest*].

<sup>7</sup> Lott, *supra* note 2.

<sup>8</sup> See *id.*; see also U.S. House Passes NRA-backed National Right-to-Carry Reciprocity Legislation, NRA-ILA (Nov. 16, 2011), <http://www.nra.org/news-issues/news-from-nra-ila/2011/11/us-house-passes-nra-backed-national-r.aspx>.

<sup>9</sup> See Anna Rittgers, *Pistol Packin’ Mamas*, WASH. TIMES (Jan. 3, 2012), <http://www.washingtontimes.com/news/2012/jan/3/pistol-packin-mamas/>; see also Shannon Bream, *House Weighs Bill to Make Gun Permits*

Senator Clifford Stearns, was reintroduced to the House of Representatives on February 17, 2011.<sup>10</sup> This note is about the constitutionality of a National Reciprocity Act and whether such Act is a proper exercise of Congress's power to regulate under the Commerce Clause. Federalism is a uniquely American issue as we have fifty-one sovereigns with each sovereign fully exercising its reserved powers.<sup>11</sup> A National Reciprocity Act would regulate an area of law that has been an issue of traditional state concern. In addition to analyzing the constitutionality of the Act, this note will highlight the major policy contentions that are unique to our Federalist system.

The Act would "require all states to allow out-of-state visitors to carry concealed firearms as long as the laws of the visitors' home states allow them to do so."<sup>12</sup> If the law were currently enacted, Ms. Graves and former Marine Jerome, would not have been arrested and charged with criminal offenses since the law would have required New York to recognize the other states' concealed handgun permits. The intention of this type of law is to alleviate confusion and to encourage interstate travel by requiring every state with concealed carry permit laws to recognize permits of other states.<sup>13</sup> The law "does not create a federal licensing system or impose federal standards on state permits; rather, it requires the states to *recognize* each others' carry permits, just as they recognize drivers' licenses."<sup>14</sup>

The most recent adaptation of the National Reciprocity Act was

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*Valid Across State Lines*, FOXNEWS.COM (Sept. 13, 2011), <http://www.foxnews.com/politics/2011/09/13/house-weighs-bill-to-make-gun-permits-valid-across-state-lines/>.

<sup>10</sup> *H.R. 822 - National Right-to-Carry Reciprocity Act of 2011*, OPENCONGRESS, <http://www.opencongress.org/bill/112-h822/show> [hereinafter *H.R. 822*].

<sup>11</sup> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (quoting U.S. CONST. amend. X) (internal quotation marks omitted).

<sup>12</sup> *H.R. 822*, *supra* note 10.

<sup>13</sup> The Act "would address concerns regarding law enforcement's ability to confirm the validity of an out-of-state concealed carry permit by requiring that a person show both a valid government-issued identification document, such as a license or passport, and a valid concealed carry license or permit." *Legislative Digest*, *supra* note 6.

<sup>14</sup> *U.S. House Passes NRA-backed National Right-to-Carry Reciprocity Legislation*, *supra* note 8 (emphasis added).

passed by the House of Representatives on November 16, 2011, with support from 62% of the members.<sup>15</sup> The Act gained much attention as more than 245 representatives co-sponsored the bill.<sup>16</sup> While previous versions of this Act have failed multiple times in the House alone, the latest version gained overwhelming bipartisan support.<sup>17</sup> However, with overwhelming popularity and sensationalism in the news, the Act has also gained strong opposition. Opponents contend that the law is an “utter disregard for public safety . . . which would take away the authority of states to decide who is allowed to carry a concealed and loaded handgun within their borders.”<sup>18</sup> Critics assert that the law infringes on states’ rights and their traditional police power role.<sup>19</sup> This contention is based on the fact that the law “would impose an intergovernmental mandate . . . by preempting some state laws that limit the ability of nonresidents to carry concealed weapons.”<sup>20</sup>

The latest National Reciprocity Act faced more contention than any of its predecessors. While hotly debated, it seems strikingly odd that creation of a uniform gun control law would create such a major uproar.<sup>21</sup> Although all previous versions of this Act have failed in either the House or Senate due to a number of concerns, proponents of the law are now armed with the landmark decisions of recent United States Supreme Court cases that have interpreted the Second Amendment as a fundamental right.<sup>22</sup> In addition to the Second Amendment

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<sup>15</sup> H.R. 822, *supra* note 10.

<sup>16</sup> *Id.*

<sup>17</sup> John Haughey, *National Right-to-Carry Act Reintroduced*, GUN SHOTS (Mar. 15, 2011), <http://www.outdoorlife.com/blogs/gun-shots/2011/03/national-right-carry-act-reintroduced>.

<sup>18</sup> Editorial, *Reckless Disregard for Safety*, N.Y. TIMES, Jan. 4, 2012, at A22 [hereinafter *Reckless Disregard*], available at <http://www.nytimes.com/2012/01/04/opinion/reckless-disregard-for-gun-safety.html?scp=1&sq=national%20right%20to%20carry%20reciprocity&st=cse>.

<sup>19</sup> See, e.g., *Lance Likes Loose Gun Laws*, NJTODAY.NET (Dec. 21, 2011), <http://njtoday.net/2011/12/21/lance-likes-loose-gun-laws/#ixzz1kJWErL7s> (The law would “trample a state’s ability to set its own rules and training requirements concerning who carries loaded, hidden guns in public and override basic state possession laws setting minimum age limits to possess handguns.”).

<sup>20</sup> *Legislative Digest*, *supra* note 6.

<sup>21</sup> “From its beginnings in the 1980s, the ‘right-to-carry’ movement has succeeded in boosting the number of licensed concealed-gun carriers from fewer than 1 million to a record 6 million today. . . . And while hotly debated, the effect of this dramatic increase is largely unknown. . . . [N]o scientific studies have reached any widely accepted conclusions about the movement’s effect on crime or personal safety.” Mike Stuckey, *Record Numbers Licensed to Pack Heat*, NBCNEWS.COM, [http://www.msnbc.msn.com/id/34714389/ns/us\\_news-life/t/record-numbers-licensed-pack-heat/](http://www.msnbc.msn.com/id/34714389/ns/us_news-life/t/record-numbers-licensed-pack-heat/) (last updated June 24, 2010).

<sup>22</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

interpretation, proponents of the Act rely on Congress's expansive Commerce Clause power to validate the law as the Act seeks to regulate interstate commerce. Armed with this jurisprudence and growing support, a National Reciprocity Act could become a reality.

As Second Amendment jurisprudence has evolved, national reciprocity of gun permits should be a necessity in order to enforce the fundamental rights of individuals. While opponents of the Act claim that it infringes upon *states'* rights, proponents argue that the Act promotes a fundamental *individual* right. Without such a system in place, it would not be difficult for one to imagine scenarios such as the ones encountered by Ms. Graves and former Marine Jerome occurring daily as more than seven million Americans have concealed permits from varying states. In addition to providing clarification of the law and enhancing interstate travel,<sup>23</sup> the Act would protect the fundamental right to keep and bear arms as it would require states to respect the permits of other states, thus limiting state infringement upon an individual right.

First, this note will discuss the evolution of state and federal firearms regulation, specifically the states' role in the governance of firearms control. This section will provide an in-depth analysis of the evolution of Second Amendment jurisprudence. Additionally, this section will focus on the traditional application of the Second Amendment to state and federal government and will analyze the effects of the recent United States Supreme Court decisions: *District of Columbia v. Heller* and *McDonald v. Chicago*.

Next, this note will provide a detailed analysis of state concealed weapons permit laws. Currently, the jurisdictions of the United States are divided into three types of concealed carry laws. This note will attempt to explain the major differences of these state regulatory regimes as well as highlight the number of states that participate in each regime. Also, this note will attempt to explain what effects, if any, the decisions of *Heller* and *McDonald* may have on concealed carry laws, specifically whether it is constitutional for states to place limitations on the right to carry a firearm. Further, this note will describe the most recent National Reciprocity Act and the current controversy associated with the Act—specifically whether the National Reciprocity Act is a proper exercise of Congress's Commerce Clause power—as well as provide an overview of the interplay between the Commerce Clause and firearms regulation generally.

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<sup>23</sup> See National Reciprocity Act of 2011, H.R. 822, 112th Cong. § 2(8) (2011) (as introduced in the House, Feb. 18, 2011).

As a final point, this note will discuss whether a National Reciprocity Act is an essential means of protection against state infringement of the individual right to keep and bear arms. Conversely, this section will also discuss the shortcomings of a national firearm legislation of such magnitude.

## II. HISTORY OF STATE AND FEDERAL FIREARM LEGISLATION

### A. Overview

The right to “self-defense is a basic right, recognized by many legal systems from ancient times to the present day.”<sup>24</sup> The Second Amendment to the Constitution addresses the right to self-defense and the protection against infringement of the right to bear arms.<sup>25</sup> This amendment effectively restricts the powers of the national government by declaring that the right to bear arms shall not be infringed upon by Congress.<sup>26</sup> In accordance with the Second Amendment, the federal government has typically established broad gun laws enforced by the Bureau of Alcohol, Tobacco, and Firearms (“ATF”).<sup>27</sup> Federal gun laws were enacted through a series of acts; primarily: the National Firearms Act (1934), the Gun Control Act (1968), the Firearm Owners Protection Act (1986), the Brady Handgun Violence Prevention Act (1993), and the Federal Assault Weapons Ban (1994–2004) (expired).<sup>28</sup>

While an expansive analysis of the Second Amendment is beyond the scope of this note, it is important to highlight that, historically, the general view is that the Second Amendment is a limitation only on the powers of the federal government and not on the powers of the states.<sup>29</sup> Federal regulations are aimed at minimizing policy spillover across state lines and establishing a national regulatory floor of restrictions on the acquisition and possession of guns.<sup>30</sup> State laws are independent of federal

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<sup>24</sup> Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696, § 3.5 (1978) (citing *McDonald*, 130 S. Ct. at 3035).

<sup>25</sup> “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.” U.S. CONST. amend. II.

<sup>26</sup> *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

<sup>27</sup> See *Laws*, ATF.GOV, <http://www.atf.gov/regulations-rulings/laws> (last visited Feb. 14, 2013) [hereinafter *ATF Laws*]; see also *Firearms Enforcement*, ATF.GOV, <http://www.atf.gov/firearms/enforcement/> (last visited Feb. 14, 2013) [hereinafter *ATF Firearms Enforcement*].

<sup>28</sup> *ATF Laws*, *supra* note 27; *ATF Firearms Enforcement*, *supra* note 27.

<sup>29</sup> Feld, *supra* note 24, § 2[a].

<sup>30</sup> Philip J. Cook et. al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1050–51 (2009).

firearm regulation and vary in form, content, and level of restriction.<sup>31</sup> Typical of our federalist system, the states primarily regulate gun laws. Thus, the federal government established broad gun laws while states and some local jurisdictions imposed additional limitations and even prohibitions of gun possession and use. Combined, federal and state law in the United States regulates most aspects of firearms commerce and possession.<sup>32</sup>

### *B. Evolution of the Second Amendment*

An absolute right to keep and bear arms was not recognized at common law.<sup>33</sup> Moreover, many jurisdictions have held that the Second Amendment did not confer such an absolute right to bear arms.<sup>34</sup> In addition, a majority of courts have ruled that the Second Amendment did not apply to private citizens as an individual right guaranteed by the United States Constitution, but rather applied as a collective right.<sup>35</sup> Further, the common law position was that the Second Amendment guarantee only restricted the federal government—but not the states. From the outset, the Second Amendment was interpreted to have very little, if any, effect on state regulation of gun control.<sup>36</sup> Thus, while the federal government was clearly limited in regulating firearms, the states have had broad discretion to limit or even prohibit the use of firearms based on common law interpretations of the Second Amendment.<sup>37</sup>

#### *1. Early Interpretation of the Second Amendment*

From 1790 until the present, states have predominantly governed the individual's right to bear arms. The Supreme Court had rarely grappled

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<sup>31</sup> See, e.g., 63 CAL. JUR. 3D *Weapons* § 2 (2013) (“The enactment of statutes regulating the possession, carrying, and use of firearms and other dangerous weapons is a proper exercise of the police power. It is long since settled . . . that the regulation of firearms is a proper police function.” (footnotes omitted)).

<sup>32</sup> Cook et. al., *supra* note 30, at 1050.

<sup>33</sup> Love v. Peppersack, 47 F.3d 120, 124 (4th Cir. 1995) (“[T]he amendment does not confer an absolute individual right to bear any type of firearm.”).

<sup>34</sup> 79 AM. JUR. 2D *Weapons and Firearms* § 5 (2013).

<sup>35</sup> See Love, 47 F.3d at 124 (“[T]he lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right.”).

<sup>36</sup> See generally Feld, *supra* note 24, §§ 3, 10–13.

<sup>37</sup> *Id.* § 3 (“Thus, in *United States v Cruikshank*, the [C]ourt declared that the Second Amendment means no more than that the right to bear arms shall not be infringed by Congress. The [C]ourt expressed the view that the Second Amendment has no other effect than to restrict the powers of the national government.” (citation omitted)).



with this individual right in over 200 years of its existence.<sup>38</sup> In 1939, the Supreme Court ruled in *United States v. Miller* that Second Amendment rights were linked to state organized militias ("collective rights") rather than individual rights of gun ownership.<sup>39</sup> This ruling was consistent with the then-prevailing interpretation of the Second Amendment.<sup>40</sup> However, the Supreme Court's position changed dramatically in the landmark 2008 case for Second Amendment challenges: *District of Columbia v. Heller*.<sup>41</sup>

## 2. *Heller and the Aftermath*

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment conferred an individual right to keep and bear arms.<sup>42</sup> Although the Court held that the Second Amendment is indeed an individual right, they reasoned that like the First Amendment, the Second Amendment is not an unlimited right.<sup>43</sup> Further the Court limited the scope of their analysis to the right to bear arms for self-defense.<sup>44</sup> The Court did not discuss the application of the Second Amendment to states. Despite this new interpretation, many states and local municipalities still contended that the Second Amendment applied only to the federal government and not to the states. These jurisdictions

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<sup>38</sup> Cook et. al., *supra* note 30, at 1057 ("For most of our country's history, the Second Amendment was absent from the Supreme Court's agenda.").

<sup>39</sup> 307 U.S. 174, 178 (1939) ("The Constitution as originally adopted granted to the Congress power—'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' U.S.C.A. Const. art. 1, § 8. With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.").

<sup>40</sup> Matthew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 707 (2002) ("[E]very level of the judiciary—from state trial courts to the United States Supreme Court—long have weighed in on the other side of the debate, interpreting the Second Amendment narrowly and opposing efforts to create an individual right to acquire and possess firearms for private use.").

<sup>41</sup> 554 U.S. 570 (2008).

<sup>42</sup> *Id.* at 595.

<sup>43</sup> *Id.* ("Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." (citation omitted)).

<sup>44</sup> *Id.* at 602 ("We therefore believe that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes.").

relied on three 19th-century cases: *United States v. Cruikshank*, *Presser v. Illinois*, and *Miller v. Texas*.<sup>45</sup> However, this contention was finally put to rest in *McDonald v. City of Chicago*,<sup>46</sup> decided in 2010.

In *McDonald*, two Illinois municipalities, Chicago and Oak Park (a Chicago suburb), had enacted laws that effectively banned handgun possession by nearly all private citizens.<sup>47</sup> The petitioners filed a federal suit against the cities' handgun bans seeking a declaration that the bans violated the Second and Fourteenth Amendments.<sup>48</sup> The cities argued that the bans were constitutional because the Second Amendment did not apply to the states.<sup>49</sup> The Seventh Circuit upheld the district court's ruling, reasoning that *Heller* explicitly refrained from "opin[ing] on the subject of incorporation vel non of the Second Amendment," and that the court had a "duty to follow established precedent in the Court of Appeals to which [it] is beholden."<sup>50</sup> The United States Supreme Court rejected this argument. Guided by its decision in *Heller*, the Court concluded that the right to keep and bear arms is deeply rooted in America's history and tradition,<sup>51</sup> and hence "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."<sup>52</sup> Thus, the Second Amendment is a fundamental right fully applicable to the states through the Fourteenth Amendment.

Despite the argument that incorporation of the Second Amendment amounts to "incursion on a traditional and important area of state concern,"<sup>53</sup> the Amendment applies to both the federal government and the states equally. Oddly, while the states maintain the right to largely regulate gun laws, they are also restricted from certain experimentation and local variation of gun control as the right to bear arms—a fundamental right—cannot be infringed upon by state or federal government.

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<sup>45</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3027 (2010).

<sup>46</sup> *Id.* at 3026.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 3027.

<sup>49</sup> *Id.* at 3028.

<sup>50</sup> *Id.* at 3027 (first alteration in original) (internal quotation marks omitted).

<sup>51</sup> *Id.* at 3036.

<sup>52</sup> *Id.* at 3042.

<sup>53</sup> *Id.* at 3049–3050.

### III. STATE RIGHT-TO-CARRY LAWS

Forty-four states provide a provision in their constitution similar to the Second Amendment to the United States Constitution.<sup>54</sup> Individual state constitutions largely determine the scope of the right to bear arms in their respective states. The right to bear arms under state constitutions is not absolute, but rather subject to reasonable regulation under the police powers of the state.<sup>55</sup> In the majority of states, statutes regulate possession of firearms by requiring licensing for activities such as carrying a concealed weapon. Under the current regulatory regime, states are able to set their own rules for concealed-carry firearm permits.<sup>56</sup> Today, forty nine states have laws permitting concealed carry of firearms in some circumstances.<sup>57</sup> Illinois is currently the only state that has no clear legal way for individuals to carry concealed firearms.<sup>58</sup>

State “right to carry” laws (*hereinafter* “RTC”) fall into three categories: (1) “shall issue,” (2) “discretionary-reasonable issue,” and (3) no permit required.<sup>59</sup> Thirty-nine states have “shall issue” laws that require permits to be issued to applicants who meet uniform standards established by the state legislature.<sup>60</sup> “Shall issue” states are considered to have fairly lax standards concerning concealed weapons permits.<sup>61</sup> Once

<sup>54</sup> 2013 NRA-ILA Firearms Fact Card, NRA-ILA INST. FOR LEGIS. ACTION (Jan. 8, 2013), <http://www.nraila.org/news-issues/fact-sheets/2013/2013-nra-ila-firearms-fact-card.aspx?s=&st=&ps=> [hereinafter *NRA Fact Sheet*].

<sup>55</sup> Marka Fleming & Sundar Fleming, *Legal Paradigms Illustrating State Gun Market Regulations and the Modern Tendency to Expand the Right to Bear Arms Under State Laws*, 23 *MIDWEST L.J.* 43, 45 (2009).

<sup>56</sup> Editorial, *House Takes Aim at Concealed-Carry Laws*, *WASH. POST* (Sept. 20, 2011), [http://articles.washingtonpost.com/2011-09-20/opinions/35275030\\_1\\_concealed-carry-reciprocity-act-law-enforcement-officers](http://articles.washingtonpost.com/2011-09-20/opinions/35275030_1_concealed-carry-reciprocity-act-law-enforcement-officers).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* See also *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (holding that the Illinois Unlawful Use of Weapons statute and the Illinois Aggravated Unlawful Use of a Weapon statute, which generally prohibit carrying guns in public, violated the Second Amendment right to bear arms for self-defense outside the home); Steve Chapman, *Concealed-Carry in Illinois, at Last*, *CHI. TRIB.* (Dec. 11, 2012), [http://articles.chicagotribune.com/2012-12-11/news/chi-concealcarry-in-illinois-at-last-20121211\\_1\\_second-amendment-new-gun-law-ban-on-handgun-ownership](http://articles.chicagotribune.com/2012-12-11/news/chi-concealcarry-in-illinois-at-last-20121211_1_second-amendment-new-gun-law-ban-on-handgun-ownership) (“[T]he General Assembly has the task assigned by the court to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment . . . on the carrying of guns in public.” (alteration in original) (internal quotation marks omitted)).

<sup>59</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-12-717, STATES’ LAWS & REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION* 5 (2012).

<sup>60</sup> *Id.* at 8 tbl.1.

<sup>61</sup> Arizona is an example of a “shall issue” state. Arizona law requires that permit be issued to an applicant if he or she meets the following conditions:

(1) Is a resident of this state or a United States citizen.

the applicant meets the requirements established by the state legislature, the state *must* issue the concealed carry permit.

There are ten “discretionary-reasonable issue” states.<sup>62</sup> Of the ten, eight have “restrictively-administered discretionary issue systems.”<sup>63</sup> California exemplifies one of the most restrictive state permit policies regarding discretionary-reasonable issue. In California, the sheriff of a county may issue a permit upon proof that the person applying is “of good moral character,” that “[g]ood cause exists for the issuance,” and that the person applying is a resident of the county or city and successfully completes a training course.<sup>64</sup> Another example of a discretionary issue state is Hawaii. Hawaiian law requires an applicant to show an “exceptional case” for a permit; the applicant must be able to show “fear [of] injury to the applicant’s person or property.”<sup>65</sup> Further, the respective chief of police *may* grant a license to carry a pistol or revolver to an applicant, only if the applicant is (1) of good moral character; (2) a citizen of the United States; (3) the age of twenty-one years or more; (4) engaged in the protection of life and property; and (5) not prohibited under section 134-7 from the ownership or possession of a firearm.<sup>66</sup> Unlike “shall issue” states, “discretionary-reasonable issue” states are *not* required to issue permits to those who meet the qualifications. These states have a broad range of discretion to deny applicants although they may meet all permit requirements. Under a discretionary-reasonable issue regime, an individual could meet all permit requirements yet still be denied a permit as it is within the state’s absolute discretion to issue the permit.

The third category of RTC states are “no permit.” Currently, four states do not require concealed carry permits to possess a firearm within

(2) Is twenty-one years of age or older.

(3) Is not under indictment for and has not been convicted in any jurisdiction of a felony . . . .

(4) Does not suffer from mental illness and has not been adjudicated mentally incompetent or committed to a mental institution.

(5) Is not unlawfully present in the United States.

(6) Has ever demonstrated competence with a firearm . . . [and] has satisfactorily completed a training program . . . .

See ARIZ. REV. STATE ANN. §13-3112 (2012).

<sup>62</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 59, at 8 tbl.1 (referring to discretionary-reasonable issue states as “May-Issue” states).

<sup>63</sup> *Right-to-Carry 2010*, NRA-ILA INST. FOR LEGIS. ACTION (Apr. 22, 2010), <http://www.nra.org/gun-laws/articles/2010/right-to-carry-2010.aspx>.

<sup>64</sup> CAL. PENAL CODE § 26150 (2012).

<sup>65</sup> HAW. REV. STAT. §134-9 (2012).

<sup>66</sup> *Id.* (emphasis added).

the state. These states are Wyoming,<sup>67</sup> Vermont, Alaska, and Arizona.<sup>68</sup> Vermont recognizes a right to carry without a permit and specifically provides for the right to bear arms in its constitution: "That the people have a right to bear arms for the defence of themselves and the State."<sup>69</sup> Alaska, Arizona, and Wyoming have "shall issue" permits for reciprocity.<sup>70</sup>

### A. Right-to-Carry Laws After *Heller* and *McDonald*

In light of the Second Amendment rights recognized by *Heller* and *McDonald*, the majority of state and local laws conditioning the possession of firearms through licensure or issuance of a permit have generally been upheld.<sup>71</sup> It is important to note in *Heller*, the Supreme Court "struck down the District of Columbia statutory scheme insofar as it essentially banned *all* handgun possession in the home but found it unnecessary to consider the constitutionality of other, less-restrictive registration requirements."<sup>72</sup> The Court did not address the specifics of the licensing requirement.<sup>73</sup>

The Seventh Circuit has noted "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically

<sup>67</sup> "Wyoming became the fourth state to affirm the right of its citizens to carry a concealed firearm without a special government-issued license when the state's House of Representatives Wyoming approved a 'Constitutional Carry' bill in a 48-8 vote several weeks ago, and Gov. Matt Mead signed it into law on March 3 [2011]. . . . Similar proposals are being pondered in Colorado and Montana." John Haughey, *Wyoming is Fourth State to Adopt Constitutional Carry*, OUTDOOR LIFE (Mar. 21, 2011), <http://www.outdoorlife.com/blogs/gun-shots/2011/03/wyoming-fourth-state-adopt-constitutional-carry-%C2%A0>.

<sup>68</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 19 n.32.

<sup>69</sup> VT. CONST. ch. I, art. 16.

<sup>70</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 11 fig. 2, 19 n.32.

<sup>71</sup> See *Plummer v. United States*, 983 A.2d 323, 339 (D.C. 2009) (citing *Brown v. United States*, 979 A.2d 630, 638 (D.C. 2009)) (upholding a statute requiring licensing and registration of handguns); *accord* *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) ("Requiring documentation enables Defendant to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not."); *Justice v. Town of Cicero*, 577 F.3d 768, 773-774 (7th Cir. 2009) (upholding a town ordinance "requiring the registration of all firearms" because it merely "regulate[s] gun possession").

<sup>72</sup> James Lockhart, Annotation, *Construction and Application of United States Supreme Court Holdings in District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) *Respecting Second Amendment Right to Keep and Bear Arms, to State or Local Laws Regulating Firearms or Other Weapons*, 64 A.L.R. 6th 131, § 27 (2011) (emphasis added).

<sup>73</sup> *Id.*

unconstitutional.”<sup>74</sup> Conversely, it seems that as long as state or local law governing the issuance or licensure of firearm permits can pass the muster of some standard of heightened scrutiny review, the statutory scheme will be upheld.<sup>75</sup>

As discussed in a case decided subsequent to *Heller*, *Plummer v. United States*, the licensure requirement “does not appear as a substantial obstacle to the exercise of Second Amendment rights.”<sup>76</sup> In addition, while RTC statutes impose regulatory restrictions on the right to bear arms, on their face they do not “stifle a fundamental liberty.”<sup>77</sup> Accordingly, unless the regulation substantially burdens the right to keep and bear arms for self-defense, the statutory schemes of most states and local municipalities would be upheld. While the definitive standard of review has yet to be established, the trend in Second Amendment jurisprudence suggests that courts will continue to expand and entrench the fundamental right to keep and bear arms through litigation of state and local gun laws. Accordingly, the National Reciprocity Act, introduced in Congress, would expand Second Amendment rights and the rights of individual gun owners nationwide.

#### IV. NATIONAL RIGHT-TO-CARRY RECIPROCITY ACT<sup>78</sup>

The National Rifle Association’s (“NRA”) position has been

<sup>74</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

<sup>75</sup> “While the court said that *Heller* expressly ruled out rational basis review, what higher standard applies has not been definitively outlined. Even so, it said that *Heller* and *McDonald* suggest that it is appropriate to use First Amendment analogues in this context.” Bernard J. Pazanowski, *Local Government—Seventh Circuit Applies Second Amendment, Shoots Down Chicago Ban on Firing Ranges*, 80 U.S.L.W. 50 (July 12, 2011).

<sup>76</sup> *Plummer*, 983 A.2d at 339.

<sup>77</sup> *Id.* (citing *Brown v. United States*, 979 A.2d 630, 638 (D.C. 2009)).

<sup>78</sup> Section 2 of the recent version of the Act contains the following:

**SEC. 2. RECIPROCITY FOR THE CARRYING OF CERTAIN CONCEALED FIREARMS.**

(a) IN GENERAL.—Chapter 44 of title 18, United States Code, is amended by inserting after section 926C the following:

**“§ 926D. Reciprocity for the carrying of certain concealed firearms**

“(a) Notwithstanding any provision of the law of any State or political subdivision thereof (except as provided in subsection (b)), a person who is not prohibited by Federal law from possessing, transporting, shipping, or receiving a firearm, and who is carrying a valid identification document containing a photograph of the person, and a valid license or permit which is issued pursuant to the law of a State and which permits the person to carry a concealed firearm, may possess or carry a concealed handgun (other than a machinegun or destructive device) that has been shipped or transported in interstate or foreign commerce, in any State, other than the State of residence of the person, that—

supported by and reflected in the Congressional findings sustaining each embodiment of the Act<sup>79</sup> since 2007. Though the Act has retained much from its failing predecessors,<sup>80</sup> there is one significant difference: the landmark cases of *Heller* and *McDonald*. Consequently, the rights conferred by the Second Amendment have dramatically expanded. While prior versions of the Act have failed, the Second Amendment now has some bite, which may facilitate the passage of this bill or a similar one into federal law. However, one obstacle remains, if some version of the Act were to become law, the constitutionality of the law may be challenged as exceeding the scope of Congress's authority under the Commerce Clause.<sup>81</sup>

While nearly every state recognizes the right to carry a concealed weapon and many states have voluntary reciprocity of concealed carry permits, there is no national framework for honoring licenses and permits uniformly.<sup>82</sup> The latest version of such law, the National Right-to-Carry Reciprocity Act of 2011 ("2011 Act") was introduced on February 17, 2011 by Florida Representative Clifford Stearns.<sup>83</sup> This bill was previously

"(1) has a statute that allows residents of the State to obtain licenses or permits to carry concealed firearms; or

"(2) does not prohibit the carrying of concealed firearms by residents of the State for lawful purposes.

"(b) The possession or carrying of a concealed handgun in a State under this section shall be subject to the same conditions and limitations, except as to eligibility to possess or carry, imposed by or under Federal or State law or the law of a political subdivision of a State, that apply to the possession or carrying of a concealed handgun by residents of the State or political subdivision who are licensed by the State or political subdivision to do so, or not prohibited by the State from doing so.

"(c) In subsection (a), the term 'identification document' means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals."

National Reciprocity Act of 2011, H.R. 822, 112th Cong. § 2 (2011) (as referred in the Senate, Nov. 17, 2011).

<sup>79</sup> H.R. 822, *supra* note 23, § 2(7) ("The overwhelming majority of individuals who exercise the right to carry firearms in their own States and other States have proven to be law-abiding, and such carrying has been demonstrated to provide crime prevention or crime resistance benefits for the licensees and for others.").

<sup>80</sup> See Stuckey, *supra* note 21 ("[The NRA] fell just two votes shy of winning approval in the U.S. Senate last summer of a measure that would have guaranteed state-to-state reciprocity for all concealed-carry laws. The Thune amendment, named for sponsoring Sen. John Thune, R-S.D., would have automatically allowed a permit holder from one state to carry a concealed gun in all states that issue such permits.").

<sup>81</sup> Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

<sup>82</sup> Bream, *supra* note 9.

<sup>83</sup> H.R. 822, *supra* note 10.

introduced several times but all prior versions had failed in either the House or Senate.<sup>84</sup> Since 2007, related versions of this bill have failed at least four times in the House alone.<sup>85</sup> Like its predecessors, the 2011 Act required that all states recognize lawfully issued permits regardless of where they were issued.<sup>86</sup> Essentially, the law would allow permit holders to carry handguns across state lines. As written, the 2011 Act did not apply to jurisdictions that completely ban Right-To-Carry.<sup>87</sup>

Although previous versions of the bill did not pass muster, the 2011 Act acquired 245 co-sponsors in the House of Representatives—more than the majority needed for passage.<sup>88</sup> The bill passed in the House on November 16, 2011,<sup>89</sup> but ultimately died in the Senate. This Act, like previous versions, has been criticized as the “Packing Heat on Your Street Act” and faces strong opposition from a number of groups, most notably: Mayors Against Illegal Guns Coalition<sup>90</sup> and the Brady Campaign To Prevent Gun Violence.<sup>91</sup> Even typically “pro-gun” groups are divided over a National Reciprocity Act; the NRA strongly supports the federal regulation while the National Association for Guns Rights is in opposition.<sup>92</sup>

Much of the controversy surrounding the National Reciprocity Act has focused on diverging opinion as to whether expanding gun rights

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<sup>84</sup> See S. 371, 111th Cong. (2009); H.R. 197, 111th Cong. (2009); S. 3207, 110th Cong. (2008); H.R. 861, 110th Cong. (2007); S. 388, 110th Cong. (2007).

<sup>85</sup> Haughey, *supra* note 17.

<sup>86</sup> See *supra* note 80 and accompanying text.

<sup>87</sup> Ironically, in *McDonald*, the Supreme Court inferred that a complete ban on RTC would be categorically unconstitutional. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010). This puts states between a proverbial “rock and a hard place” because they are responsible for policing the safety of their citizens, yet the federal government has placed limitations on the power to implement gun control.

<sup>88</sup> H.R. 822 *supra* note 10.

<sup>89</sup> *Id.*

<sup>90</sup> This coalition has gained the support of more than 600 leaders of big cities and small towns across America, a variety of law enforcement organizations including Major Cities Chiefs Association, the American Prosecutors Association, the American Bar Association, and the National Network to End Domestic Violence. See *People Who Care, OUR LIVES, OUR LAWS*, <http://www.ourlivesourlaws.org/people-who-care> (last visited Feb. 25, 2012).

<sup>91</sup> See *Gun Lobby-Backed Efforts: Federal Concealed Carry*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradiycampaign.org/legislation/gunlobbybacked/fedccw> (last visited Apr. 22, 2012) [hereinafter BRADY CAMPAIGN].

<sup>92</sup> Compare Brown, Dudley, H.R. 822 – *A Trojan Horse?*, NAT'L ASS'N FOR GUN RTS. (Sept. 15, 2011), <http://www.nationalgunrights.org/h-r-822-a-trojan-horse/>, with *National Right-to-Carry Reciprocity Bill*, NRA-ILA INST. FOR LEGIS. ACTION (Feb. 22, 2011), <http://www.nra.org/news-issues/fact-sheets/2011/the-national-right-to-carry-reciprocity.aspx>.



would lead to an increase of gun violence.<sup>93</sup> The Mayors Against Illegal Guns Coalition has opined that the regulation would put communities and police officers at unnecessary risk.<sup>94</sup> Conversely, the NRA has strongly advocated that citizens with carry permits are “more law-abiding than the rest of the population” and states with RTC laws tend to have lower violent crime rates and generally experience a decline in crime when RTC laws are adopted or expanded.<sup>95</sup>

### *A. Overview of the Commerce Clause*

Congress is empowered by the Commerce Clause of the United States Constitution to legislate over matters that are in or affect interstate commerce.<sup>96</sup> The purpose of the Commerce Clause is to provide uniform treatment of regulation that affects interstate commerce to protect national interests and ensure predictability.<sup>97</sup> The Commerce Clause grants Congress plenary authority to prohibit or to authorize state legislation regulating or affecting interstate commerce in designated areas.<sup>98</sup> The scope of the Commerce Clause has continually evolved throughout the decades. “As interpreted by the courts throughout most of the last two-thirds of the 20th century, the Commerce Clause allows federal regulation of most significant facets of American society.”<sup>99</sup> While Congress may regulate in a variety of areas, there are significant limitations to this power. Congress may not regulate purely intrastate transactions as they fall outside the scope of the Commerce Clause.<sup>100</sup>

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<sup>93</sup> See *People Who Care*, *supra* note 90. But see *NRA Fact Sheet*, *supra* note 54.

<sup>94</sup> See *People Who Care*, *supra* note 90.

<sup>95</sup> *NRA Fact Sheet*, *supra* note 54.

<sup>96</sup> 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 3:16 (2d ed. 2013).

<sup>97</sup> *Hous., E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 350-51 (1914). “Interstate trade was not left to be destroyed or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring ‘uniformity of regulation against conflicting and discriminating state legislation.’ By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.” *Id.*

<sup>98</sup> 15A AM. JUR. 2D *Commerce* § 25 (2013).

<sup>99</sup> COGGINS & GLICKSMAN, *supra* note 96.

<sup>100</sup> *United States v. Harris*, 460 F.2d 1041, 1044 (5th Cir. 1972) (“The activities that are beyond the reach of Congress are those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.” (quoting *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964)) (internal quotation marks omitted)).

### 1. Invoking the Commerce Clause

The passage of a National Reciprocity Act relies on Congress's power to regulate interstate commerce.<sup>101</sup> Gun regulations have largely been left to individual states in order to accommodate "significant regional differences in attitudes and values toward guns."<sup>102</sup> As discussed above, however, the federal government has enacted broad regulation as well. While much of the debate over a National Reciprocity Act has focused on safety concerns, the constitutionality of such an Act is a considerably more critical issue as it affects the delicate balance of power between the federal government and the states.<sup>103</sup>

National Reciprocity legislation has been characterized as an "attempt to strip cities and states of their authority to set minimum standards for concealed carry."<sup>104</sup> The opposition argues that the federal regulation would eviscerate state and local laws<sup>105</sup> as the "proposed law is designed as a race to the bottom."<sup>106</sup> The state or states with the least restrictive permit requirements would essentially become the law of the land, as those who wish to circumvent their own state laws could simply obtain a

<sup>101</sup> H.R. 822, *supra* note 23 §2(8) ("The Congress finds that preventing the lawful carrying of firearms by individuals who are traveling outside their home State interferes with the constitutional right of interstate travel, and harms interstate commerce.").

<sup>102</sup> *Our View: Leave States to Decide Who May Carry and Who May Not*, SOUTHCOASTTODAY.COM (Oct. 20, 2011, 12:00 AM), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20111020/OPINION/110200307&cid=sitesearch> [hereinafter *Our View*].

<sup>103</sup> Similar to the National Reciprocity Act of 2011 and informed by some of that debate, §1501 of the Patient Protection and Affordable Care Act of 2010 ("ACA") was hotly debated as an unconstitutional exercise of Congress's power to regulate under the Commerce Clause. Specifically, opponents of the ACA argued that the individual mandate impairs our system of federalism by intruding on an issue of traditional state concern and that the ACA contains "no sufficient or meaningful limiting principles to simultaneously enforce the individual mandate and maintain any meaningful boundaries of enumerated congressional powers." Douglas A. Bass, Annotation, *Validity of the Minimum Essential Medical Insurance Coverage, or "Individual Mandate," Provision § 1501 of the Patient Protection and Affordable Care Act of 2010*, 60 A.L.R. FED. 2D 1, § 5 (2011); see also *Thomas More Law Center v. Obama*, 651 F.3d 529, 534 (6th Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Florida ex rel Att'y. Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1284–85 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>104</sup> *Nationwide Coalition of U.S. Mayors Calls on Congress to Reject Effort to Strip State Authority to Decide Who Can Carry Concealed, Loaded Guns in Public*, PR NEWswire (Oct. 20, 2011), <http://www.prnewswire.com/news-releases/nationwide-coalition-of-us-mayors-calls-on-congress-to-reject-effort-to-strip-state-authority-to-decide-who-can-carry-concealed-loaded-guns-in-public-132247648.html> [hereinafter *Nationwide Coalition*].

<sup>105</sup> It is an attempt by the national gun lobby to expand the rights of gun owners. . . by undermining the authority of the states. . . while upsetting the balance between state and federal authority over gun ownership. *Our View*, *supra* note 102.

<sup>106</sup> Sally Kalson, *Guns, Guns for Everyone*, POST-GAZETTE.COM (Sept. 25, 2011), <http://www.post-gazette.com/pg/11268/1177053-149-0.stm>.

permit from the most lenient state.<sup>107</sup>

Proponents of the law argue that there is a need for a national reciprocity law because interstate recognition of gun permits are not uniform and creates “great confusion and potential problems for travelers.”<sup>108</sup> Thirty-nine states have broad reciprocity; ten “have very restrictive reciprocity laws. Still others deny recognition completely.”<sup>109</sup> The National Reciprocity Act would create predictability by requiring that every state honor licenses and permits uniformly. Accordingly, a National Reciprocity Act would clarify the law and encourage interstate travel as travelers would be assured that they could carry their concealed weapons across state borders.

## 2. Modern View of the Commerce Clause<sup>110</sup>

Based on the modern view of the Commerce Clause, as interpreted in United States Supreme Court cases of *United States v. Lopez* and *United States v. Morrison*, a new framework has emerged for analyzing Commerce Clause challenges.<sup>111</sup> Congress may regulate under its Commerce Clause power in three broad categories: (1) channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce.<sup>112</sup> Under the third category, the Supreme Court “identified the question of whether the regulated activity was commercial (economic) or noncommercial (noneconomic) as central to analyzing a statute’s constitutionality.”<sup>113</sup> The Court has implied that as long as the activity is economic and substantially affects interstate commerce, legislation

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<sup>107</sup> BRADY CAMPAIGN, *supra* note 91.

<sup>108</sup> *Hearing Scheduled for H.R. 822, the National Right-to-Carry Reciprocity Act of 2011*, NRA-ILA INSTITUTE FOR LEGISLATIVE ACTION (Sept. 9, 2011), <http://www.nraila.org/legislation/federal-legislation/2011/9/hearing-scheduled-for-hr-822,-the-nat.aspx?s=&st=&ps=> [hereinafter *Hearing Scheduled*]; see also Chris W. Cox, *Standards Should Be Uniform Across Nation*, PHILLY.COM (Nov. 28, 2011), [http://articles.philly.com/2011-11-28/news/30450605\\_1\\_concealed-carry-violent-crime-law-abiding-citizen](http://articles.philly.com/2011-11-28/news/30450605_1_concealed-carry-violent-crime-law-abiding-citizen).

<sup>109</sup> *Hearing Scheduled*, *supra* note 108.

<sup>110</sup> This analysis is informed by the recent Supreme Court decision regarding the ACA which exceeded the scope of Congress’ commerce clause power. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (holding the individual mandate unconstitutional because it did not regulate existing commercial activity, but rather compelled individuals to become active in commerce by purchasing a product).

<sup>111</sup> “*Lopez* and *Morrison* famously ended the Supreme Court’s long string of cases upholding statutes under the Commerce Clause and announced a new framework for analyzing Commerce Clause challenges.” Alex Kreit, *Why is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL’Y 169, 175 (2004).

<sup>112</sup> See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); see also Kreit, *supra* note 111.

<sup>113</sup> Kreit, *supra* note 111.

regulating that activity will be sustained.<sup>114</sup> Furthermore, the Court has suggested that non-economic activities will likely be struck down.<sup>115</sup>

In analyzing whether an activity is “economic,” the Supreme Court has not provided a concrete definition, but rather conducts its analysis on a case-by-case inquiry. The Court has found that possessing a firearm in school zone<sup>116</sup> and gender-motivated crimes of violence<sup>117</sup> to be non-economic activities. Conversely, the Court has held that regulation of intrastate wheat production,<sup>118</sup> public accommodations,<sup>119</sup> and home-grown marijuana for personal use<sup>120</sup> to be economic in nature. The economic versus non-economic distinction serves as a proxy to consider areas of law typically reserved to the states, thus placing a safeguard on state sovereignty and the federalist system.

The economic/non-economic distinction is only one of the factors that the Supreme Court has considered in its analysis under the third category of Commerce Clause regulation. Among other factors, the Court has considered whether the regulation has a jurisdictional nexus to interstate commerce and whether there are congressional findings regarding the effect on interstate commerce.<sup>121</sup> Furthermore, the Court has looked to whether the federal regulation is part of a comprehensive regulatory scheme and whether the activities in the aggregate substantially affect interstate commerce.<sup>122</sup> The standard of Commerce Clause review is highly deferential. Courts must determine the following: “[W]hether Congress could have had a rational basis to support the exercise of its commerce power; and, further, that the regulatory means chosen were reasonably adapted to the end permitted by the Constitution.”<sup>123</sup>

### 3. Firearms and the Commerce Clause

The Supreme Court in *Lopez* held that the Gun-Free School Zone

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<sup>114</sup> See *Lopez*, 514 U.S. at 560.

<sup>115</sup> See *United States v. Morrison*, 529 U.S. 598, 613 (2000); see also *Kreit*, *supra* note 111, at 176.

<sup>116</sup> See *Lopez*, 514 U.S. at 561-62, 567.

<sup>117</sup> “[I]n *Lopez*, the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court’s conclusion that Congress lacks authority to regulate such possession. Similarly, gender-motivated crimes of violence are not, in any sense, economic activity.” *Morrison*, 529 U.S. at 598.

<sup>118</sup> See *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

<sup>119</sup> *Katzenbach v. McClung*, 379 U.S. 294, 300-01 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

<sup>120</sup> See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

<sup>121</sup> *Lopez*, 514 U.S. at 561-562.

<sup>122</sup> See *Gonzales*, 545 U.S. at 22.

<sup>123</sup> *United States v. Kenney*, 91 F.3d 884, 886 (7th Cir. 1996) (internal quotation marks omitted).

Act exceeded the outer boundaries of Congress's Commerce Clause. Specifically, the Court held that the law was not part of a larger regulation of economic activity, the statute did not contain express Congressional findings, and it did not contain a jurisdictional element.<sup>124</sup> In a subsequent case, the Seventh Circuit considered the constitutionality of Congress's Commerce Clause power to enact an amendment to the Gun Control Act of 1968<sup>125</sup> that criminalized possession by a felon of a firearm that had traveled in interstate commerce.<sup>126</sup> In *U.S. v. Bell*, the Seventh Circuit noted that the *Lopez* decision raised many "false hopes" as challenges based on the *Lopez* decision generally failed.<sup>127</sup> The Court held that 18 U.S.C. §922(g)(1) was "immune from constitutional attack under *Lopez*."<sup>128</sup> Further they stated that only a "minimal nexus" between the firearm and interstate commerce is needed to satisfy the commerce or "economic" element.<sup>129</sup>

In a case nearly identical to *Bell*, the Sixth Circuit held that 18 U.S.C. §922(g)(1) was a valid exercise of legislative power under the Commerce Clause.<sup>130</sup> The court, in *United States v. Turner*, concluded that "[r]equiring the government in each case to prove that a felon has possessed a firearm 'in or affecting commerce' ensures that the firearm possession in question affects interstate commerce and saves § 922(g) from the jurisdictional defect."<sup>131</sup> In addition, §922(o) of the Firearm Owners Protection Act has been consistently upheld as a valid exercise of legislative authority under the Commerce Clause despite its "virtually nonexistent" legislative history.<sup>132</sup> Unlike *Bell* and *Turner*, §922(o) lacked an express jurisdictional nexus. The Court still held that §922(o) was a valid exercise of the legislature's Commerce Clause power, however, because Congress had previously found that there was a nexus between the regulation of firearms and the commerce power when it first enacted § 922 as an entire regulatory scheme.<sup>133</sup> Similarly, the Ninth Circuit in *United States v. Rambo*, upheld the constitutionality of § 922(o), finding that it fits into the first category of regulation, that of Congress's power to

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<sup>124</sup> *Id.*

<sup>125</sup> 18 U.S.C. § 922(g)(1) (2012).

<sup>126</sup> *United States v. Bell*, 70 F.3d 495, 497 (7th Cir. 1995).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 498.

<sup>129</sup> *Id.* (emphasis added) (internal quotation marks omitted).

<sup>130</sup> See *United States v. Turner*, 77 F.3d 887 (6th Cir. 1996).

<sup>131</sup> *Id.* at 889.

<sup>132</sup> *United States v. Wilks*, 58 F.3d 1518, 1519 (10th Cir. 1995).

<sup>133</sup> *Id.* at 1520.

regulate the use or misuse of the channels of commerce.<sup>134</sup>

*B. The Commerce Clause as Applied to the National Reciprocity Act*<sup>135</sup>

The National Reciprocity Act could arguably fit into any of the three broad categories of Commerce Clause regulation: (1) channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce. In a report by the ATF, the agency reported that roughly four and a half million new firearms, including approximately two million handguns, are sold in the United States annually.<sup>136</sup> An estimated two million secondhand firearms are sold each year as well.<sup>137</sup> In addition, the ATF reported that “pistols and revolvers accounted for about \$289 million in shipments; rifles, \$373 million in shipments; and single-barreled shotguns, \$155 million in shipments. A related industry—small arms ammunition—had product shipments valued at \$859 million and employment of 6,863.”<sup>138</sup> The ATF specifically noted that small arms production was concentrated in Connecticut (about 19 percent of the U.S. total) and Massachusetts (about 11 percent of the U.S. total).<sup>139</sup>

*1. Channels of Interstate Commerce*

One of the main categories under which Congress exercises its Commerce Clause powers is through “channels” of interstate commerce. In regulating the channels, “Congress regulates not conduct related to interstate commerce but rather interstate commerce itself—barring from

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<sup>134</sup> United States v. Kenney, 91 F.3d 884, 889 (7th Cir. 1996) (citing United States v. Rambo, 74 F.3d 948 (9th Cir. 1996)).

<sup>135</sup> On June 28, 2012, the constitutionality of the Affordable Care Act of 2010 (“ACA”) was held as exceeding the scope of Congress’s authority to regulate under the Commerce clause, specifically under the regulation of activities that substantially affect interstate commerce. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). While outside the scope of this note, it is important to note that the Supreme Court’s decision regarding the ACA will impact future analysis of Congress’s scope of regulation under the Commerce clause. See Bill Mears & Tom Cohen, *Emotions High After Supreme Court Upholds Health Care Law*, CNN POLITICS (June 28, 2012, 9:23 PM), <http://www.cnn.com/2012/06/28/politics/supreme-court-health-ruling/index.html>.

<sup>136</sup> DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES 1 (2000) [hereinafter ATF REPORT].

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 8.

<sup>139</sup> *Id.* at 8 (“Small arms production was concentrated in Connecticut (11 establishments with \$227 million in shipments, about 19 percent of the U.S. total) and Massachusetts (5 establishments with \$135 million in shipments, about 11 percent of the U.S. total).”).

the channels of interstate commerce a class of goods or people.”<sup>140</sup> Congress may exclude from interstate commerce articles whose use in the states for which they are destined may be injurious to the public health, morals, or welfare.<sup>141</sup> Examples of Congressional regulation of channels of commerce include but are not limited to banning interstate shipment of stolen goods or kidnapped persons, regulation of interstate shipment of goods produced without minimum-wage and maximum-hour protections, the interstate transportation of a woman or girl for prostitution, or the interstate mailing or transportation of lottery tickets.<sup>142</sup>

Firearms are articles of commerce themselves as they are manufactured and transported across state lines and sold throughout various states. As previously noted, small arms production is concentrated in a minority of states then sold across state lines. In addition, firearms are defined as “a weapon from which a shot is discharged by gunpowder—usually used of small arms.”<sup>143</sup> By nature, firearms may be injurious to the public health and easily flow through channels of interstate commerce. Thus, Congress may regulate firearms as they squarely fit within this category of the Commerce Clause as the National Reciprocity Act bars certain firearms from channels of interstate commerce. Specifically, the Act permits only those with a concealed carry permit to cross state lines with a concealed handgun, thus limiting the number of handguns that may flow through channels of interstate commerce. This is comparable to Congress regulating a lottery ticket being sent through the mail.<sup>144</sup>

However, one could contend that this Act falls outside the scope of this category as a concealed carry permit is not an article within interstate commerce but rather conduct related to interstate commerce. Further, one could argue that state RTC laws are purely intrastate regulation similar to carrying a handgun within a school zone.<sup>145</sup> As argued in *Lopez*, opponents of the Act could easily contend that handgun permits are a

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<sup>140</sup> United States v. Patton, 451 F.3d 615, 621 (10th Cir. 2006).

<sup>141</sup> *Id.* (quoting United States v. Darby, 312 U.S. 100, 114 (1941)).

<sup>142</sup> *Id.*

<sup>143</sup> *Firearm*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/firearm> (last visited Feb. 26, 2012).

<sup>144</sup> See *Champion v. Ames*, 188 U.S. 321 (1903).

<sup>145</sup> “Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government’s contention that § 922(q) is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause

purely interstate activity that should be left to the states to regulate as possession of a handgun occurs within a single state. Opponents of the Act would contend that “mere intrastate gun possession has only the most tenuous links to interstate commerce and would blur past any principled limit on the commerce power.”<sup>146</sup>

## 2. *Instrumentalities of Interstate Commerce*

Congress is empowered to regulate the instrumentalities of interstate commerce, including persons or things in interstate commerce.<sup>147</sup> As expressly stated within the Act itself, the law regulates persons or things in interstate commerce. The Act is designed to regulate persons carrying handguns: “The Congress finds that preventing the lawful carrying of firearms by individuals who are traveling outside their home State interferes with the constitutional right of interstate travel, and harms interstate commerce.”<sup>148</sup> The National Reciprocity Act prohibits states from denying recognition of concealed carry permits of other states and regulates the people traveling interstate with handguns, thus regulating both “persons” and “things” in interstate commerce.

Opponents may argue that the Act falls outside this category as well. In the strictest sense the Act does not regulate persons or things within interstate commerce but rather requires reciprocity of state permits. Simply requiring reciprocity does not regulate “persons or things” in interstate commerce but rather forces states to substitute the judgment of other states for their own and to allow individuals to circumvent state laws while partaking in a purely intrastate activity (i.e. carrying a firearm within the state). Similarly, opponents would liken RTC laws to state laws regarding civil unions or medicinal marijuana licensure which vary from state to state and are considered wholly intrastate activities that fall within state policing power.<sup>149</sup>

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authority to a general police power of the sort held only by the States.” *United States v. Lopez*, 514 U.S. 549, 549–50 (1995).

<sup>146</sup> *United States v. Rybar*, 103 F.3d 273, 277–78 (3d Cir. 1996).

<sup>147</sup> *United States v. Corum*, 362 F.3d 489, 494 (8th Cir. 2004).

<sup>148</sup> H.R. 822, *supra* note 23 §2(8).

<sup>149</sup> “Within the realm of police power, the legislature may act in any matter that falls within the dictates of the constitution expressly or by necessary implication. In fact, according to some authorities, the ability of the state to provide for the health, safety and welfare of the citizen is inherent in the police power without any express statutory or constitutional provision. It extends to all matters which concern the regulation and control of the internal affairs of the state, and may even directly affect the internal affairs of a business or industry, as long as the legislation is neither arbitrary nor discriminatory.” 16A C.J.S. *Constitutional Law* § 611 (2012) (footnotes omitted).



### 3. *Substantially Affects Interstate Commerce*

Whether the National Reciprocity Act is within Congress's Commerce Clause power to regulate activities that substantially affect interstate commerce depends on:

whether (1) the activity at which the statute is directed is commercial or economic in nature; (2) the statute contains an express jurisdictional element involving interstate activity that might limit its reach; (3) Congress has made specific findings regarding the effects of the prohibited activity on interstate commerce; and (4) the link between the prohibited conduct and a substantial effect on interstate commerce is attenuated.<sup>150</sup>

While the Act might possibly fall outside the scope of the first two categories of Commerce Clause regulation, it would most likely be upheld under the "substantially affects" category. The Act contains an express jurisdictional element, Congress has made specific findings regarding the effects on interstate commerce, the activity is arguably commercial or economic in nature, and the effect on interstate commerce is not attenuated.

As the Act specifically states that "preventing the lawful carrying of firearms by individuals who are traveling outside their home State interferes with the constitutional right of interstate travel, and harms interstate commerce,"<sup>151</sup> the two remaining concerns are whether the Act is commercial or economic in nature and whether the link between the Act and the substantial effect on interstate commerce is too attenuated. Opponents would surely argue that the law would have the opposite effect than those found by Congress. Opponents would contend that the Act would "increase the lethality of violence"<sup>152</sup> and would only exacerbate the problem of individuals inhibited from traveling interstate.<sup>153</sup> Further, they would dispute whether the RTC laws and associated permits were

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<sup>150</sup> United States v. Patton, 451 F.3d 615, 621 (10th Cir. 2006).

<sup>151</sup> H.R. 822, *supra* note 23 §2(8).

<sup>152</sup> *Facts: Studies and Reports*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/studies/view/191/>.

<sup>153</sup> Cf. Dennis A. Henigan, "Packing Heat on Your Street": Stop This Bill!, HUFFINGTONPOST.COM (Oct. 19, 2011, 1:21 PM), [http://www.huffingtonpost.com/dennis-a-henigan/packing-heat-on-your-stre\\_b\\_1019793.html](http://www.huffingtonpost.com/dennis-a-henigan/packing-heat-on-your-stre_b_1019793.html) ("The 'Packing Heat on Your Street Act' only exacerbates the problem by allowing such persons to carry their guns into virtually any state. Under this legislation, if someone with a Virginia concealed carry permit were caught armed and intoxicated in Tennessee, the State would be powerless to arrest him for gun possession while under the influence, even though it could enforce the same law against Tennessee residents.").

commercial or economic in nature as the only direct economic benefit is from the application fee of permits. In addition, they would argue that the substantial economic effect is too attenuated from the Act as the effects such as increased interstate travel, are too indirect and speculative.

Proponents would contend that a national reciprocity system would encourage interstate travel because the law would increase certainty and unify state RTC laws to some degree. Individuals with concealed carry permits would be encouraged to travel because they could carry their guns while traveling interstate and would thus feel safer.<sup>154</sup> This would have an aggregate effect of boosting interstate commerce. Additionally, proponents of a National Reciprocity Act are armed with the landmark cases of *Heller* and *McDonald* which have broadened the impact of Second Amendment rights.<sup>155</sup> They would argue that the Act is comprehensive as it requires all states with RTC laws to participate in an overarching goal of providing safety to interstate travelers. Additionally, the Act would further the goals of the Second Amendment as interpreted by the United States Supreme Court.

While critics of the Act have characterized the law as an attempt to strip states of their authority to set minimum standards for concealed carry<sup>156</sup> and as an “utter disregard for public safety,”<sup>157</sup> the authority of the Act under the Commerce Clause could probably withstand judicial scrutiny. As explained, Congress has broad authority under the Commerce Clause:

If Congress has determined that a transaction or practice is so related to interstate commerce as to warrant and necessitate regulation under its power under the Commerce Clause of the United States Constitution, a court will not substitute its judgment for that of Congress unless the subject’s relation to

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<sup>154</sup> See Stuckey, *supra* note 21 (“The highest gun homicide rate is in Washington, D.C., which has had the nation’s strictest gun-control laws for years and bans concealed carry: 20.50 deaths per 100,000 population, five times the general rate. The lowest rate, 1.12, is in Utah, which has such a liberal concealed weapons policy that most American adults can get a permit to carry a gun in Utah without even visiting the state”); see also Larry Bell, *Disarming the Myths Promoted by the Gun Control Lobby*, FORBES.COM (Feb. 21, 2012, 1:32 PM), <http://www.forbes.com/sites/larrybell/2012/02/21/disarming-the-myths-promoted-by-the-gun-control-lobby/2/> (“[L]aw-abiding American citizens using guns in self-defense during 2003 shot and killed two and one-half times as many criminals as police did, and with fewer than one-fifth as many incidents as police where an innocent person mistakenly identified as a criminal (2% versus 11%)”).

<sup>155</sup> *Supra* Part II.

<sup>156</sup> *Nationwide Coalition*, *supra* note 104.

<sup>157</sup> *Reckless Disregard*, *supra* note 18.

interstate commerce and effect upon it clearly are nonexistent.<sup>158</sup>

As the National Reciprocity Act could arguably fit into any of the three broad categories of Commerce Clause regulation, courts would be unlikely to substitute its judgment for that of Congress and rule the Act unconstitutional as exceeding Congress's authority.

## V. CONCLUSION

Opponents of the National Reciprocity Act have contended that the law is a "dangerous abdication of power to a federal government that will corrupt the power and end up using it against law-abiding gun owners."<sup>159</sup> Additionally, those opposed to the Act argue that the law forces "states with tough gun laws to allow more people to carry concealed weapons."<sup>160</sup> Essentially, the opposition views the Act as a major infringement upon an area of regulation traditionally left to individual states to control as it "overrides" state laws:<sup>161</sup>

This legislation is so dangerous that it would trample a state's ability to set its own rules and training requirements concerning who carries loaded, hidden guns in public and override basic state possession laws setting minimum age limits to possess handguns', said Dennis Henigan, acting president of the Brady Campaign to Prevent Gun Violence.<sup>162</sup>

The contention is that the state or states with the least restrictive permit requirements would essentially become the law of the land, as those who wish to circumvent their own state laws could simply obtain a permit from the most lenient state.<sup>163</sup> Adversaries of the Act maintain that the

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<sup>158</sup> 15A AM. JUR. 2D *Commerce* § 10 (2013) (footnote omitted).

<sup>159</sup> Aldridge, *supra* note 5.

<sup>160</sup> *Lance Likes Loose Gun Laws*, *supra* note 19.

<sup>161</sup> "The legislation overrides state laws by mandating that states allow the carrying of loaded, concealed weapons by anyone permitted to carry concealed weapons in another state. It undermines state concealed carry licensing systems by allowing out-of-state visitors to carry concealed firearms even if those visitors have not met the standards for carrying a concealed weapon in the state they are visiting. In effect, the bill would reduce all states to the 'lowest common denominator' of concealed carry laws." *National Right to Carry Reciprocity Act of 2011 (H.R. 822): Fact Sheet*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (OCT. 13, 2011), [http://www.bradycampaign.org/xshare/Legislation/2011-09\\_Fact\\_Sheet\\_on\\_HR\\_822\\_-\\_CCW\\_Reciprocity\\_FINAL.pdf](http://www.bradycampaign.org/xshare/Legislation/2011-09_Fact_Sheet_on_HR_822_-_CCW_Reciprocity_FINAL.pdf) [hereinafter *H.R. 822 Fact Sheet*].

<sup>162</sup> *Lance Likes Loose Gun Laws*, *supra* note 19.

<sup>163</sup> BRADY CAMPAIGN, *supra* note 91.

ultimate effect of the law will be to place more loaded guns in public which would consequently cause more crime.<sup>164</sup> However, a law requiring each state to recognize a concealed carry permit does not appear to be much of an infringement on states' rights as states already recognize a variety of other permits and licenses such as driver's licenses and marriage permits.<sup>165</sup> Furthermore, licensed drivers are involved in more fatalities per year than all gun fatalities combined<sup>166</sup> and there are a disproportionately larger number of driver license revocations than concealed carry revocations.<sup>167</sup>

Proponents of the Act have advocated this potential law as a common sense action as it moves us closer to fully protecting our Second Amendment rights, affords us the opportunity to defend ourselves wherever we are, and acts as a preventative tool against crime.<sup>168</sup> The House of Representatives, by an overwhelming majority, have agreed with this reasoning as the most recent version of the bill was passed in the House on November 16, 2011.<sup>169</sup> Congressional findings state that the Act is designed as a safeguard against the infringement of the "lawful carrying of firearms by individuals who are traveling outside their home State" because such prevention "interferes with the constitutional right of interstate travel, and harms interstate commerce."<sup>170</sup> As opponents have contended that the Act is an infringement upon states' rights, proponents of the law have similarly argued that the current status of state laws acts as

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<sup>164</sup> H.R. 822 *Fact Sheet*, *supra* note 161.

<sup>165</sup> *Id.* at 180, *but see Windsor v. United States*, 699 F.3d 169 (2nd Cir.), *cert. granted*, 133 S. Ct. 786 (2012). (challenging a section of the Defense of Marriage Act, "DOMA", for defining "marriage" as a legal union between one man and one woman as a violation of equal protection). Under DOMA, states are not required to legally recognize same-sex marriage licenses of other states.

<sup>166</sup> There are 3.6 firearm homicides death per 100,000 compared to 15.65 motor vehicle traffic fatalities per 100,000 licensed drivers. *Fast Stats: Assault or Homicide*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/homicide.htm> (last updated Jan. 11, 2013); *Fatality Analysis Reporting System Encyclopedia*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www-fars.nhtsa.dot.gov/Main/index.aspx> (last visited Feb. 26, 2012).

<sup>167</sup> In Florida alone, less than 1% (0.32%) of concealed weapons permits have been revoked compared to 29.4% of driver licenses that have been suspended and/or revoked. *See Concealed Weapon or Firearm License: Summary Report*, FLA. DEPARTMENT OF AGRIC. & CONSUMER SERVICES DIVISION OF LICENSING, [http://licweb.doacs.state.fl.us/stats/cw\\_monthly.pdf](http://licweb.doacs.state.fl.us/stats/cw_monthly.pdf) (last updated June 30, 2013); *see also Performance Statistics: Division of Driver Licenses*, FLA. DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, <http://www.flhsmv.gov/html/FactsFiguresFY2006/PerStaDDL.htm> (last updated 2009).

<sup>168</sup> Raquel Okay, *Concealed Carry: What Are We Waiting For?*, HUMAN EVENTS (Dec. 13, 2011), <http://www.humanevents.com/article.php?id=48052>.

<sup>169</sup> H.R. 822, *supra* note 10.

<sup>170</sup> H.R. 822, *supra* note 23 §2(8).

an infringement upon the individual right of Americans to keep and bear arms. The core of this “debate is over the primacy of the individual over the primacy of the government.”<sup>171</sup>

Proponents have championed this law as a means to “restore more of the constitutionally recognized right to keep and bear arms to the people of the United States.”<sup>172</sup> The Act is a “push to expand the right of self-defense in the direction of the liberty enumerated in the Bill of Rights” and embodies “the sense that many Americans have that their liberties have been steadily eroded for many years.”<sup>173</sup> As discussed above,<sup>174</sup> a National Reciprocity Act would most likely pass constitutional muster as it is an appropriate exercise of Congress’s power under the Commerce Clause. Armed with the decisions of *Heller* and *McDonald*, the rights conferred by the Second Amendment have dramatically expanded. Thus as previous versions of this Act have failed; the Act is now supported by a fundamental right and is a proper exercise of Congress’s power.

Individual citizens are acting to see this expansive interpretation of the Second Amendment become a reality through enactments of federal law that will protect their individual rights from state infringement.<sup>175</sup> While contentions voiced by the opposition are well founded, this Act is a proper exercise of Congress’s power. States’ rights are an essential feature of our democratic government and the delicate balance between state and federal government should not be undermined, however, the Constitution and Bill of Rights were “designed to limit the power of *government* and guarantee the rights of the *people*.”<sup>176</sup> For that reason, the “Second Amendment is a fundamental right to bear arms that should not be constrained by state boundary lines.”<sup>177</sup>

<sup>171</sup> Rich Mason, *Why the Right to Keep and Bear Arms is Important to You*, TENNESSEEFIREARMS.COM, [http://www.tennesseefirearms.com/articles/rkba\\_important.asp](http://www.tennesseefirearms.com/articles/rkba_important.asp) (last visited Feb. 26, 2012).

<sup>172</sup> James Heiser, *Wyoming Adopts Constitutional Carry of Firearms*, THE NEW AM. (Mar. 4, 2011, 09:18 AM), <http://thenewamerican.com/usnews/constitution/item/7908-wyoming-adopts-constitutional-carry-of-firearms>.

<sup>173</sup> *Id.*

<sup>174</sup> *Supra* Part IV.

<sup>175</sup> “It’s an organic movement . . . I think certainly we are leading the charge — I’m not hiding behind it. A lot of this is organic in the sense that it comes from people realizing that when something bad happens, it’s up to them to defend themselves and their loved ones. And when something bad happens, instant responders are better than first responders . . . People who neglect the exercise of their constitutional rights may soon find those rights have been usurped by the State.” Heiser, *supra* note 172. (internal quotation marks omitted).

<sup>176</sup> Mason, *supra* note 171 (emphasis added).

<sup>177</sup> Amy Bingham & John Parkinson, *House Passes Bill Making Concealed Carry Permits Valid Across State Lines*, ABCNEWS.COM (Nov. 16, 2011, 7:13 PM), <http://abcnews.go.com/blogs/politics/2011/11/houses-passes-bill-making-concealed-carry-permits-valid-across-state-lines/>.

There are two sides to every coin, and clearly both sides of this debate cannot be winners. As Supreme Court Justices have often highlighted, the Second Amendment is subject to limitation and is not an unlimited right.<sup>178</sup> Opponents would surely contend that limited recognition of concealed carry permits is a permissible limitation on the Second Amendment. A law such as a National Reciprocity Act should be considered in order to preserve the fundamental right to keep and bear arms. Perhaps such a national law should mandate minimum permit requirements of national reciprocity to eliminate a “race to the bottom”<sup>179</sup> effect and eliminate any opportunistic actions of those who wish to circumvent their own state laws by obtaining a permit from the most lenient state.<sup>180</sup>

Without a national reciprocity system in place, it would not be difficult for one to imagine scenarios such as the one encountered by Ms. Graves or former Marine Jerome, occurring on a daily basis as more than seven million Americans have concealed permits from varying states. Further, if both sides of this Act could agree upon certain national minimum standards, advocates of states’ rights would not have to sacrifice certain permit requirements and individual rights would be preserved.

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<sup>178</sup> District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

<sup>179</sup> Kalson, *supra* note 106.

<sup>180</sup> BRADY CAMPAIGN, *supra* note 91.