

United States Senate Judiciary Committee

Full Committee Hearing

“Firearm Accessory Regulation and Enforcing  
Federal and State Reporting to the National  
Instant Criminal Background Check System  
(NICS)”

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# Automatic Gunfire Prevention Act. S. 1916

On the terrible late evening of Oct. 1, a Twitter user provided a video showing the hotel tower and the crowd. To me, the audio sounded like automatic gunfire. There is still much that we do not know about the crime. We do know that the criminal used “bump stocks” that allowed him to fire his ordinary semi-automatic guns as fast as a full automatic.

Under current federal law, the laws for automatics (“machine guns”) are very stringent. In *District of Columbia v. Heller*, the Supreme Court suggested that such guns are not protected by the Second Amendment.<sup>1</sup> If a device makes an ordinary gun capable of sustained automatic fire, then it should be regulated similarly to an automatic itself.

Under the 1934 National Firearms Act, many devices that make a normal firearm fire like a full automatic are already highly regulated. Based on the wording of the statute, ATF correctly ruled bump stocks are not within the scope of the present statute.<sup>2</sup> Congress, not the ATF, has the authority to change the law.

## I. Grandfathering

Any realistic new law must account for people who already own the items in question. When there are tens or hundreds of thousands of such people, being realistic is especially important.

Unfortunately, S. 1916 has no provision for grandfathering. It takes effect 180 days after enactment, so current owners have 180 days to destroy their property. Some will, but others will be driven underground—pushed outside the lawful system.

A better policy and precedent have been adopted by the ATF, when items are reclassified. For example, in 1994, the ATF decided that three particular models of shotguns were covered by the 1934 National Firearms Act, and

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<sup>1</sup> 554 U.S. 570, 624–25 (2008) (affirming 1934 National Firearms Act restrictions on machine guns).

<sup>2</sup> Under the National Firearms Act, an automatic (which the statute calls a “machine gun”), is something that makes a gun fire two or more rounds “by a single function of the trigger.” A bump stock does not make a single trigger press fire more than one round, so it is not covered by the current statute. Instead, a bump stock can be used to push the trigger rapidly towards the finger.

therefore had to be federally registered.<sup>3</sup> Because ATF was changing its mind about guns that had previously been bought and sold as ordinary guns (and not as specially-restricted NFA items), ATF offered a *seven-year* registration period. ATF also waived the \$200 tax per gun that could have been imposed.<sup>4</sup>

The above approach kept more arms in the legal system than a more draconian approach would have.

If a law provided for grandfathered registration, and subjected new sales to the stringent system of the 1934 National Firearms Act, it would likely pass constitutional muster with the courts.<sup>5</sup> First of all, *Heller* indicates that full automatics are outside the scope of Second Amendment protection.<sup>6</sup>

Bump stocks degrade accuracy, making a firearm less suited for self-defense or hunting.<sup>7</sup>

Until Las Vegas, no bump stock had ever been used in a crime. Which makes sense—a criminal who was holding up a liquor store, or taking revenge on a personal enemy, would not choose an accessory that made his weapon *less* accurate. For criminal use, the only advantage of a bump stock would be in a long-range situation, with little attempt to aim—as in Las Vegas.

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<sup>3</sup> ATF Rulings 1994-1, 1994-2, <https://www.atf.gov/firearms/docs/ruling/1994-2-striker-12-shotgun-defined-nfa-weapon/download>. ATF was applying 26 U.S.C. § 5845(f), which gives ATF discretion to classify some shotguns as “destructive devices.”

<sup>4</sup> ATF Ruling 2001-1 (registration window for the shotguns will end on May 1, 2001; “although the classification of the three shotguns as NFA weapons was retroactive, the prospective application of the tax provisions allowed registration without payment of tax”), <https://www.atf.gov/firearms/docs/ruling/2001-1-destructive-device-usas-12-and-streetsweeper-shotguns/download>.

<sup>5</sup> Under federal law and the law of 37 states, machine guns are legal to own. But a buyer must go through an onerous registration process with ATF, which typically takes half a year or more. There is a \$200 tax on each acquisition. Machine guns manufactured after May 19, 1986, can only be possessed by government agencies.

<sup>6</sup> See David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS UNIVERSITY LAW JOURNAL 193, 233–35 (2017) (surveying post-*Heller* Circuit Court of Appeals decisions on machine guns), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2767979](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767979).

<sup>7</sup> The North American Model of Wildlife Conservation, which has been adopted everywhere in the U.S. and Canada, requires hunters to take aimed shots, not to blast away with rapid inaccurate fire. This is one aspect of the Model’s principle of “fair chase.” See generally J.F. ORGAN ET AL., THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION (The Wildlife Society and The Boone and Crockett Club, Technical Review 12–04, Dec. 2012), <http://wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf>.

We know that mass shooters plan their crimes for months in advance, and carefully study the techniques of other mass shooters. So there is a genuine risk that other would-be mass killers may imitate the Las Vegas fiend.

## II. The bill outlaws normal gunsmithing

“Bump stocks” can be precisely defined. Unfortunately, S. 1916 omits a definition, and simply refers to “a bump-fire device.”

Worse, the bill outlaws much normal gunsmithing, namely “anything that is designed or functions to accelerate the rate of fire of a semi-automatic rifle but not convert the semiautomatic rifle into a machinegun.”

What kind of thing “is designed or functions to accelerate the rate of fire of a semi-automatic rifle”? Gun cleaning tools “function” to make a gun fire faster. Cleaning removes ash-like debris (“fouling” from gunpowder and lead) that accumulates at various places in a rifle, including the moving parts. As with all mechanical tools, cleaning up the moving parts helps them move more rapidly.

Certainly the sponsor did not intend to outlaw gun-cleaning tools. Yet that is how far the bill’s language goes.

The overbroad language outlaws many normal modifications to a firearm. For example: you own an ordinary semi-automatic rifle. As manufactured, the trigger needs six pounds of pressure in order to operate. Perhaps your hands aren’t as strong as an average person’s, so you take the firearm to a gunsmith, who puts in some replacement springs and other parts that lower the trigger pressure to four pounds. That would be a federal felony under S. 1916.

Reducing the trigger pressure from six pounds to four pounds will necessarily make the rifle fire faster. Before you shoot, the pressure on the trigger is zero. When you press the trigger with your finger, you will necessarily get to four pounds of pressure sooner than you get to six. The time difference may be only a few-thousandths of a second. You certainly haven’t made your semi-automatic rifle fire like a full automatic. But you and the gunsmith will both be federal felons.

There are lots of items that “function” to “accelerate” the fire of a semi-automatic rifle. Anything that stabilizes a rifle makes it easier to shoot faster. This includes sandbags, bipods, or better grips.<sup>8</sup>

Anything that makes a trigger operate more smoothly would also be included. For example, a custom replacement trigger whose parts are made more precisely than the factory trigger.

The recoil buffer of a firearm uses springs, cams, or a lever to reduce how much recoil the user feels. Anything that alleviates felt recoil will help the user fire faster. Pain-reducing drugs, such as Tylenol or Advil, help in a similar way. For example, reducing shoulder pain helps the user keep the shoulder in strong, solid contact with the rifle, thus stabilizing the rifle.

Firearms are tools that employ hot gas. Some of the expanding gas energy from the gunpowder explosion propels the bullet forward; some gas energy becomes recoil against the shooter; and some gas energy dissipates elsewhere. Anything that improves the efficiency of the gas system will enable the user to fire faster.

Even replacing worn-out parts (that function relatively slowly because they are worn out) with identical fresh parts will accelerate a rifle’s operation.

In short, S. 1916 broadly outlaws much ordinary maintenance and improvement of firearms.

If enacted in current form, S. 1916 could not be applied as written. Instead, the ATF would be left to chart a course with no statutory guidance, trying to figure out which normal gunsmithing is now illegal, and which is still permissible.

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<sup>8</sup> For example, some rifles have a forward grip, similar to a handgun grip. If the user replaces the factory grip with a grip molded to fit the user’s hand, the user will have stronger control over the rifle. Thus, the user will be able to fire faster.

# Fix NICS Act of 2017. S. 2135

This bill provides some carrots and sticks to induce federal departments, bureaus, and agencies to supply information to the FBI's National Instant Criminal Background Check System (NICS). The FBI's NICS has been operational for two decades, and federal law already mandates data submission by federal entities. Yet data reporting has sometimes been erratic. Accordingly, S. 2135 would be a constructive step forward.

The intended effect of S. 2135 is to increase the number of people who are on an FBI list that prohibits them from exercising Second Amendment rights for the rest of their lives. These are people who are in one of the nine categories of "prohibited persons" created by 18 U.S.C. § 922(g).

In general, the various statutory prohibitions are protective of public safety. But there are exceptions, and Congress should consider fixing NICS by addressing some of its problems.

## I. Restore restoration of rights

When Congress enacted the Gun Control Act of 1968, with various broad categories of prohibited persons, Congress recognized that the prohibitions could sometimes sweep too broadly in individual cases. So Congress provided a procedure for persons to petition for the restoration of their rights—also known as "relief from disabilities."

Under the statutory structure, ATF has discretion about whether to grant relief. Such relief would typically require, at a minimum, that the petitioner has kept himself or herself on the straight and narrow for many years. 18 U.S. Code § 925(c).

Unfortunately, since 1993 Congressional appropriations riders have defunded the federal relief from disabilities programs.<sup>9</sup> Accordingly, ATF has treated state relief programs as providing an equivalent relief, which lifts the federal disability. Especially for misdemeanors, this program does not work very well.<sup>10</sup> First of all, some states have no program for relief from disabilities.

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<sup>9</sup> *United States v. Bean*, 537 U.S. 71 (2002) (discussing history of the appropriations rider; holding that courts may not review the ATF's failure to consider a petition for relief from disabilities).

<sup>10</sup> The Second Amendment is the only constitutional right that may be forfeited for a lifetime, based on a single misdemeanor conviction.

Second, ATF and judicial interpretation limit the federal relief that states can offer. If a state restores a person's right to arms, but does not allow that person to hold elected office, the person is still prohibited by federal law from possessing arms. Thus, a person who was told by the state government that he can now legally possess firearms ends up being prosecuted for the federal felony of illegal gun possession, with its five-year sentence.<sup>11</sup>

Or consider a state misdemeanor conviction for which the person did not lose *any* rights under state law, including the right to bear arms. Yet by federal law, that domestic violence misdemeanor is a lifetime firearms prohibition. Can the person's right to own a firearm ever be restored? The answer is "no," according to the U.S. Supreme Court. If you never lost your rights, they cannot be restored. And therefore, you can never escape from the federal gun ban.<sup>12</sup>

This strange result is not inconsistent with the current statutory language, which is poorly written, and should be revised.<sup>13</sup>

Or suppose a state law says that a former convict may possess long guns anywhere, and may possess handguns at his home or business, but he may not be issued a handgun carry permit. According to the Supreme Court, such a person may be prosecuted for possessing a long gun, since the restoration of his state rights did not include the full scope of firearms rights.<sup>14</sup>

Especially in the context of misdemeanors, the absence of a restoration of rights program can create very unfair results. As interpreted by the courts, the federal misdemeanor gun ban does *not* require that the defendant actually did anything violent. Rather, the lifetime prohibition is imposed for any unwanted or offensive touching of a domestic or intimate partner.<sup>15</sup> Thus, the law fails to distinguish between punching someone in the face versus poking a finger at a person's shoulder during an argument. Surely a person who is subject to a lifetime rights ban for a finger poke should have the opportunity to petition the

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<sup>11</sup> See, e.g., *Wyoming ex rel. Crank v. U.S.*, 593 F.3d 1236, 1247 (10<sup>th</sup> Cir. 2008) (express restoration of firearms rights pursuant to state law did not protect the defendant from being federally prosecuted as a prohibited person).

<sup>12</sup> *Logan v. U.S.*, 552 U.S. 23 (2007).

<sup>13</sup> The federal misdemeanor ban does not apply to "an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S. Code § 921(a)(33)(B)(ii).

<sup>14</sup> *Caron v. U.S.*, 524 U.S. 301, 311 (1998).

<sup>15</sup> *United States v. Castleman*, 134 S.Ct. 1405 (2014) (any offensive or unwanted touching constitutes the "force" element in the federal Gun Control Act).



federal government for restoration of rights. If the statutory federal restoration of rights process were allowed to function, ATF could consider the petitioner's lifetime record of behavior, and any other relevant factors.

## II. Respect federalism

Federal law currently prohibits firearms possession by any person “who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).” 18 U.S. Code § 922(g)(3). Among the persons who are labeled as an “unlawful user” by the Controlled Substances Act (CSA) are persons who lawfully use marijuana pursuant to state law. Currently, 29 states have laws that expressly allow and regulate marijuana use.<sup>16</sup>

Federal micromanagement of the non-commercial possession of an item solely within a single state is a stretch of the Congress's constitutional power “to regulate commerce...among the several States.”<sup>17</sup>

The stretch goes past the breaking point when the lawful in-state possession of one item (marijuana) is turned into a federal prohibition of another item allowed under state law (a firearm). To make things much worse, the prohibition eradicates the exercise of a constitutional right.

Federally, marijuana is on Schedule I of the CSA: “no currently accepted medical use and a high potential for abuse.” Under the CSA, marijuana is worse than “cocaine, methamphetamine, methadone,” and “oxycodone (OxyContin), fentanyl.” Thus drugs are on Schedule II, which allows for some legal use.

The people of 29 states—sometimes by direct vote, and sometimes through their representatives—have rejected the CSA's factual errors. The majority of states recognize that marijuana has legitimate use in some circumstances. The benefit of some medical applications is well-established.

Congress should consider updating the “prohibited person” law, to respect state decisions on marijuana. Because Congress has not yet updated the law,

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<sup>16</sup> The District of Columbia, Puerto Rico, and Guam also have such laws. National Conference of State Legislatures, *State Medical Marijuana Laws*, Sept. 14, 2017, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>17</sup> U.S. CONST., art. I, § 8, cl. 3. The over-federalization of drug laws is a closely related to the over-federalization of gun laws. See David B. Kopel & Trevor Burrus, *Sex, Drugs, Alcohol, Gambling, and Guns: The Synergistic Constitutional Effects*, 6 ALBANY GOVERNMENT LAW REVIEW 306 (2013), <http://ssrn.com/abstract=2232257>.

lawfully registered firearms are presently being confiscated from lawfully registered users of medical marijuana in Hawaii.<sup>18</sup>

At present, a person can lawfully possess arms, while also using fentanyl in compliance with applicable law. Yet medical marijuana users are felonized by federal gun law. This is irrational.

Of course states can, and do, have laws against carrying guns while under the influence of alcohol, drugs, or other substances. These state laws will remain in place. Federal laws need not drill down to purely intrastate activity.

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<sup>18</sup> Jacob Sullum, *Hawaii, Which Registers Guns and Medical Marijuana Users, Starts Disarming Patients*, Reason.com, Nov. 29, 2017, <http://reason.com/blog/2017/11/29/hawaii-which-requires-registration-of-al>.

# Background Check Completion Act. S. 1923

## I. Effect of the bill

The National Instant Criminal Background Check Systems (NICS) is established by 18 U.S.C. § 922(t). The bill would change the language for when a sale may proceed, after the seller has contacted the FBI or a state counterpart for a background check.

Under current law, the sale may proceed when:

- (B)(i) the system provides the licensee with a unique identification number; or
- (ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section;

Under S. 1923, the statute would read:

- (B) the system provides the licensee with a unique identification number;

**How current law works:** Starting on the day after the retailer contacts the government, the government’s “instant” check system has three full business days to approve or deny the sale. If the government does not act, the retailer may sell the firearm on the day after the third full business day.

For example: the retailer contacts the FBI on Monday. Three full business days pass, with no answer (Tuesday, Wednesday, Thursday). On Friday, the retailer may sell the gun.

If the transaction begins on a day other than Monday, then there will be an intervening weekend, which will add two non-business days to the delay in the sale of the firearm. So usually, the government has about a week to provide a response from the “instant” check system.

**Changes under S. 1923:** The sale may never proceed until the government affirmatively allows it. The sale may be delayed for days, months, or years, at the government’s discretion.

## II. The Charleston criminal

Dylann Roof, a racist who murdered churchgoers in Charleston, South Carolina, in 2015, had previously been arrested. During the arrest he admitted to law enforcement officers that he was a user of methamphetamine. That was sufficient, under the federal Gun Control Act of 1968, to prohibit him from owning guns, because the statute bans gun ownership by unlawful drug users. 18 U.S.C. § 922(g)(3).

However, as the FBI later admitted, the Bureau failed to properly enter into its database the prohibiting information that had been provided by local law enforcement.<sup>19</sup>

As will be detailed below, the three-business-day law is intended to protect the public from an FBI Director who might want to throttle lawful gun sales. The FBI's bureaucratic error in data entry about information received from local law enforcement is not a reason to eliminate the current statutory protections against abuse of Second Amendment rights by the FBI (or an FBI Director doing the bidding of a President).

## III. Preventing indefinite delay in the exercise of rights

Any system that involves government permission to exercise a constitutional right faces a fundamental challenge: What about government officials who are hostile to the right, and who would thwart the right simply by refusing to make a decision on the request?

In the First Amendment context (e.g., parade permits), we avoid the problem by specifying exactly what information the parade permit request should include. We also require the government to issue or deny the permit within a certain time period.

Similar issues arise in the Second Amendment context. There, even when statutes specify that a government official must approve or deny a proposed firearms purchase or license within a certain period, some officials still refuse to act. Some notorious examples have been New Jersey (30 day limit for decisions on handgun purchases, and on firearms identification cards) and New York City (six month limit for decision on handgun purchases).<sup>20</sup>

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<sup>19</sup> See Richard Perez-Pena, *Problems Plague System to Check Gun Buyers*, NEW YORK TIMES, July 27, 2015; Michael S. Schmidt, *Background Check Flaw Let Dylann Roof Buy Gun, FBI Says*, NEW YORK TIMES, July 10, 2015.

<sup>20</sup> See Firearms Purchase & Permitting in New Jersey, Report to Governor, of New Jersey Firearms Purchase and Permitting Study Commission, Dec. 21, 2015, pp. 5–9, & Appendix A,

The problem in both N.Y.C. and N.J. is that the seller is forbidden to sell until the police act, even if the police violate the law by not acting in a timely manner.

The absence of effective time rules in New Jersey may have cost Carol Browne her life. She obtained a restraining order against her ex-boyfriend, and she applied for a permit to possess a firearm. She submitted the firearm application on April 21, 2015. The ex-boyfriend stabbed her to death in early June, while her application was still pending at the local police department. The department later said that it usually takes two or three months to process an application.<sup>21</sup>

#### IV. Legislative history of the 3-business-day limit

As introduced in Congress in the late 1980s, the Brady Bill would have spread this problem nationwide. The early Brady Bills would have forbidden handgun sales until the local police chief or sheriff had affirmatively granted permission.

Adding a firm time limit was the joint effort of Rep. Charles Schumer (D-N.Y.) and Rep. James Sensenbrenner (R-Wisc.).

On April 23, 1991, the Committee on the Judiciary met to consider H.R. 7. An amendment was offered by Representatives Charles Schumer and Representative Jim Sensenbrenner to make it clear that a handgun sale could proceed under the bill at the expiration of the 7-day waiting period, provided that the transferor had not been informed by a law enforcement official that the prospective purchaser was not prohibited from buying a gun.<sup>22</sup>

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<http://nj.gov/governor/news/reports/pdf/20151221123919328.pdf>. See also N.J. Atty. Gen., Attorney General Law Enforcement Directive no. 2016-4, Apr. 8, 2016 (ordering reforms, including obedience to the 30-day law), <http://www.nj.gov/oag/newsreleases16/Permits-to-Carry-Firearms Directive.pdf>.

<sup>21</sup> Greg Adomaitis, *N.J. gun association calls Berlin woman's death an 'absolute outrage'*, NJ.COM, June 5, 2015, [http://www.nj.com/camden/index.ssf/2015/06/nj\\_gun\\_association\\_calls\\_berlin\\_womans\\_death\\_an\\_ab.html](http://www.nj.com/camden/index.ssf/2015/06/nj_gun_association_calls_berlin_womans_death_an_ab.html).

<sup>22</sup> H.R. Rep. No. 103-344, 103rd Cong., 1st Sess. 1993 (Judiciary Committee), Nov. 10, 1993 (to accompany H.R. 1025) (describing history of predecessor bills); 1993 WL 465097, 1993 U.S.C.C.A.N. 1984; P.L. 103-159, Brady Handgun Violence Prevention Act.

Dates of consideration and passage were: House, November 19, 22, 1993; Senate: November 19, 20, 24, 1993.

The House Conference Report was No. 103-412, Nov. 22, 1993 (To accompany H.R. 1025)

When the Brady Bill was brought to the House floor in the next Congress 1993, it did have a time limit for the interim provision (a local check on handguns only). But it did not have a time limit on the permanent provision (a national instant check on long guns as well as handguns). Rep. Gekas (R-Pa.) proposed an amendment that under the national instant check, the sale could proceed after one business day if the FBI failed to respond.<sup>23</sup>

So if a retailer contacted the FBI on Friday, and the FBI did nothing on Monday (the first full business day after being contacted), then the retailer could sell the gun on Tuesday.

The Gekas Amendment also required that the interim provision of the Brady Bill replaced in no longer than five years by the National Instant Check System.

Opponents of the Gekas Amendment focused their fire on the date certain provision for operation of the national instant check. None of them criticized the 1-business-day rule that would apply once the national check become operational.

The Gekas Amendment was passed 236 to 198, with the winning margin coming from Representatives who would soon vote for passage of the Brady Bill as a whole.<sup>24</sup>

The House-Senate Conference changed the 1-business-day provision to 3-business-days.

When the final version of the Brady Bill was ready for a vote, its supporters extolled the principle of time limits on law enforcement action.

Rep. Marge Roukema (R-N.J.) praised the 5-business-day limit for the interim version (local law enforcement handgun-only check). This was a safeguard against abuse:

Madam Chairman, I rise in the strongest support of this legislation, and urge my colleagues to do what their constituents expect and demand: Pass the Brady bill....

Second, there is no case to be made for unreasonable delay. The Brady bill is clear and explicit: After transmitting the name and address of the purchaser to local law enforcement officials, if the dealer has not heard

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<sup>23</sup> H.R. Rep. No. 103-341, 103rd Cong., 1st Sess. 1993, Providing for Consideration of H.R. 1025 (Nov. 9, 1993); 1993 WL 463152.

<sup>24</sup> Roll No. 559.

back from law enforcement after 5 days, positively disallowing the sale, the buyer gets his gun. There is no room for delay—it's that precise.<sup>25</sup>

Rep. William Hughes, (D-N.J.), former Chair of the House Judiciary Subcommittee on Crime, extolled the Brady Bill for the same reason:

In other words, the police are given a reasonable opportunity to conduct a background check, but they cannot indefinitely delay the sale by stalling or failing to provide a notice of authorization to the dealer. The onus rests entirely with the law enforcement officer, not the dealer or the prospective purchaser.<sup>26</sup>

## V. Analysis

Compared to the 1990s, computer systems are much more advanced. Accordingly, there might be a good argument for reducing the three-business-day limit to one or two.

A time limit has the salutary effect of encouraging the FBI to process NICS applications promptly. It prevents an FBI Director from thwarting legitimate firearms sales by taking weeks, months, or longer to act on NICS applications. It prevents the FBI from bottlenecking sales—such as by assigning too few personnel and computer resources to process applications in a reasonable time.

S. 1923 eliminates the safeguard created by Congress in 1993. Instead, no firearms sale could take place until the FBI got around to giving affirmative consent. There would be no statutory requirement for the FBI to provide the “instant” authorization, or to make a decision within 3 business days, or to make a decision ever.

Under the potential influence of an anti-gun President, the FBI Director could impose indefinite delays on all firearms sales. Or the Director could select a subset of sales to be slow-walked. Thus, the FBI Director could impose a *de facto* ban on the purchase of certain types of firearms—such as models that the President wished to prohibit, but which Congress has chosen not to prohibit.

The elimination of the time limit for a decision would make federal law even more restrictive than California, a notoriously strict state. There, the time limit for government decisions about proposed sales is ten days.<sup>27</sup>

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<sup>25</sup> Brady Handgun Violence Prevention Act, 139 CONG. REC. H9098-03, 103rd Cong., 1st sess., Nov. 10, 1993.

<sup>26</sup> *Id.*

<sup>27</sup> CAL. PENAL CODE § 27540(a).

## VI. Does Walmart make national laws?

At the behest of Michael Bloomberg's Everytown organization, Walmart has announced that it will consummate sales until it receives affirmative approval from the "instant" check system, no matter how long that takes.

As a private corporation, Walmart is free to impose on its customers restrictions that are not required by federal or state law. Indeed, under current federal law, the retailer has no obligation to deliver a firearm once three full business days have passed.

Some people argue that Walmart's corporate policies for how it treats customers and employees are not necessarily good examples that should be statutorily imposed on all businesses. For example, after far-left filmmaker Michael Moore put pressure on Walmart, the corporation chose to discontinue selling handgun ammunition. This is not the behavior of a corporation that is concerned about the constitutional rights of its customers.

Moreover, Walmart's decision to acquiesce to the demands of Mr. Bloomberg's organization was made in the context of the currently well-functioning NICS operations. As long as the federal statutory requirement for a decision within three business days remains on the books, Walmart could be confident that the vast majority of its customers would receive authorization punctually. If S. 1923 became law, then the federal statutory incentive for prompt decisions for most buyers would vanish.

Few other retailers, large or small, have chosen to follow Walmart's example. Family stores, as well as large chains (e.g., Cabela's) have a shared interest with their customers in the protection of Second Amendment rights. They seem to recognize the danger of creating a norm that the exercise of rights may be indefinitely delayed.



# Reciprocity for the carrying of certain concealed firearms. S. 446

## I. Summary

The Fourteenth Amendment was added to the Constitution to adjust the state/federal balance, granting Congress the direct power to act against state infringements of important federal rights.

S. 446 would protect the right of interstate travel, which is one of the “privileges or immunities of citizens of the United States,” which the Fourteenth Amendment gives Congress the authority to protect.<sup>28</sup>

The Second Amendment right to bear arms is also protected by section 1 of the Fourteenth Amendment; therefore Congress has the power under section 5 of the Fourteenth Amendment to act against state infringements. The Supreme Court’s *Heller* and *McDonald* decisions recognize that the right to carry arms for lawful self-defense in public places is part of the Second Amendment right.

Even if the Supreme Court had been silent on the right to carry, or left the issue in a gray zone, Congress can still act to protect the right to carry. Supreme Court cases such as *Tennessee v. Lane* and *City of Boerne v. Flores* affirm Congress’s power to enact “congruent and proportional” laws that go beyond what courts have required.

Additionally, S. 446 is supported by a long line of Supreme Court precedent that the congressional power to protect interstate commerce from state interference can be used to protect the right to travel.

Finally, S. 446 uses the same “jurisdictional hook” as many other federal gun laws: the handgun in question must have at some point moved in interstate commerce. This is the same jurisdictional basis as the federal statute barring various categories of persons from possessing firearms, and other federal gun laws.

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<sup>28</sup> The written testimony on S. 466 is based in part on Kopel’s prior testimony: United States House of Representatives Subcommittee on Crime, Of the Committee on the Judiciary, “Regarding interstate recognition of handgun carry permits H.R. 822,” 112<sup>th</sup> Cong., 2d sess., Sept. 13, 2011, <http://davekopel.org/Testimony/HR822-Kopel.pdf>.

## II. Congressional enforcement of the right to travel

S. 466 is closely connected to the right to travel. It protects “an individual” who meets certain conditions, and who possesses or carries a concealed handgun “in any State other than the State of residence of the individual.” The bill is for travelers who are outside their State of residence.

A long-established line of Supreme Court precedents recognizes the constitutional right to travel.<sup>29</sup> The leading modern precedent on interstate

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<sup>29</sup> *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (a “fundamental personal right”); *Griffin v. Breckenridge*, 403 U.S. 88, 105–07 (1971) (affirming congressional power to enact a statute to thwart private criminal conduct interfering with the right to travel; “That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation.”); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (“This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”); *United States v. Guest*, 383 U.S. 745, 758 (1966) (Congress can enact legislation against state or private interference with the right to travel, which is “A right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union.”); *id.* at 763 (Harlan, J., concurring) (“past cases do indeed establish that there is a constitutional ‘right to travel’ between States free from unreasonable governmental interference.”); *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring) (“The conclusion that the right of free movement is a right of national citizenship stands on firm historical ground.”); *United States v. Wheeler*, 254 U.S. 281 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (“among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state”); *Williams v. Fears*, 179 U.S. 270, 274 (1900) (“the right, ordinarily, of free transit from or through the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution”); *Blake v. McClung*, 172 U.S. 239 (1898) (“The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise”) (quoting *Corfield v. Coryell*, 4 Wash. C.C. 371, 380, Fed. Cas. No. 3,230, a leading case decided by Justice Bushrod Washington while circuit-riding); *Slaughter-House Cases*, 83 U.S. 36, 51 (1872) (Bradley, J., dissenting) (same quote from *Corfield*); *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (Regarding Article IV’s privileges and immunities clause: “It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.”); *Crandall v. Nevada*, 73 U.S. 35, 49 (1867) (“We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”); *Passenger Cases*, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) (same language quoted and adopted by the *Crandall* majority, above).

travel is *Sáenz v. Roe*, 526 U.S. 489 (1999). Writing for a seven–Justice majority, Justice Stevens explained:

The word “travel” is not found in the text of the Constitution. Yet the “constitutional right to travel from one State to another” is firmly embedded in our jurisprudence. *United States v. Guest*, 383 U. S. 745, 757 (1966). Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson*, 394 U. S. 618 (1969), the right is so important that it is “assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all.” *Id.*, at 643 (concurring opinion).

Quoting the *Shapiro* case, the *Sáenz* Court wrote that it has been “long ‘recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.’” *Sáenz* at 499.

In other words, an “unreasonable” burdens or restrictions on interstate travel violate the Constitution. The *Sáenz* Court explained that there are three components to the right to travel. Two of them (the right to cross state borders, and the right to become a citizen of a different state) are not addressed by S. 446. The component that is addressed is the “right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.” *Id.* at 500.<sup>30</sup>

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*Paul v. Virginia* (1868), *supra*, was over-ruled on other grounds in *United States v. S.E. Underwriters Ass’n*, 322 U.S. 533 (1944). *Paul*’s explication of Article IV privileges and immunities remains good law, and had been quoted with approval in *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) and *Baldwin v. Montana Fish and Game Comm’n*, 436 U.S. 371, 380–81 (1978).

<sup>30</sup> In dissent, Chief Justice Rehnquist and Justice Thomas argued that that there was no violation of the right to travel in the case at bar: California’s rule that new arrivals to the state would for their first year in California receive welfare benefits at the levels of their previous state, rather than the higher payments provided in California.

The dissenters agreed, however, that “The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free interstate passage of citizens.” Further, “Nonresident visitors of other States should not be subject to discrimination solely because they live out of State.” *Sáenz* at 511–12 (Rehnquist, C.J., dissenting).

The dissenters’ main argument was that the majority was conflating the right to travel with the separate right to become a citizen of another state. That criticism, whether or not it is correct, does not bear on S. 446, because S. 446 only involves pure travel, not immigration to another state.

The right of visitors to be treated equally is guaranteed by Article IV, section 2: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

It provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin v. Orbeck*, 437 U. S. 518 (1978), to procure medical services, *Doe v. Bolton*, 410 U. S. 179, 200 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell*, 334 U. S. 385 (1948).<sup>31</sup>

Those protections are not “absolute,” but the Clause “does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.” *Sáenz* at 501–02.<sup>32</sup>

**A. The Fourteenth Amendment was intended to give Congress the power to protect the right to travel—with special concern for travelers who might be threatened by violence.**

Section 5 of the Fourteenth Amendment granted a new power to Congress: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” One of the purposes of section 5 was to give Congress the affirmative power to enforce the rights protected in Article IV, § 2, which Congress believed to be among those rights that were protected by section 1 of the Fourteenth Amendment.<sup>33</sup>

Notably, congressional debate on the Fourteenth Amendment’s Privilege or Immunities clause indicated specific intent to protect the right to travel—not just the right to become a citizen of a new state. Congress discussed South Carolina’s notorious 1844 persecution of Samuel Hoar, an attorney from Massachusetts. Hoar had traveled to South Carolina to mount a legal

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<sup>31</sup> “[W]ithout some provision . . . removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.” Article IV, section 2, removes “from the citizens of each State the disabilities of alienage in the other States.” *Paul v. Virginia*, 8 Wall. 168, 180 (1869).

<sup>32</sup> Variations of this phrase appear in four other cases, starting in 1948.

<sup>33</sup> Randy Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 JOURNAL OF LEGAL ANALYSIS 165 (2011). To remove any doubt, the drafters of the Fourteenth Amendment made sure to put “Privileges or Immunities of citizens of the United States” in section 1 of the Fourteenth Amendment, and a congressional enforcement power in section 5. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEORGETOWN LAW JOURNAL 329 (2011).

challenge to the state law that authorized the capture and enslavement of free black sailors who in a South Carolina port stepped off their ship and onto the land.<sup>34</sup> Incited by the South Carolina legislature and governor, mobs threatened violence against the attorney, and he was forced to flee the state.<sup>35</sup>

Two decades later, Senator John Sherman (R–Ohio)<sup>36</sup> used Hoar’s case to explain the need for the Fourteenth Amendment. Article IV of the Constitution had always meant that “a man who was recognized as a citizen of one state had the right to go anywhere within the United States and exercise the immunity of a citizen of the United States; but the trouble was in enforcing this constitutional provision. In the celebrated case of Mr. Hoar...This constitutional provision was in effect a dead letter as to him.”<sup>37</sup>

Illinois Senator Lyman Trumbull had authored the Thirteenth Amendment, abolishing slavery. He too cited the Hoar case, and Mississippi’s prohibition on gun ownership by freedmen, as examples of the needs for a congressional power to enforce national citizenship rights.<sup>38</sup>

Ohio Republican Columbus Delano promoted the Fourteenth Amendment to the public by reminding them of the Hoar atrocity, and stating that the Fourteenth Amendment would protect the right of travel.<sup>39</sup>

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<sup>34</sup> A second offense was punishable by enslavement.

Hoar had previously served in the U.S. House, and he also had a long career, before and after 1844, in the Massachusetts legislature. The Governor of Massachusetts had appointed him to go to South Carolina to carry out the Massachusetts legislature’s instructions to collect information about the seizure of Massachusetts free black citizens in South Carolina, and to bring lawsuits challenging the constitutionality of the South Carolina statute.

<sup>35</sup> See Massachusetts General Court, Joint special committee on the treatment of Samuel Hoar by the state of South Carolina, Resolve and declaration (1845).

<sup>36</sup> He later served as Secretary of the Treasury, and Secretary of State, and is best known today as the sponsor of the Sherman Antitrust Act.

<sup>37</sup> CONG. GLOBE, 39th Cong., 1st Sess. 41 (Dec. 13, 1865).

<sup>38</sup> CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866). See also CONG. GLOBE, 39th Cong., 1st Sess. 1066 (Feb. 27, 1866) (Rep. Hiram Price, of Iowa, regarding the proposed privileges or immunities clause of the Fourteenth Amendment: “I want to have a Constitution that will protect my children and my children’s children who may have occasion to travel in any part of the United States.”).

For more on Trumbull, see David B. Kopel, [Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer](#), 47 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 1117 (2016).

<sup>39</sup> CINCINNATI COMMERCIAL, Aug. 31, 1866, p. 2 (report of speech at Coshocton, Ohio, Aug. 28). Delano had been a U.S. Representative and a State Representative, and would later serve as Commissioner of Internal Revenue and as Secretary of the Interior.

**B. Congress’s power to regulate interstate commerce includes the power to thwart impediments to the right to travel.**

After the Civil Rights Act of 1964 outlawed racial discrimination in places of public accommodation, various legal challenges were brought. The one that related to the right to travel was *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

The motel clearly solicited and catered to interstate travel:

It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State.

*Id.* at 242.

The unanimous Supreme Court found that Congress could prohibit the motel from refusing black guests, because such refusal was a barrier to interstate travel. The Court summarized congressional testimony and fact-finding that discrimination had “a qualitative as well as quantitative effect on interstate travel by Negroes.” The uncertainty about being able to find lodging “had the effect of discouraging travel on the part of a substantial portion of the Negro community.” *Id.* at 252–53.

Citing many precedents, the *Heart of Atlanta* Court said that the interstate commerce power included the power to protect interstate transportation of persons. Relying particularly on precedents from 1913, 1917, and 1946, the Court wrote: “Nor does it make any difference whether the transportation is commercial in character.” *Id.* at 256.

The Court concluded:

It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed – what means are to be employed – is within the sound and exclusive discretion of the Congress. It is subject only to one caveat – that the means chosen by it must be reasonably adapted to the end

permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

*Id.* at 261–62.

### C. Application to S. 466

All states have statutes authorizing the carrying of handguns in public places for lawful self–defense.<sup>40</sup>

The large majority of states have reciprocity agreements with other states, so that a carry permit issued to residents of state A may be used by those residents when they visit state B, and vice versa. A few states—including California, New York, and New Jersey—refuse to enter into reciprocity agreements with any of their sister states, *and* they have no provision allowing a non-resident to apply for a permit.

For decades, many states have recognized reciprocity. There does not appear to have been much, in any, caused by visitors who were lawfully bearing arms, pursuant to reciprocity agreements. Thus, in the minority of states that absolutely prohibit licensed carry by non-residents, “there is not substantial reason for the discrimination beyond the mere fact that they are citizens of other states.” The discrimination denies the “right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.” The discrimination imposes “qualitative” impediments on interstate travel.

As with Samuel Hoar, the government of the visited state is affirmatively interfering with visitors’ right to travel in safety and security.

Notably, the need to be prepared for self–defense is especially acute when one is traveling in a different state. At home, one will be familiar with the relative safety of different parts of town at different times of the day. A visitor will not have such familiarity, and could more easily end up in a dangerous area.

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<sup>40</sup> Only Vermont has no procedure to issue licenses. Ever since a 1903 court decision, Vermont has allowed concealed carry by persons who can legally possess handguns. *State v. Rosenthal*, 75 Vt. 295 (1903).

Several other states do not require carry licenses, but they do issue carry permits to applicants who meet the requisite standards. Applicants seek these optional permits in order to take advantage of interstate reciprocity agreements. Also in these states, carry with a permit may be allowed in certain places where unlicensed carry is not allowed. Besides Vermont, the states that do not require carry permits are Alaska, Arizona, Idaho, Kansas, Maine, Mississippi, Missouri, New Hampshire, North Dakota, West Virginia, and Wyoming.

Similarly, a person who goes out for a walk in her hometown will know that while there may be several ways to get from A to B, one particular route is well-lit, with busy streets, and many businesses that are open at night, in which one could seek refuge in case of trouble. A visitor will not have such detailed knowledge.

Tourists and other visitors are particularly targeted by criminals. Their style of dress or mannerisms may indicate that they are not familiar with local mores. Because they are not local residents, they are known to be less able to make another trip to testify in court against the criminal, so the criminal has a greater sense of impunity in attacking a tourist.<sup>41</sup>

For the traveler who has been disarmed by the host state, the alternative to stay shut up in one's hotel room at night. Or to spend all one's time solely in a small tourist zone which has a heavy police presence. To be forced to do so is to be deprived of the constitutional right to travel freely throughout the United States of America.

As in the *Heart of Atlanta* case, or most other laws enacted under section 5 of the Fourteenth Amendment, S. 466 is not the only possible step that Congress could take to solve the problem. Congress could deploy tens of thousands of new federal law enforcement officers all over America, dedicated solely to the protection of interstate travelers. Congress has already enacted criminal laws against persons who attempt to interfere with a person's right to interstate travel,<sup>42</sup> and Congress could enact additional such statutes. Congress could create a civil cause of action on behalf of any interstate traveler who was injured because state action deprived her of the practical means of self-defense.

Congress can instead choose to enact S. 466, which is less intrusive than the other alternatives. S. 466 puts no new federal officials into the states, does not force any state officials to do anything, and imposes no new federal criminal penalties on anyone. S. 466 simply requires that state and local officials not interfere with the lawful defensive carrying of handguns by interstate visitors, *provided that in carrying, the visitors follow the same laws about the manner and places of carrying that are applicable to residents of the host state.*

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<sup>41</sup> Ronald W. Glensor & Kenneth J. Peak, U.S. Department of Justice, *Crimes Against Tourists*, Office of Community Oriented Policing Services, Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 26 (Aug.) 2004, available at [www.cops.usdoj.gov](http://www.cops.usdoj.gov).

<sup>42</sup> The modern application of this Reconstruction era civil rights statute is discussed in *United States v. Guest*, 383 U. S. 745 (1966).



### III. Congressional enforcement of the Right to Bear Arms

Even without the right to travel, S. 466 is constitutionally sound based on Congress's power under section 5 of the Fourteenth Amendment to enforce the rest of that Amendment.

#### A. *Heller* and the Right to Bear Arms

The Second Amendment guarantees the pre-existing “right to keep and bear Arms.” *District of Columbia v. Heller*, 554 U.S. 570 (2008). The full scope of the Second Amendment is protected from state or local government infringement by section 1 of the Fourteenth Amendment. Section 1 declares, in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law....” In 2012, *McDonald v. Chicago* held that state and local governments must respect the Second Amendment right.<sup>43</sup>

Congress has broad powers under section 5 to enforce protection of the rights in section 1. Congress may go further than the courts have, by enacting prophylactic measures to protect a right. These measures must be “congruent and proportional” to the problem addressed. *E.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004). When courts have not defined the full contours of a constitutional right, Congress may use its section 5 powers to provide protections in gray areas.

What Congress may *not* do is defy a direct Supreme Court precedent about the scope of a right. Thus, when the Supreme Court ruled that a particular judicial standard of review should apply to cases involving the First Amendment right of free exercise of religion, Congress could not enact a statute that changed the standard of review. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Notably, the *Boerne* Court itself reaffirmed that Congress's powers under section 5 are not limited to practices that the Supreme Court has explicitly declared unconstitutional. For example, although the Supreme Court had ruled that literacy tests for voters, if fairly administered, are not unconstitutional,<sup>44</sup> Congress outlawed literacy tests in the Voting Rights Act

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<sup>43</sup> In *McDonald*, four Justices thought that the work of applying the Second Amendment to the states was done by the second clause (the “liberty” clause), while Justice Thomas thought that the work was done by the first clause (“privileges or immunities”). *McDonald v. Chicago*, 561 U.S. 742 (2010). For purposes of S. 466, the relevant legal fact is that the Second Amendment is made fully applicable to the states by section 1.

<sup>44</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

of 1965. The Court upheld the ban.<sup>45</sup> *Boerne* cited the literacy test cases with approval, and stated that “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” *Boerne* at 517–18.

Thus, if *Heller* and *McDonald* had been silent on the right to bear arms, S. 466 would be legitimate under section 5, because Congress would be protecting rights in a gray zone left unclear by the Court.<sup>46</sup>

According to *Heller*, the right to “bear Arms” includes the right to “carry weapons in case of confrontation” for the “core lawful purpose of self–defense.” *Heller*, 554 U.S. at 592, 630.

The *Heller* opinion made it clear that not all gun controls are unconstitutional, and listed some “presumptively lawful regulatory measures.” According to the Supreme Court: “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>47</sup>

These are the exceptions that prove the rules. Under *Heller*, ordinary citizens have Second Amendment rights to possess guns, but convicted felons and the mentally ill do not. Gun sales may not be banned, but there may conditions

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<sup>45</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970). As the *Boerne* Court pointed out, the Voting Rights Act was based mainly on Congress’s enforcement power in section 2 of the 15th Amendment, and the doctrinal analysis for the Fourteenth Amendment’s enforcement power in section 5 is identical. (The two sections have only minor, non-substantive differences in wording.)

<sup>46</sup> What might constitute a violation of *City of Boerne*, in the context of S. 466? Let’s imagine that the Supreme Court had handed down a decision that the Second Amendment right to “keep” arms is an absolute right for everyone to have guns at home for any purpose. Further imagine that the Court also said the right to bear arms was solely for the militia. Then S. 466 would not be appropriate under section 5, because it protects bearing arms all many citizens, not just the militia.

An 1840 Tennessee Supreme Court case interpreted the state constitution this way, and said that the Second Amendment means the same thing. *Aymette v. Tennessee*, 2 Humphreys 154 (Tenn. 1840). Regarding *Aymette*, the *Heller* Court wrote, “This odd reading of the right is, to be sure, not the one we adopt . . .” *Heller* at 613.

<sup>47</sup> *Id.* at 626–27.

and qualifications for gun stores. The Second Amendment right includes the right to carry guns, but not to carry in “sensitive places.”

The *Heller* Court explicated the right to bear arms by approvingly citing and discussing state cases involving the right. Each of these cases came to the same conclusion: a state could ban concealed carry of handguns, if and only if the state also allowed the *open* carry of handguns. Thus, a legislature could regulate the *mode* of carry as long as law-abiding citizens could actually exercise the right to carry.

For example, *State v. Reid*, 1 Ala. 612, 616–17 (1840), upheld a ban on carrying a weapon concealed, but added: “A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.” This sentence is quoted in *Heller* as an accurate expression of the right to bear arms.<sup>48</sup>

Likewise cited by the Supreme Court as an accurate reading of the Second Amendment was *Nunn v. State*, 1 Ga. 243 (1846).<sup>49</sup> That case, relying on the Second Amendment struck down a general ban on carrying handguns for protection. *Nunn* upheld a ban on concealed carry, because open carry was allowed.

*Heller* also relied on *State v. Chandler*, 5 La. Ann. 489 (1850). As *Heller* put it: “the Louisiana Supreme Court held that citizens had a right to carry arms openly: ‘This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.’”<sup>50</sup>

Likewise, in *Andrews v. State*, 50 Tenn. 165 (1871), the Tennessee Supreme Court equated the state constitutional provision to the Second Amendment, and struck down a law against carrying handguns “publicly or privately, without regard to time or place, or circumstances.” *Heller* at 629.

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<sup>48</sup> *Heller* at 629.

<sup>49</sup> Cited in *Heller* at 612–13. For a detailed survey of early state and federal caselaw on the Second Amendment, and the modern Supreme Court’s treatment of that caselaw, see David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY 127 (2016).

<sup>50</sup> *Heller* at 613.

The *Heller* Court also approvingly cited other legal authorities stating that the right to arms included the right to carry defensive arms.<sup>51</sup>

The states that have caused the problem addressed by S. 466 have done what *Reid, Chandler, Nunn, Andrews*—and *Heller*—forbid. For visitors, these states have eliminated the right to bear a handgun for lawful protection.

## B. *McDonald* and the Right to Bear Arms

Discussion the constitutional violations that the Fourteenth Amendment was designed to remedy, Justice Alito’s opinion in *McDonald* pointed out the Mississippi statute providing that “no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . . .”<sup>52</sup> *McDonald* also cited to a Louisiana law: “No negro who is not in the military service shall be allowed to carry firearms, or any kind of weapons, within the parish, without the written special permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol.”<sup>53</sup>

*McDonald* described a convention of black citizens in South Carolina who sent a petition to Congress stating that the Constitution “explicitly declares that the right to keep and bear arms shall not be infringed” and urging that “the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution.”<sup>54</sup> Rep. George Washington Julian (R–Ind.) decried that South Carolina law and a similar Florida one:

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<sup>51</sup> WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 72 (1716) (there is “no Reason why a Person, who without Provocation, is assaulted by another *in any Place whatsoever*, in such a Manner as plainly shews an Intent to murder him, . . . may not justify killing such an Assailant”) (emphasis added), cited in *Heller* at 582.

“The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in congressional discussion of the bill, with even an opponent of it saying that the founding generation ‘were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.’ CONG. GLOBE, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).” *Heller* at 615–16.

<sup>52</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010).

<sup>53</sup> *McDonald* at 279–280 (“see also Regulations for Freedmen in Louisiana, in *id.* [1 DOCUMENTARY HISTORY OF RECONSTRUCTION 289 (W. Fleming ed. 1950)]”).

<sup>54</sup> *McDonald* at 771, n.18, quoting STEPHEN. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 9 (1998).

Although the civil rights bill<sup>55</sup> is now the law, . . . [it] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is whipped. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.

CONG. GLOBE, 39th Cong., 1st Sess., 3210 (June 16, 1866).

“The most explicit evidence of Congress’ aim” regarding the Fourteenth Amendment, *McDonald* continued, appeared in Freedmen’s Bureau Act of 1866. It guaranteed “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms . . . .”<sup>56</sup>

Justice Thomas’s *McDonald* concurrence referred to states that “enacted legislation prohibiting blacks from carrying firearms without a license.” The opinion quoted Frederick Douglass: “the black man has never had the right either to keep or bear arms”—a problem the Fourteenth Amendment aimed to remedy.<sup>57</sup>

### C. Concealed handguns?

As accurately noted by *Heller*, many state courts have upheld bans on *concealed* carry.<sup>58</sup> S. 466 applies only to concealed carry. If S. 466 were applied to a state that banned visitors from carrying concealed, *and* if that state allowed open carrying by visitors, then there might be a serious question about whether S. 466 could be applied to such a state pursuant to Congress’s Fourteenth Amendment powers.<sup>59</sup>

However, there is no such state. States such as New York and New Jersey that are obliterating the constitutional rights of visitors are no more tolerant of

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<sup>55</sup> Civil Rights Act of 1866, 14 Stat. 27–30 (Apr. 9, 1866).

<sup>56</sup> *McDonald* at 773.

<sup>57</sup> *McDonald* at 847, 849 (Thomas, J., concurring).

<sup>58</sup> “[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” *Heller* at 629.

<sup>59</sup> In other words, there would be a question under the *Tennessee v. Lane* line of cases about whether the congressional remedy was “congruent and proportional.”

open carry by visitors than they are of concealed carry. For all practical purposes, all defensive carry by visitors is prohibited.

Accordingly, Congress may in its discretion enact national reciprocity for concealed carry rather than for open carry. Like any legislature, Congress may make a choice between preferring one mode of carry over another. Further, Congress may, in enacting system based on interstate reciprocity of *licenses*, take into account the fact that 49 states have laws to issue licenses to residents for concealed carry, but only a few issue licenses for open carry.<sup>60</sup>

#### IV. Constitutionality based on the handgun's having been shipped or transported in interstate commerce.

S. 466 is justified by original public meaning of the Fourteenth Amendment, which granted Congress the power to protect the rights to travel and to bear arms. In addition, Supreme Court precedents strongly support congressional use of Interstate Commerce Clause to protect the right to interstate travel.

S. 466 could also be upheld under a different theory: the bill only applies to a gun that has previously moved in interstate commerce.<sup>61</sup> The gun having once been an item of interstate commerce, it forever remains subject to Congress's interstate commerce power.

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<sup>60</sup> Most states have statutes that require the issuance of concealed carry licenses to law-abiding citizens based on standards that a reasonable law-abiding adult can meet. *See, e.g.*, ARK. CODE ANN. § 5-73-309(a); COLO. REV. STAT. ANN. § 18-12-203(1); FLA. STAT. ANN. § 790.06(2); GA. CODE ANN. § 16-11-129; IDAHO CODE ANN. § 18-3302(1); IND. CODE ANN. § 35-47-2-3(e), IOWA CODE ANN. § 724.7; KANSAS STAT. ANN. § 75-7c03; KY. REV. STAT. ANN. § 237.110(2); LA. REV. STAT. ANN. § 40:1379(A)(1); ME. REV. STAT. ANN. tit. 25, § 2003; MICH. COMP. LAWS ANN. § 28.422(2)(3); MINN. STAT. § 624.714, subdiv. 2(b); MISS. CODE ANN. § 45-9-101(2); MO. ANN. STAT. § 571.090(1); MONT. CODE ANN. § 45-8-321(1); NEB. REV. STAT. § 28-1202; NEV. REV. STAT. ANN. § 202.3657(2); N.H. REV. STAT. ANN. § 159.6; N.M. STAT. ANN. § 29-19-4; N.C. GEN. STAT. § 14-415.11(b); N.D. CENT. CODE § 62.1-04-03; OHIO REV. CODE ANN. §2923.125(D)(1); OKLA. STAT. ANN. tit. 21, § 1290.12(12); OR. REV. STAT. ANN. § 166.291; 18 PA. CONS. STAT. ANN. § 6109(e); S.C. CODE ANN. § 23-31-215(A); S.D. CODIFIED LAWS § 23-7-7; TENN. CODE ANN. § 39-17-1351(b); TEX. GOV'T CODE ANN. § 411.177(a); UTAH CODE ANN. § 53-5-704(1)(a); VA. CODE ANN. § 18.2-308(D); WASH. REV. CODE ANN. § 9.41.070(1); W. VA. CODE ANN. § 61-7-4(f).

Eight states are problematic in respect to issuance of carry permits. In Hawaii, permits are only issued to a few security guards. Permits are rarely issued in New Jersey and Maryland. In California, New York, and Delaware, licensing practices vary by county, and a minority of counties rarely issue. In Rhode Island and Massachusetts, town police are the main licensing authorities; practices range from fair issuance to near prohibition.

<sup>61</sup> S. 466 applies to carrying a handgun, "that has been shipped or transported in interstate or foreign commerce." Proposed 18 U.S.C. § 926D(a)(1).

I have previously criticized this theory, which extremely far removed from the original meaning of the Interstate Commerce Clause and from common sense.<sup>62</sup> Many other federal gun control laws contain the same jurisdictional element. These include:

- The statute barring various categories of persons from possessing firearms and ammunition. Gun Control Act of 1968, 18 U.S.C. § 922(g) & (n). Notably, this law applies to individuals whose personal current possession of the arm does not involve interstate commerce. The state border crossing might have occurred decades ago, unconnected to the individual.
- The version of the Gun-Free School Zones Act (GFSZA) that Congress enacted in 1995, after an earlier version of the GFSZA was ruled unconstitutional by the Supreme Court in *United States v. Lopez*.<sup>63</sup> 18 U.S.C. 922(q). This law applies to gun carrying within a state regardless of whether the carrying has to do with interstate commerce. The revised the GFSZA has been upheld in lower courts.<sup>64</sup> Like S. 466, the GFSZA controls the conditions for carrying handguns in public places.
- Law Enforcement Officers Safety Act. 18 U.S.C. § 926B&C (LEOSA). This law allows gun carrying by qualified active and retired law enforcement personnel, and protects their travel rights.<sup>65</sup>

In some other areas, Congress has enacted Interstate Commerce Clause legislation that does not even contain the jurisdictional predicate of an interstate border crossing. For example, the Controlled Substances Act applies to intrastate non-commercial possession of controlled substances that have

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<sup>62</sup> David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENVER UNIVERSITY LAW REVIEW 901, 938 (2009); David B. Kopel & Glenn Harlan Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban*, 30 CONNECTICUT LAW REVIEW 59 (1997). See also *United States v. Cortner*, 834 F. Supp. 242, 243 (M.D. Tenn. 1993), rev'd sub nom. *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994) (“To say . . . that because something once traveled interstate it remains in interstate commerce after coming to rest in a given state, is sheer sophistry. This Court, at one time, owned a 1932 Ford which was manufactured in Detroit in the year 1931 and transported to the state of Tennessee. It remained in Tennessee thereafter. Now if this car were hijacked today, some sixty years later, is it still in interstate commerce?”).

<sup>63</sup> 514 U.S. 549 (1995).

<sup>64</sup> *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999).

<sup>65</sup> Before LEOSA, all states allowed off-duty gun carrying by resident active law enforcement. For resident retired law enforcement, the states either issued permits, or did not require permits. Pre-LEOSA, most states allowed carry by non-resident law enforcement, or retired law enforcement, but some were prohibitive to non-residents.

never crossed a state border. Indeed the Act even applies to medical marijuana lawfully cultivated under state law, and which never leaves the home of the patient-cultivator.

A court decision that held S. 466 to be beyond the scope of congressional interstate commerce would necessarily mean that many federal laws on guns, drugs, and other items are unconstitutional. Whether such a sweeping change would be beneficial is a matter on which there is disagreement.

In the unlikely event that a dramatic reversal of modern precedent occurred, S. 466 would retain a solid constitutional foundation based on section 5 of the Fourteenth Amendment (the power to protect interstate travel and to protect the right to bear arms). Even without the jurisdictional predicate about the handgun itself, S. 466 is also well-founded on a longstanding congressional interstate commerce power to protect interstate travel.