
STUDENT MATERIALS

THE RIGHT TO ARMS IN THE STATES

Most firearm regulation in the United States, past and present, is imposed by state law rather than federal law. A perspective on state law is therefore essential for understanding the topic. Moreover, state constitutions protecting the right to arms existed before the federal Second Amendment. As Chapters 15 and 16 show, early state courts often heard challenges to state and local weapons laws under state constitutions, while the lack of comparable federal laws (and reluctance to apply the Bill of Rights to the states) left the Second Amendment with only a modest role to play during that period. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 6.A), has greatly increased the relevance of the federal right to arms, but state constitutions continue to play an important role; indeed, the U.S. Supreme Court has relied on state case law in *Heller* and elsewhere. Also significant to any overview of American gun regulation are specialized state-level legislative protections of the right to arms, such as the preemption statutes in place in most states.

Part A of this reader begins with a look at state constitutional right-to-arms decisions in the late twentieth and early twenty-first centuries. Part B surveys recent changes to state constitutional arms-right guarantees. Part C looks at state preemption statutes that limit the authority of cities and counties to independently regulate weapons. Part D is a survey of modern laws typically governing firearm ownership and use in American jurisdictions today, with an emphasis on state and local regulation.

A. MODERN STATE CONSTITUTIONAL DECISIONS

State constitutions boomed in importance in the 1970s. Many state courts became willing to apply their state constitutional bills of rights differently — and often more broadly — than the interpretations the federal courts had given to analogous provisions of the U.S. Constitution. This was especially true in criminal procedure contexts, such as search and seizure and the right against self-incrimination; the state constitutional renaissance also encompassed other individual liberties, such as freedom of expression. This movement, which became known as the “New Judicial Federalism,” took inspiration from a famous call to action by U.S. Supreme Court Justice William Brennan. See William J. Brennan Jr., *State Constitutions and the Protection*

of Individual Rights, 90 Harv. L. Rev. 489 (1977). Brennan argued that state courts had a heightened responsibility to consider *state* constitutional liberty claims because the U.S. Supreme Court (then led by the “law and order” Chief Justice Warren Burger) had begun to limit or retreat from 1960s decisions taking a broad view of the federal constitution’s Bill of Rights. Brennan urged state courts to “step into the breach” and protect civil liberties he thought at risk after the Burger Court’s withdrawal. *Id.* at 503.

Oregon’s courts stood out for their energetic and thoughtful approach to state constitutional interpretation. Justice Hans Linde, a former law professor who sat for 13 years on the Oregon Supreme Court, was the leading advocate of the “primacy” approach to state constitutions. This approach treats state constitutions as distinctive legal documents that should be interpreted by looking at their own texts, histories, and structures, rather than by reacting (whether supportively or critically) to federal law decisions. *See, e.g.*, Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980).

The Oregon court interpreted the right to bear arms in Oregon’s 1859 constitution in the case that follows. It reached conclusions different from the very narrow readings of the federal Second Amendment that were said to be drawn from the U.S. Supreme Court’s *United States v. Miller*, 307 U.S. 174 (1939) (Ch. 3.A.1), decision and similar to the view the Supreme Court reached 28 years later in *Heller*.

State v. Kessler

614 P.2d 94 (Or. 1980)

LENT, Justice.

The defendant in this case was convicted of “possession of a slugging weapon,” ORS 166.510(1). We allowed review to consider his claim that the legislative prohibition of the possession of a “billy” in ORS 166.510(1) violates Article I, section 27, of the Oregon Constitution. That provision states:

“The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.”

The language of this provision raises several questions in this case, including:

- (a) To whom does the right belong?
- (b) What is the meaning of “defense of themselves”?
- (c) What is the meaning of “arms,” and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.³ The decisions construing the second amendment to the United States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. . .

Despite the many variations in wording, the states' constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

I. THE HISTORICAL BACKGROUND

Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. .

The original Indiana constitution was adopted in 1816 at Indiana's first statehood convention. Indiana's constitution was revised in 1851, but the 1816 version of the right to bear arms provision remained unchanged. . .

The drafters of Indiana's bill of rights of 1816 borrowed freely from the wording of other state constitutions, most notably the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania. These state constitutions were drafted between 1776 and 1802. Oregon's right to bear arms provision therefore can be traced to state provisions drafted in the revolutionary and post-revolutionary war era. . .

II. THE OREGON RIGHT TO BEAR ARMS

A. "Defense of Themselves and the State"

. . . The phrase "for defense of themselves and the state" appears in the present day constitutions of Oregon, Indiana, and six other states. The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.

The language "the right to bear arms . . . for defense of . . . the state" more likely refers to the historical preference for a citizen militia rather than a

³ In *State v. Robinson*, 343 P.2d 886 (1959) this court held that ORS 166.270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord *State v. Cartwright*, 418 P.2d 822 (1967).

standing army as outlined above. *See People v. Brown*, 235 N.W. 245, 246 (Mich. 1931):

“It is generally recognized that . . . the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self protection in a frontier society also was a factor.”

The phrase “the right to bear arms in defense of themselves” has a suggested purpose which is closely related to the preference for citizen militias. That suggested purpose is the deterrence of government from oppressing unarmed segments of the population. For example, King James II attempted to disarm the Protestants while allowing Catholics to bear arms, thus prompting the guarantee in the 1689 [English] Bill of Rights (Ch. 11.C.4) that Protestants could have “arms for their defense.” Joseph Story wrote that,

“The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”

3 J. Story, *Commentaries on the Constitution* 746 (1833) (Ch. 15.F.2.a). *Cf. Carlton v. State*, 58 So. 486, 488 (1912) (state provision was “intended to give the people the means of protecting themselves against oppression and public outrage”).

“Defense of themselves” has also been said to include an individual’s right to bear arms to protect his person and home. *Schubert v. DeBard*, 398 N.E.2d 1339, 1341 (Ind. App. 1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense).¹ Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States. Although the right to bear arms for self protection does not appear to have been an important development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. . .

B. The Meaning of the Term “Arms”

The term “arms” is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only

¹ [Schubert held that state officials lacked authority under state law to deny a handgun-carry permit to an otherwise qualified citizen who wanted one for self-defense, holding that the contrary interpretation would violate the Indiana Constitution’s right to bear arms. — Eds.]

one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, and knife. G. Neumann, *Swords and Blades of the American Revolution* 6-15, 252-254 (1973). When the revolutionary war began, the colonists came equipped with their hunting muskets or rifles, hatchets, swords, and knives. The colonists suffered a severe shortage of firearms in the early years of the war, so many soldiers had to rely primarily on swords, hatchets, knives, and pikes (long staffs with a spear head). W. Moore, *Weapons of the American Revolution* 8 (1967).

Therefore, the term “arms” as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term “arms” was not limited to firearms, but included several handcarried weapons commonly used for defense. The term “arms” would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

. . . [A]dvanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual’s “right to bear arms,” the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not “arms” which are commonly possessed by individuals for defense, therefore, the term “arms” in the constitution does not include such weapons.

If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia “for defense of the State,” then the term “arms” most likely would include only the modern day equivalents of the weapons used by colonial militiamen. The Oregon provision, however, guarantees a right to bear arms “for defense of themselves, and the State.” The term “arms” in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon.

The constitutional guarantee that persons have the right to “bear arms” does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example, the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the people. A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be “killed, wounded, or otherwise damaged.” The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example many courts have upheld statutes prohibiting the carrying of concealed weapons, and statutes prohibiting possession of firearms by felons. . .

III. THE PRESENT CASE

We now turn to the facts of the present case. The defendant was involved in an off and on verbal argument with his apartment manager in the course of the day on November 13, 1978. The dispute escalated into name calling, colorful words, and object throwing. At one point the defendant kicked the elevator door in the apartment building. The police were called and arrested the defendant. The defendant asked the police to get his coat from his apartment. The officers found two “billy clubs” in the defendant’s apartment.

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. . . [T]he defendant was found guilty as charged on both counts. . .

The defendant contends that his conviction for possession of a billy club violates his right to possess arms in his home for personal defense. Pursuant to our previous discussion regarding the purpose and scope of the right to bear arms provision, we hold that Article I, section 27, of the Oregon Constitution includes a right to possess certain arms for defense of person and property. The remaining question is whether the defendant’s possession of a billy club in this case is protected by Article I, section 27.

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal weapon, commonly carried by the police. ORS 166.510 prohibits possession of a “billy;” however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a “blackjack” or “billy.”

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

Our historical analysis of Article I, section 27, indicates that the drafters intended “arms” to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant’s possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution.

The defendant’s conviction for disorderly conduct is affirmed, and his conviction for possession of a slugging weapon is reversed.

NOTES & QUESTIONS

1. **CQ:** When you read *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 6.A), compare and contrast the state constitutional analysis in *Kessler* with the federal constitutional analysis by the U.S. Supreme Court. Are there

any significant differences? Do you find one opinion more persuasive or cogent than the other?

2. *Kessler* states that a regulation would be invalid if it “frustrate[d] the guarante[e] of the state constitution.” How can one decide whether that test is met?

3. *Nonfirearm “arms.”* *Kessler* holds that “arms” under the Oregon Constitution is not limited to militia-type weapons, but also includes “the hand-carried weapons commonly used for personal defense.” In decisions following *Kessler*, the Oregon Supreme Court held that the state constitution’s right to arms protected not only home possession, but also the right to possess an impact weapon in public (a billy club, *State v. Blocker*, 630 P.2d 824 (Or. 1981)) and a switchblade knife in public (*State v. Delgado*, 692 P.2d 610 (Or. 1984)). For a broader look at recent decisions involving nonfirearm weapons, see Chapters 6.C (Supreme Court decision on stun guns) and 9.D (nonfirearm weapons).

4. For surveys of state cases on the right to arms, see Stephen P. Halbrook, *Firearms Law Deskbook* (annually updated); David B. Kopel, *The First Century of Right to Arms Litigation*, 14 Geo. J.L. & Pub. Pol’y 102 (2016); David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Arms*, 50 Santa Clara L. Rev. 1113 (2010); David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 Alb. L. Rev. 305 (2005) (New Mexico, Missouri, Ohio, Wisconsin, Rhode Island).

5. *When are modern weapons protected?* In *State v. Delgado*, 692 P.2d 610 (Or. 1984), the Oregon Court adopted a modified historical test to determine whether a given type of weapon is a constitutionally protected “arm”:

The appropriate inquiry . . . is whether the kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon’s constitution was adopted.

Id. at 400-01. Applying this test, *Delgado* unanimously concluded that although the modern switchblade knife did not exist in 1859, it was sufficiently similar to a nineteenth-century jackknife to be constitutionally protected. *Id.* at 403 (describing the mid-nineteenth century as a period when “the format and efficiency of weaponry was proceeding apace,” including the development of “breach loading rifles, metallic cartridges, and repeating rifles”). The *Delgado* Court was accurate in describing the mid-nineteenth century as a period of tremendous improvements in weaponry. See online Ch. 23.C-D.

Despite the foregoing language, a divided panel of the state court of appeals held in *Oregon State Shooting Ass’n v. Multnomah Cty.*, 858 P.2d 1315, 1324

(Or. App. 1993) that various semiautomatic pistols and rifles dubbed “assault weapons” did not qualify as arms protected by the state constitution.

Kessler seems to reflect a categorical approach to the validity of weapons bans: A billy club was a protected arm, so it could not lawfully be banned. Nineteenth-century courts had also been willing to use categorical doctrine to apply the right to arms (Chs. 15.B, 16.H).

In the second half of the twentieth century, however, many other state courts gravitated to a deferential standard of “reasonable regulation” for the review of laws challenged under their states’ constitutional rights to arms and other enumerated civil liberties. In the following case, the majority and the dissenting opinions disagree about whether this is the appropriate standard of review under the Ohio Constitution’s right to keep and bear arms.

Arnold v. City of Cleveland

616 N.E.2d 163 (Ohio 1993)

DOUGLAS, J.

The underlying issue in this appeal concerns the constitutionality of an ordinance which bans the possession and sale of “assault weapons” in the city of Cleveland. Appellants challenge this legislation on essentially two grounds. First, appellants contend that the ordinance is an overbroad restriction on their constitutional right to bear arms and defend themselves and, thus, is in violation of Sections 1 and 4, Article I of the Ohio Constitution. Second, appellants maintain that the ordinance violates the Supremacy Clause of the federal Constitution.

I

A

Presumption of Constitutionality

In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation. . . Further, the legislation being challenged will

not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt. . .

B

State and Federal Constitutions

Section 4, Article I of the Ohio Constitution provides that:

“The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.”

Appellants maintain that the ordinance violates Section 4, Article I of the Ohio Constitution.⁴

Specifically, appellants urge that the ordinance acts to deny them the fundamental “individual” right to bear arms and defend themselves. Appellants’ argument places at issue the scope of Section 4, Article I, which has not been previously considered by this court.

The question as to whether individuals have a fundamental right to bear arms has, seemingly, been decided in the negative under the Second Amendment to the United States Constitution. *See generally United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (Ch. 16.C); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886) (Ch. 16.E); *United States v. Miller*, 307 U.S. 174 (1939) (Ch. 3.A.1). . .

The vast majority of decisions which have considered the Second Amendment convey that this amendment is applicable to the federal government. These decisions signify, and history supports the position, that the amendment was drafted not with the primary purpose of guaranteeing the rights of individuals to keep and bear arms but, rather, to allow Americans to possess arms to ensure the preservation of a militia. This view has been stated

⁴ Appellants also contend that the ordinance violates Section 1, Article I of the Ohio Constitution. This section provides that:

“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.”

by some courts and legal scholars to be a “collective” right as opposed to an “individual” concept. . .

C

State Constitutionalism/New Federalism

The United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal Constitution. *See, e.g., City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982) (“[A] state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”). Further, in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), the Supreme Court reinforced its comments in this area by declaring that the state courts’ interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds. . .

The recent movement by state courts to rely on their constitutions, rather than on the federal Constitution, has been labeled “state constitutionalism” or “new federalism.” This movement has met with considerable approval. . . [William J. Brennan Jr.], *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). One court has pointedly stated that “[w]hen a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.” *Davenport [v. Garcia]*, 834 N.W.2d 4, 12 (Tex. 1992)].

In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

D

Right to Bear Arms in Ohio

We are cognizant of the current controversy that exists in Ohio and across our nation over the right of an individual to possess firearms. If debated today as a new issue, such a provision in a state constitution like ours might be completely different. However, it is our charge to determine and not to disturb the clear protections provided by the drafters of our Constitution.

The language of Section 4, Article I of the Ohio Constitution is clear. This provision is divided by two semicolons, coordinating three independent clauses. Rather than focusing merely on the preservation of a militia, as provided by

the Second Amendment, the people of Ohio chose to go even further. Section 4, Article I not only suggests a preference for a militia over a standing army, and the deterrence of governmental oppression, it adds a third protection and secures to every person a fundamental *individual* right to bear arms for “their *defense and security*.” (Emphasis added.) This clause was obviously implemented to allow a person to possess certain firearms for defense of self and property. . .

The right of defense of self, property and family is a fundamental part of our concept of ordered liberty. To deprive our citizens of the right to possess any firearm would thwart the right that was so thoughtfully granted by our forefathers and the drafters of our Constitution. For many, the mere possession of a firearm in the home offers a source of security. Furthermore, given the history of our nation and this state, the right of a person to possess certain firearms has indeed been a symbol of freedom. . .

Fundamental rights (personal liberties) are those rights which are explicitly or implicitly embraced by our Constitution and the federal Constitution. Our goal should be to preserve the existence of these sacred rights. However, to achieve this objective, the people of our nation, and this state, cannot have unfettered discretion to do as we please at all times. Neither the federal Bill of Rights nor this state’s Bill of Rights, implicitly or explicitly, guarantees unlimited rights.

For instance, the protections of assembly, speech and press found in the First Amendment and Sections 3 and 11, Article I of the Ohio Constitution, while fundamental in our free society, cannot, in order to preserve these rights, be unlimited. For good reason, one does not have the right to yell “fire” in a crowded theater, nor are persons with opinions or beliefs always entitled to express them on an unlimited basis to a group in any public place at any time. *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho*, 556 N.E.2d 157, 161 (1990). Likewise, the freedom granted to the press is not unlimited. Defamation laws limit, albeit slightly, the absoluteness of the right. A clear limit is also found in Section 11, Article I of the Ohio Constitution which states, in part, that “[e]very citizen may freely . . . publish his sentiments on all subjects, *being responsible for the abuse of the right*.” (Emphasis added.)

Pursuant to the Fourth Amendment and Section 14, Article I of the Ohio Constitution, “the people [are] to be secure in their persons, [and] houses, . . . against unreasonable searches and seizures.” As a general rule, searches conducted without a warrant are deemed unreasonable. However, distinct exceptions to the search warrant requirement have been recognized, permitting police officers, under certain circumstances, to obtain incriminating evidence without a warrant.

Further, the right to counsel found in the Sixth Amendment and Section 10, Article I of the Ohio Constitution is not an absolute right. Counsel may

have to be appointed for an indigent, as an example, but the appointment need not be a specific person in accordance with a defendant's choice. . .

There is no question that the drafters of both the federal and state Bill of Rights intended to grant to the people broad protections in many areas. These protections are imperative to the existence and continuance of our democratic society. Nevertheless, we must be cognizant that these freedoms, if made absolute, might result in the creation of public safety problems. Hence, we must be able to draw a line when certain rights have foreseeable consequences of causing harm to others.

Therefore, based on the foregoing, we find that Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the fundamental right to bear arms. However, this right is not absolute.

E

Police Power

The authority to regulate or limit constitutional guarantees has been commonly referred to as the police power. In Ohio, the grant of police power to a municipality is set forth in Section 3, Article XVIII of the Ohio Constitution, which provides that:

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

[In] *Cincinnati v. Correll*, 49 N.E.2d 412 (1943), . . . this court stated that:

“Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.”

The ordinance in question was passed by virtue of the police power of the city of Cleveland. Section 628.01 of the ordinance, entitled “Findings,” clarified, among other things, that the purpose sought to be obtained was the safety and welfare of the people of Cleveland. Section 628.01 provided that:

“The Council finds and declares that the proliferation and use of assault weapons [are] resulting in an ever-increasing wave of violence in the form of uncontrolled shootings in the City, especially because of an increase in drug trafficking and drug-related crimes, and pos[e] a serious threat to the health, safety, welfare and security of the citizens of Cleveland. The Council finds that the primary purpose of assault weapons is antipersonnel and any civilian application or use of such weapons

is merely incidental to such primary antipersonnel purpose. The Council further finds that the function of this type of weapon is such that any use as a recreational weapon is far outweighed by the threat that the weapon will cause injury and death to human beings. Therefore, it is necessary to establish regulations to restrict the possession or sale of these weapons. It is not the intent of the Council to place restrictions on the use of weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities.”

Legislative concern for public safety is not only a proper police power objective—it is a mandate. This court has established that firearm controls are within the ambit of the police power. *See State v. Nieto*, 130 N.E. 663, 664 (1920); *Mosher v. Dayton*, 358 N.E.2d 540, 542-43 (1976). . .

In *Mosher*, this court concluded that an ordinance, which required individuals having or acquiring handguns to possess an identification card issued by the city of Dayton, was not violative of either Section 4, Article I or the Second Amendment. The court reasoned that neither the federal nor the state constitution states that the right to bear arms is supreme over the authority of a municipality under the police power. The court further observed that the public purpose of the ordinance was to safeguard the public from the dangers of illegal weapons and, therefore, such weapons were a proper subject for *reasonable* regulation.

That the right to bear arms is not an unlimited right and is subject to reasonable regulation is an accepted principle among other jurisdictions. . . The majority of the cases which have decided this issue has taken the position that legislation which regulates or prohibits the possession or use of certain arms must be *reasonable* to be a valid exercise of the police power.

To meet the divergent needs and evolving conditions of society, legislation pursuant to the police power needs to be enacted. Almost every exercise of this authority will, in most if not all instances, interfere with a personal or collective liberty. Therefore, the test is one of reasonableness. Here, the question is whether the legislation is a reasonable regulation, promoting the welfare and safety of the people of Cleveland.

In reviewing the reasonableness of an ordinance, we are guided by certain principles. It is not a court’s function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation. Further, “unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion. Local authorities are presumed to be familiar with local conditions and to know the needs of the community.” *Porter v. Oberlin*, 205 N.E.2d 363, 368 (1965) (quoting *Allion v. Toledo*, 124 N.E. 237 (1919) [syllabus]).

Keeping the foregoing principles in mind, we believe that the ordinance, while admittedly broad in its scope, is a reasonable exercise of the municipality’s police power. The ultimate objective of the legislation appears

to be public safety. To reach this end, the municipality is attempting to limit the accessibility of certain generally recognized dangerous firearms.

Appellants and various *amici curiae* have presented numerous materials and statistical data, urging that the instant gun control legislation is not needed. However, even if the statistics presented are accurate, this does not diminish the public safety threat of assault weapons, or demonstrate that the ordinance is unreasonable or arbitrary. The prohibition of a harmful act need not be postponed until it occurs. . .

Appellants concede that appellee may regulate, within reason, the manner in which firearms are purchased or used. Appellants insist, however, that the ordinance under review goes beyond regulating the manner of acquisition and use and, instead, acts as a prohibition on the right to possess firearms, which is beyond the scope of the police power.

Appellants' contention lacks merit. This court has commented that the police power includes the power to prohibit. *See Porter*, 205 N.E.2d at 368. . .

The ordinance at issue affects a class of firearms. Clearly, the city would have exceeded its authority under Section 3, Article XVIII, and would have violated Section 4, Article I if it had banned *all* firearms. For this reason, we are not persuaded by appellants' argument that by banning certain firearms "there is no stopping point" and legislative bodies will have "the green light to completely ignore and abrogate an Ohioan's right to bear arms."

Accordingly, we believe that appellants can prove no set of facts entitling them to relief. Therefore, we find that former Cleveland Ordinance No. 415-89, prohibiting the possession and sale of "assault weapons" in the city of Cleveland, was a proper exercise of the police power under Section 3, Article XVIII of the Ohio Constitution and does not violate Section 4, Article I. . .

WILLIAM B. HOFFMAN, J., concurring in part and dissenting in part.

I must respectfully dissent from the majority's conclusion that former Cleveland Ordinance No. 415-89 is constitutional. I believe such decision is premature and analyzed under the wrong standard by the majority.

The majority correctly recognizes that Sections 1 and 4, Article I of the Ohio Constitution confer upon the citizens of Ohio the fundamental right to bear arms and that such right is an individual one. Conceded to the majority is the fact that, although fundamental, such right is not absolute.

It is undisputed that legislative concern for public health and safety is a proper police power objective. This court has recognized as constitutional gun control legislation which has regulated the manner in which a weapon may be borne. . . However, the Cleveland ordinance goes beyond mere regulation. It is a total prohibition of possession of certain types of arms.

The majority adopts the position that as long as the legislation is enacted to promote public health and safety it need only be reasonable to pass constitutional muster, even though it interferes with a personal or collective liberty. Such standard is appropriate when analyzing legislative restrictions

on nonfundamental rights. However, I believe a stricter standard must be utilized when the legislation places restrictions upon fundamental rights, particularly where the legislation prescribes an outright prohibition of possession as opposed to mere regulation of possession. A “strict scrutiny” test, *i.e.*, whether the restriction is *necessary* to promote a *compelling governmental interest*, as opposed to the less demanding “reasonable” or “rational relationship” test, ought to be applied. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Under the strict scrutiny analysis, a law which impinges upon a fundamental right is presumptively unconstitutional unless a compelling governmental interest justifies it. Furthermore, any such infringement must be drawn with “precision.” *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). “And if there are other, reasonable ways to achieve those goals with a lesser burden on a constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” Exercise of the police power may not be achieved by a means which sweeps unnecessarily broadly. *Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972). The majority candidly recognizes that the Cleveland ordinance is broad in its scope.

Whether the city of Cleveland’s objective in enacting the subject ordinance is necessary to promote a compelling governmental interest and whether the legislation enacted to accomplish that objective sweeps unnecessarily broadly are questions which are not yet ripe for review by this court in light of the procedural posture of this case. As noted in the majority opinion, the trial court converted appellee’s motion to dismiss appellants’ counts two through twelve of the complaint into a motion for summary judgment. Civ.R. 12(B) provides in pertinent part:

“When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleadings and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. * * * All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.”

I believe appellants’ second amended complaint adequately challenged the constitutionality of the ordinance and was sufficient to withstand appellee’s motion to dismiss. Though the trial court could properly treat appellee’s motion for dismissal as a summary judgment motion, when doing so it denied *both parties* the opportunity to present materials pertinent thereto. The briefs of the parties and respective *amici* filed herein are replete with statistics and reports collected throughout the country regarding the impact of guns and their relationship to criminal behavior. The majority makes reference to these materials but concludes that even if accurate, they would not diminish the public safety threat of “assault weapons” or demonstrate that the ordinance is unreasonable or arbitrary. Though the majority’s position may ultimately be

proven correct, the parties have been precluded from establishing their record in the courts below.

Few would question the wisdom of banning “assault weapons.” However, use of the term “assault weapons” generates emotional responses and inherent bias. Whether the weapons banned by the Cleveland ordinance are primarily antipersonnel or whether they are equally suitable for defensive or sporting purposes has yet to be demonstrated. All weapons are antipersonnel and assaultive by nature. The mere declaration by Cleveland Council that it finds the primary purpose of assault weapons to be antipersonnel and any civilian application or use of those weapons is merely incidental to such primary antipersonnel purpose, coupled with its declaration that the proliferation and use of said assault weapons pose a serious threat to the health, safety, welfare and security of the citizens of Cleveland is, standing alone, insufficient to satisfy the government’s burden when such legislation infringes upon a fundamental right. When challenged, the government must be allowed to demonstrate this claim and the challenger must be afforded an opportunity to demonstrate otherwise. Both sides have been precluded from doing so in this case.

I would reverse the decision of the appellate court, and remand the matter to the trial court for further proceedings in accordance with this opinion and the law.

PFEIFER, J., concurs in the foregoing opinion.

NOTES & QUESTIONS

1. *The “reasonable regulation” standard.* One proponent of the “reasonable regulation” review deployed in *Arnold* describes this form of scrutiny as “equally deferential” as rational-basis review, involving “a balancing of interests” in which “th[e] balancing is decidedly tipped in favor of the government, so much so that the individual almost never wins. The large-scale problem of violence in society . . . virtually always overwhelms the individual . . . interest in self-defense or recreation.” Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 688, 717-18 (2007). The *Arnold* majority views the legislature’s power to regulate guns as coextensive with its “police power” to protect public safety. Many state courts also extend reasonableness review to other guarantees under their state constitutions. Is this a proper standard of review for state right-to-arms claims? For state constitutional rights claims in general?

2. *The “frustration” standard.* A number of state courts take the view that regulations of the right to keep and bear arms are generally constitutional if they do not “frustrate” the right, “frustrate or impair” the right’s exercise, or similar terms. Regulations that do frustrate the right are normally unconstitutional. This concept was mentioned in *State v. Kessler* and has been applied by other courts. *See, e.g., State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003) (holding that a law prohibiting the concealed carry of a handgun even when

worn in one's own place of business frustrated the right to bear arms under the state constitution, and so was invalid); *City of Tucson v. Rineer*, 971 P.2d 207 (Ariz. Ct. App. 1997) (prohibition on carrying handguns in city park "neither frustrates nor impairs" the right to bear arms for self-defense); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988) (holding that discretionary "may issue" carry permit system was invalid because it threatened to frustrate the right to carry a handgun for self-defense). Does the frustration standard differ from the "reasonable regulation" standard applied in *Arnold*? When, if ever, might they lead to different outcomes? Is one preferable to the other?

3. A key tenet of the New Judicial Federalism is that state constitutions can "offer broader protection of individual rights than that required by the United States Constitution." Thomas Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the Edmunds Decision*, 47 Duq. L. Rev. 503, 506 (2009). During the decades preceding *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 6.A), many lower federal courts adopted interpretations of the Second Amendment that deprived it of substance, see Chs. 3.A.2, while state courts continued to interpret their state constitutional rights to arms as meaningful limits on gun control laws. So, there is a straightforward sense in which these state courts were embodying the judicial-federalist vision. After *Heller*, too, some state courts have used the right to arms provisions in their state constitutions to provide protections that may reach beyond the revitalized federal Second Amendment. See, e.g., *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632 (Del. 2017) (regulations effecting a total ban on carrying for self-defense in parks and forests violated Delaware's constitutional right to bear arms, Del. Const. art. I, § 20); *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014) (state supreme court concluding that the same ban did violate the Delaware right to arms because the state text is "intentionally broader" in wording than the Second Amendment). Should state courts defer to developing Second Amendment jurisprudence when applying their state constitutions, or should they treat state constitutional rights to arms as independent guarantees?

4. In *Rocky Mtn. Gun Owners v. Polis*, 467 P.3d 314 (Colo. 2020), plaintiffs challenged the constitutionality, under the Colorado Constitution, of a statute prohibiting the possession and sale of magazines capable of accepting, or that were "designed to be readily converted to accept," more than 15 rounds of ammunition. The court held that the statute was constitutional under the state's "reasonable exercise" test, under which "government enactments . . . have a legitimate government end within the police power, such as promoting the public health, safety, or welfare." *Id.* at 328.

5. For further analysis of *Arnold*, see David B. Kopel, Clayton E. Cramer & Scott G. Hattstrup, *A Tale of Three Cities: The Right to Bear Arms in State*

Supreme Courts, 68 Temple L. Rev. 1177 (1995) (discussing *Arnold* and similar cases from Colorado and Oregon).

Norman v. State

215 So.3d 18 (Fla. 2017)

PARIENTE, J.

In this case, we determine the constitutionality of section 790.053, Florida Statutes (2012) (“Florida’s Open Carry Law”), first passed by the Legislature in 1987 and challenged by Norman as a violation of his right to bear arms for self-defense outside the home under both the United States and Florida Constitutions. . .

Florida’s Open Carry Law is a provision within Florida’s overall scheme regulating the use of firearms (codified in chapter 790, Florida Statutes), but still allowing the possession of firearms in most instances. Chapter 790 permits individuals to carry firearms in public, so long as the firearm is carried in a concealed manner. Pursuant to section 790.06, Florida employs a “shall issue” scheme for issuing licenses to carry concealed firearms in public. Under this licensing scheme, which leaves no discretion to the licensing authority, the licensing authority must issue an applicant a concealed carry license, provided the applicant meets objective, statutory criteria. Accordingly . . . the right of Floridians to bear arms for self-defense outside of the home is not illusory. . .

FACTS AND PROCEDURAL HISTORY

On February 19, 2012, Dale Lee Norman received by mail a license issued by the Florida Department of Agriculture and Consumer Services authorizing Norman to carry his firearm in public in a concealed manner. He left his Fort Pierce home on foot with a .38 caliber handgun and his new concealed-carry license. A few minutes after he left his home, a bystander observed Norman walking alongside U.S. Highway 1 with his handgun holstered on his hip and not covered by any article of clothing. The bystander alerted the Fort Pierce Police Department, which dispatched officers. Fort Pierce Police Department officers arrived on the scene approximately five minutes later and also “saw [Norman] carrying a firearm in ‘plain view’ in a holster on his hip. The firearm was on the outside of [Norman’s] tight fitting tank top.” . . . A dashboard camera from a responding officer’s patrol car that captured Norman’s arrest on video “showed that [Norman’s] gun was completely exposed to public view, in its holster, and not covered by [his] shirt.” . . .

Norman was charged with Open Carrying of a Weapon (firearm) in violation of section 790.053, Florida Statutes (2012), a second-degree

misconduct carrying a maximum penalty of a \$500 fine and a term of imprisonment not exceeding 60 days. . .

ANALYSIS

The issue we address is whether Florida's Open Carry Law, which prohibits openly carrying a firearm subject to sixteen statutory exceptions, violates the Second Amendment to the United States Constitution or article I, section 8, of the Florida Constitution. . .

In determining whether Florida's Open Carry Law is constitutional under both the Florida and the United States Constitutions, we first describe Florida's statutory scheme for possessing and carrying firearms (codified in chapter 790). We then discuss the history and scope of the rights guaranteed by the Second Amendment to the United States Constitution and article I, section 8, of the Florida Constitution. After reviewing both federal and state case law addressing the constitutional validity of other firearm regulations, we then determine the appropriate level of review for this issue. We conclude by analyzing whether the law violates the Second Amendment or Florida's separate constitutional right to keep and bear arms for self-defense under article I, section 8 of the Florida Constitution, which is explicitly subject to the Legislature's authority to regulate the manner of doing so.

I. CHAPTER 790, FLORIDA STATUTES

Florida's statutory scheme for regulating the manner of carrying firearms has existed in its current state for almost three decades. In 1987, the Florida Legislature passed the Jack Hagler Self-Defense Act ("the Act"), amending section 790.06, Florida Statutes (1985). The former section 790.06 authorized local governments to issue concealed-carry licenses to applicants based on the applicant's "good moral character" and other varying criteria. The Act streamlined Florida's licensing scheme for carrying concealed firearms by authorizing the State to issue concealed-carry licenses, instead of local governments. At that time, Florida became one of the first states to allow the concealed carrying of firearms by a state-run licensing scheme. Notable for our purposes here, Florida's "shall-issue" permitting scheme leaves no discretion to the State in issuing concealed-carry licenses, provided the applicant meets certain objective, statutory criteria.

Shortly after the Act went into effect, the Legislature passed in a special session House Bill 28-B, which prohibited the open carrying of firearms. House Bill 28-B was later codified in section 790.053, Florida Statutes (1987). Representative Ronald C. Johnson, a member of the Florida House of Representatives and the sponsor of the Act, spoke on the floor of the House of Representatives and implored his colleagues to vote in favor of House Bill 28-B because "a problem ha[d] arisen in the minds of the public," concerning Florida's gun laws. This problem was brought to light in a letter Florida's then attorney general wrote to Florida's then governor, and by contemporaneous news reports that claimed that, with the recent passage of the Act, Florida law

now allowed the open carrying of firearms in public. Representative Johnson stated that House Bill 28–B would clarify that in Florida, “we did not then and we do not now allow for the open carry of firearms.” After House Bill 28–B passed unanimously, Representative Johnson thanked his colleagues for their vote, stating that the Legislature had reaffirmed in the eyes of the public that Florida was a “safe place for individuals to live, and an excellent place for people to visit.” The Senate unanimously voted the following day to approve the concurring bill. . .

As explained above, Florida’s “shall-issue” licensing scheme provides almost every individual the ability to carry a concealed weapon. The statute merely requires the applicant to provide a statement that he or she “[d]esires a legal means to carry a concealed weapon or firearm for lawful self-defense” and that the applicant meets certain objective requirements. These objective requirements include that the applicant is not a convicted felon, has not been committed to a mental institution, and has demonstrated competence with handling a firearm. Thus, under Florida’s “shall-issue” licensing scheme, the State has no discretion in issuing licenses and may not withhold a license from an individual based on any subjective beliefs, provided the applicant meets the objective, statutory requirements.

II. FEDERAL AND STATE CONSTITUTIONAL RIGHT TO BEAR ARMS

Norman challenges the constitutionality of Florida’s Open Carry Law under both the Second Amendment to the United States Constitution and article I, section 8, of the Florida Constitution. We explain below the history and scope of these rights, both through constitutional text and case law. Put simply, Florida’s right provides explicitly to Floridians what the United States Supreme Court has interpreted the federal right to guarantee — an individual right to bear arms for self-defense, subject to legislative regulation.

A. History and Scope of the Right Provided by the Second Amendment to the United States Constitution

[In this section, the court discusses *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 6.A), *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Ch. 6.B), and their pre-*New York State Rifle & Pistol Ass’n v. Bruen* (Ch. 6.D) progeny.]

B. History and Scope of the Right Provided by Article I, Section 8, of the Florida Constitution. . .

[T]he Florida Constitution includes a separate constitutional right to bear arms in article I, section 8. Specifically, the Florida Constitution provides:

The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be

infringed, except that the manner of bearing arms may be regulated by law.

Art. I, § 8(a), Fla. Const. (emphasis added). In contrast to the federal right, Florida's Constitution explicitly states that the purpose of the constitutional right is self-defense while simultaneously expressly limiting that right by providing the Legislature the authority to regulate the manner of bearing arms.

This constitutional right has endured in Florida — with only a small gap — since 1838 when Florida's Constitution was adopted by the then Territory of Florida. When Florida's current Constitution was adopted in 1968, the explicit right of the Legislature to regulate the manner in which arms are borne first announced in the 1885 Constitution remained.

Near the turn of the twentieth century, in one of this Court's earliest decisions interpreting Florida's constitutional right to keep and bear arms for self-defense, this Court recognized in *Carlton v. State*, 63 Fla. 1, 58 So. 486 (1912), that article I, section 20, the precursor to today's constitutional right, which was contained in the 1885 Constitution's Declaration of Rights, was “intended to give the people the means of protecting themselves against oppression and public outrage, and was not designed as a shield for the individual man, who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society.”

A former member of this Court also echoed the *Heller* Court's statement that some early gun laws were enacted with a racial motivation in mind. As Justice Buford explained in *Watson v. Stone*, 148 Fla. 516, 4 So.2d 700 (1941), when concurring specially in a decision of this Court, which applied the rule of lenity to strictly construe the predecessor of section 790.05 in favor of the defendant:

The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there had never been,

within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

Id. at 703 (Buford, J., concurring specially) (emphasis added).

Consistent with the plain language of article I, section 8, and its predecessor providing that the Legislature may regulate the manner and use of firearms, as well as the *Heller* Court's interpretation of the federal right as not unlimited, the Legislature has enacted various laws regulating the manner in which arms are carried. This Court has upheld these various regulations of this constitutional right upon challenge. For instance, in *Nelson v. State*, 195 So.2d 853 (Fla. 1967), this Court concluded that the "statutory prohibition of possession of a pistol by one convicted of a felony, civil rights not restored, [was] a reasonable public safeguard." *Id.* at 855–56. Then, in *Rinzler v. Carson*, 262 So.2d 661 (Fla. 1972), this Court upheld a statute that barred the usage of an entire class of firearms, explaining that "[a]lthough the Legislature may not entirely prohibit the right of the people to keep and bear arms," pursuant to article I, section 8, "it can determine that certain arms or weapons may not be kept or borne by the citizen." In doing so, the Court did not apply any level of scrutiny and noted that it had previously upheld other regulations enacted by the Legislature that regulated the use and manner of bearing specific weapons:

In *Nelson v. State*, 195 So.2d 853 (1967) we held constitutional Section 790.23, Florida Statutes, F.S.A., which makes it unlawful for a convicted felon to have in his possession a pistol, sawed-off rifle, or sawed-off shotgun. In *Davis v. State*, 146 So.2d 892 (1962) we held valid Section 790.05, Florida Statutes of 1961, which made it a criminal offense for any person to carry around with him or to have in his manual possession a pistol, Winchester rifle or other repeating rifle in a county without a license from the county commissioners. In *Carlton v. State*, 63 Fla. 1, 58 So. 486 (1912) we upheld as valid against the contention that it unlawfully infringed upon the right of the citizen to bear arms a statute of this State which made it unlawful to carry concealed weapons.

As we recognized in *Rinzler*, inherent in the holdings of these cases is the acknowledgment that under the Florida Constitution, "*the right to keep and bear arms is not an absolute right*, but is one which is subject to the right of the people through their legislature to enact valid police regulations to promote the health, morals, safety and general welfare of the people." In light of *Heller's*

clarification that the federal right under the Second Amendment is not unlimited, the Florida right is, thus, consistent with the federal right.

III. DETERMINING THE APPROPRIATE LEVEL OF SCRUTINY

[The court determined, consistent with the cases handed down between *Heller* and *Bruen*, see Ch. 6.C, intermediate scrutiny was appropriate for Norman's Second Amendment claim.]

IV. REVIEWING SECTION 790.053 UNDER INTERMEDIATE SCRUTINY

[The court held that Florida's ban on open carry survived intermediate scrutiny.]

V. FLORIDA CONSTITUTIONAL CHALLENGE TO SECTION 790.053

We have already determined that Florida's Open Carry Law survives intermediate scrutiny when considering whether the law violates the Second Amendment. We next consider whether Florida's freestanding constitutional right to keep and bear arms for self-defense, subject to the explicit grant of legislative authority to regulate how those arms are kept and borne, provides more constitutional rights than provided by the Second Amendment. Norman contends that it does because article I, section 8, is part of the Florida Constitution's Declaration of Rights, "a series of rights so basic that the framers of our Constitution accorded them a place of special privilege." *Traylor v. State*, 596 So.2d 957, 963 (Fla. 1992).

Significantly unlike other rights contained in Florida's declaration of rights, however, the plain language of article I, section 8, of the Florida Constitution explicitly authorizes the Legislature to regulate the manner of exercising the right to keep and bear arms for self-defense. Because we have already determined that the Open Carry Law merely regulates one manner of carrying firearms in public, we reject Norman's argument that this law regulating how firearms are carried in public warrants strict scrutiny review under Florida's constitutional right. Accepting such an argument would render every law regulating the use and manner of firearms presumptively unconstitutional, thereby rendering meaningless the text of article I, section 8, authorizing the Legislature to regulate firearms.

Indeed, our conclusion that laws regulating the manner and use of firearms do not actually implicate Florida's freestanding constitutional right, triggering strict scrutiny review, is borne out by this Court's precedent upholding against constitutional challenges laws on the keeping and bearing of arms without subjecting the laws to any form of heightened scrutiny. See *Rinzler*, 262 So.2d at 664 (upholding constitutionality of statute making it unlawful for any person to "possess[] or control any short-barreled rifle, short-barreled shotgun, or machine gun which is, or may readily be made, operable"); *Nelson*, 195 So.2d at 856 (upholding constitutionality of statute making it unlawful for *42 convicted felons to possess a pistol, sawed-off rifle, or sawed-off shotgun); *Davis*, 146 So.2d at 895 (holding valid law making it a criminal offense to carry

in one's manual possession a pistol, Winchester rifle or other repeating rifle in county without a license from county commissioners). Therefore, we conclude that section 790.053, which regulates one manner of carrying arms in public, is not subject to strict scrutiny review. Accordingly, consistent with our conclusion that section 790.053 passes constitutional muster under intermediate scrutiny, and therefore does not violate the Second Amendment, we hold that section 790.053 does not violate article I, section 8, of the Florida Constitution under the same standard.

CONCLUSION

We hold that section 790.053 does not unconstitutionally infringe on the Second Amendment right to bear arms, as interpreted by the United States Supreme Court in *Heller* and *McDonald*, or the Florida Constitution's freestanding right to bear arms subject to the Legislature's authority to regulate the use and manner of doing so. . .

NOTES & QUESTIONS

1. What was Florida's reason for enacting its ban on open carry? Was it purely aesthetic? *See Heller and Public Carry Restrictions*, 40 Campbell L. Rev. 431, 458 (2018) (presentation transcript).

2. The dissent took issue with the two reasons proffered by the state, and accepted by the majority as satisfying intermediate scrutiny, for Florida's ban:

The justification relied on by the majority is ostensibly related to public safety concerns. There are two elements to the justification. Both are feeble. First, this reason is offered: "An armed attacker engaged in the commission of a crime, for example, might be more likely to target an open carrier than a concealed carrier for the simple reason that a visibly armed citizen poses a more obvious danger to the attacker than a citizen with a hidden firearm." . . . Second, it is suggested that the State is justified in displacing open carrying in favor of concealed carrying because "deranged persons and criminals would be less likely to gain control of firearms in public because concealed firearms — as opposed to openly carried firearms — could not be viewed by ordinary sight."

These reasons may not be totally irrational, but they do not provide any substantial justification for the ban on open carrying.

Norman v. State, 215 So.3d 18, 45 (Fla. 2017) (Canady, J., dissenting); *id.* at 39-40 (majority opinion). Do you agree?

B. RECENT CHANGES TO STATE CONSTITUTIONAL RIGHT TO ARMS GUARANTEES

In *Arnold* (Part A), the dissenting judges argued that because the right to bear arms was a fundamental right, restrictions affecting it should be subjected to “strict scrutiny,” a demanding form of review that the U.S. Supreme Court often applies to restrictions on fundamental rights under the U.S. Constitution. But the *Arnold* majority applied “reasonableness” review instead. “Strict scrutiny” was first used by the Supreme Court as a term of art in *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (Equal Protection for law sterilizing certain repeat felony convicts). It next appeared in a 1961 dissent. *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (state ban on use of artificial birth control by married couples). The phrase was used in a few other cases in the second half of the decade and became common in the 1970s. During the latter third of the twentieth century, strict scrutiny was rarely used for gun laws, although the “frustrate” standard or other formulations sometimes amounted to the same thing in practice.

In recent years, the people of three states have amended their state constitutional rights to arms to expressly require strict scrutiny of almost all gun restrictions.

1. Louisiana

In 2012, over 74 percent of Louisiana voters approved Amendment 2, a legislatively referred measure that revised their state constitution’s right-to-arms provision. The new provision reads: “The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.” La. Const. art. I, § 11 (2012).

This replaced a former provision, adopted in 1974, that had read: “The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of concealed weapons.” La. Const. art. I, § 11. Under the old language, the state’s courts had extended feeble protection to the right to arms, holding that the right could “be regulated in order to protect the public health, safety, morals or general welfare so long as that regulation is a reasonable one.” *State v. Amos*, 343 So.2d 166, 168 (La. 1977). Similarly, the Louisiana Supreme Court had affirmed a lower court decision stating that the right to arms could be “restrict[ed] . . . for legitimate state purposes, such as public health and safety.” *State v. Blanchard*, 776 So.2d 1165 (La. 2001).

As the first state to mandate strict scrutiny for the right to arms, Louisiana has developed the largest body of case law interpreting that standard. The *J.M.* case, below, explains the Louisiana Supreme Court’s approach to the amended state constitution.

CLARK, Justice.

A juvenile in a delinquency proceeding argued the criminal statutes regarding the intentional concealment of a weapon and the possession of a handgun by a juvenile fail to meet the requirement of strict scrutiny under the state constitutional provision securing the right to keep and bear arms. . . For the reasons that follow, we hold both criminal statutes are constitutional and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Before its recent amendment, La. Const. art. I, § 11 provided: “The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.”

Pursuant to Acts 2012, No. 874, § 1, a proposal to amend this provision of the state constitution was submitted to the electors of the state of Louisiana, and was ratified by them in a statewide election held on November 6, 2012. Effective December 10, 2012, La. Const. art. I, § 11 now provides: “The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction of this right shall be subject to strict scrutiny.” *See State v. Draughter*, 130 So.3d 855 (La. 2013).

. . . [S]ix days after the effective date of this new state constitutional provision, on December 16, 2012, the juvenile, J.M., knowingly possessed a handgun on his person, in violation of La. R.S. 14:95.8, and intentionally concealed a weapon on his person, in violation of La. R.S. 14:95(A). Based on these alleged delinquent acts, the state sought to have J.M. adjudged delinquent and filed a petition for the adjudication of delinquency in the juvenile court for East Baton Rouge Parish.

La. R.S. 14:95.8 prohibits the possession of a handgun by a juvenile except under certain exceptions. Subsection A of the statute provides: “It is unlawful for any person who has not attained the age of seventeen years knowingly to possess any handgun on his person. Any person possessing any handgun in violation of this Section commits the offense of illegal possession of a handgun by a juvenile.” . . . Subsection C describes seven exceptions under which

circumstances the prohibition of possessing a handgun will not apply to a juvenile, as follows:

- (1) Attending a hunter's safety course or a firearms safety course;
- (2) Engaging in practice in the use of a firearm or target shooting at an established range;
- (3) Hunting or trapping pursuant to a valid license issued to him pursuant to the laws of this state;
- (4) Traveling to or from any activity described in Paragraph (1), (2), or (3) of this Subsection while in possession of an unloaded gun;
- (5) On real property with the permission of his parent or legal guardian and with the permission of the owner or lessee of the property;
- (6) At such person's residence and who, with the permission of such person's parent or legal guardian, possesses a handgun; and
- (7) Possessing a handgun with the written permission of such person's parent or legal guardian; provided that such person carries on his person a copy of such written permission.

La. R.S. 14:95(A)(1) . . . prohibits: "The intentional concealment of any firearm, or other instrumentality customarily used or intended for probable use as a dangerous weapon, on one's person."

Counsel for J.M. filed motions to declare both statutes unconstitutional under the new provisions of La. Const. art. I, § 11, arguing the statutes did not pass strict judicial scrutiny. Additionally, counsel argued the effect of the amendment of the constitution invalidated any prohibition restricting the carrying of concealed weapons.

The Office of the Louisiana Attorney General . . . joined with the East Baton Rouge Parish District Attorney in opposing J.M.'s motions, arguing [that as a juvenile] J.M. did not have a right to assert under the state constitution, and, even if he did, the statutes at issue pass strict scrutiny review.

. . . The juvenile court first subjected La. R.S. 14:95.8 to the strict scrutiny required by La. Const. art. I, § 11 and found the state showed a compelling government interest for prohibiting the possession of handguns by a juvenile. The juvenile court explained: ". . . it is clear that this statute attempts to address a well known [and] studied fact in our society, that the cognitive brain development of minors is not the same as an adult." Based on this inherent difference between adults and children, the juvenile court found a compelling state interest not only in restricting the possession of handguns from those who lack the maturity to handle them, and for the benefit of the safety of society at large, but also to provide a method of punishment separate from those sanctions imposed on adult criminal offenders.

After finding a compelling state interest in prohibiting the possession of handguns by juveniles, the juvenile court turned to the second part of the strict

scrutiny analysis. The juvenile court considered . . . whether [the] statute is narrowly drawn to achieve the compelling government interest and found:

La. R.S. 14:95.8 is neither over-inclusive as to be too broad, nor under-inclusive so as to be too vague, because the statute refers to a specific group, individuals under the age of seventeen. Further, La. R.S. 14:95.8 does not prohibit juveniles from total use and possession of firearms. The statute only places a prohibition on handguns. As previously mentioned, the majority of shootings committed by juveniles are committed with handguns. Therefore, this statute clearly advances the interest asserted, safety of society.

Despite these findings, the juvenile court nevertheless ruled four of the exceptions found in Subsection C should be severed from the statute, even though J.M. failed to assert any examples of less restrictive means of enforcement. The juvenile court first examined all seven exceptions to the handgun restriction found in Subsection C. The first three circumstances described in the exceptions were approved by the juvenile court, which found juveniles could possess handguns for attending a hunter's or firearms safety course, engaging in practice in the use of a firearm or target shooting at an established range, or hunting or trapping pursuant to a valid state license.

As for the remaining four circumstances, without further analysis the juvenile court indicated “. . . the court does not have the same feeling towards the remaining exceptions: C(4), (5), (6) and (7)” and ordered them severed from the statute. After the four exceptions were severed, the juvenile court found La. R.S. 14:95.8 was narrowly tailored to serve a compelling governmental interest, explaining: “The statute only prohibits a particular type of firearms (handguns) by a particular group of individuals and further strikes a fine line between the right to bear arms and the protection of individuals in our society.”

As to the prohibition against carrying concealed weapons found in La. R.S. 14:95(A), the juvenile court again found a compelling state interest for the statute “in protecting society from any and all types of violence.” However, the juvenile court did not believe the statute was narrowly tailored. Specifically, the juvenile court found La. R.S. 14:95(A)(1) was “. . . unconstitutional as it relates to juveniles because there already exist[s] a law that restricts juveniles['] possession of guns, i.e. La. R.S. 14:95.8 . . . La. R.S. 14:95(A)(1) as it relates to juveniles is duplicitous in nature.” The juvenile court explained “La. R.S. 14:95.8 is a narrowly tailored statute which passes the strict scrutiny analysis [presumably after taking into consideration the severance of the four exceptions in Subsection (C)(4-7)] and therefore, there is no need for any additional restrictions on juveniles to possess guns to be found in any other statutes.”

The state sought direct review of the juvenile court's declaration of the unconstitutionality of La. R.S. 14:95(A)(1) as applied to juveniles pursuant to La. Const. art. V, § 5(D). The state also asserts in brief that it is directly

appealing the juvenile court's ruling insofar as it found La. R.S. 14:95.8(C)(4-7) unconstitutional and severed those portions of the statute from La. R.S. 14:95.8. J.M. applied for writs directly to this court to consider the underlying constitutionality of La. R.S. 14:95.8 with the state's appeal. This court granted J.M.'s writ application and consolidated the two matters for the court's docket.

LAW AND DISCUSSION. . .

Nature of the Right to Keep and Bear Arms

Before we address the constitutionality of the statutes at issue, we must discuss the nature of the state constitutional right to keep and bear arms. After its 2012 amendment, La. Const. art. I, § 11 provides: "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."

This court's function in construing a constitutional provision is to ascertain and give effect to the intent of the people who adopted the provision. *See State v. Bazile*, 144 So.3d 719 (2013) . . . The proper analysis to determine the understanding of the voters is described as follows:

In general, in seeking to discover that constitutional intent, this court is guided by the same rules it follows in interpreting laws and written instruments. . . When a constitutional provision is clear and unambiguous, and its application does not lead to absurd consequences, it must be applied as written without further interpretation in search of its intent. Every provision must be interpreted in light of the purpose of the provision and the interests it furthers and resolves. When the provision is susceptible of different meanings, it is interpreted by examining the context and the text in which it occurs as a whole and by giving it the meaning that best conforms to its purpose.

Id. (internal citations omitted).

As we stated in *State v. Amos*, 343 So.2d 166, 168 (La.1977), "[t]he right to keep and bear arms, like other rights guaranteed by our state constitution, is not absolute." That limits may be imposed on the right was evidenced in the language of the official ballot proposition presented to the voters. The proposition asked:

Do you support an amendment to the Constitution of the State of Louisiana to provide that the right to keep and bear arms is a fundamental right and any restriction of that right requires the highest standard of review by a court? (Amends Article I, Section 11)

See Acts 2012, No. 874, § 3.

The voters of Louisiana did not ratify this constitutional amendment in a vacuum. In our opinion, the reference to restrictions on the right to keep and bear arms in the proposition reflects an expectation of sensible firearm

regulation held by the voters, and comports with historical restrictions with respect to the acquisition, possession or use of firearms for lawful purposes found in Louisiana law. The Supreme Court has described a similar understanding of the nature and limitations of the right to bear arms in the analogous Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (Ch. 6.A) (“From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

We also conclude the voters’ ratification of strict scrutiny as a review standard of alleged infringements on the right to keep and bear arms was not meant to invalidate every restriction on firearms, whether in existence at the time the amendment was ratified or yet to be enacted. Rather, the strict scrutiny standard adopted by the voters “is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker” for firearm regulation within the context of the fundamental right to keep and bear arms. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). In *Draughter*, decided in our last opinion cycle, we concluded the right to bear arms has always been a fundamental right and the amendment to the constitutional provision merely sought to ensure that the review standard of an alleged infringement of this fundamental right was consistent with developing standards of constitutional analysis. *Draughter*, 130 So.3d at 855. Strict scrutiny requires a careful examination by our courts, keeping in mind that the fundamental right at issue is one where some degree of regulation is likely to be necessary to protect the public safety. *Grutter*, 539 U.S. at 327 (in a strict scrutiny analysis, “context matters.”).

Strict Scrutiny Analysis

La. Const. art. I, § 11 states any restriction on the right to keep and bear arms must meet strict scrutiny review. Where strict judicial scrutiny is required, a state “is not entitled to the usual presumption of validity, the state rather than the complainant must carry a heavy burden of justification, the state must demonstrate its [legislation] has been structured with precision, and is tailored narrowly to serve legitimate objectives, and that it has selected the less drastic means for effectuating its objectives.” *Southland Corp. v. Collector of Revenue for Louisiana*, 321 So.2d 501, 505 (La.1975). . . In meeting this heavy burden of justification, the state’s role is to present evidence of the compelling nature of the government’s interest served by the regulation and to demonstrate the restrictions are narrowly tailored to achieve the asserted interest.

In this case, the state based its argument on “logic, case law, and statistics.” At issue are two long-standing limitations on the right to keep and bear arms—the prohibition against the carrying of concealed weapons, and the possession of firearms by children—for which there exists an extensive history of law and jurisprudence. Under such circumstances, we find “a long history, a

substantial consensus, and simple common sense” to be sufficient evidence for even a strict scrutiny review. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992).

La. R.S. 14:95.8 [restrictions on handgun possession by those 16 or under]

To demonstrate a compelling government interest, the state must establish “the need to address a perceived problem, protect a group from harm, or cure some ill in society.” *In re Warner*, 21 So.3d 218, 250. The state asserts the compelling interest of the government in enacting this legislation is the safety of the general public and juveniles in particular. The juvenile court agreed, and referred to a “well known [and] studied fact in our society, that the cognitive brain development of minors is not the same as an adult.”

We agree public safety is a compelling state interest for restricting the possession of handguns by juveniles. Common sense, science and social science agree that juveniles exhibit a sometimes transient lack of maturity, impetuosity, suggestibility and vulnerability which would make the possession of a handgun by a juvenile a danger for the public and the juveniles themselves. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012) [holding that mandatory sentences of life without parole are unconstitutional for juvenile offenders]. We also note this prohibition on the juvenile possession of a handgun is the type of long-standing limitation on the right to keep and bear arms with which voters were familiar. As early as in 1890, the Louisiana legislature made it a misdemeanor offense “for any person to sell, or lease or give through himself or any other person, any pistol, dirk, bowie-knife or any other dangerous weapon, which may be carried concealed to any person under the age of twenty-one years.” 1890 La. Acts, No. 46.

Courts have found “the clandestine acquisition of firearms by juveniles and minors is a most serious problem facing law enforcement and the citizens of this country.” *National Rifle Ass’n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 199 (5th Cir. 2012). The statistics obtained through a congressional investigation and referred to in the case law confirmed a “causal relationship between the easy availability of firearms other than a rifle or shotgun and . . . youthful criminal behavior.” *Id.* Based on these considerations, we agree with the finding of the juvenile court in this respect and hold there is a compelling government interest supporting the enactment of La. R.S. 14:95.8.

Based on the historical tradition restricting the possession of weapons by juveniles in Louisiana, the legislature could have instituted a total ban on a juvenile’s possession of a handgun. Instead, and in order to structure this legislation with precision, the legislature narrowly tailored the statute to provide exceptions for circumstances consistent with the possession or use of a handgun by a juvenile for a lawful purpose. A statute is narrowly tailored where, as here, it “actually advance[s] the interest asserted,” “is reasonably necessary to serve the state interest,” is not under-or over-inclusive, and no

less “restrictive alternatives . . . would serve the compelling state interest at least as well.” . . .

The statute restricts only the possession of a certain type of weapon, a handgun, which according to statistics and case law considered by the juvenile court is the most readily accessible type of weapon to juveniles, and is most often used in committing crimes. The prohibition targets only individuals aged 16 years and younger, consistent with the studies and case law showing this as the most vulnerable age group. We find the first four exceptions to the statute, La. R.S. 14:95.8(C)(1-4), describe situations in which a juvenile would possess a handgun for the lawful purposes of engaging in, or traveling to and from, activities consistent with hunting, trapping, target shooting and firearms safety. In La. R.S. 14:95.8(C)(5-7), we find the legislature acknowledged the special relationship which parents or legal guardians of children possess. Where a parent or legal guardian believes a juvenile has shown sufficient maturity and skill to possess a handgun in certain specified locations or otherwise with written permission, the legislature has crafted an exception to encompass those circumstances.

It is clear the legislature was focused on solving a particular problem — that of preventing persons sixteen years of age or younger, who might be immature and impulsive, from easily accessing handguns, in order to reduce the incidence of accidents or violent crime. We find La. R.S. 14:95.8 is narrowly tailored to achieve the legitimate purposes of the government’s interest in enacting this legislation. Considering the compelling government interest in enacting La. R.S. 14:95.8, and our finding the statute is narrowly tailored to achieve this legitimate purpose, we hold La. R.S. 14:95.8 withstands strict scrutiny analysis. The juvenile court’s ruling which severed Section C(4-7) from La. R.S. 14:95.8 is reversed.

La. R.S. 14:95(A)(1) [restrictions on carrying concealed weapons]

J.M. initially argues the changes in the language from the former version of La. Const. art. I, § 11 to its current version eliminated the legislature’s authority to place any restrictions on the carrying of a concealed weapon. Specifically, J.M. asserts the removal of the phrase: “. . . but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person” invalidates any enforcement of La. R.S. 14:95(A)(1) whatsoever.

Generally, a change to the language of an existing law, particularly the deletion of a phrase authorizing an action, indicates the legislature was aware of the original language and its interpretation and signals a change in the law. *State v. Johnson*, 884 So.2d 568, 577 (La. 2004). Clearly, this is the basis for J.M.’s argument that in doing away with the constitutional authorization for legislation restricting the carrying of concealed weapons, the voters intended to restrict the legislature’s ability to make any laws on that subject. Under this

interpretation, J.M. argues La. R.S. 14:95(A)(1) is unconstitutional and cannot serve as a basis for an adjudication of delinquency.

We disagree with J.M.'s interpretation of the effect of the constitutional amendment. In our opinion, the drafters and ratifiers did not intend to invalidate the existing law restricting the carrying of concealed weapons, or to restrict the legislature's authority to pass laws on that subject. The clear and unambiguous language of the second sentence of the amended provision ensures that **any** restriction on the right to keep and bear arms, including those laws regarding the carrying of concealed weapons, must pass the requirements of strict scrutiny. There is no limitation on the phrase "any restriction." To read the constitutional provision as J.M. urges would be inconsistent with the clear terms of the second sentence of La. Const. art. I, § 11. We hold the 2012 amendment to La. Const. art. I, § 11 did not invalidate La. R.S. 14:95(A)(1) and does not prohibit the legislature from enacting laws regarding the carrying of concealed weapons.

The juvenile court found the prohibition against intentionally carrying a concealed weapon, as applied to juveniles, overlapped the restriction on a juvenile's possession of a handgun. In dismissing similar arguments, this court has held "even assuming the two offenses totally overlapped, we are not aware of how this statutory arrangement conflicts with any constitutional principle." *State v. Smith*, 766 So.2d 501, 514 (La. 2000) (quoting *State v. Neal*, 500 So.2d 374, 378 (La. 1987)). The court has explained "the policy of our criminal code recognizes that there will be overlapping in the code sections and other statutes and expressly provides that in such cases prosecution may proceed under either provision." *Id.* Our statutory policy intends that an offender "will be protected from unwarranted multiple prosecutions by the law concerning double jeopardy." *Neal*, 500 So.2d at 378. . .

J.M. argues the prohibition against carrying concealed weapons does not pass strict scrutiny review, as there is no compelling reason for the legislation, as applied to juveniles, and the statute is not narrowly tailored. The state again asserts the compelling interest of the government in this legislation is the safety of the general public. The juvenile court found the state carried its burden of sufficient justification for the enactment of La. R.S. 14:95(A)(1). As with the prohibition against the possession of handguns by juveniles, we are again presented with a long-standing limitation on the right to keep and bear arms in Louisiana.

In *State v. Fluker*, 311 So.2d 863, 865 (La. 1975), this court presented "an historical exegesis of the concealed weapons law in Louisiana." *Fluker* noted "[t]he first statute to proscribe the concealment of weapons was enacted in 1813," the year after Louisiana became a state. The preamble to La. Acts 1813, p. 172, § 1 provided:

Whereas assassination and attempt to commit the same, have of late been of such frequent occurrence as to become a subject of serious alarm to the peaceable and well disposed inhabitants of

this state; and whereas the same is in a great measure to be attributed to the dangerous and wicked practice of carrying about in public places concealed and deadly weapons, or going to the same armed in an unnecessary manner. . .

In applying this statute, the court found “[t]his law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons.” *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850) (Ch. 15.B.1 Notes 2, 3). In upholding this statute against a Second Amendment challenge, the court found:

[t]his was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke.

State v. Smith, 11 La. Ann. 633 (1856). Against another Second Amendment challenge, the court explained: “[t]he statute in question does not infringe the right of the people to keep or bear arms. It is a measure of police, prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society.” *State v. Jumel*, 13 La. Ann. 399, 399-400 (1858).

Other than the elimination of language requiring the weapon to be in full open view, and the addition of a requirement of intentional concealment, the amendments to the statute have not changed the definition of illegally carrying a weapon to the present day. *Fluker*, 311 So.2d at 865. This type of long-standing limitation on the right to keep and bear arms is the kind of historical restriction of which the voters of Louisiana were aware when they voted for the constitutional amendment. Just as concealed weapons presented a danger to the public order in 1813, they continue to do so, particularly when those weapons are in the hands of impulsive, immature juveniles. Protecting the juvenile population from itself and protecting society-at-large from increased gun violence is now, more than ever, a compelling interest of the government. We find the state has a compelling interest in prohibiting juveniles from carrying concealed weapons.

Likewise, we find this statute is narrowly drawn to achieve the state’s legitimate interest in public safety. First, La. R.S. 14:95(A)(1) is not over-inclusive because it does not prohibit more conduct than necessary. The statute prohibits individuals from carrying a concealed firearm (or other dangerous weapon) in public without a permit. Under La. R.S. 40:1379.3, Louisiana residents over the age of 21 may obtain a permit to carry concealed weapons for up to five years. There is even a provision for a lifetime permit. The statute

at issue is not a complete ban on the carrying of concealed weapons; the statute merely places restrictions on the carrying of concealed weapons in order to protect the public. The statute is not under-inclusive, as it includes firearms and all other instruments “customarily used or intended for probable use as a dangerous weapon.” La. R.S. 14:95(A)(1).

J.M. asserts the ease with which a permit to carry a concealed weapon may be obtained negates the state’s compelling interest in enacting the prohibition in the first place. We disagree. The very fact that an individual submits his identifying information and likeness to the state, and meets the qualifications for obtaining a permit (including a demonstration of competence and training with a handgun), is at least some indicia that the individual intends to carry a concealed weapon for a lawful purpose, i.e. the defense of self or property.

Finally, J.M. contends there is no need for La. R.S. 14:95(A)(1) because the Second Amendment of the United States Constitution and La. Const. art. I, § 11 are *themselves* public safety measures. We find the legislature, in the exercise of its police power, has the authority to enact a statute prohibiting the carrying of concealed weapons. *See Fruge v. Board of Trustees of Louisiana State Employees’ Retirement System*, 6 So. 3d 124, 128 (La. 2008) (“Because the provisions of the Louisiana Constitution are not grants of power but instead are limitations on the otherwise plenary power of the people, exercised through the legislature, the legislature may enact any legislation that the constitution does not prohibit.”).

Considering the compelling government interest in enacting La. R.S. 14:95(A)(1), and our finding the statute is narrowly tailored to achieve this legitimate purpose, we hold La. R.S. 14:95(A)(1) withstands strict scrutiny analysis. The juvenile court’s ruling which held La. R.S. 14:95(A)(1) unconstitutional as applied to juveniles is reversed.

CONCLUSION

We hold the 2012 amendment to La. Const. art. I, § 11, which deleted the specific constitutional language authorizing the passage of laws regarding the carrying of concealed weapons, did not invalidate La. R.S. 14:95(A)(1) or restrict the legislature’s ability to pass laws on this subject. We further hold La. R.S. 14:95(A)(1) and La. R.S. 14:95.8 pass the strict scrutiny analysis required by the constitutional provision. The juvenile court ruling which severed Sections C(4-7) from La. R.S. 14:95.8 and held La. R.S. 14:95(A)(1) to be unconstitutional is reversed. This matter is remanded to the juvenile court for further proceedings.

REVERSED AND REMANDED.

Retired Judge MARION EDWARDS, assigned as Justice ad hoc, sitting for HUGHES, J., recused.

NOTES & QUESTIONS

1. *Strict scrutiny*. Constitutional law scholar Gerald Gunther famously described strict scrutiny as being “strict’ in theory but fatal in fact,” because few regulations survived review in the United States Supreme Court under that standard. See Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). This might have been true in 1972, when strict scrutiny was novel. But as strict scrutiny has developed, many government actions have withstood the test. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006) (finding that, from 1990 to 2003, laws challenged in federal court survived strict scrutiny 30 percent of the time). Other studies have found survival rates ranging from 12 to 48 percent, with an 88-percent survival rate in Second Amendment cases. George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 Duke L.J. Online 41, 53-54 (2018) (citing studies). The standard test for strict scrutiny has been: (1) There must be a “compelling government interest,” and (2) The law or government action must be “narrowly tailored” to that compelling interest. This means that the law must be “the least restrictive means” to protect the government interest. The government bears the burden of proof for every element. Did *Interest of J.M.* apply this test?

2. *Concealed carry, culture, and constitutional change*. Did the *Interest of J.M.* court correctly understand the application of the 2012 amendment to concealed carry laws? Why did it cite old right-to-arms cases decided generations prior to the amendment? As *Interest of J.M.* reports, nineteenth-century courts in Louisiana and elsewhere upheld restrictions on concealed carry, viewing concealment as suspicious or undesirable compared to the more forthright practice of openly bearing weapons. See Chs. 15.B, 16.H. From 1879 to 2012, Louisiana’s state constitutional right to arms included a proviso specifying that concealed carry could be banned. See, e.g., La. Const. of 1879, art. 3 (“... this provision shall not prevent the passage of laws to punish those who carry weapons concealed.”). But the 2012 amendment eliminated this proviso.

Attitudes toward concealed carry have changed since the nineteenth century: Louisiana has had a “shall-issue” concealed carry permitting statute since 1996, and over 290,000 Louisianans have been issued concealed carry permits, with about 1.6 percent of those having been revoked or suspended. Louisiana Dep’t of Pub. Safety, Office of State Police, Concealed Handgun Permit Unit, Annual Legislative Report 2019, at 1. The *J.M.* court reasons that, because the amended right to arms says “all restrictions” should get strict scrutiny, restrictions on concealed carry can survive as long as they pass strict scrutiny. It does seem plausible that many aspects of modern shall-issue permitting laws may satisfy the strict scrutiny standard on their own merits. But what do you think of *J.M.*’s further claim that nineteenth-century

concealed carry restrictions were a “type of long-standing limitation on the right to keep and bear arms [that] is the kind of historical restriction of which the voters of Louisiana were aware when they voted for the constitutional amendment”?

3. *Felon in possession laws.* In the states that have moved to strict scrutiny for the right to arms, several decisions have addressed the constitutionality of laws prohibiting convicted felons from possessing firearms. Courts have so far upheld these laws. *See, e.g., State v. Eberhardt*, 145 So.3d 377, 385 (La. 2014) (upholding ten-year ban on possession by convicted felons as constitutional both on its face and as applied to defendant previously convicted of burglarizing an occupied dwelling); *State v. Merritt*, 467 S.W.3d 808 (Mo. 2015) (upholding lifetime ban for convicted felons). The *Merritt* Court did so for nonviolent felons even though the text of the new constitutional provision made an exception only for “convicted violent felons.” The Court brushed off the argument that it must consider less restrictive alternatives, such as a firearms ban for nonviolent felons that was for a term of years, and not for life. Are there any circumstances in which you think a law prohibiting a convicted felon from owning a firearm might fail strict scrutiny?

4. Suppose you work as a lawyer for the legislature and you are tasked with writing a proposed revision of your state’s constitutional right to arms. Or if you live in a state without such a right, suppose that you were assigned to design the new state constitutional right. What language would you use? You may draw on language from past or present state constitutional arms-bearing provisions. (They are reprinted in the *A History of State Constitutional Arms-Bearing Provisions* reader on the Student Materials page of <http://firearmsregulation.org>.) Or you may create your own original text.

5. Can you think of cases in which the strict scrutiny standard might yield different results from the *Heller/Bruen* historical test?

2. *Missouri*

In 2014, Missouri voters, by a vote of 61 percent in favor, adopted Amendment 5, which amended the 1945 right to arms provision of the Missouri Constitution by adding the underlined language:

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be inalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall

be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity.

Mo. Const. art. I, § 23. The revision also eliminated a clause in the former section 23 that stated that the provision “shall not justify the wearing of concealed weapons.”

3. Alabama

In 2014, 72 percent of Alabamans voted to approve Amendment 3, which changed the Alabama Constitution’s right to arms provision to read:

(a) Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny.

(b) No citizen shall be compelled by any international treaty or international law to take an action that prohibits, limits, or otherwise interferes with his or her fundamental right to keep and bear arms in defense of himself or herself and the state, if such treaty or law, or its adoption, violates the United States Constitution.

Ala. Const. art. I, § 26. The provision’s former language, dating back to 1819, had simply stated: “That every citizen has a right to bear arms in defense of himself and the state.”

4. Iowa

A legislatively referred amendment to the Iowa constitution requires a majority vote in both houses of the state legislature in two legislative sessions, with an election for state legislators between the two sessions, and a referendum vote thereafter approving the amendment. An amendment requiring strict scrutiny review for any alleged violations of the right passed both houses in March 2019 and again in January 2021, and the requisite election took place between the two sets of votes. The proposed provision read:

Right to keep and bear arms. Sec. 1A. The right of the people to keep and bear arms shall not be infringed. The sovereign state of Iowa affirms and recognizes this right to be a fundamental individual right. Any and all restrictions of this right shall be subject to strict scrutiny.

In the November 2022 general election, the Iowa amendment passed with 65% and all but two counties voting in favor. Under the amendment, judicial review of the Iowa constitutional right to keep and bear arms is not to be based

on the U.S. Second Amendment standard from *Heller* and *Bruen*. Strict scrutiny is a methodology used in some Equal Protection and First Amendment cases. The government must prove that it has a “compelling state interest.” And the government must prove that the restriction is “narrowly tailored.” For example, the government must use the “least restrictive means” to accomplish the objective.

5. *Oklahoma*

The Oklahoma House of Representatives in March passed a resolution that would have amended the state constitutional right to arms to specify that Oklahomans have a right to possess handguns, rifles, shotguns, knives, nonlethal defensive weapons, and other arms in common use. Additionally, the amendment would specifically protect ammunition and firearm and ammunition components. The amendment also would allow the legislature to adopt time, place, and manner regulations regarding firearms only if they pass strict scrutiny. Finally, the amendment would prohibit the state or any localities from imposing registration or special taxation upon firearms, ammunition, or their components.

Although the resolution passed the state house, the state senate [referred](#) it to its rules committee and has since then taken no action on it.

6. *Tennessee*

The Tennessee Senate in April passed a resolution amending the state constitutional right to arms. It would remove the legislature’s authority “to regulate the wearing of arms with a view to prevent crime.” Instead, it would substitute the following language as the entirety of the provision: “That the citizens of this State have a right to keep, bear, and wear arms.” In the [words](#) of its sponsor, this language would align the state constitutional right with the Second Amendment.

The state house has taken [no action](#) on the proposed amendment.

7. *Kansas*

In January, numerous members of the Kansas House of Representatives introduced a constitutional amendment to Kansas’ right to arms that would expressly protect ammunition, firearm accessories, and firearm components. It would also subject any restrictions on the right to strict scrutiny.

The proposed amendment [died](#) in the chamber’s Committee on Federal and State Affairs in April.

C. STATE FIREARMS PREEMPTION LAWS

In most states, the ability of municipal and local governments to adopt separate gun control laws is heavily restricted by state *preemption statutes*. These statutes are based on a legislative determination that firearms laws should be uniform throughout the state.

Forty-three states have broad preemption statutes that prohibit municipal governments from independently restricting firearms in all or many cases. The majority of these ban all local laws that are not identical to state laws. A minority of them allow for additional regulation on certain subjects, such as firearms discharge.

Florida's statute is typical:

Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.

Fla. Stat. Ann. § 790.33(1) (2011). Florida's law also includes a feature added to several firearms preemption statutes in recent years: It authorizes a private civil action for violations, backed by a *fee-shifting* provision similar to federal civil rights statutes such as 42 U.S.C. § 1983:

A person or an organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of this section may file suit against any county, agency, municipality, district, or other entity in any court of this state having jurisdiction over any defendant to the suit for declaratory and injunctive relief and for actual damages, as limited herein, caused by the violation. A court shall award the prevailing plaintiff in any such suit:

1. Reasonable attorney's fees and costs in accordance with the laws of this state, including a contingency fee multiplier, as authorized by law; and
2. The actual damages incurred, but not more than \$100,000.

Fla. Stat. Ann. § 790.33(3)(f). Under these provisions, a citizen who brings a successful preemption challenge against a municipal gun law is entitled to recover his or her attorneys' fees from the losing city or county government.

Some states, including California and Nebraska, have limited preemption statutes. They prohibit localities from enacting separate laws on specified topics, such as the ownership of firearms. *See* Cal. Gov. Code § 53071 (“It is the intention of the legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms . . . and such provisions shall be exclusive of all local regulations. . .”).

Five states (Connecticut, Hawaii, Massachusetts, New Jersey, and New York) have no statutory preemption of weapons laws. However, in these states, particular local restrictions may still be found to be preempted by state law if they conflict with an existing statewide regulation. *See, e.g., Dwyer v. Farrell*, 475 A.2d 257 (Conn. 1984) (holding that a state law allowing individuals privately to sell a handgun after obtaining a permit preempted a conflicting city ordinance that required a seller of one personally owned handgun to obtain a federal dealer’s license).

State firearms preemption statutes reflect the state legislature’s decision to limit the authority of municipalities to enact gun controls within their boundaries. Yet many state constitutions contain *home rule* provisions that recognize the autonomy of municipal governments. The home rule doctrine takes various forms in different states, but a common formulation holds that the state government retains paramount authority to enact general laws in matters that have a statewide significance, while the municipalities have the authority, under the home rule doctrine, to regulate in matters of mainly local significance. Where does weapons regulation fall in that divide?

City of Cleveland v. State

942 N.E.2d 370 (Ohio 2010)

LUNDBERG STRATTON, J.

Today this court must decide whether R.C. 9.68, a statute enacted by the General Assembly in 2006 that provides that only federal or state regulations can limit an Ohioan’s individual right to bear arms, is a general law. We hold that R.C. 9.68 is a general law that displaces municipal firearm ordinances and does not unconstitutionally infringe on municipal home rule authority.

I. PROCEDURAL HISTORY

In 2006, the General Assembly enacted R.C. 9.68. . . , effective March 14, 2007, recognizing that the right to keep and bear arms is a “fundamental individual right” that is a “constitutionally protected right in every part of Ohio” but that there was a “need to provide uniform laws throughout the state” regulating ownership and possession of firearms. R.C. 9.68(A), 151 Ohio Laws, Part IV, 8138, 8139.

Before the General Assembly enacted R.C. 9.68, the city of Cleveland . . . enacted several ordinances regulating firearms, including Cleveland Codified Ordinances 627.08 (possession of firearms by minors), 627.09 (possessing deadly weapons on private property), 627.10 (possessing certain weapons at or

about public places), 627A.02 (access to firearms, prohibiting children's access to firearms), 628.03 (unlawful conduct, prohibiting possession and sale of assault weapons), and 674.05 (registration of handguns).

In March 2007, the city filed a complaint against the state of Ohio . . . , seeking a declaration that R.C. 9.68(1) is an unconstitutional infringement of Cleveland's home rule powers under Section 3, Article XVIII of the Ohio Constitution. . .

[T]he court of appeals held that R.C. 9.68 is not a general law, that it unconstitutionally limits municipalities' home rule powers, and that it violates the separation of powers doctrine of the Ohio Constitution. We accepted the state's discretionary appeal. For the reasons that follow, we reverse the judgment of the court of appeals.

II. LAW and ANALYSIS

. . . Section 3, Article XVIII of the Ohio Constitution, commonly known as the Home Rule Amendment, gives municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Today we must determine whether R.C. 9.68 is a general law.

We first turn to the words of the statute in question. R.C. 9.68 provides:

"(A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition."

Traditionally, we have used a three-part test to evaluate conflicts under the Home Rule Amendment. A state statute takes precedence over a local ordinance when "(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." *Mendenhall v. Akron*, 881 N.E.2d 255, 260 (2008).

The first and third parts of the analysis are not involved in this case. The city acknowledges that its firearm ordinances are an exercise of municipal police power. Further, the city does not argue that its local firearm ordinances do not conflict with R.C. 9.68. Thus, our focus is on the second part of the home

rule analysis, which involves determining of whether R.C. 9.68 is a general law.

A. Is R.C. 9.68 a General Law for Purposes of Home Rule Analysis?

“A general law has been described as one which promotes statewide uniformity.” *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted*, 602 N.E.2d 1147, 1149 (1992). “Once a matter has become of such general interest that it is necessary to make it subject to statewide control as to require uniform statewide regulation, the municipality can no longer legislate in the field so as to conflict with the state.” *State ex rel. McElroy v. Akron*, 181 N.E.2d 26, 30 (1962).

In *Canton v. State*, 766 N.E.2d 963 (2002), this court held that to constitute a general law for purposes of home-rule analysis, a statute must “(1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.”

Applying the *Canton* test, the court of appeals concluded that R.C. 9.68 is not a general law, because it failed the first, third, and fourth prongs of the *Canton* test. For the reasons that follow, we disagree.

1. Statewide and Comprehensive Legislative Enactment

Under the first prong of the *Canton* test, we must examine whether R.C. 9.68 is part of a statewide and comprehensive legislative enactment. The court of appeals held that Sub.H.B. No. 347 pertains to a matter of statewide concern but that it is not comprehensive, because it leaves a “great deal of firearm activity unregulated.” *Cleveland v. State*, 923 N.E.2d 183, 187 (2009). Specifically, the court held that Sub.H.B. No. 347 did not address discharge of firearms, possession and sale of assault weapons, carrying firearms in public places, possession and use of firearms by minors, registration of handguns, registration and licensing of firearm dealers, licensing of firearm owners, and background checks for firearm purchasers.

In *Clyde*, this court held that “[t]he General Assembly reiterated the need for uniformity in R.C. 9.68(A), which represents an attempt by that body to nullify all municipal laws impeding uniform application of the state statute.” *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967, 974 (2008). In addition to pointing to the words of the statute, we concluded that “[t]he General Assembly could not have been more direct in expressing its intent for statewide comprehensive handgun-possession laws.” *Id.* Thus, this court held that R.C. 2923.126, “which regulates handgun possession as part of the licensing procedure,” was a statewide comprehensive legislative enactment. *Id.*

Therefore, today we reaffirm what we held in *Clyde*—that R.C. 9.68 is part of a comprehensive statewide legislative enactment—and we hold that the court of appeals erred in analyzing R.C. 9.68 in a vacuum. There are a host of

state and federal laws regulating firearms. For example, statutes prohibit possession of firearms in specific places. *See, e.g.*, R.C. 1547.69 (vessels), 2921.36 (detention and mental health facilities), 2923.121 (liquor establishments), 2923.122 (school zones), and 2923.123 (courthouses). Other statutes preclude discharge of firearms in certain locations. *See, e.g.*, R.C. 1541.19 (state parks), 2909.08 (airports), 2923.16 (motor vehicles), 2923.161 (habitation structures), and 2923.162 (cemeteries, schoolhouses, churches, dwellings, charitable institutions, and public roads).

In addition, there are statutes that prohibit certain persons from possessing firearms. *See, e.g.*, R.C. 2923.13 (felons and incompetents), 2923.15 (persons under the influence of drugs or alcohol), and 2923.211 (minors). Further, state law bans the acquisition and possession of certain firearms, such as automatic firearms, sawed off firearms, zip guns, and semiautomatic weapons. R.C. 2923.11(E) and (K) and R.C. 2923.17. Other statutes preclude the reckless transfer of a firearm to a person with a disability, R.C. 2923.20, preclude the defacement of identification marks on firearms, R.C. 2923.201, authorize interstate firearm transactions, R.C. 2923.22, and specify that locking devices be offered with all firearm sales, R.C. 2923.25.

Other state statutes establish a framework of laws regarding carrying concealed handguns. *See, e.g.*, R.C. 2923.125 (licensing procedures) and 2923.126 (listing of places where carrying concealed handguns is prohibited and where it is permitted). Still other statutes enhance criminal sentences when a defendant commits certain offenses with a firearm. *See, e.g.*, R.C. 2941.141 (one-year prison term for general firearm specification), 2941.144 (six-year prison term for possessing an automatic firearm or a firearm with a muffler), 2941.145 (three-year prison term for displaying or brandishing a firearm), 2941.146 (five-year prison term for discharging a firearm from a motor vehicle), and 2941.1412 (seven-year prison term for discharging a firearm at police officers or corrections officers).

Finally, our state firearm laws also integrate federal firearm laws. *See, e.g.*, R.C. 2923.22(C). Federal laws impose mandatory background checks for firearm purchasers and prohibit persons with certain disabilities (such as prior felony convictions, mental defects, or illegal alien status) from possessing firearms. 18 U.S.C. §§ 922(g), (s), (t). Federal laws also require firearm dealers to meet specific qualifications and obtain a license, and they criminalize the transport and sale of firearms by unlicensed persons. *Id.* §§ 922(a), 923. In addition, federal law requires that the sale of two or more firearms be reported to the attorney general and state law enforcement, *id.* § 923(g)(3)(A), and requires that records of importation, production, shipment, receipt, sale, or other disposition of firearms be maintained. *Id.* § 923(g)(1).

A comprehensive enactment need not regulate every aspect of disputed conduct, nor must it regulate that conduct in a particularly invasive fashion. *See Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906, 913 (2008) (“There is no requirement that a statute must be devoid of exceptions to remain statewide

and comprehensive in effect”). . . Nor does “comprehensive” mean “exhaustive.” And the fact that regulations of firearms appear in various code chapters does not nullify the fact that they are all part of a comprehensive enactment concerning firearms. This court, in *Am. Fin. Servs. Assn. v. Cleveland*, 858 N.E.2d 776 (2006), held that the General Assembly had enacted comprehensive consumer mortgage lending regulations even though the applicable provisions — R.C. 1.63 and 1349.25 through 1349.37 — were codified in two different chapters. *Id.* at 783. . .

We reaffirm the holding that R.C. 9.68 is part of a statewide comprehensive legislative enactment. . .

3. Establishes Police Regulations Rather Than Granting or Limiting Municipal Legislative Power

Under the third prong of the *Canton* test, a general law must set forth police, sanitary, or similar regulations rather than simply granting or limiting municipal legislative power. The court of appeals held that R.C. 9.68 attempts to curtail the city’s home rule police powers without enacting legislation to remedy the purported ill of a confusing patchwork of municipal regulations involving firearms. The appellate court once again found that R.C. 9.68 has many gaps, and to support that holding, it relied on Justice O’Connor’s concurring opinion in *Cincinnati v. Baskin*, 859 N.E.2d 514 (2006), wherein she stated: “In comparison to other states, Ohio has barely touched upon the subject of firearm possession, use, transfer, and ownership.” *Id.* at 528.

However, the fact that some states have more regulations than Ohio does not warrant a conclusion that Ohio’s statutory scheme for regulating firearms is not comprehensive, nor does it mean that R.C. 9.68 does not set forth a police regulation. We conclude that R.C. 9.68 establishes police regulations rather than limiting municipal legislative power.

4. Prescribes a Rule of Conduct Upon Citizens Generally

The court of appeals held that R.C. 9.68 does not prescribe a rule of conduct upon citizens generally but instead limits lawmaking by municipal legislative bodies. However, we note again that the court of appeals erred in considering R.C. 9.68 in isolation rather than as part of Ohio’s comprehensive collection of firearm laws. . . Thus, when we consider the entire legislative scheme, as we must, we conclude that when interpreted as part of a whole, R.C. 9.68 applies to all citizens generally. . .

III. CONCLUSION

R.C. 9.68 addresses the General Assembly’s concern that absent a uniform law throughout the state, law abiding gun owners would face a confusing patchwork of licensing requirements, possession restrictions, and criminal penalties as they travel from one jurisdiction to another. We hold that R.C. 9.68 is a general law that displaces municipal firearm ordinances and does not unconstitutionally infringe on municipal home rule authority. . . Accordingly,

we reverse the judgment of the court of appeals and remand the cause to the court of appeals for it to address the city's assignment of error that Sub.H.B. No. 347 violates the one subject rule, an issue which the court of appeals previously held to be moot.

Judgment reversed and cause remanded. . .

PFEIFER, J., dissenting.

The Home Rule Amendment, Section 3, Article XVIII, Ohio Constitution, states: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws."

In *Am. Fin. Servs. Assn. v. Cleveland*, 858 N.E.2d 776, 782 (2006), the court stated: "A statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent * * * but does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment * * *." From this, I conclude that the General Assembly is incapable of casting a preemption blanket over an entire field.

The key issue when analyzing whether a local ordinance is a proper subject of home rule is whether the ordinance conflicts with general laws. In *Cincinnati v. Hoffman*, 285 N.E.2d 714, 719 (1972), we stated that "in order for * * * a conflict to arise, the state statute must positively permit what the ordinance prohibits, or vice versa, regardless of the extent of state regulation concerning the same object." We have also stated that "[n]o real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa." *Struthers v. Sokol*, 140 N.E. 519, 521 (1923).

It is not enough to determine that R.C. 9.68 is a general law or that R.C. 9.68 is extensive; the Cleveland ordinances must be shown to conflict with the statute. In this case, I conclude that the Cleveland ordinances do not conflict with R.C. 9.68, because they do not permit something that the statute forbids or vice versa. *Sokol* at paragraph two of the syllabus.

Paragraph three of the syllabus in *Sokol* is even more specific; it states: "A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law * * *." I believe that R.C. 9.68 infringes upon municipalities' constitutional home-rule rights by preventing them from tailoring ordinances concerning the regulation of guns to local conditions. I dissent. . .

In 2022, Philadelphia's mayor issued an executive order banning licensed carry at all city-owned recreation spaces, including parks, basketball courts

and pools. Office of the Mayor, Executive Order 4-22 (Sept. 7, 2022). A state trial held that the ban is preempted by the state's Uniform Firearms Act. *Gun Owners of Am. v. Philadelphia*, No. 2647 (Phil. Cty. Ct. of Common Pleas, 1st Dist. Oct. 3, 2022) (preliminary injunction); *McBride v. City of Philadelphia*, No. 2647 (Phil. Cty. Ct. of Common Pleas, 1st Dist. Aug. 13, 2024) (permanent injunction).

In contrast, Philadelphia's ban on home manufacture of guns by nonFFLs was held 4-3 not to violate the state's Uniform Firearms Act, because the parts used to manufacture firearms are not themselves firearms. The dissent pointed to state firearms law preemption precedents that had declined to read the Uniform Firearms Act "hyper-literally." *Gun Owners of America v. Philadelphia*, 311 A.3d 72 (Pa. Commw. 2024).

A Florida statute allows civil actions and penalties against local officials who willfully violate the state firearms preemption law. Fla. Stats. § 790.33. Several elected officials argued that the statute violates common law legislative immunity and governmental function immunity. By 5-1, the Florida Supreme Court disagreed. "[T]o engage in conduct that is prohibited by statute is not a discretionary function." *Fried v. State & City of Weston v. State*, 355 So.3d 899 (Fla. 2023).

Lebanon, Ohio, allows licensed carry in its municipal building, such as during city council meetings, but not while court is in session. The ordinance was held not to violate Ohio's preemption law. *Donovan v. City of Lebanon*, No. 21-CV-094117 (Ohio Ct. Common Pleas, Warren Cty., Apr. 4, 2023).

Ongoing preemption litigation over gun control laws enacted by the city of Columbus, Ohio, has been complicated by the city's location in three different counties. The Columbus ordinances are presently enjoined. *Doe v. City of Columbus*, No. 23 CV H 02 0089 (Ct. Common Pleas, Del. County, May 12, 2023). The case is presently before the Ohio Supreme Court. *Doe v. City of Columbus*, No. 2024-0056 (Ohio 2024) (docket); 173 Ohio St.3d 1443 (2024) (accepting appeal). Besides the merits, the case involves the appealability of preliminary injunctions.

In 2018, the Ohio legislature strengthened the state's preemption statute, Ohio Rev. Code § 9.68, by expanding the scope of covered laws and by providing for citizen enforcement by lawsuits, which could seek damages, injunctive relief, declaratory relief, and, if successful, a mandatory award of attorneys' fees. A 2022 amendment added knives to the preemption statute. Ohio's intermediate appellate court reversed a preliminary injunction which had held 2018 and 2022 amendments to violate Ohio's Home Rule constitutional amendment. "To the extent the 2018 and 2022 amendments to the law may have altered its preemptive effects and expanded the liability of political subdivisions that act in conflict with it, the City has not proven by clear and convincing evidence that those amendments change the constitutional calculus

forged by *City of Cleveland* (2010).” (Part C). *Cincinnati v. State*, 2024-Ohio-2425 ¶61 (Ohio App. 2024).

NOTES & QUESTIONS

1. *Statewide preemption statutes and home rule in Colorado*. Under Colorado’s “home rule” amendment, Colo. Const. art. XX, § 6, courts divide legislative subjects into matters of statewide concern, where state authority is exclusive; matters of mixed state and local concern, where both can legislate, but state law controls; and matters of local concern, where home rule cities, like Denver, enjoy exclusive authority.

When Colorado broadly preempted firearm regulation, Denver sued for a declaration upholding its ordinances. A trial court upheld Denver’s bans on (1) open handguns carry, (2) so-called “assault weapons,” and (3) the retail sale of so-called “Saturday Night Specials” (small inexpensive handguns). The court struck (1) some of Denver’s restrictions on carrying firearms in automobiles, (2) some restrictions on firearms possession by juveniles, and (3) prohibition of licensed concealed carry in Denver city parks. On appeal, a 3-to-3 Colorado Supreme Court “affirmed by operation of law.” *State v. City and County of Denver*, 139 P.3d 635 (Colo. 2006).

A subsequent state district court decision held that a later state supreme court preemption decision controlled. *Chambers v. City of Boulder*, No. 2018CV30581 (D. Boulder, Mar. 12, 2021) (“*City & County of Denver* . . . is nonbinding and was issued before the supreme court decided [*City of Longmont v. Colorado Oil & Gas Ass’n*, 369 P.3d 573, 580 (Colo. 2016)]”) *Chambers* voided, on preemption grounds, Boulder’s ban on “assault weapons” and magazines capable of holding more than 10 rounds. Most of the court’s analysis focused on the need for statewide uniformity in firearm laws to prevent the criminalization of unsuspecting travelers who pass through localities with divergent regulations. Part of the court’s analysis focused on the legislature’s pronouncements to this effect.

In response, the Colorado legislature passed legislation explicitly permitting local firearm regulation. [SB21-256, 2021 Reg. Sess. \(Colo. 2021\)](#). The bill removes existing statutory language declaring that statewide uniformity was desirable. For example, it strikes from statute: “It is necessary to provide statewide laws concerning the possession and ownership of firearms to ensure that law-abiding persons are not unfairly placed in the position of unknowingly committing crimes involving firearms.”

The bill’s expansion of local power to regulate public carry was less broad. It allowed localities to “prohibit[] a permittee from carrying a concealed handgun in a building or specific area.” It did not define “specific area.” The bill requires that such concealed carry regulation (but not other local regulation) be noticed by “signs at the public entrances to the building or specific area.” It awaits the governor’s signature.

2. *Must states adopt legal restrictions on guns in order to validly preempt municipal restrictions?* The *City of Cleveland* majority concludes that Ohio's statewide gun laws (which are those of a typical American state) contain enough regulation of firearms that they qualify as a "comprehensive legal enactment" together with the state preemption statute, which was necessary for the preemption statute to validly preempt the laws of a home rule municipality like Cleveland. Notice that Ohio Rev. Code 9.68, the preemption statute challenged in *City of Cleveland*, invoked the Ohio right to bear arms as part of the justification for the statute. *See* Ohio Const. art. I, § 4 ("The people have the right to bear arms for their defense and security. . .").

3. *Firearm federalism or firearm localism?* One argument in favor of preemption statutes stresses the value of predictability and uniformity. Allowing each city or county in a state to adopt its own body of gun regulations risks creating a patchwork of conflicting requirements that will be difficult for an individual to comply with, particularly if he or she crosses city or county lines in the course of work or leisure, as many Americans regularly do. For example, if some of the municipalities along a bicyclist's route to work allow carry while others ban it, in practice the rider is going to be chilled from exercising the ability to carry at all. On the other hand, some scholars argue that urban areas have very different public safety needs and cultural attitudes toward firearms than rural areas do; thus, municipalities should retain the power to independently regulate guns. For a debate canvassing the arguments for and against statewide preemption, see Michael P. O'Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 Yale L.J. Online 359 (2014) and Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82 (2013).

4. *Knife preemption laws.* From 2010 to 2020, 12 states amended their preemption statutes to prohibit municipal regulation of knives as well as firearms and ammunition. The Kansas statute reads: "A municipality shall not enact or enforce any ordinance, resolution, regulation or tax relating to the transportation, possession, carrying, sale, transfer, purchase, gift, devise, licensing, registration or use of a knife or knife making components." Kan. Stat. Ann. § 12-16,134(a) (2014). Proponents note that many persons who are licensed to carry a firearm will also carry a knife for self-defense. If a city or county is barred from restricting a person from carrying a gun, then it may be difficult to find a rational basis for letting that locality criminalize the person's choice to carry a particular style of knife. Are the knife preemption laws sensible? Should they be expanded into generalized "arms preemption" laws that include nonlethal weapons like pepper spray? *See generally* David B. Kopel, Clayton Cramer & Joseph Olson, *Knives and the Second Amendment*, 47 U. Mich. J.L. Reform 175 (2013); Ch. 9.C (nonfirearm arms).

5. *Preemption and public transit.* Public transit is often not covered by preemption laws, either explicitly or by operation of other law. In Illinois, for example, rapid transit systems are exempted from the state's preemption

statute. 430 Ill. Comp. Stat. 66/65(a)(8). In Texas, an Attorney General opinion states that a rapid transit authority may prohibit concealed carry on their vehicles. Tex. Op. Att’y Gen. DM-364 (1995). The Supreme Court of Wisconsin, however, held that the City of Madison, through its Transit and Parking Commission, may not prohibit the concealed carriage of “any knife or firearm or weapon” as long as all other applicable laws are complied with. *Wisconsin Carry, Inc. v. City of Madison*, 892 N.W. 2d 233, 254 (Wis. 2017).

6. *Preemption and Public Carry — Public Universities.* In *Bd. of Regents of Higher Educ. of Mont. v. State of Montana*, 512 P.3d 748 (June 29, 2022)⁶⁸ the Montana Supreme Court struck down Mont. Code Ann. § 45-3-111. This law was passed by the state legislature to eliminate the authority of the Montana University Board of Regents to regulate the public carry of firearms on the Montana University System (MUS) campuses. The new law merely required compliance with Montana state law in order to carry firearms on MUS campuses. The Board of Regent’s Policy 1006 had effectively banned both the open and concealed carry of firearms on all MUS campuses. The decision does not specifically discuss Montana’s preemption doctrine, codified at Mont. Code Ann. § 45-8-351 which reads:

Restriction on local government regulation of firearms. (1) Except as provided in subsection (2), a county, city, town, consolidated local government, or other local government unit may not prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any weapon, including a rifle, shotgun, handgun, or concealed handgun.

(2)(a) For public safety purposes, a city or town may regulate the discharge of rifles, shotguns, and handguns. A county, city, town, consolidated local government, or other local government unit has power to prevent and suppress the carrying of unpermitted concealed weapons or the carrying of unconcealed weapons to a publicly owned and occupied building under its jurisdiction.

(b) Nothing contained in this section allows any government to prohibit the legitimate display of firearms at shows or other public occasions by collectors and others or to prohibit the

⁶⁸ Published one week after the U.S. Supreme Court issued its opinion in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

legitimate transportation of firearms through any jurisdiction, whether in airports or otherwise.

The Montana high court side-stepped the firearm preemption issue by finding that Montana Board of Regents was not a “local government” subject to the legislative control of the Montana Legislature:

Under the 1889 Montana Constitution, the Legislature possessed absolute authority over the Board, which was vested with "general control and supervision of the State University . . . [with] powers and duties [as] prescribed by law." Mont. Const. of 1889, art. XI, § 11. The 1972 Constitution removed the language subjecting the Board's powers and duties to legislative control and instead vested the Board with the "full power, responsibility, and authority to supervise, coordinate, manage and control the [MUS] and . . . supervise and coordinate other public educational institutions assigned by law." Mont. Const. art. X, § 9(2)(a). By the plain language of Mont. Const. art. X, § 9, the Board retains full independence over the MUS.

Bd. of Regents of Higher Educ. of Mont., 512 P.3d at 751.

Note that the Montana Supreme Court found that “Montana is not immune from the catastrophic loss that follows the use of firearms on school campuses. . . The Board, not the Legislature, is constitutionally vested with full authority to determine the [firearm regulation] priorities of the MUS.” The Court’s finding was not that MUS was not immune from liability, but that the State of Montana was not immune.

The Court then concluded that the “Board is constitutionally vested with full responsibility to supervise, coordinate, manage, and control the MUS and its properties. The regulation of firearms on MUS campuses falls squarely within this authority. As applied to the Board, Sections 3 through 8 of HB 102 [Mont. Code Ann. § 45-3-111] unconstitutionally infringe[d] upon the Board's constitutionally derived authority.”

The Court’s rationale explicitly links exposure to liability to authority to regulate firearms. The Court’s opinion then appears to concede that the State of Montana’s treasury remains at risk for injuries when crimes involving firearms happen on campus. Yet the Board of Regents can turn MUS campuses into “gun-free zones” and thus override the Legislature’s policy designed to mitigate that liability by allowing the law-abiding public to carry of firearms for self-defense on MUS campuses in the same manner that they do in the rest of the state.

7. *Preemption and Public Carry – Public Land Leased to Private Entities.* In *Herndon v. City of Sandpoint*, 2023 WL 4111076 (Idaho June 22, 2023), the Idaho Supreme Court found no state constitutional or statutory barrier to a municipality leasing a public park to a private music festival, who in turn

banned the public from carrying firearms on park grounds during the period of time the park was leased to the festival operators.

Idaho's preemption doctrine is codified at Idaho Code § 18-3302J:

(1) The legislature finds that uniform laws regulating firearms are necessary to protect the individual citizen's right to bear arms guaranteed by amendment 2 of the United States Constitution and section 11, article I of the constitution of the state of Idaho. It is the legislature's intent to wholly occupy the field of firearms regulation within this state.

(2) Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition. . .

An exception to Idaho's constitutional carry (Ch. 10.D.6.b) policy is found at Idaho Code § 18-3302(25): "Nothing in [Idaho's constitutional carry statute] shall be construed to limit the existing rights of a private property owner, private tenant, private employer or private business entity."

The plaintiffs had argued that the government of the City of Sandpoint was fully preempted from regulating firearms in the public park — and as the city was not "a private property owner" — that it could not convey the right to regulate firearms in the public park to the music festival through the artifice of a lease.

The Idaho Supreme Court disagreed, and upheld the lease provision as a short-term conveyance of public property, that transmuted the public park to private property for the duration of the lease. This allowed the festival to take full advantage of I.C. § 18-3302(25) as if they were private property owners of the public park.

8. Both *Board of Regents* and *Herndon* side-stepped the head-on conflict between state governments regulating the public carrying of firearms and what are arguably subordinate political entities promulgating their own, in some cases, contradictory policies.

Is this conflict or confusion exactly what a preemption doctrine is supposed to address? What other policy objectives do firearm preemption laws achieve?

- a. Could a state legislature conclude that mitigation of mass shooting casualties is best achieved by allowing all law-abiding citizens to provide for their own self-defense, and that in exercising for their own self-defense the armed private citizen becomes the first line of defense against these horrific events?

- b. In *DeShaney v. Winnebago County*, 489 U.S. 189 (1989) the U.S. Supreme Court found no constitutional violation when governments fail to protect someone from criminal conduct. There are exceptions to this general rule: (1) when the state takes a person into custody, thus confining the person against his or her will; (2) the “state-created danger” doctrine where the state actor creates the danger or renders a person more vulnerable to an existing danger, *Id.*, 489 U.S. at 198-201; and (3) conduct by a government actor that is arbitrary or shocks the conscience in a constitutional sense. See *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *Waddell v. Hendry County Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003).

The properties at issue in *Board of Regents* and *Herndon* are still public property (state university campus and city park). Are the government actors (school administrators and city managers) placing anyone who would normally carry a firearm for self-defense in greater danger by forbidding him or her from exercising the right to carry on these public properties?

The case of *Peschke v. Carroll College*, 929 P.2d 874 (1996), cited in the Montana case, was brought by the estate of an employee of the MUC who had been murdered on campus. The case went to the jury on a negligence cause of action on the proposition that the college had failed to provide a safe and secure place to work. The Montana Supreme Court upheld the jury verdict in favor of the college; the jury found that the college had not breached its duty of care on a negligence claim. But what if Emma Peschke normally carried a gun for self-defense? A right since *Bruen*, recognized by the Supreme Court, even in public.

What if Emma Peschke was trained and proficient in the use a handgun and likely could have neutralized the threat against her? Would the MUC's policy of disarming everyone on campus constitute a “state-created danger”? Would this be an exception to *DeShaney*? Would the estate of Emma Peschke have had more than just a negligence work place claim to bring if the same events occurred today, post-*Bruen*? Assuming she could prove causation (normally a question for the jury) that “but for” the campus's gun-free zone policy, she would have carried a gun and neutralized the threat, should she (or her estate) be able to bring a claim against state-actors for infringing the right of self-defense?

D. MODERN STATE GUN CONTROL LAWS

Chapter 4 covers federal law on firearm possession and transfer. This Part provides a summary of state law analogs to federal regulation, where applicable. It also covers additional issues in state firearms regulation. Inasmuch as state residents and visitors are subject to both sets of rules, the material in this Part is complementary to that in Chapter 4.

1. Purchasing a Gun

A minority of states and localities impose their own restrictions on firearm purchases. These could include a waiting period of several days before you can take possession of the gun, *e.g.*, Fla. Const. art. I, § 8(b); Fla. Stat. § 790.0655(1) (2017) (three-day waiting period between the purchase and delivery of a handgun); acquiring a special license that allows you to possess firearms, such as Illinois’s FOID (Firearm Owners Identification) card, 430 ILCS 65/2 (2016); a requirement to obtain the approval of state or local law enforcement officials for each purchase, *e.g.* Minn. Rev. Stat. § 624.7131 (2008) (purchase permit issued by local law enforcement for each retail purchase of a handgun or “semiautomatic military-style assault weapon,” unless the purchaser holds a valid concealed-carry permit); or a requirement to pass a safety class. In a few highly restrictive places — such as New York City or Washington, D.C. — the process of acquiring a firearm, including a long gun, can take months.

A minority of states require that all firearm transactions, including those between private individuals who engage in the occasional purchase, sale, or trade with a resident of the same state be routed through a federally licensed firearms dealer (FFL), and comply with whatever additional rules apply in that state to FFL sales. Several states have adopted laws, promoted by Michael Bloomberg’s Everytown advocacy group, that require most private transfers of firearms to be conducted through a licensed dealer, and define “transfers” in an unusual way that includes many temporary loans and returns of firearms.² A few states also restrict out-of-state long gun purchases by their residents. (The federal Gun Control Act forbids interstate handgun purchases. Ch. 4.A.1.a.iii)

2. Gun Registration

California, the District of Columbia, Hawaii, American Samoa, Guam, Puerto Rico, the U.S. Virgin Islands, and a few cities, such as Chicago and New York, require the registration of all firearms. *E.g.*, Haw. Rev. Stat. Ann. §§ 134-3(a), (b) (2016) (requiring registration, within five days, of all firearms purchased or brought into the state). New York State and a few others register handguns only.

States that have enacted bans on “assault weapons” have required retroactive registrations for grandfathered owners (California, Connecticut, Hawaii, Maryland, New Jersey, New York). Retroactive registration laws have very low rates of compliance, a problem that has persisted ever since Arkansas attempted retroactive registration of all guns in 1923, repealing the law in

² See David B. Kopel, Background Checks for Firearms Sales and Loans: Law, History, and Policy, 53 Harv. J. on Legis. 303, 313-31 (2016).

1925 due to noncompliance. *See* Kopel, *Background Checks*, at 346. The Arkansas fiasco was one reason that the National Conference of Commissioners on Uniform State Laws rejected putting registration in the model Uniform Firearms Act. *Id.*; Ch. 3.A.3.a (Uniform Firearms Act). For more on defiance rates and likely responses to de facto registration schemes, *see* George A. Mocsary, *Insuring Against Guns?*, 46 Conn. L. Rev. 1209, 1258-62 (2014) and Chapter 9.A Note 17.

Separately, some states and territories require licenses for some or all gun owners. The licensing system functions as a registration system for gun owners, although not necessarily for all of their guns. States and territories that require a license to own a gun are Connecticut, Hawaii, Illinois, Massachusetts, New Jersey, American Samoa, Guam, and Puerto Rico. States with licensing only for handguns are Iowa, Maryland, Michigan, Nebraska, New York, North Carolina, and Rhode Island. Once the license is granted, some states further require specific advance permission for the acquisition of an additional firearm. The District of Columbia does not formally have firearms owner licensing, but its registration system process of requiring permission in advance for acquiring any firearm amounts to the same thing.

3. Keeping a Gun at Home

As with any potentially lethal instrument, the general rules of criminal and civil negligence apply to use and storage of a firearm. A minority of jurisdictions have adopted special storage laws for firearms, such as requirements that the firearm be stored in such a way as to make them inaccessible to minors. The most stringent laws, in Massachusetts and San Francisco, require all firearms not under the user's immediate control to be stored in a locked container or disabled with a weapon lock.³ California, Connecticut, and New York have less severe lock mandates.

4. Target Shooting

Target ranges may be open to the public or may be private clubs. Many private clubs are open to the public on some days of the year, especially before hunting season. Public ranges may be operated by the government or by private organizations. Public lands (e.g., those managed by the National Forest Service or Bureau of Land Management) are generally open to the public for target shooting; such lands may also have designated places for target shooting.

³ Mass. Gen. Laws ch. 140, § 131L (2014); S.F., Cal., Police Code art. 45, § 4512(a), (c)(1); *see* Ch. 10.A Note 2 (discussing *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), which upheld San Francisco's storage law, and *Jackson v. City and County of San Francisco*, 576 U.S. 1013 (2015) (Thomas, J., dissenting from denial of cert.)).

A person driving to the target range is required in some states to keep the gun unloaded and locked away, unless he or she has a concealed-carry permit (see below). In a handful of jurisdictions, such as New York or New Jersey, a specific license to transport even an unloaded handgun to and from the target range is needed.

Laws about ranges themselves are discussed in Section D.7.b.

5. Hunting with a Gun, and the Right to Hunt

State game laws vary widely. Some require a hunting license for all hunting, some only for hunting on public land, and some for hunting outside the confines of one's own land. In all states, the laws and regulations specify with particularity the lawful hunting seasons for various species. States may also limit the types of guns you can use to hunt—for example, by requiring rifle hunters to use a cartridge at or above a minimum power level sufficient for humanely taking a particular species of game. Hunting licenses require a hunter safety card, which is earned by taking and passing a hunter safety class.

All states follow the North American Model of Wildlife Conservation (Ch. 16.G.6). The quantities of permits and seasons are managed so that species are maintained at a healthy level. Thus, for some species (e.g., coyotes in Colorado), year-round hunting might be allowed. For others (e.g., elk), the state is divided into game management units, and the number of permits issued for a particular unit would depend on animal population that particular year. If the population is down, the number of hunting permits issued for the next year in that unit would be reduced. The North American Model has been in use for over a century and has been very successful at maintaining and growing populations of game animals. Fishing in the United States is also managed pursuant to this model.

While the terms of hunting licenses differ from state to state, a typical *small game* permit might authorize the hunting of foxes, rabbits, squirrels, and similar species. The permit would be usable statewide, during the specified seasons for each species. For larger game, a more detailed permit is usually required, authorizing hunting only of a particular species, only during a particular week or weeks, or only within a particular part of the state.

Hunters who travel to another state to hunt usually pay much more for an out-of-state hunting license than a home state one. Indeed, out-of-state hunters are a major economic resource for most state wildlife departments. *Cf. Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978) (differential fees for nonresidents do not violate the Constitution's Article IV "Privileges and Immunities" clause).

Except for obviously nonedible species, such as prairie dogs, hunting laws require that hunters harvest the meat and take it home for consumption. They are usually allowed to give away some of the meat, but not to sell it.

Twenty-three state constitutions guarantee the right to hunt and fish. Their full text is available online at Nathaniel DeMelis, *State Right-to-Hunt and Right-to-Fish Constitutional Provisions*, Student Materials, Firearms Law and the Second Amendment: Regulation, Rights, and Policy. Vermont put the right to hunt into its 1777 Constitution and kept it in 1786. All the other constitutional provisions are amendments added in 1996 or later. The provisions acknowledge the government's authority to regulate hunting and fishing, such as for long-term conservation. Some of the more verbose provisions specifically state that they do not alter existing trespass laws. Others state that hunting and fishing are the preferred means of managing nonthreatened species.

The right to hunt has deep roots in America. Most of the emigrants from the British Isles who emigrated to America were not allowed to hunt in the old country, but hunting in America was open for everyone. As Blackstone had observed, the very restrictive British game laws were sometimes a pretext for disarming the common people. Online Chs. 22.

The Second Amendment right includes arms for hunting, according to St. George Tucker's 1803 *Blackstone*. Ch. 14.F.2.a. *Heller* said that the Second Amendment unquestionably protects militia use of arms, but "whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case." *Heller*, 554 U.S. at 636-37. Further, "Americans valued the ancient [militia] right; most undoubtedly thought it even more important for self-defense and hunting." *Id.* at 599. All lower courts to address the issue have agreed that the Second Amendment right includes arms for hunting.⁴ So did the D.C. Circuit decision that was affirmed in *Heller*: "That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad)." *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 6.A).

⁴ E.g., *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 206-07 (5th Cir. 2012) (federal law prohibiting 18- to 20-year-olds from buying handguns in stores does not affect their ability to "possess and use handguns for self-defense, hunting, or any other lawful purpose"); *United States v. Carter*, 669 F.3d 411, 414-15 (4th Cir. 2012) ("The Court noted that the right to keep and bear arms was understood by the founding generation to encompass not only militia service, but also 'self-defense and hunting.'"); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1252 (D.C. Cir. 2011) (Ch. 10.A Note 2) ("not only to maintain the militia, but also for self-defense and hunting") (internal citations omitted); *United States v. Rene E.*, 583 F.3d 8, 14, 16 (1st Cir. 2009) (state law restricting handgun possession by minors "contains important exceptions" for "self- and other-defense in the home, national guard duty, and hunting, among other things").

NOTES & QUESTIONS

1. The right to hunting arms is certainly part of the Second Amendment, but what is the right to hunt? Could it be an unenumerated right protected by the Fifth, Ninth, or Fourteenth Amendment? If the Second Amendment were interpreted to be militia-only, could it still include a right to hunt? Consider the observation of an Englishman during the reign of Elizabeth I: “Hunting is a military exercise; the like stratagem is often invented and executed in war against soldiers as the hunter doth against divers kinds of beasts.” Charles Carlton, *This Seat of Mars: War and the British Isles, 1485-1746*, at 33 (2011).

2. *Further reading:* Joseph Blocher, *Hunting and the Second Amendment*, 91 Notre Dame L. Rev. 133 (2015); Stephen P. Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 Wm. & Mary Bill of Rights J. 197 (2010); Michael L. Smith, *Shooting Fish*, 12 Ky. J. Equine, Agric. & Nat. Resources L. 187 (2020) (states’ laws against shooting fish; also covers fishing with explosives, spears, etc.); James B. Whisker, *The Right to Hunt* (rev. ed. 2010) (philosophical and legal perspectives).

6. *Carrying a Gun for Protection*

a. At Home or in One’s Place of Business or Automobile

If one lawfully owns a gun, no permit is required to carry a gun at home. Only in a few jurisdictions is a permit needed at one’s own place of business. “Place of business” generally means one that the person owns or operates, not a place where he or she is an employee. In some jurisdictions, an employer is allowed to authorize his or her employees to carry a firearm at the place of business.

Some states require a permit for carrying a gun in an automobile, and some do not. States may have particular rules about how the gun must be transported in the car, such as in the console or glove compartment, or open and visible.

b. Concealed Carry in Public Places

In the early twenty-first century, by far the most common method of defensive handgun carrying is *concealed carry*, with the gun in a holster that is concealed from view under clothing, or concealed in some other manner (e.g., a purse with a special compartment).

Twenty-nine states allow permitless concealed carry by adults who are lawfully allowed to possess handguns.⁵ Proponents call the laws “constitutional carry”—a term more in tune with the seventeenth and eighteenth centuries than the nineteenth. For America’s first two centuries, from 1606 until about 1820, New Jersey was the only state that banned concealed carry; it was lawful everywhere else, with no need for a permit. See Chs. 12.B.1.a.viii, 15.B, 16.H. As of 2000, only Vermont allowed concealed carry without a permit. In 2003, Alaska enacted permitless carry, and started a trend that continues to spread.

The other 32 states allow concealed carry only with a permit. Most states have a *shall-issue* system for permitting. Except in special circumstances, an applicant who meets all the statutory criteria shall be issued a permit.⁶ Typically, these require a fingerprint-based background check and passing a safety class. A few of these states do not require fingerprints, or do not require a class. Some of these states also have what is called “the naked man” rule; the issuing authority may deny a permit to a person who has a clean record but for whom the licensing authority can point to specific evidence showing that the person could be a danger to himself or others. Connecticut law allows considerable police discretion, but in practice, the state commonly issues permits to applicants who meet the similar standards as in shall-issue states.

In total, there are 42 states—plus the District of Columbia, Guam, and Puerto Rico—where concealed carry in public either needs no license, or is permitted pursuant to a licensing system whereby almost all law-abiding adult applicants can obtain a permit if they choose.

In California, Hawaii, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, and the U.S. Virgin Islands, carry permits are issued only on a *may-issue* basis, under which local issuing authorities exercise far more discretion in deciding who will, and will not, be allowed to obtain a permit. Local practices vary quite a bit in these jurisdictions. In some counties, such as upstate New York and the majority of California counties, carry permits are issued fairly readily, under criteria typical of a shall-issue state. In others, permits may be issued only to individuals who can document a special threat to their safety, such as obtaining a restraining order against a stalker, or transporting diamonds, prescription drugs, or large sums of cash for

⁵ Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming. In North Dakota, permitless carry is limited to residents. As of 2020, Idaho’s permitless carry extends to all United States citizens, over eighteen, qualified to obtain a license. Idaho Code § 18-3302(4)(f).

⁶ All of the permitless carry states except Vermont also issue permits on a shall-issue basis. The permit may allow carry in certain areas where permitless carry is not allowed. The permits are also useful for traveling, as many states recognize carry permits issued by other states.

business. Other locales, such as New York City, appear to issue permits readily to celebrities or other well-connected individuals, and hardly ever to anyone else. Corruption is not uncommon in the issuance of permits in these jurisdictions.⁷ Based on statutory text, Hawaii is may-issue, but in practice it is never-issue, except for security guards. American Samoa and the Northern Mariana Islands are never issue.

Some states allow nonresidents to apply for permits, so that, for example, a person who visits the state frequently on business would be able to carry. Many states offer *reciprocity* by recognizing concealed carry permits issued by other states. State practices are quite diverse. Some recognize a permit from any state, some only from states that meet certain criteria in issuing their permits, and some only from states with whom a formal agreement allows each to carry in the other's state. Because states vary so widely in what permits, if any, are recognized, careful checking in advance is necessary before telling a client that carry is lawful in another state. The same is true even for clients who are visiting permitless carry states, because not all of them allow nonresidents to go permitless, and some have locational restrictions on permitless carry.

c. Open Carry in Public Places

Recall from Chapters 12, 15, and 16 that permitless *open carry* was lawful in all the American colonies and remained so throughout almost all the United States through the nineteenth century. Today, the majority of American states allow the open carry of a loaded handgun (e.g., in a visibly exposed belt holster) in at least some circumstances, but state and local laws are diverse.

About half the states allow open carry without a permit, and in many jurisdictions this has been the law since statehood. In other states — particularly in those that have only recently relegalized open carry — open carry requires a state-issued permit. *See, e.g.*, Tex. Penal Code §§ 46.02, 46.035 (2015) (prohibiting the carrying of a visible handgun except by a handgun carry license holder, who if carrying openly must carry the gun in “a shoulder or belt holster”).

Starting in the nineteenth century, some state constitutional right to arms provisions guaranteeing a right to bear arms for self-defense included an

⁷ *See, e.g.*, Benjamin Weiser, *Man Pleads Guilty to Gun License Scheme*, N.Y. Times, Nov. 11, 2016, at A18; Clayton Cramer, *Congressional Authority to Pass Concealed Carry Reciprocity Legislation*, 27 Kan. J.L. & Pub. Pol'y 211, 212 & n.7 (citing sources).

express exception allowing the legislature to restrict carrying “concealed weapons.” Thus, the legislature may not prohibit open carry.⁸

In most places, open carry is relatively uncommon compared to concealed carry. Open carry has long been a norm in Arizona and has become more normal in some other places. The practice can be controversial, however, particularly in some urban areas. Individuals who fear firearms or dislike encountering them cannot help but see an openly carried gun, whereas they can mentally ignore the fact that any given crowd (e.g., at a shopping mall) is likely to have a number of people carrying concealed. To some, the “open wearing of firearms on the streets of a modern American city” is a “jarring” practice that illustrates “the cultural divide around the Second Amendment.” It can thus be argued that in urban areas, the law should favor concealed carry over open carry. James Bishop, *Hidden or On the Hip: The Right(s) to Carry After Heller*, 97 Cornell L. Rev. 907, 908, 926 (2012).

In practice, open carriers occasionally encounter more obstacles than the letter of the applicable laws might predict. Broadly worded criminal statutes prohibiting disturbing the peace or disorderly conduct have sometimes been invoked to detain or arrest open carriers.⁹

7. Property Rights and Arms Rights

This Section discusses the interplay of arms rights and property rights, as seen in zoning, shooting ranges, and parking lot laws.

⁸ E.g., N.M. Const. of 1971, art. II, § 6; Ky. Const. of 1891, § 1, cl. 7; *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. App. 1971) (municipal prohibition on gun carrying, “as it is applied to carrying arms openly and in plain view,” violates state constitutional right to bear arms); *Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956) (under the Kentucky Constitution, “the legislature is empowered only to deny to citizens the right to carry concealed weapons. . . . If the gun is worn outside the jacket or shirt in full view, no one may question the wearer’s right so to do; but, if it is carried under the jacket or shirt, the violator is subject to imprisonment for not less than two nor more than five years.”); see also Wisconsin Department of Justice Advisory Memorandum (Apr. 20, 2009) <https://www.doj.state.wi.us/sites/default/files/2009-news/final-open-carry-memo-2009.pdf> (concluding that Wisconsin Constitution’s right to arms provision, adopted in 1998, protects “the right to openly carry a firearm” for self-defense and other purposes); Wis. Const. art. I, § 25.

⁹ See, e.g., Edmund H. Mahony, This Is an Open-Carry State, but Disputes Arise Between Police, Citizens, Hartford Courant, Apr. 18, 2010, at A1 (reporting judge’s dismissal of charges against a Connecticut man with a gun carry permit who openly carried in restaurant; police officers arrested him for breach of the peace); Linda Spice, West Allis Man Not Guilty in Open Carry Gun Case, Milwaukee Journal Sentinel, Feb. 17, 2009 (reporting dismissal of charges against a Wisconsin man who carried a handgun openly while planting a tree in his yard; police officers entered the man’s property, arrested him for disorderly conduct, and confiscated his gun).

a. Zoning

It has been settled law since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that governments have a constitutionally legitimate police power to regulate land use. Most zoning is constitutionally satisfactory even if the regulations reduce the value of the land.

The Supreme Court has recognized that traffic safety and aesthetics may justify zoning regulations on commercial speech. *Lorillard Tobacco Co., v. Reilly*, 533 U.S. 525, 551 (2001). The Court required a local government to bear the burden of proving harm to the community when it sought to ban adult bookstores. *Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

In *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017), *cert. denied* at 138 S. Ct. 1988 (2018) (on appeal from the government's successful motion to dismiss), a gun store business applicant was denied approval by the County Board of Supervisors. After a district court granted a motion to dismiss, a Ninth Circuit panel reversed. It held that the decision infringed the rights of the gun store's prospective customers to acquire guns, asserted by the store owners. *See Craig v. Boren*, 429 U.S. 190 (1976) (businesses could bring constitutional claims on behalf of their customers). Second, the County had infringed the store owner's right to sell guns. The County's "unsubstantiated assertions" were not sufficient to carry its burden of proof under heightened scrutiny. The Ninth Circuit en banc vacated the panel opinion. The en banc court said that the store owners had no right of their own to sell guns, but they could assert the rights of their potential customers. But preventing a new gun store from opening did not harm any customers. There were other gun stores in the area, and no claim had been made that anyone was presently unable to acquire arms because of a shortage of stores. *Teixeira v. Cty. of Alameda*, 822 F.3d 1047 (9th Cir. 2016), *vacated*, 873 F.3d 670 (en banc).

In contrast, the Northern District of Illinois rejected a Chicago suburb's obstruction of the opening of a gun store. The court announced that it did not need to decide whether gun stores had Second Amendment rights; circuit precedent plainly ruled that such stores could assert the Second Amendment rights of their customers. *Kole v. Village of Norridge*, 941 F. Supp. 2d 933 (N.D. Ill. 2013); Ch. 10.F (excerpting the circuit precedent of *Ezell I and II*, also discussed in the next Section).

NOTES & QUESTIONS

1. What standard of review should apply to zoning regulations aimed at keeping objectional businesses out of a community? Does it matter if the commerce directly involves a fundamental constitutional right such as books, religious objects, printing presses, paper, ink, guns, knives, ammunition, or arms accessories?

2. While Massachusetts is the only state to outlaw firearms sales from a residence, many municipalities do so. After a Fargo, North Dakota, ban was

upheld a against a state preemption law challenge, the North Dakota legislature amended the preemption law to include zoning. [HB1340](#) (N.D. 2023). A state district court ruled against Fargo’s challenge to the new statute. Jack Dura, *A Judge has Dismissed Fargo’s Challenge to North Dakota Restrictions on Local Gun Control*, Assoc. Pr., Feb. 23, 2024.

b. Shooting Ranges

Like gun stores, gun ranges are subject to zoning laws. If range sells ammunition or guns, it must comply with applicable state and federal laws. A city’s zoning law that entirely prohibited gun ranges was held to violate the Second Amendment. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (*Ezell I*) (Ch. 10.F). So was a replacement zoning system that banned ranges in 98 percent of the city. *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) (*Ezell II*) (Ch. 10.F).

Shooting ranges are for shooting bullets and the vast majority of bullets are made mainly of lead. Statutes or regulations that require good ventilation of indoor ranges are widespread. Outdoor ranges have the separate concern of lead buildup in the soil, if the shooting is not confined to earthen berms or other areas that do not impact the environment. A Florida statute requires public and private ranges to “implement situation appropriate environmental management practices.” If there is contamination, then the remediation under the supervision of the Department of Environment Protection (DEP) should presume that the land will continue to be used as a range, rather than become a housing development. Ranges that are in compliance with the law, including a cleanup under DEP supervision, may not be sued by other parties.¹⁰

Gun safety is enhanced by range practice. Indoor ranges are usually far too small to accommodate shotgun practice or rifle practice above the little .22 caliber. Outdoor ranges are for gunshots, which are loud. Many ranges have been shut down by new noise limit laws enacted after the range was built. Many others have been shut down by nuisance lawsuits, including from homeowners who came to the nuisance by buying their property after the range was established. To preserve the remaining ranges, 48 states (all but Hawaii and Washington) have enacted *range protection* statutes. These statutes provide ranges with some protection from noise laws, nuisance suits, or both. *See, e.g.*, 63 Okla. Stat. Ann. § 709.2 (both); Ariz. Rev. Stat. Ann §§ 17-601 et seq. (nuisance only). Some apply statewide standards to range operations, like decibel limits and hours of operation, preempting local laws to the contrary. *See, e.g.*, Minn. Stat. Ann. § 15.01 et seq.; Or. Rev. Stat. Ann. § 467.131. Others

¹⁰ Fla. Stat. § 790.333. The statute is criticized in Rachel E. Deming, *The Second Amendment v. The Environment: Florida’s Transformation of Gun Range Environmental Liability*, 29 Colo. Nat. Res. Energy & Envtl. L. Rev. 81 (2018).

freeze in place the law that was in effect when the range opened, exempting the range from later changes, such as lowered decibel levels. *See, e.g.*, Ala. Code § 6-5-341. Some apply only to private individuals who come to the nuisance. *See, e.g.*, Md. Code Ann. § 5-403.1.

NOTES & QUESTIONS

1. How should courts resolve conflicts where zoning regulations clash with Second Amendment rights?

2. For a thorough resource on the topic of zoning and shooting ranges, see American Law of Zoning, § 18.16.50.

3. A landowner in a residentially-zoned district of Stroudsburg, Pennsylvania, shot firearms on his 4.66 acre property, prompting noise complaints from neighbors, and a revision of the municipality's firearms discharge ordinance to prohibit such activities in residential areas. As revised, the municipality's zoning laws allow shooting ranges only in the open space and recreation districts. A range must comprise at least five acres, with a minimum lot width of 250 feet. Outdoor ranges, in addition, must be at least 150 from other occupied structures, and may only operate from dawn to dusk. Reversing a decision of the Commonwealth Court, four Justices of the Pennsylvania Supreme Court held that that plaintiff's activities were plainly protected by the Second Amendment, but, per *Bruen*, the municipality's regulations were supported by a long historical tradition of firearms discharge restrictions in municipalities. Another Justice concurred and dissented, arguing that the Second Amendment was not implicated at all. One dissenting Justice argued that the majority had been too loose in its acceptance of scattered laws about firearms discharge and shooting galleries. *Barris v. Stroud Township*, 310 A.3d 175 (Pa. 2024).

c. Parking Lots

The beginning of the Oklahoma hunting season is a time when people all over the state are especially likely to have firearms in their vehicles.¹¹ In October 2002, at the Weyerhaeuser paper mill in Valliant, the mill's security staff obtained the assistance of the local sheriff to use trained detection dogs for mass, warrantless searches of employee cars. The cars were in a company parking lot, which was also open to the public and was used by customers of a nearby Wal-Mart and golf course. A dozen employees had guns in their cars. There was no dispute that the guns were owned for lawful purposes, such as hunting after work, or for protection while traveling to and from work. All of

¹¹ This section was drafted by Dylan Jarrett, J.D. Candidate, Duke University School of Law 2022.

them were fired. In 2004, Oklahoma enacted two laws against employers and property owners barring employees and others from “transporting and storing firearms in a locked vehicle” in a parking lot owned by the employer or property owner. Okla. Stat. tit. 21 §§ 1289.7a, 1290.22. Since then, 23 other states have enacted similar laws — known as “parking lot” or “bring your gun to work” laws. Proponents say that people who drive to work should not be left defenseless during their commute, so they have to be able to use the parking lot.

Some parking lot laws protect only employees in workplace parking lots. Others prohibit all business property owners from banning the storage of firearms in vehicles on their property. Common provisions include the following: The firearm must be stored in a locked vehicle or compartment (19 states), the firearm must be stored out of sight (10 states), and employers have immunity from liability (18 states). Three states prohibit employers from inquiring about firearms that may be stored in an employee’s vehicle. A majority of states with parking lot laws provide at least one exception allowing employers to prohibit firearms in workplace parking lots under some circumstances, such as at child care centers or correctional facilities.

The few legal challenges to parking lot laws have focused on federal preemption and on employers’ property rights. The Tenth Circuit rejected a claim that Oklahoma’s parking lot law effected a Fifth Amendment taking requiring just compensation. Nor was it preempted by the Occupational Safety and Health Act of 1970 (OSHA). The enforcement agency, the Occupational Safety and Health Administration, had explicitly “declined a request to promulgate a standard banning firearms from the workplace.” *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1206 (10th Cir. 2009).

NOTES & QUESTIONS

1. One commentator has suggested that parking lot laws force some politicians to choose between “the right of business owners to control what happens on their property and people’s Second Amendment right to bear arms.” Joe Palazzolo, *Gun Showdown at Work*, Wall St. J. (Nov. 30, 2012). Are there other ways that legislatures regulate employment relationships in order to improve employees’ safety or rights, or for other purposes?

Is it possible to reconcile an employee’s right to bear arms with an employer’s right to decide who enters his or her property? Does the debate over parking lot laws hinge on whether having guns in cars (which sometimes have to be parked) increases or decreases safety?

As applied to shopping centers, how are parking lot laws similar to, and different from, other public accommodation laws? Is it consistent to allow property owners to bar one kind of otherwise constitutionally protected activity on their premises, but not another? Is it possible to assign relative worth to rights in a nonsubjective way?

2. *Further reading:* *Fla. Retail Fed'n, Inc. v. Att'y Gen. of Fla.*, 576 F.Supp.2d 1281 (N.D. Fla. 2008) (striking one provision of Florida's parking lot law; remainder of the law does not violate the Due Process Clause); Dylan Jarrett, *Parking Lot Laws: A History*, Duke Ctr. for Firearms L. (June 17, 2020) (examining the historical context in which early parking lot laws developed); Dylan Jarrett, *Parking Lot Laws: Their Content and Applicability*, Duke Ctr. for Firearms L. (June 25, 2020) (identifying trends in the specific content of various parking lot laws); Stefanie L. Steines, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 Iowa L. Rev. 1171 (2008); Malerie Leigh Bulot, *"Bring Your Gun to Work" and You're Fired: Terminated Employees' Potential Rights for Violations of Parking Lot Laws*, 78 La. L. Rev. 989 (2018) (constitutionality of parking lot laws and the consequences of violating them); Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 Mich. L. Rev. (forthcoming 2021) (outlining the history and policy behind parking lot laws).