

# FEDERALISM AND THE IMPLEMENTATION OF THE RIGHT TO ARMS

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## INTRODUCTION: FEDERALISM VS. THE RIGHT TO ARMS?

In the Second Amendment debate, the slogan of federalism has been mainly associated with opposition to a meaningful right to arms. Supporters of gun control have traditionally argued that the Second Amendment<sup>1</sup> is a mere "federalism" provision, in the sense that it protects state military organizations (or perhaps individuals' participation in such organizations) from interference by the federal government, but does not guarantee a personal right to keep and use arms.<sup>2</sup> Meanwhile, gun rights

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1. "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.

2. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2836 n.27 (2008) (Stevens, J., dissenting) (suggesting that "the Second Amendment was enacted in a unique and novel context, and responded to the particular challenges presented by the Framers' federalism experiment," and thus does not protect the ownership or use of firearms for personal

supporters have traditionally argued that, at least since the ratification of the Fourteenth Amendment in 1868, there is nothing especially “federalist” about the Second Amendment: it is a general limitation on government that guarantees a personal right standing on the same footing as the other rights reflected in the provisions of the Bill of Rights<sup>3</sup>—most of which have been incorporated against the States as a matter of Fourteenth Amendment due process.<sup>4</sup>

This pattern reproduced itself during the landmark Second Amendment litigation in *District of Columbia v. Heller*.<sup>5</sup> Although *Heller* did not raise the issue of Second Amendment incorporation (since the District of Columbia is a federal enclave, not a part of a state), the plaintiffs signaled sympathy with the mainstream gun-rights attitude by describing the nonincorporation of the Second Amendment as an “anomaly,”<sup>6</sup> while the District of Columbia argued against incorporation on grounds of federalism.<sup>7</sup> The amicus curiae brief of thirty-one state attorneys general called openly for the incorporation of an individual right to arms against the states,<sup>8</sup> while five other states (mostly populous Northeastern

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purposes); Saul Cornell, “Don’t Know Much About History”: *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 666-67 (2002) (arguing that recent scholarly work “demonstrates convincingly that the main issue for both Federalists and Anti-Federalists in the Second Amendment debate was not individual rights, but federalism”).

3. See, e.g., Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 50 (1996) (“If the Court has the slightest regard for doctrinal consistency, it will have no choice except to incorporate the Second Amendment.”); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 252-53 (1983) (arguing that nineteenth century cases refusing to incorporate the Second Amendment against the states “derive[ ] from a concept of federalism (i.e., that civil liberties are guaranteed only against the federal government and that their infringement by the states is not the business of the federal judiciary) that has long been discredited”).

4. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

5. *Heller*, 128 S. Ct. at 2797, 2821-22 (holding that the Second Amendment protects an individual right to defensive arms; invalidating the District of Columbia’s bans on handguns and on armed self-defense in the home as violations of the Amendment).

6. Brief in Response to Petition for Certiorari at 17, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (“[W]hile federal courts have not subjected state laws to Second Amendment review for lack of incorporation . . . that anomaly will presumably be addressed in a future case.”).

7. Brief for Petitioners at 38-39 n.9, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), available at <http://www.gurapossessky.com/news/parker/documents/PetitionersbriefinD.C.v.Heller.pdf> (arguing that “incorporation against the states would be curious since the Second Amendment was enacted to protect state prerogatives”).

8. See Brief of the States of Texas et al. as Amici Curiae in Support of Respondent at 23 n.6, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), available at <http://www.gurapossessky.com/news/parker/documents/07-290obsacTexas.pdf> (“[A]mici States submit that the right to keep and bear arms is fundamental and so is properly subject

jurisdictions with strict gun control laws) weighed in against Second Amendment incorporation.<sup>9</sup>

One might wonder whether constitutional arguments premised on federalism, in the area of gun rights, even remain viable after the Supreme Court's decision in *Heller*. There is no doubt that *Heller* affirmed a thoroughly individual conception of the right to arms. The majority concluded that the Second Amendment protects a personal right "to possess and carry weapons in case of confrontation."<sup>10</sup> Self-defense is the right's "core lawful purpose."<sup>11</sup> The right "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>—although not to "weapons not typically possessed by law-abiding citizens for lawful purposes . . ."<sup>13</sup>

Thus, *Heller* can be viewed as a typical case (if there is such a thing) about a fundamental constitutional right, involving a guarantee that is now ripe to be incorporated in full against state and local governments, like the Religion Clauses of the First Amendment,<sup>14</sup> the Fourth Amendment's warrant requirement,<sup>15</sup> the Takings Clause of the Fifth Amendment,<sup>16</sup> and many other parts of the Bill of Rights. In a contemporaneous article, I have presented such an analysis of the right recognized in *Heller*, and I think it is, on balance, the best way to understand the decision.<sup>17</sup>

Yet there is another plausible way of viewing the issue of guns and the Constitution. It is hard to shake the intuition that the American gun debate implicates federalism. State and local gun laws diverge importantly along regional lines.<sup>18</sup> The intensity of the cultural conflict over guns suggests that it will not be easy to frame national standards that will bridge this gap.<sup>19</sup> Therefore, efforts to impose nationwide gun restrictions not

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to incorporation.").

9. See Brief for New York et al. as Amici Curiae in Support of Petitioners at 1, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157197 ("While the Amici States do not defend the specific handgun ban at issue in this case and do not as a matter of public policy endorse it, preserving state sovereignty in this area is of paramount importance to the States.").

10. *Heller*, 128 S. Ct. at 2797.

11. *Id.* at 2818.

12. *Id.* at 2791-92.

13. *Id.* at 2816.

14. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise Clause).

15. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

16. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

17. Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. (forthcoming 2009).

18. See *infra* Part II.

19. See *infra* Part I.

only threaten the same constitutional interests that local gun legislation does, they also risk a significant conflict with federalism.

In this symposium article, I pay federalism its due by presenting the best arguments for implementing the Second Amendment, after *Heller*, in a way that is informed by federalism values. On the issue of gun policy, American jurisdictions are divided into two main camps: a primary gun culture that broadly supports armed self-defense and imposes few restrictions on peaceable citizens who want to own modern self-loading rifles and handguns; and a secondary gun culture that generally respects armed self-defense in the home, but restricts defensive gun carry and imposes restrictions on private ownership of self-loading firearms. A federalist approach to implementing the Second Amendment would seek to protect both American gun cultures by: (1) preventing the national government from interfering with legislative choices of the primary gun culture states; (2) leaving individual jurisdictions free to choose many of the usages of the secondary gun culture; and (3) eliminating the "marginal" gun culture of a handful of jurisdictions such as Chicago and New York City that profoundly impair the right to armed self-defense. These goals could be accomplished by incorporating the Second Amendment subject to a bifurcated standard of review: national gun laws receive strict scrutiny, while state and local gun laws receive intermediate scrutiny.

#### I. GUNS AND FEDERALISM

Theory and precedent both suggest that firearms policy is generally inappropriate for uniform national control.

##### A. Federalism Theory

The debate over gun policy in America is notable for its intensity and divisiveness. It has been described, with only moderate exaggeration, as "a sort of low-grade war . . . between two alternative views of what America is and ought to be."<sup>20</sup> Disagreements over gun policy often reflect highly

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20. B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 61 (Fall 1976). Bruce-Briggs's description of the conflict is a much-quoted classic:

On the one side are those who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization.

On the other side is a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no

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charged conflicts of cultural visions—conflicts that, according to some recent research, may derive from psychological attitudes so deep-seated that they are largely resistant to correction through new data.<sup>21</sup>

Constitutional federalism can help lower the intensity of such divisive cultural conflicts by protecting the ability of sub-national jurisdictions to adopt different policies that can satisfy different constituencies. Competition between sub-national jurisdictions can promote freedom and the satisfaction of individual preferences to a greater degree than national uniformity. Michael McConnell offers a helpful illustration of

[t]he first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach.

... For example, assume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and

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interference from the state. They are "conservative" in the sense that they cling to America's unique pre-modern tradition—a non-feudal society with a sort of medieval liberty writ large for everyman.

*Id.*

21. Dan Kahan and Donald Braman argue that the divides in cultural and psychological makeup that shape the gun debate are so basic—affecting not only present attitudes, but also one's reception of new information—that conventional empirical arguments about safety and risks are unlikely to produce consensus. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1322-25 (2003). Individuals with differing cultural templates will tend to undervalue information about risks that do not conform to those templates. *Id.*; see also Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 134-36 (2007).

Kahan and Braman document the tenacious conflict over gun policy, but do not consider the support their research seems to lend to federalism-based approaches to that conflict. Instead, Kahan and Braman call for citizens to bridge the culture gap through new modes of deliberation—citizens should "talk through their competing visions of the good life without embarrassment" in order to "seek policies that accommodate their respective worldviews." Kahan & Braman, *More Statistics, Less Persuasion*, *supra*, at 1321-22. The two scholars envision a search for a novel, "pertinent yet respectful expressive idiom for debating gun control," a project in which "anthropologists, sociologists, and philosophers will play a larger role" than in previous gun policy discussions. *Id.* at 1323. Kahan emphasizes the importance of enriching discourse by "striv[ing] to infuse law with as many diverse and competing cultural meanings as it can possibly bear" in the hope of mitigating conflict over those meanings. Kahan, *Cognitively Illiberal State*, *supra*, at 142.

One may respect the aims of this project (as I do), while still regarding constitutional federalism as a more concrete option for responding to cultural conflict. It is an option that could be pursued right now, without the need to wait for novel expressive idioms to develop. Our society is mobile. Putting the national government largely out of the gun control business—thereby allowing different American jurisdictions leeway to enact gun laws that concretely embody different cultural aspirations, thus attracting individuals who share those aspirations—would seem a more effective way of mitigating the conflict over guns than even the most pertinent and respectful new modes of discussion.

only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. [But if] a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.<sup>22</sup>

Federalism thus provides "a uniquely successful constitutional device for dealing with many of the most heartfelt and divisive problems of social heterogeneity."<sup>23</sup>

### B. Federalism Precedent

Precedent confirms the relevance of federalism arguments to national gun control. Two of the most important decisions in the Rehnquist Court's federalism revolution invalidated Congressional attempts to micromanage gun policy.

*United States v. Lopez* struck down the Federal Gun-Free School Zones Act of 1990,<sup>24</sup> which prohibited the possession of any firearm within 1000 feet of a primary or secondary school.<sup>25</sup> In holding that the statute exceeded Congress's interstate commerce power, the Supreme Court emphasized that Congress lacks plenary authority over areas such as "criminal law enforcement . . . where States historically have been sovereign."<sup>26</sup> Justice Anthony Kennedy agreed that the Act improperly "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise . . . ."<sup>27</sup>

22. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987).

23. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 763 (1995); see also *id.* at 776 ("If I dislike the laws of my home state enough and feel tyrannized by them enough, I always can preserve my freedom by moving to a different state with less tyrannous laws.").

24. See 18 U.S.C. § 922(q) (1994), *invalidated by* 514 U.S. 549 (1995).

25. 514 U.S. at 551.

26. *Lopez*, 514 U.S. at 564; see also *id.* at 561 n.3 ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law . . . .'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)) (internal quotation marks omitted); see also *id.* (noting President George H. W. Bush's criticism of the Gun-Free School Zones Act for "inappropriately overrid[ing] legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress") (quoting Statement of President George H. W. Bush on Signing the Crime Control Act of 1990, 26 WEEKLY COMP. OF PRES. DOC. 1944, 1945 (Nov. 29, 1990)).

27. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Justice Kennedy also wrote:

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The Justices in *Lopez* echoed a venerable argument of federalism advocates that regulating violent crime in general, and the misuse of firearms in particular, is a central responsibility of the states, not the federal government.<sup>28</sup> Indeed, some hardcore federalism advocates criticized *Lopez* for focusing on state regulatory autonomy in particular areas (an echo of former notions of areas of “traditional government functions”)<sup>29</sup> rather than affirming a broad-based theory of limitations on the commerce power.<sup>30</sup>

The subsequent decision in the drug case of *Gonzales v. Raich*<sup>31</sup> supports the view that the pro-federalism result in *Lopez* turned at least in part on *Lopez*'s subject matter. When given a chance in *Raich* to impose Commerce Clause limitations with implications for a broad range of federal regulations, the Court declined to do so. However, unlike the Commerce Clause, the Second Amendment is a narrow, subject-based limitation on federal power: it deals specifically with restrictions on the possession and use of firearms and other weapons.<sup>32</sup> *Heller*'s acknowledgment of a Second Amendment individual right could thus enable the Court to vindicate some of the federalist intuitions that informed *Lopez*, by striking down intrusive attempts by Congress to claim a police power in the area of gun control, without having to worry (as *Lopez* and *Raich* did) about the “spillover” effects such holdings might have on other areas of federal

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While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation . . . .

*Id.* at 581 (Kennedy, J., concurring) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

28. See *id.*; see, e.g., Edwin Meese III & Rhett DeHart, *How Washington Subverts Your Local Sheriff*, POL'Y REV., Jan. 1996, at 48, available at <http://www.hoover.org/publications/policyreview/3585206.html> (criticizing “the federalization of laws regulating firearms, a matter left to the states during most of our country's history” as contributing to the deaths of citizens at the hands of law enforcement agents at Ruby Ridge, Idaho and Waco, Texas).

29. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 854 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

30. See MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 32-33 (1999) (complaining that “*Lopez* starts out as an enumerated powers case about the outer limits of federal power,” but, in the end, “[i]ts central value . . . is the protection of the states' regulatory prerogatives”).

31. 545 U.S. 1 (2005) (upholding, against a Commerce Clause challenge, the application of the federal Controlled Substances Act to the local cultivation of marijuana for personal use).

32. U.S. CONST. amend. II.

regulation such as narcotics control or environmental law.<sup>33</sup>

The Commerce Clause was not the only area in which the Rehnquist Court trimmed federal power to regulate guns. In *Printz v. United States*, its most important Tenth Amendment “anti-commandeering” case, the Court held that Congress trespassed on the reserved powers of the states by enacting interim provisions of the Brady Handgun Violence Prevention Act that required state and local law enforcement officers to perform background checks on handgun purchasers to assure compliance with federal regulations.<sup>34</sup> The Court noted that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”<sup>35</sup>

Thus, both academic and judicial sources suggest that gun control is a ripe field for pro-federalism arguments. When one turns to empirical data, trends in state approaches to gun policy reinforce this conclusion.

## II. AMERICA’S GUN CULTURES

The controversy over gun policy in America has a regional flavor, but the nature of the regional divide has changed. Analysts have traditionally described the pro-gun culture as being “rural,” and have identified a basic division on guns between the American South and the rest of the nation.<sup>36</sup> However, the geographic patterns of state and Congressional participation in the *Heller* amicus briefing,<sup>37</sup> and of trends in state firearms legislation,<sup>38</sup>

33. Cf. Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 933 (2005) (contemplating the “distressing . . . possibility that *Raich* announces a return to the days in which the Bill of Rights is the only judicially-enforced limit on the power of the federal government”).

34. 521 U.S. 898, 933-35 (1997).

35. *Id.* at 922.

36. See, e.g., Bruce-Briggs, *supra* note 20, at 60 (“Gun ownership is more prevalent among men, rural and small-town residents, Southerners, veterans, and whites” while supporters of restrictive gun laws “are more likely to be young, single, prosperous, well-educated, liberal, New England non-gun owners with little knowledge of existing gun control laws.”); Sheldon Hackney, *Southern Violence*, in THE HISTORY OF VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 505 (Hugh Davis Graham & Ted Robert Gurr eds., 1969); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 398 (1999) (“The gun culture is predominantly rural and small-town, and its enemies are predominantly urban. . . . [T]he South would appear to be a special center of the gun culture.”).

37. The 55 U.S. Senators who joined the pro-individual right amicus brief in *Heller* came from a wide range of Midwestern, Southern, and Western states. See generally Brief for 55 Members of the United States Senate et al. as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-920), available at <http://www.gurapossessky.com/news/parker/documents/07-290bsacMembersUSSenate.pdf>; see also Brief of the State of Texas et al. as Amici Curiae In Support of Respondent, Dist. of

more accurately reflect the current reality. The major divide on guns is no longer between the rural South and the rest of the nation. Instead it is between several highly urbanized coastal states and cities, whose gun laws reflect a common denominator I call the *secondary gun culture*, and the rest of the nation—Midwest, South, and West—whose laws reflect America’s *primary gun culture*.

The primary gun culture broadly supports armed self-defense and imposes few restrictions on peaceable citizens who wish to own modern self-loading rifles and handguns. The secondary gun culture generally respects armed self-defense in the home, but restricts defensive gun carry and imposes restrictions on private ownership of self-loading guns. The primary gun culture is “primary” both in number of jurisdictions and in population. At the same time, the secondary gun culture is also a significant political formation. For purposes of exposition, I will discuss the secondary gun culture first.

*A. The Secondary Gun Culture*

Jurisdictions in the *secondary gun culture* include California, Hawaii, and much of the northeastern corridor, including the District of Columbia, Maryland, Massachusetts, New Jersey, New York, and (to a lesser degree) Connecticut. Metropolitan Chicago is this culture’s lone outpost in the Midwest. One could call it the *coastal* gun culture, treating Lake Michigan as an inland sea. Rates of gun ownership are lower in these enclaves than in the rest of the country—although even in gun-shy New England, over one-third of all households include a firearm.<sup>39</sup> But the jurisdictions in the secondary gun culture all share two traits: (1) they lack “shall issue” concealed carry (CCW) statutes,<sup>40</sup> and (2) they ban or substantially restrict

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Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) (including Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming as amici curae).

38. See *infra* notes 39-56 and accompanying text.

39. Mark S. Kaplan & Olga Geling, *Firearms Suicides and Homicides in the United States: Regional Variations and Patterns of Gun Ownership*, 46 SOC. SCI. MEDICINE 1227, 1232 tbl.3 (1998) (identifying 38% of New England households as containing at least one firearm).

40. See Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 680 (1995). “Shall Issue” statutes allow all adults who pass a criminal background check and meet specified requirements (such as a required class in safety and marksmanship) to acquire permits to carry concealed handguns for self-defense. See *id.* Connecticut proves a bit difficult to classify. Like the other listed jurisdictions, Connecticut lacks a “shall issue” carry permit statute, and instead

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private possession of modern self-loading rifles and/or pistols.<sup>41</sup>

I use these two criteria to distinguish the two main gun cultures because they are good markers of the degree of recognition that a particular state gives to the right to *keep* modern defensive firearms (in the case of restrictions on self-loading guns) and to *bear* arms for defense outside the home (in the case of concealed carry statutes). Moreover, these two variables reliably predict the other aspects of a state's regulatory climate with respect to firearms. Most of the intrusive state-level gun licensure and registration requirements,<sup>42</sup> waiting periods,<sup>43</sup> limits on gun purchases,<sup>44</sup> ammunition restrictions,<sup>45</sup> and the like are clustered in jurisdictions that

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vests discretion in local authorities to issue carry permits to individuals whom the authorities deem suitable. *See* CONN. GEN. STAT. ANN. § 29-28(b) (2005) (providing that local authorities and the Commissioner of Public Safety "may issue" a carry permit upon a finding that the applicant is "a suitable person to receive" it). However, unlike those of the other secondary gun culture jurisdictions, Connecticut's discretionary permit system is administered in a liberal fashion similar to "shall issue" in practice and includes meaningful appellate review to ensure that permit denials are not made on an arbitrary or capricious basis. *See id.* § 29-32b(b) (2005) (providing for de novo review, by Board of Firearms Permit Examiners, of permit denials). Nevertheless, in light of the need to retain clear and simple criteria for differentiating the two gun cultures—and because discretionary "may issue" language is inherently less rights-protective than "shall issue" language, since "may issue" makes it easy for administering authorities to shift to a more grudging posture in the future—I only count states as "shall issue" if their governing statutes explicitly eliminate official discretion in permit issuance.

41. Specifically, these jurisdictions all maintain state or local "assault weapons" bans that prohibit common self-loading, that is, semi-automatic, rifles or pistols of military appearance, as well as the large-capacity ammunition magazines that such rifles can accept. A former federal statute banned the production of new "assault weapons" and large capacity magazines for private possession, before its expiration in 2004. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (formerly codified at 18 U.S.C. §§ 921(a)(30), 922(v), 922(w) (1994)); *see also* Andrew Park, *A Hot-Selling Weapon, An Inviting Target*, N.Y. TIMES, June 3, 2007, § 3, at 1 (reporting that AR-15 type semiautomatic carbines, formerly subject to the federal assault weapons ban, are "selling briskly" and "are now the guns of choice for many hunters, target shooters and would-be home defenders").

42. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 140, §§ 129B, 131 (West 2002) (requiring would-be gun owners to obtain a Firearm Identification Card in order to possess any long gun or firearms ammunition, and an additional, discretionary license to possess handguns or to possess long guns that can accept magazines holding more than ten rounds of ammunition).

43. *See, e.g.*, CAL. PENAL CODE §§ 12071(b)(3)(A), 12072(c)(1) (West 2000 & Supp. 2008) (requiring ten-day waiting period before delivery of any firearm to a purchaser).

44. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-128(b) (LexisNexis 2003) (prohibiting the purchase of more than one handgun in a thirty-day period).

45. *See* N.J. STAT. ANN. § 2C:39-3(f) (prohibiting the possession of "hollow nose or dum-dum bullet[s]" by private citizens, with exceptions for possession in the home or business). In general, hollow point ammunition is preferred for self-defense and law enforcement use because it expands upon impact. This increases its stopping power (reducing the number of times an aggressor must be shot) and also reduces the risk that fired

lack shall-issue concealed carry statutes and maintain semi-automatic bans.

The secondary gun culture is geographically small, but more densely populated than the rest of the country. The relevant jurisdictions had a total population in 2000 (the date of the last census) of about eighty-one million, or a bit more than one quarter of the American population.<sup>46</sup> Put another way, the U.S. secondary gun culture encompasses a population that, if it were an independent nation, would be comparable to the population of Germany, and more populous than France.<sup>47</sup> Of course, the secondary gun culture also exerts an outsized influence on the life of the nation because it is home to many elite media, educational, and governmental institutions. Its cultural influence on the federal judiciary is considerable, and increases the higher one ascends in the judicial hierarchy. It is a striking fact that every current Supreme Court Justice except Clarence Thomas (a native of Georgia) was born in a state or city associated with the secondary gun culture.<sup>48</sup> Equally remarkable, all nine Justices spent the *entirety* of their U.S. undergraduate and graduate educations in such places, including Harvard (in Massachusetts), Princeton (New Jersey), Yale (Connecticut), Stanford (California); and even Justice Stevens's years at Northwestern and the University of Chicago, both in Cook County, Illinois.<sup>49</sup>

#### B. The Primary Gun Culture

The primary gun culture—defined here as jurisdictions that both have “shall issue” concealed carry laws and do not treat modern self-loading firearms differently from other common arms—is not only Southern, but also Midwestern and Western.<sup>50</sup> One important recent statistical analysis

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bullets will “over-penetrate” through a lawful target and potentially injure innocent bystanders beyond the target.

46. See generally U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd> (last visited Oct. 22, 2008) (2000 Census population figures).

47. Central Intelligence Agency, The World Factbook, France, <https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html#people> (last visited Oct. 23, 2008) (reporting that population of France was about sixty-four million as of July 2008); Central Intelligence Agency, The World Factbook, Germany, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html#people> (last visited Dec. 5, 2008) (reporting that population of Germany was about eighty-two million as of July 2008).

48. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Oct. 22, 2008) (providing biographical information on each current Justice).

49. *Id.*

50. Every Western state qualifies as a primary gun culture state except California (a secondary gun culture state which restricts self-loading guns and has an often arbitrary, county-based discretionary system of gun carry licensing). So does every Midwestern state

finds that being a Westerner correlates more closely with opposition to gun control than does being a Southerner.<sup>51</sup> The primary gun culture is not only rural, but also exurban, suburban, and urban. Dozens of states ensure that urban and rural residents retain identical gun rights through preemption laws that prohibit municipalities within the state from enacting local gun bans.<sup>52</sup>

These state preemption laws play a critical role in maintaining a robust federalism based on competition between jurisdictions. They recognize that the smallest appropriate geographic unit for firearms policy (and for most culturally divisive issues) is not the city or county, but the *state*—because that is the minimum geographic unit for living a balanced life. Rural and exurban residents need cities to visit. Urbanites need to escape to quieter areas. Statewide preemption insures the ability of the states to embody coherent cultural and social options for Americans with different preferences.

Thus, when efforts are made to paint the conflict over guns as urban versus rural, it is useful to recall that the contemporary legal landscape differs greatly from this stereotype. In reality, in 2008, an American with a clean record can obtain a modern, self-loading rifle and pistol, and a permit to carry the pistol for self-defense, not only if he or she lives in a traditional gun culture enclave such as rural Idaho or Kentucky, but also if he or she is a resident of downtown Houston, Indianapolis, Miami, Phoenix, Pittsburgh,

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except Iowa (which has a discretionary carry permit system, though it is liberally administered), plus Illinois and Wisconsin, which lack concealed carry altogether. The latter three states lack statewide semi-auto bans, and thus are members of neither gun culture. In the East, Delaware and Rhode Island, which lack semi-auto bans but have capriciously administered discretionary carry permit systems, also fall between the two stools. Finally, down South, Alabama maintains permit laws that are not “shall issue” because they vest local authorities with discretion over permit issuance, but are administered in practice in a manner similar to “shall issue.” See Nicholas J. Johnson, *A Second Amendment Moment*, 71 BROOK. L. REV. 715, 748 n.186 (2005) (discussing liberally administered “may issue” jurisdictions). Thus, although Alabama generally behaves like a primary gun culture state, it is technically excluded from that category here.

51. The data on attitudes towards guns from the 1988-2000 responses to the National Opinion Research Center’s General Social Survey are analyzed in Kahan & Braman, *supra* note 21, at 1306 tbl.1. Since “the West” includes liberal California as well as traditionally conservative mountain and plains states, it is likely that opposition toward gun control is still more pronounced in those Western states that are members of the primary gun culture.

52. See generally NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION, COMPENDIUM OF STATE LAWS GOVERNING FIREARMS 3 (2007), available at <http://www.nraila.org/media/PDFs/Compendium.pdf>. Primary gun culture states tend to have broader firearms preemption laws, allowing little leeway for added municipal restrictions, while secondary jurisdictions tend to have very limited pre-emption (Massachusetts, New York) or none (Maryland)—although California, with strong preemption, is an exception to the pattern.

St. Louis, Seattle, and many other urban areas.

These legislative preferences appear stable. None of the thirty-five American states to adopt “shall issue” concealed carry has ever repealed it. None of these states had ever banned or restricted modern, magazine-fed, self-loading rifles prior to the enactment of the federal “assault weapons” ban; none enacted such legislation during the federal ban; and none has reacted to the expiration of the federal ban by replacing it with a state-level ban.<sup>53</sup>

As with the secondary gun culture, the presence of the two key features in primary gun culture states serves as an index of their gun-friendliness in other respects. For example, more than twenty states have recently adopted so-called “Stand Your Ground” and “Castle Doctrine” statutes that revise applicable doctrines of criminal and tort law doctrines to make them more hospitable to armed self-defense by private citizens.<sup>54</sup> None of these states belong to the secondary gun culture. All but one of them belongs to the primary gun culture as defined here.<sup>55</sup> Similarly, in the *Heller* litigation, thirty primary gun culture states (and no secondary gun culture states) signed the pro-rights *amicus curiae* brief of Texas, which supported incorporation of the Second Amendment.<sup>56</sup>

### C. The Marginal Gun Culture

Where does the holding in *Heller* fit into this taxonomy? *Heller* did not deal with the secondary gun culture, whose scope is considerable, but

53. Massachusetts, a secondary gun culture state, responded to the sunset of the federal ban by enacting its own permanent semi-auto rifle ban. See MASS. GEN. LAW. ANN. ch. 140, §§ 121, 131M (West 2002). See also Scott S. Greenberger, *State Moves on Assault Weapons Ban*, BOSTON GLOBE, June 24, 2004, at A1.

54. See Patrik Jonsson, *Is Self-Defense Law Vigilante Justice?*, CHRISTIAN SCI. MONITOR, Feb. 24, 2006, at 2 (noting that 21 states were considering “Stand Your Ground” statutes that would remove the duty to retreat before responding to a forcible felony with deadly force).

55. A popular guide to state firearms laws lists twenty-one states that have, as of January 1, 2008, adopted statutes authorizing deadly force against any person unlawfully and forcibly entering an occupied dwelling or (often) an occupied vehicle. See J. SCOTT KAPPAS, TRAVELER’S GUIDE TO THE FIREARMS LAWS OF THE FIFTY STATES 8, 10-60 (2008 ed.) (identifying Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas as having adopted “Castle Doctrine” laws).

56. See generally Brief of the States of Texas et al. as *Amici Curiae* in Support of Respondent, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); see *id.* at 23 n.6 (calling for the Second Amendment’s incorporation). Alabama (which lacks full “shall issue” concealed carry, but in most respects behaves as a primary culture state) also joined the Texas brief. See *id.*

with laws characteristic of a *marginal* gun culture that is found only in a few jurisdictions such as D.C., Chicago, and San Francisco,<sup>57</sup> which have enacted handgun bans, and New York City, which uses extensive regulatory hurdles and discretionarily administered requirements to make handgun ownership extremely difficult.<sup>58</sup> The intensity of the restrictions these jurisdictions place on gun rights, combined with the Supreme Court's willingness to police "outliers" in other constitutional contexts suggests, that there is no serious federalism objection to requiring these marginal jurisdictions to conform their firearms laws to national norms. American jurisdictions that ban or heavily restrict handguns are both rarer and less populous<sup>59</sup> than the six states that formerly authorized the death penalty for child rape,<sup>60</sup> let alone the fourteen states that formerly criminalized homosexual sex (although the latter prohibitions were rarely enforced),<sup>61</sup> to name just two recent instances in which the Court has intervened in favor of national constitutional norms. Thus, the federalism approach sketched here is consistent with implementing the Second Amendment, through incorporation, in a way that forces marginal gun culture jurisdictions such as Chicago to rejoin the American mainstream.<sup>62</sup>

57. San Francisco voters attempted to enact a handgun ban by initiative in 2005, but the measure was held invalid as a violation of California's firearms preemption statutes. *See Fiscal v. City and County of San Francisco*, 70 Cal. Rptr. 3d 324, 341 (Cal. Ct. App. 2008) (holding that San Francisco's attempt to enact a handgun ban violated state's firearms preemption statutes); *see also* CAL. PENAL CODE § 12026 (West 2000); CAL. GOV'T CODE § 53071 (West 1997) (expressing state's intent to occupy the field of firearms and ammunition regulation).

58. *See generally* Suzanne Novak, *Why the New York State System for Obtaining a License to Carry a Concealed Weapon is Unconstitutional*, 26 FORDHAM URB. L.J. 121 (1998) (discussing application of New York's Sullivan Act).

59. The "handgun ban" jurisdictions of D.C., Chicago, and San Francisco had a total combined population in 2000 (the date of the most recent census) of roughly 4.2 million. *See* U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/> (last visited Oct. 24, 2008). Adding the five boroughs of New York City, with their harsh gun laws, brings the total to somewhat over twelve million people—barely four percent of the U.S. population. *Id.* Even if one includes the whole of New York State, this brings the marginal gun culture's population only to twenty-three million people, still much less than one out of ten Americans. *Id.*

60. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2645 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008) (mem.) (invalidating, as violation of Eighth Amendment's Cruel and Unusual Punishments Clause, laws in Georgia, Louisiana, Montana, Oklahoma, Texas, and South Carolina authorizing capital punishment for certain types of child rape).

61. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating sodomy laws in fourteen states, including Florida, Michigan, Missouri, and Texas, as violative of an unenumerated substantive due process right to adult consensual noncommercial sex).

62. The victorious plaintiff's counsel in *Heller* are now pursuing a federal lawsuit that challenges Chicago's handgun ban and certain of its more onerous registration requirements as violations of the Second and Fourteenth Amendments. *See generally* Complaint,

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### III. SECOND AMENDMENT PARTIAL INCORPORATION?

Some type of incorporation is likely to occur, since the Second Amendment right to arms not only elegantly satisfies the criteria developed in the twentieth century in the Supreme Court's "selective incorporation" due process case law<sup>63</sup> (a point emphasized in Nelson Lund's contribution to this symposium issue),<sup>64</sup> but can also claim a strong grounding in the original public meaning of the Fourteenth Amendment.<sup>65</sup> Assuming that incorporation will occur, a second question arises: should incorporation be carried out "jot-for-jot and case-for-case,"<sup>66</sup> imposing exactly the same limits on state and local gun laws as on federal gun laws, or should the scope of the right as incorporated differ from the right's contours as applied to the central government?

Though "jot for jot" incorporation was the norm in the classical incorporation era during the mid-twentieth century, the Court has sometimes taken an alternative, "partial incorporation" approach to portions of the Bill of Rights. The main example is the Sixth Amendment right to jury trial in criminal cases. The jury right has been incorporated against the states,<sup>67</sup> but while a unanimous jury is required for conviction in federal court, unanimity is not required in state court.<sup>68</sup> The Fourth Amendment was also applied in this way in the middle of the twentieth century: state courts were bound by the Fourth Amendment's limitation on reasonable searches and seizures, but not its exclusionary rule.<sup>69</sup> Finally, the First Amendment's freedom of expression has been applied to sexually

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McDonald v. City of Chicago, No. 08-CV-3645 (N.D. Ill. June 26, 2008), available at <http://www.chicagoguncase.com/wp-content/uploads/2008/06/complaint.pdf>.

63. See *Duncan v. Louisiana*, 391 U.S. 145, 147-54 (1968) (noting that factors supporting the application of a constitutional right against the states include: (1) whether the right is enumerated in the federal Bill of Rights; (2) the existence of an English antecedent for the right; (3) protection of the right by state constitutions; and (4) the degree of support that the right enjoys today); see also Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 51, 56-71 (2007) (arguing that the right to arms easily satisfies *Duncan's* criteria for selective incorporation).

64. See generally Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185 (2008).

65. AKHIL REED AMAR, *THE BILL OF RIGHTS* 257-66 (1998); see also MICHAEL KENT CURTIS, *NO SHATE STALL ABRIDGE* 140-41 (1986) (discussing references to right of arms during fourteenth amendment ratification debates).

66. *Duncan*, 391 U.S. at 181 (Harlan, J., dissenting).

67. *Id.* at 149-50 (majority opinion).

68. See *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 369-77 (1972) (Powell, J., concurring).

69. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949); *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

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explicit material in a way that is attentive to state and local standards. Whether material is obscene (and therefore largely unprotected by the First Amendment) turns, in part, upon whether it appeals chiefly to the prurient interest and depicts sexual activity in a patently offensive way.<sup>70</sup> Courts decide whether challenged material displays these two traits by referring to “contemporary community standards” within the forum jurisdiction, rather than to nationwide standards.<sup>71</sup>

Partial incorporation offers one way to harmonize the strong interpretive arguments for the Second Amendment’s right’s incorporation with the culture-conflict aspects of gun policy that make a federalist approach to that issue normatively appealing. The most natural form for partial incorporation to take would be a bifurcated standard of scrutiny. National gun restrictions are more suspect than state and local ones: national laws implicate federalism interests (respect for local autonomy, and skepticism about Congress’s institutional competence to design uniform gun laws for the continent-sized American polity) as well as the underlying substance of the Second Amendment’s preference for an armed population. Such laws should therefore receive strict scrutiny, even if state and local gun laws receive intermediate scrutiny.

Notice that this bifurcated approach perfectly explains the *Heller* Court’s conspicuous refusal to choose between intermediate and strict scrutiny for Second Amendment claims in *Heller*.<sup>72</sup> *Heller* dealt with the gun laws of the District of Columbia, which is a true anomaly from the standpoint of federalism: the only important jurisdiction that is

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70. *Miller v. California*, 413 U.S. 15, 24 (1973) (citing *Kois v. Wisconsin*, 408 U.S. 229, 231-32 (1972)).

71. *See Miller*, 413 U.S. at 30-34. One can imagine extensions of the *Miller* “community standards” idea to the Second Amendment context. For example, when evaluating the constitutionality of a federal restriction on a category of arms, courts will surely ask whether the arms in question are “typically possessed by law-abiding citizens for lawful purposes” *in America as a whole*, a nation in which primary gun culture jurisdictions predominate. *See Heller*, 128 S. Ct. at 2816. State and local restrictions could be reviewed under the same standard, or courts might ask instead whether such arms are typically possessed by private individuals and/or police officers for lawful purposes in jurisdictions within the secondary gun culture, or some other sizable relevant subset of the nation. *See Ashcroft v. ACLU*, 535 U.S. 564, 586-87, 592-93, 603 (2002) (concurring opinions of O’Connor, J., and Kennedy, J.; dissenting opinion of Stevens, J.) (suggesting that, under First Amendment, locally distributed materials should be analyzed for obscenity according to local “community standards,” but materials with nationwide distribution via the Internet should be assessed using national standards).

72. *See Heller*, 128 S. Ct. at 2817-18 (holding that a handgun ban fails constitutional muster “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights”); *id.* at 2817 n.27 (rejecting rational basis scrutiny of Second Amendment claims).

simultaneously federal and local. If federal gun laws should ordinarily receive strict scrutiny, but local gun laws should ordinarily receive intermediate scrutiny, then it is not at all clear what to do with D.C. *Heller* thus wisely leaves open the question of standard of review, which the Court can clarify when it first considers the constitutionality of a national gun law in the aftermath of *Heller*.

#### IV. IMPLICATIONS OF PARTIAL INCORPORATION

##### A. Protection Against Constitutional "Dilution"

The Second Amendment's likely incorporation gives new relevance to a jurisprudential oldie last heard from in the 1960s and early 1970s: the fear that extending a federal constitutional limitation uniformly to state and local activity will result in the watering down of that limitation as applied to the federal government.

During the classical incorporation era, this "anti-dilution" objection was pressed most strongly by the second Justice Harlan. In a series of cases involving the Fourth and Sixth Amendments, Harlan warned that jot-for-jot incorporation would produce a perverse "backlash" effect on federal constitutional rights, by inducing judges to take a narrower view of the scope of the Bill of Rights in cases involving states and local governments than they would have applied to the federal government in the absence of incorporation.<sup>73</sup> Under the usual approach to incorporation, these permissive precedents resulting from applying the Bill of Rights to state governments would then become fully applicable to the federal government as well, thereby diluting protections against federal action. Justice Harlan argued forcefully that such dilution had actually occurred with respect to the Sixth Amendment's criminal jury trial guarantee, which the Supreme Court construed, following incorporation, to permit juries of as few as six persons, despite the long federal tradition of requiring twelve-person juries.<sup>74</sup>

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73. See, e.g., *Williams v. Florida*, 399 U.S. 78, 118 (1970) (Harlan, J., concurring in the result) ("[T]he 'incorporationist' view . . . which underlay *Duncan* . . . must be tempered to allow the States more elbow room in ordering their own criminal systems. . . . But to accomplish this by diluting constitutional protections within the federal system itself is something to which I cannot possibly subscribe."); *Ker v. California*, 374 U.S. 23, 64-65 (1963) (Harlan, J., concurring in the result) (refusing to join in the incorporation of the federal Fourth Amendment requirements governing search and seizure; adding that "if the Court is prepared to relax Fourth Amendment standards in order to avoid unduly fettering the States, this would be in derogation of law enforcement standards in the federal system").

74. Harlan protested the Supreme Court's decision in *Duncan v. Louisiana* to incorporate the Sixth Amendment's jury trial guarantee against the states. 391 U.S. at 171-

This "anti-dilution" objection to jot-for-jot incorporation applies with surprising force to the Second Amendment. Consider an example of federal legislation that could provoke a major Second Amendment showdown in the future. In view of the results of the 2008 congressional and presidential elections, there may be an attempt in the near future to enact a new version of the 1994 federal "assault weapons" ban on many types of popular, magazine-fed self-loading rifles and handguns, following the original ban's expiration in 2004.<sup>75</sup> From the standpoint of federalism, such a law could be understood as a form of cultural imperialism, in which prominent federal legislators from secondary gun culture states<sup>76</sup> attempt to impose that gun culture's norms on the nation at large, even though such measures have failed to obtain a foothold in the primary gun culture states (not one of which has ever adopted such a law at the state level).<sup>77</sup> As I argue at length elsewhere,<sup>78</sup> a fair application of *Heller* to such a law leads to the conclusion that modern self-loading rifles such as the AR-15, which are widely owned for self-defense, hunting, and target shooting, and which

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93 (Harlan, J., dissenting). When the Court later held in *Williams v. Florida*, 399 U.S. 78 (1969) that the states—and therefore, given *Duncan*, the federal government too—could limit criminal juries to only six persons without violating that guarantee, Harlan sharply criticized the Court for allowing a harmful "dilution" of the Sixth Amendment's protection in federal court:

I consider that before today it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six [instead of the traditional twelve jurors] . . .

The 'backlash' in *Williams* exposes [a] malaise, for . . . the Court dilutes a federal guarantee in order to reconcile the logic of 'incorporation,' the 'jot-for-jot and case-for-case' application of the federal right to the States, with the reality of federalism. Can one doubt that had Congress tried to undermine the common-law right to trial by jury before *Duncan* came on the books the history today recited would have barred such action?

*Williams*, 399 U.S. at 122, 129-30 (Harlan, J., concurring in the result).

75. See, e.g., *supra* note 41.

76. Leading sponsors of recent attempts to enact a renewed federal ban include Senators Dianne Feinstein (of California), Edward Kennedy (Massachusetts), Charles Schumer (New York), and Representative Carolyn McCarthy (New York). See Joe Johns & Craig Broffman, *Senate Kills Bill Protecting Gun Makers* (Mar. 3, 2004), <http://cnn.com/2004/ALLPOLITICS/03/02/senate.guns/index.html> (last visited Oct. 24, 2008); Assault Weapons Ban and Law Enforcement Protection Act of 2007, H.R. 1022, 110th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1022> (listing Rep. McCarthy as bill's lead sponsor).

77. The enactment of the federal ban provoked a major electoral backlash, with some strategists attributing to the ban the Democratic Party's loss of both of its Congressional majorities in the 1994 mid-term elections. See Peter Wallsten, *Democrats Hesitant to Push Gun Laws*, L.A. TIMES, Apr. 20, 2007, at A20. This, too, fits the theory that the ban was an example of overreach by legislators from secondary gun culture states.

78. Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. (forthcoming 2009).

are routinely issued to ordinary patrol officers, are unquestionably a class of arms “typically possessed by law-abiding citizens for lawful purposes” today,<sup>79</sup> and thus are constitutionally protected against federal prohibition or crippling regulation.<sup>80</sup> As a practical matter, however, the federal courts are much more likely to reach that correct result if they must consider federalism interests that weigh in favor of invalidation, as well as the inherent strength of their commitment to the individual right to arms.<sup>81</sup> Put more bluntly, the courts are far more likely to protect Southerners, Westerners, and Midwesterners in their right to acquire modern self-loading rifles if the courts can do so without thereby discarding the “assault weapons” laws of the secondary gun culture states, and thereby (as the judges might see it) bringing AR-15s to high-rise apartments in Manhattan.<sup>82</sup> Dilution is a real risk, one that supporters of Second

79. *Heller*, 128 S. Ct. at 2816.

80. *Id.* at 2818.

81. Brannon Denning has chronicled the resistance of many post-New Deal lower federal courts to the prospect that “the Second Amendment [could be construed] to contain anything resembling a right under which an individual might make a colorable claim.” Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 999 (1996).

In light of the geographic and cultural split discussed in this article, it is also worth considering that federal appellate judges are subject to reputational incentives—favorable opinions from the national media, the elite legal academy, and the national institutions of the legal profession—that arise disproportionately from the coastal jurisdictions that embody the secondary gun culture. This is, of course, a standard theme of conservative critique of the political tendency of the federal judiciary. See, e.g., Robert H. Bork, *Their Will Be Done: How the Supreme Court Sows Moral Anarchy*, WALL ST. J., July 10, 2005, available at <http://www.opinionjournal.com/extra/?id=110006940> (arguing that federal judges drift leftward under the influence of “the intellectual class . . . dominant in . . . the universities, the media, church bureaucracies and foundation staffs—a class to which judges belong and to whose opinions they respond”).

82. Another post-*Heller* Second Amendment challenge that would be strengthened by federalism arguments targets the 1996 “Lautenberg Amendment” to the federal Gun Control Act, named for its chief sponsor, Senator Frank Lautenberg of the secondary gun culture state of New Jersey. Codified at 18 U.S.C. § 922(g)(9), this unusual provision permanently bars individuals convicted of misdemeanor crimes of domestic violence from possessing firearms. 18 U.S.C. § 922(g)(9) (2006).

The case for § 922(g)(9)’s facial unconstitutionality is strong even before taking federalism into account. The very point of designating an offense as a misdemeanor, subject to lighter punishment than felony crimes, is to classify it as belonging to “a category of petty crimes or offenses” that do not implicate the same serious consequences as the commission of a felony crime. *Duncan*, 391 U.S. at 159 (citing *Cheff v. Schnackenberg*, 384 U.S. 373, 379-80 (1966)) (holding that Sixth Amendment right to jury trial attaches only to prosecutions for “serious crimes” punishable by more than six months imprisonment). See also *Heller*, 128 S. Ct. at 2816-17 (stating that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . .”) (emphasis added). Legislative attempts to use mere misdemeanor convictions as the occasion to deprive individuals permanently of other constitutional rights, such as the right

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Amendment incorporation (a group to which I belong) should consider with care.

*B. Second Amendment Review of Federal Gun Restrictions Should Not Be Guided By Deferential Twentieth-Century State Constitutional Case Law*

One prominent argument for applying a deferential standard of scrutiny to Second Amendment claims originates with Professor Adam Winkler. In a recent article,<sup>83</sup> Winkler argues that federal courts should apply the Second Amendment in conformity with state court decisions construing state constitutional right-to-arms provisions—not all state court decisions, but those since World War II.<sup>84</sup>

For a number of reasons, this article must be rejected as a guide to post-*Heller* Second Amendment adjudication. First, quite apart from the issue of federalism, the opinion of the Court in *Heller* makes clear that Winkler has focused on the wrong set of cases. The *Heller* opinion shows almost no interest in the post-New Deal state case law that Winkler discusses, instead drawing its guidance from the rich nineteenth-century state constitutional jurisprudence of the right to arms.<sup>85</sup> Winkler's article,

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to vote, would likely be invalidated by the federal courts for failing to adhere to the requirement of narrow tailoring. Yet the lower courts' uncertain commitment to the substance of the right to arms, as well as the powerful political considerations that weigh against invalidating restrictions on domestic violence offenders, leave it uncertain whether § 922(g)(9) will be struck down in the wake of *Heller* as it deserves to be. Some courts have already declined to do so. *E.g.*, *United States v. White*, No. 07-00361-WS, 2008 WL 3211298 (S.D. Ala. Aug. 6, 2008).

Litigants challenging § 922(g)(9) would benefit from the ability to bring additional, federalism-based arguments to the table. In addition to its previously discussed defects, § 922(g)(9) is a grave affront to federalism. It is an attempt to micromanage at the national level the states' handling of, not merely violent crime between intimates (a traditional area of state, not federal authority), but of a particular class of those crimes that is *concededly less serious than others*—namely, misdemeanors.

Indeed, from the standpoint of federalism, § 922(g)(9) seems to combine the problematic (for federal control) features of both of the national statutes invalidated in the Rehnquist Court's leading federalism decisions: it is a gun possession statute that focuses on domestic violence. *See Lopez*, 514 U.S. at 551; *United States v. Morrison*, 529 U.S. 598, 601, 627 (2000) (striking down, as beyond Congress's enumerated powers, 42 U.S.C. § 13981, the civil remedy provision of the federal Violence Against Women Act of 1994).

83. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 687, 716-18 (2007), *cited in Heller*, 128 S. Ct. at 2853 (Breyer, J., dissenting). Professor Winkler also co-authored an amicus brief in *Heller* that presents similar arguments. *See generally* Brief of Law Professors Erwin Chemerinsky and Adam Winkler, as Amici Curiae in Support of Petitioner, *Dist. of Columbia v. Heller* (2008) (No. 07-290), *available at* <http://www.gurapossessky.com/news/parker/documents/LawProfAmicus.pdf>.

84. Winkler, *supra* note 83 at 687.

85. *See O'Shea, supra* note 78 (characterizing *Heller's* interpretation of the Second Amendment loosely as recognizing "a nineteenth-century right to arms").

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largely self-limited to the mid- and late twentieth century (an unusually pro-gun control period of American history, particularly in the courts)<sup>86</sup> does not cite or discuss these nineteenth-century cases. They reflect an attitude toward individuals' arms rights that is different from the complacent deference that Winkler identifies in the twentieth-century case law. For example, in the important case of *Andrews v. State* (cited three times by *Heller*,<sup>87</sup> but none by Winkler), the Tennessee Supreme Court distinguished the right to "bear arms," which is subject to a good deal of public regulation, from the right to "keep arms," which is more absolute.<sup>88</sup> Yet even the right to bear arms was interpreted to impose significant limitations on government weapons control: *Andrews* held that there was a constitutional right to carry service-type handguns ("repeaters").<sup>89</sup> Government could regulate the mode of exercising this right (such as by banning concealed carry of handguns, while allowing them to be openly carried) but could not destroy or prohibit it.<sup>90</sup> Other nineteenth-century state cases, which reflect a similar commitment to the right to arms, also played a key role in guiding the *Heller* Court's interpretation of the Second Amendment.<sup>91</sup> Again, Winkler neither cites nor discusses these decisions.

Of more immediate relevance, Winkler's analysis also fails to appreciate how the federalism interest in gun policy discussed in this article weighs in favor of heightened judicial review of federal gun laws. Winkler

86. See generally Denning, *supra* note 81 (diagnosing resistance to an individual right to arms in the lower federal courts from the New Deal to the 1990s).

87. See *Heller*, 128 S. Ct. at 2806, 2809, 2818 (citing *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178, 183, 187 (Tenn. 1871)).

88. *Andrews*, 50 Tenn. (3 Heisk.) at 185-86. The court reasoned:

[W]e may say, with reference to such arms . . . [that] he may keep and use [them] in the ordinary mode known to the country, no law can punish him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restrictions on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

*Id.* See Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and "Reasonable Regulation"*, 75 TENN. L. REV. 137, 139-143 (2007) (containing a discussion of the Tennessee right-to-arms cases that diverges from Winkler's characterization of state case law).

89. *Andrews*, 50 Tenn. (3 Heisk.) at 187-88.

90. *Id.*

91. See *Nunn v. State*, 1 Ga. 243, 251 (1846) (invalidating ban on weapons carry) (cited in *Heller*, 128 S. Ct. at 2794 n.9, 2809, 2816, 2818); *State v. Chandler*, 5 La. Ann. 489, 490 (La. 1850) (upholding right to carry weapons) (cited in *Heller*, 128 S. Ct. at 2809, 2816); *State v. Reid*, 1 Ala. 612, 616-17 (Ala. 1840) (cited in *Heller*, 128 S. Ct. at 2818).

argues that the federalism interest weighs the other way, reasoning that "Second Amendment strict scrutiny would completely displace existing state law with a single national standard."<sup>92</sup> However, that argument assumes jot-for-jot incorporation and is invalid under a regime of partial incorporation. The considerations Winkler discusses actually cut in favor of strict scrutiny of federal laws. Because uniform national gun controls directly threaten the states' role as "laboratories of democracy,"<sup>93</sup> they should be viewed with extra skepticism by the federal courts, in order to "afford [the states] sufficient space to experiment with various solutions to social problems without national governmental supervision."<sup>94</sup> Today a peaceable resident of the state of Wyoming<sup>95</sup> can carry a handgun openly; can obtain a "shall issue" permit to carry the same gun concealed,<sup>96</sup> can freely own, use, and transport modern, magazine-fed self-loading rifles; can buy and sell guns privately with fellow state residents without government paperwork; can carry the same expanding-tip bullets for defense that are uniformly favored by law enforcement; and can defend himself in his or her home while enjoying legal protection against civil liability.<sup>97</sup> A resident of the state of New Jersey enjoys *none* of these prerogatives.<sup>98</sup> The observed divergence of gun laws among American jurisdictions ought to undermine any tendency to believe nationwide restrictions imposed by Congress will be presumptively appropriate; thus, it undermines Winkler's argument that courts should review such restrictions deferentially.

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92. Winkler, *supra* note 83, at 712.

93. *Id.* (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

94. *Id.*

95. *Cf.* *Renewing America's Promise: Report of the Platform Committee, 2008 Democratic National Convention* 48, available at <http://www.demconvention.com/assets/downloads/2008-Democratic-Platform-by-Cmte-08-13-08.pdf> (accessed Dec. 9, 2008) (stating in party platform that, although the right to arms is subject to reasonable regulation, "what works in Chicago may not work in Cheyenne[, Wyoming]").

96. *See* WYO. STAT. ANN. § 6-8-104 (2007).

97. *Id.* § 6-1-204 (2007 & Supp. 2008).

98. *See* N.J. STAT. ANN. §§ 2C:39-5(b) (West 2005) (prohibiting gun carry without a permit); 2C:58-4 (imposing a discretionary carry permit system); 2C:39-3(f) (prohibiting use of expanding ammunition for defensive carry); 2-C:39-1(w), 2C:39-5(f) (banning many modern self-loading guns as "assault firearms"); 2C:39-9(d), 2C:58-2 (prohibiting sale of guns without firearms retailer's license).

## CONCLUSION

Federalism is not merely a shorthand for legislative divergence among states; it is also a ground for heightened judicial skepticism of national legislation. I've tried to suggest that even after *Heller*, national gun legislation raises federalism concerns that state gun legislation does not, and that partial incorporation could respond to these issues.

I will close by acknowledging (rather than treating in detail) two main objections to this approach. First, one could object that firearms regulation is not a proper subject for federalism because guns are chattels that can be transported easily from state to state, thereby creating a problem of porous boundaries between pro-gun and anti-gun jurisdictions.<sup>99</sup> This objection raises empirical questions that are beyond the scope of this symposium contribution. However, there are reasons to think the objection proves too much, for it extends equally well to state regulation of almost any controversial form of contraband. Yet recent history shows that some of the most important federalism battles have dealt precisely with state autonomy over such portable chattels as alcoholic beverages<sup>100</sup> and narcotics.<sup>101</sup> The state governments and other participants in these battles had no doubt that meaningful state regulatory prerogatives were at stake.

99. See, e.g., Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207, 219 (1995) (citing Rene Sanchez, *Building an Arsenal, One Gun at a Time*, WASH. POST, Nov. 3, 1993, at A1) (discussing incidents in which "the effectiveness of local gun control laws can be defeated by gun runners, who load up on guns in low regulation jurisdictions and sell them—illegally—in high regulation jurisdictions").

100. The Twenty-First Amendment, ratified in 1933, ended national alcohol prohibition, but affirmed state authority to prohibit alcohol, by providing: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2; see also *Granholm v. Heald*, 544 U.S. 460, 484 (2005) ("The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.").

101. See generally *Gonzales v. Raich*, 545 U.S. 1 (2005) (considering Commerce Clause and Tenth Amendment challenge to application of federal Controlled Substances Act to intrastate possession of marijuana that was authorized by state law); *id.* at 42 (O'Connor, J., dissenting) ("We enforce the 'outer limits' of Congress' . . . authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government."); Amicus Curiae Brief of the States of California, Maryland, and Washington in Support of Angel McClary Raich, Et Al., *Gonzales v. Raich*, 545 U.S. 1, (2004) (No. 03-1454), available at <http://www.angeljustice.org/downloads/California%20Washington%20and%20Maryland%20Amicus.pdf> (states defending in Supreme Court their claims to independence from federal regulation of medical marijuana possession).

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The continental scale of the American polity further reduces the force of the porousness objection, due to the large size of many American states and the often large geographical distances between American jurisdictions.

The other objection was noted at the beginning of this article: the argument that the Second Amendment right to defensive arms is, as *Heller* suggests,<sup>102</sup> a fundamental human right,<sup>103</sup> and therefore not a proper subject for federalism. Committed federalism advocates still acknowledge that courts should give uniform protection to certain basic human rights, perhaps even in the face of cultural conflict and determined resistance to those rights by certain regions or localities.<sup>104</sup> I have presented some reasons for thinking that (due to the risk of dilution) the net amount of judicial protection of the right to arms under partial incorporation may actually be equal to or greater than the amount of protection under jot-for-jot incorporation. Yet this does not negate the expressive function that total incorporation could serve by enshrining the right to arms as a "first-order" constitutional right. Moreover, the risk of dilution rests on a predictive judgment about courts' attitudes. It might prove unfounded, or the dilution might run in the opposite direction from the one I contemplate, with courts using the divergence of federal and state Second Amendment standards as an excuse to give little or no protection to gun rights at the state level, without meaningfully increasing protection at the federal level.

The proposal considered in this article also raises basic questions of constitutional interpretation. Can courts properly use structural federalism principles as a basis for applying different tiers of scrutiny to the same enumerated constitutional right? Or does the logic of incorporation require either jot-for-jot incorporation or nothing? The answer may depend in part upon whether Second Amendment incorporation proceeds through the relatively free-wheeling framework of the Fourteenth Amendment's Due Process Clause, or in a more rigorously originalist fashion through the Privileges or Immunities Clause. I will be content if this article has succeeded in illuminating the current American regional and cultural division on guns, and how this division suggests that uniform, nationwide firearms restrictions deserve particular skepticism as Second Amendment doctrine develops.

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102. *Heller*, 128 S. Ct. at 2798 ("By the time of the [American] founding, the right to arms had become fundamental for English subjects."); *id.* (citing Blackstone's connection of the right to arms with "the natural right of resistance and self-preservation").

103. David Kopel advances this argument in his contribution to this symposium. David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235 (2008).

104. Calabresi, *supra* note 23, at 813-17 (discussing Supreme Court's protection of rights of political participation and antidiscrimination rights).