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THIS IS A STICK UP! ROBBING CITIZENS OF THEIR SECOND AMENDMENT RIGHTS AND THE DEMISE OF THE POLITICAL SAFEGUARDS OF FEDERALISM IN NATIONAL RIGHT-TO-CARRY LEGISLATION

P. Kramer Rice*

INTRODUCTION

The personal ownership and possession of firearms pre-dated the Union, occupied the minds of the Framers, and compelled states to ratify the Second Amendment. More than 200 years later in 2010, the United States Supreme Court affirmed that history by protecting the place of firearms in the American Story, incorporating as enforceable against the states the Second Amendment right to own and possess a handgun. As of that same year, approximately 118 million handguns were either available for sale or already owned within the United States. The most common way handgun owners exercise their Second Amendment right to keep and bear arms is through concealed carry, and while the federal government maintains minimal oversight of the shipment and maintenance of firearms and dangerous weapons, states regulate the rest, enforcing eligibility and possession requirements for the licensing of concealed handguns.

Because of the regulatory role the states have maintained in shaping the contours of Second Amendment rights, the Second Amendment necessarily implicates principles of federalism. Yet, every year since incorporation, the Senate or the House of Representatives has challenged state laws regulating Second Amendment rights by putting forth national legislation for reciprocal state recognition of out-of-state concealed carry handgun licenses ("CHLs"). These proposed national right-to-carry laws now animate the gun control policy debate,

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4. See infra Part II.
5. See infra Part III.B.2. It has even been suggested that the Second Amendment is a “federalism provision” incapable of incorporation. See McDonald, 130 S. Ct. at 3111 (2010) (Stevens, J., dissenting).
which has experienced an invigorated revival in the wake tragic events involving gun violence and presidential proposals for federal gun control measures.\footnote{7}{In wake of the fatal shootings occurring in Aurora, Colorado and Newtown, Connecticut, President Barack Obama put forth his \textit{Now is the Time} Campaign, wherein he sought strong federal regulatory measures, such as a ban on the sale of assault weapons and a requirement of universal background checks on all gun purchasers, to combat gun violence. \textit{See NOW IS THE TIME: THE PRESIDENT’S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE} (Jan. 16, 2013), available at http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf [hereinafter \textit{NOW IS THE TIME}]. Responsively, some senators have called for national reciprocity of concealed carry to serve as \textit{de facto} background checks. \textit{See}, e.g., \textit{Rubio on Gun Control} (NBC Television broadcast April 14, 2013), available at http://www.nbcnews.com/video/meet-the-press/51534273.}

Exemplifying national right-to-carry legislation generally, and the only CHL reciprocity bill passed in either house of Congress, is the House of Representatives’ National Right-to-Carry Reciprocity Act of 2011 (“NRTC” or “Act”).\footnote{8}{H.R. 822, 112th Cong. (2011).} Standing as the most “sweeping firearms law in nearly two decades,”\footnote{9}{While some in the media were quick to label \textit{Now is the Time} the most “sweeping firearms law in nearly two decades,” a mere two years earlier the House of Representative passed the NRTC, which, because it impacts not only ownership rights, as addressed in \textit{Now is the Time}, but also the carriage rights, is the most sweeping gun control law passed within two decades. \textit{See} Laura Meckler, Peter Nicholas, and Colleen Nelson, \textit{Obama’s Gun Curbs Face a Slog in Congress}, \textit{WALL STREET JOURNAL}, January 16, 2013, available at http://online.wsj.com/article/SB1000142412788732396830457824570749827656.html?mod=WSJ_LEFTT opStories (labeling inaccurately \textit{Now is the Time} as the most recent and the most sweeping gun legislation is the past two decades).} the NRTC relaxes gun regulations by mandating reciprocal state recognition of out-of-state CHLs,\footnote{10}{See infra Part I.} providing individuals wishing to carry a concealed handgun across states broad federal protection to do so.\footnote{11}{See infra Parts I and IV.} Like local challengers’ claims against restrictive federal gun control proposals, national challengers to the permissive regulation of the NRTC claim the NRTC violates principles of federalism.\footnote{12}{Mississippi Governor Phil Bryant charged that his state would resist federal limits on firearms controls. \textit{See} Emily Pettus, \textit{Bryant: Miss. should resist federal limits on guns}, \textit{KATC.COM} (January 16, 2013, 5:51 PM) http://www.katc.com/news/bryant-miss-should-resist-federal-limits-on-guns/. For state-based challenges to the NRTC, \textit{see infra} notes 28-35 and accompanying text.} Because the history and protection of Second Amendment rights necessarily includes state regulation,\footnote{13}{See \textit{U.S. Const.} amend. X (“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.”).} and because the Tenth Amendment reinforces such state prerogative on gun control,\footnote{14}{See \textit{infra} Part II and Part III.2.} opponents to national gun regulation—both restrictive and permissive—always fault federal proposals for failing to respect the province of states to pass firearm laws representative of their citizens’ interests.

This Note considers the constitutionality of the National Right-to-Carry Reciprocity Act of 2011 in light of the principles of federalism underlying the recurring challenges to federal firearms law. Although the Supreme Court’s incorporation of the Second Amendment constricts the breadth of any state gun restrictions, the Second Amendment does not mandate the abolition of all state gun
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regulations.\textsuperscript{15} Even as Circuit Courts are split as to the propriety of states' selective gun licensure regulations,\textsuperscript{16} specifically concealed carry regulation,\textsuperscript{17} the Supreme Court has confirmed twice the constitutionality of such selective gun licensure.\textsuperscript{18} Nonetheless, the House of Representatives' invocation of its Commerce Clause power to pass the NRTC undermines state autonomy and interest in local gun licensure by requiring state enforcement of respective concealed carry requirements.

Ultimately, because the NRTC fails to respect the place of states in crafting Second Amendment law, the Act likely is unconstitutional. Below, Part I discusses the text and history of the National Right-to-Carry Reciprocity Act of 2011. Part II comparatively analyzes existing state eligibility requirements for CHLs. Part III provides an overview of the governing standard of review for laws challenged on federalism grounds—a structural review derived from the Tenth Amendment and grounded in the Constitutional allotment of political representation of states in Congress—and how that review of political safeguards has developed within Commerce Clause jurisprudence, particularly as it pertains to traditional state function, clear statement, and anti-commandeering principles. Part III also discusses Supreme Court cases concerning the Second Amendment and the split in Circuit Courts concerning the meaning and application of those precedents as applied to CHLs. Part IV concludes that the National Right-to-Carry Reciprocity Act's federal mandate likely is beyond Congress' Commerce Clause power because first, it infringes upon the traditional state function to police concealed handgun licensure,\textsuperscript{19} and second, even assuming Congress acted within its power to regulate interstate commerce, the Act improperly neuters the political safeguards of federalism structured in the Constitution.\textsuperscript{20}

I. H.R. 822: THE NATIONAL RIGHT-TO-CARRY RECIPROCITY ACT OF 2011

States issuing CHLs most regularly allow license holders to carry a loaded handgun, such as a pistol or revolver, on their person, in their vehicle, or in public and in such a manner that the handgun is not visible to others.\textsuperscript{21} On November 16, 2011, the House of Representatives passed pursuant to its Commerce Clause power the NRTC,\textsuperscript{22} providing three substantive measures broadening the manner in which CHL holders may lawfully own and possess a handgun.\textsuperscript{23} First, the Act's primary

\begin{itemize}
\item[15.] See infra Part III.B.2.
\item[16.] See infra Part III.B.3.
\item[17.] See infra notes 139-158 and accompanying text.
\item[18.] See infra notes 122-133 and accompanying text.
\item[19.] See infra Part IV.A.
\item[20.] See infra Part IV.B.
\item[21.] See GAO REPORT, supra note 2, at 5.
\item[23.] See infra notes 24-37 and accompanying text. In addition to its substantive requirements, the NRTC also has two administrative requirements: the Comptroller General must conduct an audit of concealed carry
\end{itemize}
provision allows individuals with valid state-issued CHLs to carry a concealed firearm in any other state that also issues CHLs or does not prohibit the carrying of concealed firearms.\textsuperscript{24} Second, the NRTC leaves in place non-eligibility regulations, that is, the Act leaves untouched those state laws controlling the manner of handgun ownership and possession; the NRTC does not affect pre-existing state laws governing how concealed firearms are possessed or carried because reciprocal licensees are subject to the same conditions of limitation imposed by federal, state, and local law to residents of that state.\textsuperscript{25} For example, regulations banning the possession of guns in state parks, schools, and government buildings remain intact and enforceable to all violators.\textsuperscript{26} Third, the law does not impact a state’s eligibility requirements for its own residents; the NRTC proscribes individuals from relying on the reciprocity of state recognition to carry a concealed weapon in their home state under the permit or license of another state when their home state otherwise forbids them from possessing or carrying a gun.\textsuperscript{27}

Typical of Second Amendment legislation, the legislative debate surrounding the passage of the NRTC pitted two opposing sides on the issue of whether the law offends federalism and impedes states’ rights.\textsuperscript{28} According to (former) Representative Stearns, a co-sponsor of the NRTC, the Act does not offend federalism because it “does not set up a federal carry permit system or establish any

\begin{quote}
	\textit{Accord Respecting States' Rights and Concealed Carry Reciprocity Act of 2013, H.R. 578, 113th Cong. (2013).}
\end{quote}

\begin{quote}
	\textit{Accord H.R. 578.}
\end{quote}

\begin{quote}
	\textit{See supra note 22 (seven Republicans rejecting it, forty-three Democrats supporting it).}
\end{quote}
federal regulation of concealed carry permits . . . [t]hat power remains with the states. Conversely, opponents claim that the legislation "jeopardize[s] public safety and [is] an insult to states . . . that purposefully have strong gun ownership laws." The Brady Campaign to Prevent Gun Violence, a nonpartisan group, states that the NRTC undermines state laws. Proponents of the law respond to detractors by highlighting the Act's purpose—to "guarantee[] citizens' constitutional rights as affirmed by . . . D.C. v. Heller and McDonald v. Chicago" and to protect the "fundamental" right to defend oneself and loved ones from criminals. Supporters of the Act believe the Second Amendment is a right that should not be extinguished when an individual crosses a state border. Congressman Lamar Smith, Chairman of the House Judiciary Committee, compares interstate recognition of concealed carry permits to the manner in which drivers' licenses are recognized in other states and suggests that universalizing the recognition of CHLs ensures that lawful CHL holders do not unwittingly violate out-of-state laws.

II. FEDERAL FIREARMS LAW & STATE CONCEALED CARRY ELIGIBILITY REGULATION

A. Federal Firearms Law

Currently there are no federal laws addressing the issuance of CHLs at the state level; rather, state issuance of CHLs is subject to the federal Gun Control Act (GCA), to which the NRTC is an additional piece. The GCA is Title I of the National Firearms Act, signed into law in 1938 as a part of President Franklin


34. See Statement of Judiciary Committee Chairman Lamar Smith Full Committee Markup of H.R. 822, the "National Right-to-Carry Reciprocity Act of 2011," U.S. HOUSE OF REPS. COMM. ON THE JUD. (Oct. 13, 2011), http://judiciary.house.gov/news/Statement%20HR%20822.html (stating the NRTC requires states currently permitting people to carry concealed firearms to recognize other states' valid concealed carry permits is "much like [how] the states recognize drivers' licenses issued by other states").


36. The Now is the Time proposal for universal background checks potentially provides greater federal regulation of concealed carry, but as proposals, they are not law. See supra note 7 and accompanying text.
Roosevelt's federal firearms campaign. The GCA is less focused on who can possess a gun and more concerned with the type of gun to be possessed. This relegation of gun ownership and possession comports with the purpose of Roosevelt's federal firearms campaign, which was to aid state and local efforts in gun control by prohibiting firearm transactions that would violate state and local laws. To this end, legislators deleted during drafting a proposed nationwide handgun registration provision and instead relied on state law to regulate that area of gun control. Years later, bill supporters lamented that customers from states requiring licenses could purchase guns in states without a requirement.

B. State Concealed Carry Regulation

Subject to the baseline federal regulation of the GCA, CHLs are administered according to state law. States are loosely classified into four distinct categories according to their respective concealed carry laws: (1) No-issue States ("state does not permit residents or nonresidents to carry concealed handguns"); (2) May-issue States ("state applies discretion in granting permits to carry concealed handguns"); (3) Shall-issue States ("issuing authorities are required to issue a permit to an applicant that fulfills the objective statutory criteria if no statutory reason for denial exists"); and (4) No-permit required ("states do not require a permit to carry a concealed handgun").

While currently Illinois is the only No-issue State, along with the District of Columbia, for those states which do issue CHLs, they retain varying levels of discretion in issuing licenses. There are thirty-nine Shall-issue States, ten May-issue States, and four No-permit required States. Within the ten May-issue States, eligible individuals are subject to discretionary screening involving review of such matters as an applicant’s history and personal character as well as an applicant’s


38. While the GCA does generally prohibit certain classes of people from receiving or possessing a firearm, such as persons less than eighteen years of age, the majority of provisions concern limitations on the type of dangerous weapons individuals cannot own or possess, such as grenades and other weapons typically reserved for military uses. See Gun Control Act, 18 U.S.C. §§ 921–928 (2006).

39. See Franklin E. Zimring, Firearms and Federal Law: The Gun Control Act of 1968, 4 J. LEGAL STUD. 133, 138 (1975). The jurisdiction for intrastate transactions under the National Firearms Act is based on its regulatory powers on a tax imposed on the traffic of weapons. At the time of passage, the tax rate was $200 per transfer. See id.

40. See id.

41. See id. at 140.

42. GAO REPORT, supra note 2, at 5.

43. The Seventh Circuit has rejected Illinois’ ban on issuing CHLs; however, the court stayed its ruling for 180 days to permit Illinois to re-craft its law. See Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

44. The total number of classified states adds to fifty-three because three states are concurrently classified as a "No[-] permit required" and a "Shall-issue" state, namely Alaska, Arizona, and Wyoming. See GAO REPORT, supra note 2, at 8–9.
asserted good cause for needing a permit.\textsuperscript{45} Similarly, sixteen of the thirty-nine Shall-issue states preserve limited additional discretion to issue CHLs even in the absence of a statutory reason for denial.\textsuperscript{46} Thus, even in states with statutory requirements to issue CHLs, in practice those statutory requirements combine with officials’ discretion to manifest a licensure proceeding akin to May-issue states, resulting in a more robust review process than the Shall-issue classification otherwise suggests.\textsuperscript{47}

Similar to state officials' varying levels of discretionary licensure proceedings, states maintain a variety of statutory disqualifying factors that must be considered before a CHL can be issued. Commonly shared disqualifying factors include: abuse of controlled substances, conviction of a felony, mental deficiencies or psychiatric disorders, and dishonorable discharge from the armed forces.\textsuperscript{48} Additionally, many states maintain unique disqualifying laws, such as prohibiting issuance of CHLs to individuals delinquent on their child support payments\textsuperscript{49} or payment of taxes\textsuperscript{50} as well as persons who are mentally or physically infirm\textsuperscript{51} or chronic or habitual alcoholics.\textsuperscript{52} If not pre-emptively disqualified from CHL eligibility, some common statewide qualifying requirements include firearms safety training and a twenty-one minimum age requirement.\textsuperscript{53}

Disqualifying and qualifying CHL laws reflect the interests of citizens and the laws their state representatives pass, and in that vein, form the basis of states' reciprocal recognition of out-of-state CHLs. Thirty-nine of the forty-eight CHL-issuing states, including Vermont,\textsuperscript{54} selectively recognize permits from other states based on state statutory law.\textsuperscript{55} The criteria states consider for reciprocal recognition are wide-ranging; some states only recognize another state's CHLs if that other state recognizes their CHLs or maintains proper criminal and firearm registration databases.\textsuperscript{56} Moreover, states maintain different laws concerning when CHLs must be provided to law enforcement officials and how CHLs must be physically

\textsuperscript{45} See GAO REPORT, supra note 2, at 12–13. For example, in California, officials discretionarily consider whether the applicant is of good moral character and has put forth a sufficiently good reason for requiring a handgun. See id. at 13; see also Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) (holding consistent with the Second Amendment New York law requiring a concealed carry permit applicant to demonstrate proper cause to obtain a license).

\textsuperscript{46} See GAO REPORT, supra note 2, at 12. For example, Virginia can discretionarily deny individuals if courts conclude by a preponderance of the evidence that the proposed licensee likely will use the weapon unlawfully or negligently in harm of others. See id. at 13.

\textsuperscript{47} See Moore, 702 F.3d at 943 (Williams, J., dissenting) (noting New York as an example).

\textsuperscript{48} Such states include but are not limited to the following: Arizona, California, Florida, Georgia, Louisiana, Tennessee, Texas, and Virginia. See GAO REPORT, supra note 2, at 17.

\textsuperscript{49} Such states include but are not limited to the following: California, Tennessee, and Texas. See id.

\textsuperscript{50} Such states include but are not limited to the following: California and Texas. See id.

\textsuperscript{51} Such states include but are not limited to the following: Florida, Louisiana, and Tennessee. See id.

\textsuperscript{52} Such states include but are not limited to the following: Florida, Georgia, Louisiana, Maryland, Tennessee, Texas, and Virginia. See id.

\textsuperscript{53} See id. at 17-28.

\textsuperscript{54} Vermont neither requires CHLs nor issues CHLs. See id. at 19, n.32.

\textsuperscript{55} See id. at 19.

\textsuperscript{56} See, e.g., TEX. GOV'T CODE ANN. § 411.173(b) (West 2005) (Texas will only recognize out-of-state permits issued in states that conduct background checks).
manufactured; for example, Arizona, Florida, Louisiana, Tennessee, Virginia, and Texas require all CHL holders to produce the permit when law enforcement requests it, while California, Maryland, and Georgia do not. Consequently, these inconsistencies between states force a majority of those states issuing CHLs to grant some level of law enforcement reciprocity whereby various local agencies work cross-border with other states’ registration databases and license-issuing offices to verify proper CHL holders.

III. THE PRINCIPLES AND POLITICAL SAFEGUARDS OF FEDERALISM WITHIN COMMERCE CLAUSE & SECOND AMENDMENT JURISPRUDENCE

A. Commerce Clause

Congress passed the NRTC pursuant to its power under the Commerce Clause. The Commerce Clause grants authority to Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;” however, such regulatory power over the states and their citizens has not been and continues not to be unlimited. While Garcia v. San Antonio Metropolitan Airport sets forth the governing standard of review for federalism cases, the Supreme Court has since refined that once deferential review of federal regulation allegedly infringing on state prerogatives.

1. Refinement #1: Traditional State Functions


At one time, the judiciary limited the power of the Commerce Clause by immunizing from it those activities it classified as traditional state functions. In National League of Cities v. Usery, the Court considered whether Congress’ extension of federal wage and hour laws to almost all public employees of states involved “functions essential to separate and independent existence ... so that Congress may not abrogate the States’ otherwise plenary authority to make them.” Then-Justice Rehnquist, writing for the majority, answered in the affirmative,

57. See GAO REPORT, supra note 2, at 29-30. In the event a CHL is provided to law enforcement, most states require name, birthdate, and expiration date of permit, but only some require a state seal, photograph, race and sex classification, and signature. See GAO REPORT, supra note 2, at 30.

58. See GAO REPORT, supra note 2, at 31.

59. See supra notes 22-24 and accompanying text.

60. U.S. CONST. art. I, § 8, cl. 3; see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (“[T]he power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).


63. Id. at 845-46 (citations omitted) (internal quotation marks omitted).

64. See id. at 845 (“We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an
citing fire prevention, police protection, sanitation, and public health as examples of services typically provided by the state. In reviewing the federal wage and hour requirements in light of those customary state functions, the Court emphasized that the increased cost on the state government impermissibly interfered with state delivery of public services. Accordingly, the Court held that the federal displacement of "the States' freedom to structure integral operations in areas of traditional governmental functions [was] not within the authority granted Congress by Art. I, § 8, cl. 3." 

Writing for the dissent, Justice Brennan disagreed with the Usery majority's protection of traditional state functions. The dissent suggested that the safeguard of federalism was not found in judicial determinations on what constitutes a traditional state function but inherent in constitutional structure, asserting that "there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution," and that "the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises." 

Less than a decade after the Supreme Court's decision in Usery, the Court vindicated Justice Brennan and his fellow Usery dissenters in Garcia v. San Antonio Metropolitan Transit Authority, wherein the Court rejected a Commerce Clause carve-out for traditional state functions. Justice Blackmun, writing for the majority in another challenge to the extension of federal wage law to state officials, concluded that Usery "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." The Court set forth the new governing standard for reviewing federalism challenges under national legislation:

[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."].

65. See id. at 851.
66. See id. at 847 ("[T]he Act [extending federal wage law to state workers] displaces state policies regarding the manner in which [states] will structure delivery of those governmental services.").
67. Id. at 852.
68. Justices White, Marshall, and Stevens joined the dissent. See id. at 856.
69. Id. at 858 (Brennan, J., dissenting).
70. Id. at 876 (emphasis added).
72. See id. at 546-47 ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'").
73. Id. at 546.
possible failings in the national political process rather than to dictate a "sacred province of state autonomy." 74

Inasmuch, the Court found that equal state representation in the Senate, state control of voter qualifications, and state participation in the Electoral College exemplified political safeguards of federalism, that is, those structural elements of the Constitution dividing and providing power between and within state and federal governments. 75 Moving forward, the Court would not vigorously review Tenth Amendment claims unless a component of the political process of states' citizens' election of their federal representatives could not function properly.

Justice Powell disagreed with the majority in Garcia, faulting the Court for its failure to follow the precedent set in Usery and the fallacious rationale underlying its decision. 76 In his dissent, Powell responded to the majority's adoption of the political safeguards theory by succinctly noting the unfounded assumption that members of Congress will retain their state's interest while serving the federal government. 77 Further, Powell found that the Court disregarded the role of the Tenth Amendment in ensuring state integrity and ignored how fire prevention, police protection, and public health, as noted in Usery, "epitomize[d] the concerns of local, democratic self-government," which states "are better able than the National Government to perform." 78 Powell concluded that federal overreaching under the Commerce Clause undermines the constitutional balance of power between the States and the Federal Government, "a balance designed to protect our fundamental liberties." 79

74. Id. at 554 (emphasis added) (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).

75. See id. at 550-51 ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent." (Citations omitted)).

76. Justices Rehnquist and O'Connor also dissented in separate opinions. See id. at 579 (Rehnquist, C.J., dissenting); id. at 580 (O'Connor, J., dissenting).

77. See id. at 564-65 (Powell, J., dissenting) ("Today's opinion does not explain how the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty. Members of Congress are elected from the various States, but once in office they are Members of the Federal Government. Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States' interest against federal encroachment." (Footnotes omitted)).

78. Id. at 574-76 (Footnote omitted) (citing Usery, 426 U.S. at 851).

79. Id. at 572.

Although Garcia foreclosed judicial attempts to discern what is traditional, integral, or necessary to local governmental functions, in recent years the Supreme Court, in Lopez v. United States and United States v. Morrison, has structured the outer limits of Congress’ Commerce Clause power by ensuring Congress’ regulatory power over interstate commerce does not eviscerate the distinction between “what is truly national and what is truly local.” In Lopez, the Court considered the constitutionality of Congress’s enactment of the Gun Free School Zones Act (“GFSZ”), which prohibited the knowing possession of firearms within a school zone. Writing for the majority, Chief Justice Rehnquist held the GFSZ exceeded Commerce Clause authority. Although the political safeguards theory would dictate otherwise, the Court considered the traditional role of the state police function, concluding, “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” Similarly in Morrison, Rehnquist, again writing for the majority, explicitly reaffirmed that Congress’ use of the Commerce Clause cannot “obliterate the Constitution’s distinction between national and local authority.” In considering the Violence Against Women Act (“VAWA”), the Court reaffirmed the protection against federal infringement upon a state’s traditional police power. Even in the face of Garcia, both Lopez and Morrison distinguish between national and local activity, specifically utilizing the state police function to underscore that distinction.

Even though the Supreme Court seemingly resurrected traditional state functions in Lopez, the dissenters in Lopez did not counter that consideration, instead waiting until Morrison to address the repudiation of traditional state functions.

82. Id. at 617-18 (citing Lopez, 514 U.S. at 567-68).
83. Lopez, 514 U.S. at 551 (citation omitted).
84. See id. (holding the GFSZ was an unconstitutional exercise of Commerce Clause power because it neither regulated a commercial activity nor contained a requirement that the gun possession be connected to interstate commerce).
85. Id. at 567. In his concurrence, Justice Kennedy acknowledged some validity in the general claim that the balance between national and state power is entrusted in its entirety to the political process but ultimately rejected this idea by re-characterizing Garcia, asserting “the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.” Id. at 577-78 (Kennedy, J. concurring); see also, id. at 584 (Thomas, J. concurring) (emphasis in original) (“We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power.”).
86. Morrison, 529 U.S. at 615.
87. See id. (holding that the suppression of violent crime has always been the prime objective of states’ police power and fearing that regulating violence in the aggregate could be applied to other areas of traditional state function).
functions as set forth in *Garcia*. In *Morrison*, Justice Souter stated on behalf of the dissent:

The objection to reviving traditional state spheres of action as a consideration in commerce clause analysis... not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that *politics, not judicial review*, should mediate between state and national interests.

... Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance. Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. Moreover, Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the Judiciary.

In rejecting the Court's revival of the traditional state functions test in *Lopez* and *Morrison*, the *Morrison* dissent relied on the governing *Garcia* standard to confirm that federalism is protected through political process and popular representation of states in the federal government; the dissent found that the majority improperly placed the local over the national instead of deferring to the political process as a safeguard of local interests.

The Supreme Court's revival of the traditional state functions test put forth in *Usery* confirms that the promise of federalism is its protection of individual liberty. As most recently reaffirmed in *National Federation of Independent Business v. Sebelius*, the Court stated, "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." The diffusion of power between state police and the federal government ensures the safeguarding of individual liberties, upon which more local governments should promote and be held accountable rather than the federal government. By relying on the state police function to distinguish...
between national and local activity, the Court resurrects and reinforces structural considerations of constitutional allocations of power in two sovereigns—the State and the Union.

2. Refinement #2: Clear Statement Rule

Even when Congress permissibly regulates in areas traditionally reserved for states under Garcia by implicitly relying on the political process to ensure proper protection of federalism, Congress must be clear and cannot be ambiguous as to the scope of such regulation. In Gregory v. Ashcroft, the Supreme Court confronted the issue of whether Missouri’s state-mandated retirement age of seventy for state judges violated federal age discrimination law. Writing for the majority, Justice O’Connor stated, “[I]nasmuch as this Court in Garcia has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.”

Although the federal law prohibits employers, including “a State or political subdivision thereof,” from discharging employees because of their age, the Court held that it would not read the law “to cover state judges unless Congress has made it clear that judges are included.” Because the federal age discrimination law did not explicitly state that the judges were employees of the state, the Court declared that such regulatory ambiguity precluded it from attributing to Congress “an intent to intrude on state government functions.”

In his dissent, Justice White accused O’Connor of contravening the holding in Garcia; however, White’s Garcia-based dissent is misguided in that, by adopting a clear statement rule, Justice O’Connor merely ensures Garcia is applied effectively. Similar to the Lopez-Morrison-Sebelius line of Commerce Clause cases, O’Connor is making a structural argument. Nowhere in the text of the Commerce Clause does it require Congress to be clear as to its regulations over states; nevertheless, the nature of dual sovereignty requires federal legislators to consider the potential impact of any federal regulation because:

96. Id. at 464.
98. Id. at 467 (first emphasis added). O’Connor went on to say, “[I]t must be plain to anyone reading the Act that it covers judges.” Id.
99. Id. at 470.
100. See id. at 477 (White, J., dissenting); see also id. at 479 (“As long as ‘the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.” (emphasis in original) (quoting South Carolina v. Baker, 485 U.S. 505, 513 (1988))). White concluded that there was no indication that the procedural passage of the ADEA inadequately protected the States from undue federal burden. See id. (“There is no claim in this case that the political process by which the ADEA was extended to state employees was inadequate to protect the States from being ‘unduly burden[ed]’ by the Federal Government.” (quoting Garcia, 469 U.S. at 556)).
101. See U.S. Const. art. 1, § 8, cl. 3.
The powers delegated by the proposed Constitution to the federal government are few and defined.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.102

In acknowledging Garcia’s rejection of Usery’s traditional state functions test and relying upon the political structure as the sole safeguard to federalism, which in turn is the safeguard of individual liberties, O’Connor establishes a simple qualifier: Congress must be clear during the political process when that process imposes a burden on the states, because such clarity ensures the electorate of an honest and thorough record upon which to consider when holding elected representatives accountable for those decisions made on behalf of the state and its citizens and affecting their individual liberties.

3. Refinement #3: Anti-commandeering Principles

Even if Congress regulates clearly under Gregory, the law cannot compel states to enact regulatory programs serving federal policies. In New York v. United States103 and Printz v. United States,104 as well as Sebelius, the Supreme Court rejected the federal government’s position that, under the respective Commerce Clause regulations, the United States could compel state legislatures or mandate state executives to enforce federal regulatory programs.105 In New York, the Court confronted the national problem of radioactive waste disposal and Congress’ coercion of states to either follow federal mandates on radioactive waste or take title to the waste within their borders.106 Justice O’Connor’s majority opinion rejected congressional compulsion upon states because it insulates federal legislators from the political accountability necessary to safeguard federalism:

Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.... [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of

102. Gregory, 571 U.S. at 458 (emphasis added) (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison)).
105. See Printz v. United States, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”); New York v. United States, 505 U.S. 144, 166 (1992) (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” (citations omitted)).
106. See New York, 505 U.S. at 149, 153-54.
public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.107

In Printz v. United States, the Court faced Congress’ temporary GCA mandate that state police enforce federal gun registration protocols.108 Justice Scalia’s majority opinion extended O'Connor's New York reasoning to states’ executive branches, highlighting that federally mandated regulatory schemes carried out by state executives can misallocate benefits to the federal government and burdens to the states:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.109

Structurally, New York and Printz emphasize that the federal government enacts laws on people, not states, and the dual-sovereignty of federalism protects sweeping legislation from offending individual liberties.110

The issue of large bureaucratic compulsion offensive to individual liberties also arose in Sebelius, wherein the Court rejected economic compulsion. Congress could not hold a “gun to the head” of states to comply with the Patient Protection and Affordable Care Act.111 By aggrandizing itself and creating a vast national bureaucracy, the federal government left states with no option but to adopt the federal government’s Medicaid expansion or lose Medicaid funding.112 This

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107. Id. at 168-69.
108. Printz, 521 U.S. at 902.
109. Id. at 930.
110. See id. at 921 (suggesting the separation between the States and the Federal Government is one of the “structural protections of liberty” that “will reduce the risk of tyranny and abuse from either front” (quoting Gregory, 501 U.S. at 458)); New York, 505 U.S. at 181 (“The Constitution divides authority between federal and state governments for the protection of individuals.”).
112. See id. at 2604-06. In New York, Justice White wrote in dissent, “The ultimate irony of the decision today is that in its formally rigid obeisance to 'federalism,' the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems.” New York, 505 U.S. at 210 (White, J., dissenting). White believed the majority’s holding prevented Congress from forcing a recalcitrant New York into abiding by its compromise with other States to reduce low-level radioactive waste. See id. In his Printz dissent, Justice Stevens echoed Justice White, arguing, “Perversely, the majority’s rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of
prohibition against "economic dragooning" reinforced the anti-commandeering principles established in *New York* and *Printz*, namely that the federal government cannot commandeer state bodies by indirectly coercing or directly requiring them to employ federal mandates, as it interferes with federalism's structural safeguard of political accountability.\(^{114}\)

### B. Second Amendment

The NRTC's stated purpose is to secure the individual right protected under the Second Amendment as recognized in *District of Columbia v. Heller* and *McDonald v. City of Chicago*.\(^{115}\) *Heller* and *McDonald* were the first Supreme Court cases, separated by only two years, to interpret the substantive rights contained in the Second Amendment, which provides that "[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."\(^{116}\)

1. The Second Amendment is an Individual Right: *District of Columbia v. Heller*

   In *District of Columbia v. Heller*, the Supreme Court interpreted the meaning of the Second Amendment as securing an individual right to maintain a handgun in the home for safety.\(^{117}\) The District of Columbia's ("DC") firearms statute prohibited the registration of handguns and declared it a crime to carry any unregistered firearm.\(^{118}\) Heller was a DC special police officer who challenged DC's rejection of his handgun registration application for a handgun he wished to keep at home.\(^{119}\) Justice Scalia's majority opinion concluded the right to keep and bear arms was an individual right unrelated to service in the armed forces or a collective right that applied only to state-regulated armed forces.\(^{120}\) After concluding the right to keep

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\(^{113}\) Sebelius, 132 S. Ct. at 2605 (finding the threatened loss of over ten percent of a state's budget is economic dragooning that leaves the states with no option but to acquiesce in the Medicaid expansion provision).

\(^{114}\) See id. at 2602-03.


\(^{116}\) U.S. CONST. amend. II.

\(^{117}\) See *Heller*, 554 U.S. at 635 (holding the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

\(^{118}\) See D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (West 2001). The Court did not address the District of Columbia's licensing requirement. See *Heller*, 554 U.S. at 631 ("We . . . assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.").

\(^{119}\) *Heller*, 554 U.S. at 575.

\(^{120}\) See id. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").
and bear arms was an individual right, the majority found that the DC handgun ban unconstitutionally impeded that right.\textsuperscript{121}

After holding the Second Amendment protected an individual right, the Court separately addressed the scope of the defined right. The Court specifically defined the individual right at issue as including protection for “handguns held and used for self-defense in the home.”\textsuperscript{122} The Court emphasized that the Second Amendment right is “not unlimited;” Scalia stated that the right to bear arms “was not a right to keep and carry any weapons whatsoever in any manner whatsoever and for whatever purpose.”\textsuperscript{123} Indeed, the Court specifically noted that its opinion did not call into question “the majority of the 19th-century courts” holdings “that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues;”\textsuperscript{124} the Court confirmed that such regulations are presumptively lawful.\textsuperscript{125} Furthermore, the Court set the governing standard moving forward: “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”\textsuperscript{126} In response to Justice Breyer’s dissent calling for the Court to conduct an “interest-balancing” test focusing on “practicalities, the statute’s rationale, the problems that called it into being, and its relation to those objectives,”\textsuperscript{127} Scalia retorted that the Second Amendment “is the very product of an interest balancing by the people.”\textsuperscript{128} The Court purposely did not rule against state-based prohibitory laws because the history of the Second Amendment necessarily included state citizen involvement in shaping the contours of the Second Amendment right.

2. Incorporation of the Second Amendment: \textit{McDonald v. City of Chicago}

Under similar facts as \textit{Heller}, the Court confronted in \textit{McDonald v. City of Chicago} the City of Chicago’s effective ban on handguns and asked whether the protected right divined in \textit{Heller} could be applied, that is incorporated, against the

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121. See \textit{id}. at 628-30. Justice Scalia did not address any standard of review for Second Amendment claims because the DC laws preventing guns for self-defense “of one’s home and family” were unconstitutional “under any of the standards of scrutiny the Court has applied to enumerated constitutional rights.” \textit{Id}. at 628.

122. \textit{Id}. at 628. Justice Scalia found that the DC handgun ban amounted to prohibitions on an entire class of “arms” that Americans “overwhelmingly” use for the lawful purpose of self-defense in the home “where the need for defense of self, family, and property is most acute.” \textit{Id}.

123. \textit{Id}. at 626.

124. \textit{Id}. at 626-27 (emphasis added). This is not the first time the Supreme Court has claimed that prohibitions on concealed carry comport with the Second Amendment. \textit{See} Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897) (stating in dicta that the Second Amendment “is not infringed by laws prohibiting the carrying concealed weapons”). \textit{Heller} also did not “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” \textit{Heller}, 554 U.S. at 626-27.

125. \textit{See} \textit{Heller}, 544 U.S. at 627 n.26 (“We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”).

126. \textit{Id}. at 634-35.

127. \textit{Id}. at 687 (Breyer, J., dissenting).

128. \textit{Id}. at 635 (second emphasis added).
\end{footnotesize}
Justice Alito, joined by Scalia, Kennedy, and Rehnquist for the plurality opinion, concluded in the affirmative. The plurality ruled that *Heller* dictated the conclusion that the "right to keep and bear arms is fundamental to our ordered scheme of liberty," the standard for determining whether an amendment in the Bill of Rights should be incorporated through the Fourteenth Amendment. In reaching this conclusion, the plurality acknowledged incorporation does limit the "legislative freedom of States," but rejected the City's argument that the Court should depart from its incorporation methodology on the grounds that enforcing the Second Amendment against states is inconsistent with principles of federalism.

Alito appealed to history—that the selective incorporation approach had been adopted to safeguard the values of federalism and state experimentation—and reality—that thirty eight States appearing as *amici* affirmed they would continue to experiment with firearms law. The plurality reaffirmed that it was not casting doubt on states' longstanding prerogative to craft and enforce handgun regulation.

The dissent did not disagree with the plurality; Justices Stevens and Breyer similarly appealed to principles of federalism, specifically highlighting the integral role of *state* and *local* governments in policing the Second Amendment. In this regard, both the plurality and dissent agree that states and their citizens are an integral component in shaping Second Amendment rights.

The disagreements in *Heller* and *McDonald* are reminiscent of the structural considerations addressed in the *Lopez-Morrison-Sebelius* line of Commerce Clause cases concerning state functions and national policy, but unlike *Lopez, Morrison,*

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129. The Chicago law prohibited a person from possessing any firearm "unless such person is the holder of a valid registration certificate for such firearm," but because the code prohibited registration of most handguns, the ordinance effectively banned handgun possession by almost all city residents. *See McDonald,* 130 S. Ct. at 3026 (2010).

130. *McDonald,* 130 S. Ct. at 3036 (plurality opinion).

131. *See id.* at 3045-46 (rejecting Chicago's claim that making the Second Amendment binding on the states and subdivisions violates the principles of federalism and will stifle states' experimentation with firearm law).

132. *Id.* at 3046 ("State and local experimentation with reasonable firearms regulations will continue under the Second Amendment.").

133. *See id.* at 3047. The Court ultimately did not rule on the constitutionality of Chicago's gun regulations, instead reversing and remanding the case for further proceedings. *Id.* at 3050.

134. Consequently, the question arises whether the Stevens and Breyer dissents can be reconciled with their rejection of traditional state functions in prior cases, such as *Lopez and Morrison.* Justice Stevens attempts to answer that question: "[e]lementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold *state* governments to different standards than the *Federal Government in certain areas.*" *McDonald,* 130 S. Ct. at 3093 (emphasis added).

135. Justice Stevens wrote that the Fourteenth Amendment "did not unstitch the basic federalist pattern woven into our constitutional fabric." *McDonald,* 130 S. Ct. at 3093. Similarly, Breyer wrote, "[s]tates and local communities have historically differed about the need for gun regulation as well as about its proper level [and it is not] surprising that ‘primarily, and historically,’ the law has treated the exercise of police powers, including gun control, as ‘matter[s] of local concern.’" *Id.* at 3128-29. The distinction Stevens and Breyer draw between state and national governments and their significance in adjudicating Commerce Clause and Incorporation actions, however tenuous one might consider it, rings of the fundamental concern Justice Powell raised in his *Garcia* dissent—that the political safeguards of federalism ignore the important role of state governments in crafting state prerogative. Stevens seems to accept this much, finding "[i]f a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate." *Heller,* 130 S. Ct. at 3101.
and Sebelius, both the majorities and dissents in Heller and McDonald rely on constitutional structure to support their opinions invoking traditional state practice. In both Heller and McDonald, the majority, plurality, and dissent disputed not the existence of the tradition of state regulation of gun control, but rather the scope and impact that tradition had and has in shaping the contours of the Second Amendment. Although Justice Scalia's Heller opinion did not exhaustively analyze the full scope and history of the Second Amendment, it did find an individual right of handguns inside the home for protection, to which Justice Stevens confirmed and countered, "[A] conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right." In McDonald, Stevens and Breyer both countered Alito's analysis on the scope of the right incorporated, speaking of the tradition of formidable state gun regulation. Therefore, nearly the entire Supreme Court agrees in the context of liberty interests deriving from the Second Amendment, the individual right at issue is shaped necessarily according to the historically popular and personal judgments of the citizens of states, as expressed through state legislatures and enforced through state executives.

3. Circuit Court Split on application of McDonald and Heller to CHLs

In wake of the Supreme Court's McDonald decision to remand consideration of whether the City of Chicago's handgun registration ban was constitutional, Chicago amended its firearms law to prohibit the carrying of a concealed gun in public, eliminating the general handgun ban as applied within the home. This law, though, did not end the legal challenges to Chicago's strict gun control measures. In Moore v. Madigan, the Seventh Circuit addressed whether the Second Amendment right to use arms within the house for safety could be extended to protect the right of self-defense outside of the home. The Seventh Circuit, in a 2-1 split decision, interpreted the right "to bear" arms implies a right "to carry a loaded gun outside the home," and in so doing, readily dispensed with the controlling Heller standard to engage in a historical review of whether founding-era America recognized such a right. The court summarily concluded, "[t]he

136. See supra notes 115-35 and accompanying text.
137. Heller, 554 U.S. at 636 (Stevens, J., dissenting).
138. Justice Stevens stated, "[T]he Constitution still envisions a system of divided sovereignty, still 'establishes a federal republic where local differences are to be cherished as elements of liberty' in the vast run of cases, still allocates a general 'police power . . . to the States and the States alone.'" See McDonald, 130 S. Ct. at 3093 (Stevens, J. dissenting) (quoting Nat'l Rifle Assn. of Am. Inc. v. Chicago, 567 F.3d 856, 860 (7th Cir. 2009)); United States v. Comstock, 130 S.Ct. 1949, 1967 (2010)). Justice Breyer echoed this concern by stating that the ability of States to reflect local preferences and conditions are "key virtues of federalism." Id. at 3128 (Breyer, J. dissenting).
139. See 720 ILL. COMP. STAT. 5/24-2 (West 2008); 720 ILL. COMP. STAT. 5/24-1(a)(4), (10), -1.6(a) (West 2008); 720 ILL. COMP. STAT. 5/24-1(a)(4)(iii), (10)(iii), -1.6(a)(3)(B) (West 2008).
140. 702 F.3d 933 (7th Cir. 2012).
141. See generally id.
142. See id. at 934, 942 (discussing briefly the need for handguns in public for self-defense in the plains territory where skirmishes with Native Americans occurred but admitting a disinclination "to engage in
Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside. The sole dissenter, Judge Ann Williams, repudiated the majority for failing to engage in the historical analysis required by *Heller*. In suggesting that it was unclear whether founding-era America recognized a right to carry guns in public for self-defense, Williams recognized that such historical uncertainty permitted Illinois to craft domestic gun law otherwise consistent with *Heller*. Williams acknowledged principles of federalism mandated that Illinois follow the wishes of its citizens pertaining to gun law, as those wishes comport with the liberty interest enshrined in the Second Amendment. Like Judge Williams in *Moore*, a three-judge panel of the Tenth Circuit in *Peterson v. Martinez* engaged in the proper historical analysis and unanimously concluded that the Second Amendment does not confer a right to carry a concealed handgun. The Colorado law at issue restricts issuance of in-state CHLs and recognition of out-of-state CHLs; Colorado law limits issuance of Colorado CHLs to state residents and reciprocally recognizes out-of-state CHLs only from individuals who are residents of the CHL-issuing state. Peterson claimed that these laws created a “licensing scheme” that violated the Second Amendment by “prohibiting any meaningful opportunity” for him to carry a handgun in Denver, a city he frequently visited. After noting the Supreme Court has provided little guidance on the standard of review governing state restrictions on the possession of firearms other than some level of historical review, the court rejected Peterson’s Second Amendment claims by relying on dicta from *Robertson v. Baldwin*, wherein...
the Supreme Court stated that the Second Amendment “is not infringed by laws prohibiting the carrying of concealed weapons,” and conducting an independent historical analysis, finding that scholars, as the Court did in Heller, recognize a “long history” of concealed handgun restrictions in the United States. Accordingly, instead of disregarding the historical analysis required by and acknowledged in Heller, the Tenth Circuit relied on prior historical analysis and even engaged in its own review to find no Second Amendment protection for concealed carry.

In addition to Peterson, Moore is anomalous in light of the other CHL cases applying Heller, including Hightower v. City of Boston and Kachalsky v. Cnty. of Westchester. In Hightower, the First Circuit applied Heller to hold the City of Boston may regulate gun licensure procedures to preclude the carrying of concealed weapons outside of the home by those falsifying their CHL applications. Similarly, in Kachalsky the Second Circuit held New York’s good-cause prerequisite to obtaining a CHL to carry a handgun in public was consistent with the Second Amendment after finding an inconsistent history as to public possession of handguns. Presumably, had the Seventh Circuit performed adequate historical review of carriage of guns in public, it would have adopted the historical findings of its sister circuit precedents in Hightower and Kachalsky and applied Heller more narrowly to find that the scope of Second Amendment liberty interests is shaped according to states’ autonomous representation of its citizens’ interests.

IV. TRADITIONAL STATE POLICE FUNCTION & WANT FOR POLITICAL SAFEGUARDS OF FEDERALISM IN THE NRTC

To the extent the Supreme Court has revived Usery’s traditional state functions immunity as a constraint on the scope of Commerce Clause power, the NRTC is outside the scope of Commerce Clause power because it unconstitutionally regulates the traditional state police function. Yet, even if the traditional state functions test has not been revived and the political safeguards theory enunciated in Garcia governs, the NRTC remains unconstitutional—it violates the Clear Statement and Anti-commandeering principles of the Tenth Amendment by deconstructing the political procedures necessary to ensure that citizens’ Second

153. See id. at 1210 (citing Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897)).
154. See id. at 1211. The court also rejected Peterson’s challenge to the law under the Privileges and Immunities Clause on primarily the same grounds as the Second Amendment issue. See id. at 1212.
155. 693 F.3d 61 (1st Cir. 2012).
156. 701 F.3d 81 (2d Cir. 2012).
157. See Hightower, 693 F.3d at 73 (interpreting Heller as providing presumptive legality to local laws prohibiting the carrying of concealed weapons).
158. See Kachalsky, 701 F.3d at 91 (stating that unlike the ban on handguns in the home protected in Heller, history and tradition did not “speak with one voice” concerning the scope of right to bear arms in public and that history demonstrated states often disagreed as to the scope of the right to bear arms in public).
159. See United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (warning against treating Heller as “containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense”).
160. See discussion infra Part IV.A.
Amendment liberty interests, as measured by and through the states, remain protected.\textsuperscript{161}

\textbf{A. The NRTC Exceeds Commerce Clause Authority}

Issuing gun licenses and policing those licenses has and continues to be a traditional state function. Indeed, the \textit{Lopez} Court, drawing influence from Justice Powell’s dissent in \textit{Garcia}, finds that enforcing a prohibition on gun \textit{possession} near schools exemplifies the police function reserved to the states.\textsuperscript{162} Similarly, the majority, plurality, and dissenting opinions in \textit{Heller} and \textit{McDonald} extend the broad purpose and legislative methods for promoting state police power as to gun \textit{ownership} generally; by relying on history first, to recognize a private right to keep and bear arms in \textit{Heller}, and second, to incorporate that right against the states as a fundamental right necessary for ordered liberty in \textit{McDonald}, the Court confirms states’ historic and continued role in regulating gun ownership and possession.\textsuperscript{163} The NRTC implicitly recognizes the right of states to police the safety, health, and welfare of their citizens with respect to lawful gun ownership \textit{and} possession because the Act only allows persons with valid state-issued CHLs to carry a concealed firearm in those states that also issue such permits or do not prohibit the carrying of concealed firearms.\textsuperscript{164} The NRTC’s provisions permitting state laws to govern the manner of concealed gun possession creates a false dichotomy between ownership and possession because it assumes ownership and possession are not both subject to the policing judgments as to the health, safety, and welfare of citizens.\textsuperscript{165} Thus, notwithstanding a contrary suggestion in \textit{Moore}, a contrived separation between lawful licensure to \textit{own} a gun and the associated \textit{possessory rights} impermissibly deprives states of their traditional function to police the collective health, safety, and welfare covering all aspects of personally concealed firearms within their borders.\textsuperscript{166}

Because the NRTC nationally mandates state recognition of another state’s CHLs, it directly impairs not just states’ traditional function of policing the licensure of concealed firearms, which under \textit{Lopez}, \textit{Morrison}, and \textit{Sebelius}, cannot be impaired at the expense of national regulation under the Commerce Clause, but also the scheme of liberty which, although enforceable against the states, is molded according to states’ traditional police function. The NRTC simply ignores the

\textsuperscript{161} See discussion \textit{infra} Part IV.B.

\textsuperscript{162} See supra notes 76-79, 83-85 and accompanying text.

\textsuperscript{163} See supra notes 136-38 and accompanying text; see also United States v. Morrison, 529 U.S. 598, 618 (2000) (finding the suppression of violent crimes has always been the prime object of states’ police power).

\textsuperscript{164} See supra note 25 and accompanying text.

\textsuperscript{165} The objective of state police power is to “allow government to establish rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of corresponding enjoyment by others.” David Kopel & Glenn Reynolds, \textit{The Evolving Police Power: Some Observations for a New Century}, 27 \textit{HASTINGS CONST. L.Q.} 511, 516 (2000). In furtherance of that objective, “[s]tate legislatures and local governments have a police power to enact laws for the benefit of public safety, health, welfare, and even morality.” \textit{Id.} at 528.

\textsuperscript{166} See generally \textit{Moore v. Madigan}, 702 F.3d 933, 942 (7th Cir. 2012).
purpose and function of a dual federalist system to ensure personal liberty is protected from federal interference. The Supreme Court recognized in *Heller* and *McDonald* the integral role states have had and will continue to have in shaping the scope of Second Amendment rights on behalf of its citizens, and it is that traditionally local function that the Commerce Clause cannot regulate.\(^1\)

### B. The NRTC Neuters the Political Safeguards of Federalism

To the extent a law is presumed proper under the Commerce Clause, post-*Garcia* reliance on the country's political structure to safeguard federalism is only deferential to congressional directives insofar as the political processes function properly.\(^2\) The NRTC is unconstitutional even under Justice Blackmun's political safeguards standard set forth in *Garcia* because federally mandating states to recognize and enforce other states' CHL eligibility requirements unclearly confuses voters as to the nature of the Second Amendment rights at issue and, even if clear, inappropriately forces states into a federal regulatory scheme structurally incapable of responsibly crafting substantive CHL eligibility laws representative of local electorates' wishes.

1. The NRTC Violates the Clear Statement Rule

The NRTC is unclear as to the nature of protection it is affording to the Second Amendment liberty interest because the purpose of the NRTC—to create a police function carve-out for state reciprocity for CHLs in respect of the Second Amendment right recognized in *McDonald* and *Heller*—is at odds with both the bill it amends and the individual right it purportedly seeks to secure. First, the primary purpose of the *GCA* is to reinforce state and local laws in reducing gun violence; however, the NRTC removes from states an integral element in reducing gun crime—determining the people who can legally own and conceal one.\(^3\) Second, the only Second Amendment right recognized in *Heller* was "handguns held and used for self-defense in the home,"\(^4\) not rights to carry concealed handguns out of the house and across state borders or to be licensed for concealed carry in a state with different eligibility laws. Although the *Heller* Court admittedly did not undertake "an exhaustive historical analysis . . . of the full scope of the Second Amendment," the Court explicitly disclaimed that its ruling jeopardized the longstanding prohibitions on presumptively lawful ownership eligibility requirements, prohibitions which explicitly included concealed carry because states did not collectively protect that right at the time of the Second Amendment.\(^5\)

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1. See supra notes 80-87 and accompanying text.
2. See supra notes 74, 89 and accompanying text.
3. See supra notes 38-41 and accompanying text.
5. Id. at 618 (quoting 2 *JAMES KENT, COMMENTARIES ON AMERICAN LAW* 340 (Oliver Wendel Holmes, Jr. ed., 12th ed., Boston, Little, Brown & Co. 1873) ("As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute..."
Even if merely presumptive, Peterson, supported by Kachalsky and Hightower, engaged in the necessary historical review of the public carriage of arms and determined no such right firmly existed at the adoption of the Second Amendment. Accordingly, by claiming its purpose is to affirm the Supreme Court’s holdings in Heller and McDonald, the NRTC does just the opposite, fostering a great ambiguity, like the ambiguity addressed in Gregory, as to the proper scope Second Amendment rights permissibly protectable. Just as Justice O’Connor found it at least ambiguous as to whether state judges fell within the scope of the federal wage law, it is entirely ambiguous, and likely improbable, that the NRTC’s CHL protections properly comport with the GCA or fall within the scope of the right protected by the Second Amendment.

It is not enough that supporters of the NRTC analogize driver’s licenses with the CHLs in an effort to bring them within the scope of permissible federal regulation because this comparison misapprehends the distinction between constitutional rights and federal law and the place of each within the federalist structure of dual sovereigns. As Justice O’Connor affirmed in Gregory, and as reaffirmed in New York, Lopez, Printz, and Sebelius, the purpose of federalism is to safeguard individual liberty, a constitutional precept, from the overreaching of federal law, and because Heller and McDonald confirm the Second Amendment right is an individual right fundamental to an ordered scheme of liberty, federalism must secure the right as the Country recognized it at the inception of the Second Amendment.Ironically, the constitutional ignorance of the NRTC undercuts its aim to secure Second Amendment protections because it removes from the liberty interest of lawful gun ownership the necessary state involvement of citizens shaping broader contours of that right according to their perceptions of local health, safety, and welfare not offensive to the Constitution.

Ultimately, the NRTC’s lack of clear purpose and provisions as to the Second Amendment liberty protected under the Act contributes to the lack of clear congressional divide upon which representatives—state or federal—can be held accountable, undermining the political safeguards standard as applied in Gregory.

prohibiting persons, when not on a journey, or as travelers, from wearing or carrying concealed weapons, be constitutional. There has been a great difference of opinion on the question.”).

172. See supra notes 149-59 and accompanying text.

173. To the extent the NRTC reflects a political agenda, the CHL state reciprocity function further fails to respect the Court’s holding in Heller that the scope of constitutional rights is not subject congressional manipulation when legislators disagree with them. See supra note 126 and accompanying text.

174. See supra Part III.

175. In fact, the NFCT could result in more Second Amendment restrictions within states because states may be forced to compensate for the regulatory failures of other states; states may have to alter interior regulation because exterior CHL eligibility laws negatively impact their police function on the manner of both ownership and possession. For example, Virginia offers on-line classes to obtain a CHL, and other states have expressed concerns that such facilitation to receive a CHL may adversely impact their state and state policies; in Texas, a state which requires extensive training to obtain a CHL, the Land Commissioner has stated, “I’m more concerned that the online course doesn’t give folks the knowledge they need to have about Texas law than I am about them not being proficient.” Virginia’s Online Classes make it Easy for Out-of-state Gun Owners to Get Permits, FOX NEWS, (Sept. 3, 2012), http://www.foxnews.com/us/2012/09/03/online-classes-make-it-easy-for-non-virginia-gun-owners-to-get-permits/#ixzz2DLpSK9xt.
The NRTC fails the Gregory formation of Garcia’s political safeguards standard because it does not hedge against defective procedural processes, being ambiguous as to delineations of political accountability. First, the NRTC ignores that certain states maintain lesser concealed licensing requirements; for example, a Georgia resident with a mental infirmity may be lawfully licensed to carry a concealed handgun in Florida even though Florida bars individuals with mental infirmities from obtaining a CHL. Second, even under circumstances where both states share common eligibility requirements, states differ on threshold inquiries; for example, both Tennessee and Virginia prohibit felons from obtaining a CHL, yet Virginia classifies theft of goods greater than $200 as a felony whereas Tennessee classifies theft of goods less than $500 as a misdemeanor. Third, some states currently enter into reciprocal CHL agreements but only after a complete analysis of shared eligibility requirements, in part to ensure those individuals within its borders it considers to be dangerous to the health, safety, and welfare of its citizens may not lawfully possess or carry a concealed handgun; indeed, Texas only enters into reciprocal CHL arrangements with states which perform background checks. Accordingly, it remains unclear to whom a Florida, Tennessee, and Texas resident would hold accountable—the federal government for passing the NRTC or internal state representatives for not requiring or pressuring stronger eligibility thresholds or altering non-eligibility possession requirements—for perceived inadequacies in Second Amendment laws.

2. The NRTC Violates Anti-commandeering Prohibitions

Even if Congress clearly regulates CHLs under its Commerce Clause power in the NRTC, Congress cannot force states into reciprocal recognition of other states’ firearm eligibility laws as such a measure effectively compels legislation and insulates both federal and neighboring state legislators from political accountability. Because the NRTC prohibits any CHL-administering state from discriminating against an individual on the basis of an out-of-state CHL, the Act forces states to regulate according to a federally-induced scheme. First, the NRTC compels a race-to-the-bottom structure. Within this structure, states are compelled to reduce

176. See supra Section III.A.2.
177. See GAO REPORT, supra note 2, at 17.
179. See TEX. GOV’T CODE ANN. § 411.173(b) (West 2012). The NRTC does not create the concept of state reciprocity generally; a number of states maintain reciprocal agreements with other states concerning several issues affecting their citizens and government, from state income taxes to teacher licenses to driver’s licenses. As to reciprocity of CHLs, thirteen states recognize CHLs in all other forty seven issuing states while seven states recognize permits from less than nineteen other states. See GAO REPORT, supra note 2, at 20.
CHL eligibility requirements in order to increase CHL revenue, a type of "gun to the head" regulation that is more than mere financial inducement as it directly implicates economic pressures outside the control of Congress. This race-to-the-bottom structure violates Sebelius. Second, even if the economic compulsion is insufficiently coercive, the effect upon safety, health, and welfare of a state's citizenry illustrates an alternative measure of the significant perils of the NRTC's coercive structure. Instead of forcing states to de-regulate eligibility laws for revenue, the Act could force states to increase regulation in fear of facing the federal burdens of forced state reciprocity; protection against the substantive risks posed to the health and safety of the public is just as significant as financial incentives, as suggested in New York and the compulsion to take title to radioactive waste. Like Sebelius and New York, either course of de-regulation or hyper-regulation of domestic legislation is crafted not according to local moral and policy judgments but at the direction of external and ulterior motivations precipitated by the actions of other states via federal regulation.

Yet, when state voters are dissatisfied with the substantive CHL eligibility laws, local legislators bear the electoral burden rather than the federal government or neighboring legislators, even though congressmen and neighboring state legislators were the two parties responsible for the substantive law now affecting in-state citizens; local citizens of states with stiff eligibility requirements have no political recourse to the burdens of deficient CHL law because they can neither vote against federal legislators not in their district nor vote against state legislators not in their state. By insulating both federal and neighboring state legislators from political accountability, the NRTC's national reciprocity mandate adds an additional layer of political unaccountability at the state level, a broader yet more exacting frustration of New York: Congress cannot directly force states to legislate according to their scheme because doing so diminishes political accountability and prevents state officials from "regulat[ing] in accordance with the views of the local electorate . . . ." And because the burden is born most harshly on state police, the NRTC also violates the New York rationale as extended in Printz. The burden of enforcing reciprocally recognized CHLs falls most harshly on state police, as it did in Printz, because police officers must learn and enforce various state eligibility laws as well as the legally required physical features of concealed carry licenses. Accordingly, the NRTC's structure dissolves the political safeguards that are necessary under Garcia, as interpreted and applied in Sebelius, New York and Printz, for congressional Commerce Clause legislation to be constitutional.

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181. See Sebelius, 132 S. Ct. at 2604-05 (rejecting the mere financial inducement of the Affordable Care Act because it dictates regulation as to ten percent of states' overall budgets).
182. See New York, 505 U.S. at 166.
183. See id. at 169.
184. See H.R. 822, 112th Cong. (2011) §§ 3-4 (requiring the Comptroller General to conduct an audit of concealed carry laws and regulations of each state as well as a study on the ability of local law enforcement to verify the validity of out-of-state permits or licenses).
CONCLUSION

State regulation of lawful handgun ownership fundamentally shaped the individual right the Second Amendment secures as liberty, and state regulations of concealed carry continue to shape the liberty interest of lawful handgun possession and ownership. By securing a right of concealed carry on a national scale without concern toward the role the State has and must continue to maintain in shaping the contours of Second Amendment rights, the National Right-to-Carry Reciprocity Act, like its national right-to-carry counterparts, steals from states their traditional state police function in handgun regulation. In that act of robbery, the Act misconceives the right it seeks to protect, thereby causing great confusion as to what substantive law affects states’ citizens and to whom those citizens hold responsible when the law does not fairly represent their interests. Compounding the confusion is that even if citizens discern which legislative representatives to hold responsible for inadequate CHL law, they are limited to voting within their federal and state districts, not those of neighboring states where the substantive law that directly impacts their individual liberty is crafted. The NRTC’s federal mandate forces states into a system without any process for which the interests of their citizens can be represented. States are required to accept the notions of another state legislature via the federal legislature without initial involvement or subsequent recourse—they neither shape the law nor can change it should it be detrimental to their interests. Conclusively, even in the unlikely event the Act permissibly regulates concealed handgun licenses under the Commerce Clause, the National Right-to-Carry Act remains unconstitutional for confounding the Second Amendment liberty interest protected and contravening the political safeguards necessary to ensure the individual right therein is not offended.
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