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Article

The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping Legislation

MICHAEL P. O'SHEA

Proposals for federal gun control have recently focused on expanding background checks and recordkeeping requirements for private firearms transfers. This Article places the debate about such legislation in a fuller context that includes the actions of the executive and judicial branches, as well as current gun control efforts in the states. This enables a more informed appraisal of the anti-slippery slope arguments that motivate opposition to such laws. I examine mechanisms that can make descending the slippery slope more or less likely, focusing on judicial enforcement of the Second Amendment right to arms in the federal courts. A study of 225 lower federal court Second Amendment decisions from June 2008 to October 2013 reveals that, since District of Columbia v. Heller*, most courts have taken a highly deferential approach to legislation, and Second Amendment limits on government action have been imposed—all but exclusively—by judges appointed by Republican presidents.*

*The Article closes by considering possible bases for legislative compromise. Future proposals for expanded background checks should: (1) structure the check to minimize recordable information about transfers, and (2) remedy the lower courts' clearest shortfall in enforcing the post-*Heller *Second Amendment by mandating nationwide handgun carry permit reciprocity.*

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The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping Legislation

MICHAEL P. O'SHEA*

I. INTRODUCTION

The United States Senate's rejection in April 2013 of the so-called Manchin-Toomey Amendment, a gun control measure that would have extended federal background checks and recordkeeping requirements to most private transfers of firearms,[1] prompted relief in some quarters[2] and anger in others—including the Oval Office.[3] Manchin-Toomey was part of a slate of proposed gun control measures in the Senate that also included bans on the sale of dozens of popular models of self-loading rifles[4] and of

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[1] Public Safety and Second Amendment Rights Protection Act of 2013, S. Amend. 715 to S. 649, 113th Cong. § 122 (2013). The amendment was nicknamed for its lead sponsor, Democratic Senator Joe Manchin of West Virginia, and its co-sponsor, Republican Senator Patrick Toomey of Pennsylvania. Jeff Zeleny, *Senators Crack Impasse on Gun Background Check*, ABC NEWS BLOG (Apr. 10, 2013, 1:12 PM), http://abcnews.go.com/blogs/politics/2013/04/senators-crack-impasse-on-gun-background-check/. The amendment's other sponsors were Democratic Senator Charles Schumer of New York and Republican Senator Mark Kirk of Illinois. *Id.*

[2] *See* Chris Cillizza & Sean Sullivan, *Why the American Public Isn't Mad as Hell About the Failure of the Gun Bill (in Numbers)*, WASH. POST (Apr. 24, 2013, 7:00 AM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/24/why-the-american-public-isnt-mad-as-hell-about-the-failure-of-the-gun-bill-in-numbers/ ("39 percent call themselves 'relieved' or 'happy' about [the defeat of Manchin-Toomey].").

[3] *See* EMILY MILLER, EMILY GETS HER GUN BUT OBAMA WANTS TO TAKE YOURS 112 (2013) ("After the Senate votes, the president was enraged."); Ed O'Keefe & Philip Rucker, *Senate Rejects Curbs on Guns*, WASH. POST, Apr. 18, 2013, at A1 (describing the President as "visibly angry" while remarking to the press that Manchin-Toomey's rejection was "a pretty shameful day for Washington").

[4] S. Amend. 711 to S. 649, 113th Cong. § 402 (2013); *see* Press Release, Dianne Feinstein, U.S. Senator, Feinstein Introduces Bill on Assault Weapons, High-Capacity Magazines (Jan. 24, 2013), *available at* http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5dffbf07-d8e5-42aa-

common types of magazines holding more than ten rounds of ammunition.[5]

In the end, none of the gun control proposals obtained enough votes to proceed from the Senate.[6] Some failed to obtain support from even a bare majority of Senators.[7] In one case—the proposed ban on modern self-loading rifles—the proposed measure was rejected by a supermajority margin.[8]

The rejection of the background check recordkeeping provisions drew particular criticism, with some claiming that legislators who opposed the measure "are merely obstructionists . . . who will not agree to common-sense gun legislation."[9] Such controversy is likely to be revived before Congress in the future.[10]

This Article attempts to inform the debate about congressional background recordkeeping legislation by placing it in a broader context that includes recent actions of the judicial and executive branches of the federal government, as well as restrictive gun legislation recently enacted at the state level. This fuller context suggests that the rejection of expanded federal recordkeeping legislation was a reasonable response to genuine threats to the constitutional right to keep and bear arms. Constitutional and legislative protections for gun rights are mechanisms that could, in some situations, reduce such threats and pave the way to regulatory compromise. But the burden of this Article is to argue that those mechanisms are not functioning properly today. Under those conditions, the rejection of Manchin-Toomey was consistent with a

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9f22-0743368dd754 ("[T]he bill prohibits the sale, manufacture, transfer, and importation of 157 of the most-commonly-owned military-style assault weapons.").

[5] S. Amend. 714 to S. 649, 113th Cong. § 402 (2013). This proposed amendment was introduced by Senator Richard Blumenthal of Connecticut for Senator Frank Lautenberg of New Jersey. *Id.*

[6] The Manchin-Toomey background recordkeeping measure obtained fifty-four votes, but fell short of the sixty-vote hurdle the Senate had set for amendments to the underlying bill, the Safe Communities, Safe Schools Act of 2013. *U.S. Senate Roll Call Votes 113th Congress – 1st Session*, SENATE.GOV (Apr. 17, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00097. The Safe Communities, Safe Schools Act, which was introduced by Senate Majority Leader Harry Reid of Nevada, contained a more prohibitive set of regulations for private firearms transfers. S. 2584, 113th Cong. (2013).

[7] The proposed magazine ban, S. Amend. 714 to S. 649, was defeated by a vote of forty-six to fifty-four. *U.S. Senate Roll Call Votes 113th Congress – 1st Session*, SENATE.GOV (Apr. 17, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00103.

[8] Senator Feinstein's proposed ban on the AR-15 and dozens of other popular self-loading rifles, S. Amend. 711 to S. 649, was defeated by a vote of forty to sixty. *U.S. Senate Roll Call Votes 113th Congress – 1st Session*, SENATE.GOV (Apr. 17, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00101.

[9] Robert A. Levy, Op-Ed., *A Libertarian Case for Expanding Gun Background Checks*, N.Y. TIMES (Apr. 26, 2013), http://www.nytimes.com/2013/04/27/opinion/a-libertarian-case-for-resurrecting-the-manchin-toomey-compromise.html?_r=0.

[10] *See* MILLER, *supra* note 3, at 112 (quoting Senator Reid's pledge that "this debate is not over").

skeptical and defensive orientation toward potential threats to Second Amendment values—an orientation that legislators, in turn, were justified in adopting.

The objections voiced to proposed laws like Manchin-Toomey often include concerns about privacy and the related fear that official information about firearms ownership will not be kept secure. Indeed, these worries appear more plausible in light of recent abuses of government firearms databases. For example, in a high-profile incident last year, Missouri Highway Patrol officials responded to an oral request from a single U.S. Social Security Administration investigator by mailing him the personal information of over 163,000 Missouri concealed carry permit holders.[11]

But a further, and perhaps more fundamental objection to this type of legislation takes the form of a slippery slope argument,[12] which is the focus of this Article. Many opponents of background check recordkeeping laws agree that certain categories of people (e.g., convicted felons, the insane, drug addicts) are properly excluded from the right to gun ownership.[13] Federal law already mandates background checks for retail purchases of firearms.[14] Some would agree that expanding checks to private sales would prevent some transfers of firearms to prohibited persons.[15] The slippery slope objection, then, does not focus upon the immediate operation of expanded background check laws; rather, it rests on the fear

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[11] David A. Lieb, *Mo. Patrol Gave Feds List of Concealed Gun Holders*, KAN. CITY STAR (Apr. 12, 2013), http://www.kansascity.com/2013/04/12/4177167/mo-patrol-gave-feds-list-of-concealed.html. Federal officials originally stated that they were able to read the information on the discs, but then reversed the statement and reported that they were unreadable. The head of Missouri's Department of Revenue, the state agency that compiled the carry permit information, resigned shortly after the information disclosure became public. Jonathan Shorman, *Department of Revenue Director Resigns Amid Gun Permit Scrutiny*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.) (Apr. 15, 2013), http://www.news-leader.com/article/20130415/NEWS01/304150098/After-saying-gun-permit-list-was-read-federal-agency-reverses-itself.

[12] *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1029 (2003) (defining a slippery slope as a situation "where one group's support of a first step A eventually made it easier for others to implement a later step B that might not have happened without A").

[13] *See, e.g.*, Clayton E. Cramer, Background Checks and Murder Rates 2–3 (unpublished manuscript) (Apr. 11, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249317 (criticizing the empirical evidence that laws mandating background checks for private gun sales actually reduce homicides, but conceding that "the logic of such laws seems persuasive"). The Supreme Court's opinion in *District of Columbia v. Heller* extended at least presumptive approval to the constitutionality of laws prohibiting felons and the insane from owning firearms. *See* 554 U.S. 570, 626–27 (2008) (describing such laws as "longstanding" forms of regulation).

[14] 18 U.S.C. § 922(t)(1) (2012). For a description of the process by which retailers must check and record information about gun purchasers, see *infra* Part II.B.

[15] *See, e.g.*, Greg Sargent, *Why Expanding Background Checks Would, in Fact, Reduce Gun Crime*, WASH. POST (Apr. 3, 2013, 12:49 PM), http://www.washingtonpost.com/blogs/plumline/wp/2013/04/03/why-expanding-background-checks-would-in-fact-reduce-gun-crime/ (noting that the ability to trace records of gun transfers would create a "disincentive" to sell to prohibited persons).

that expanding such laws will make it more likely that government officials will later enact or enforce additional restrictions that the opponents do regard as substantively unacceptable and/or unconstitutional.[16] This Article documents features of the contemporary political and legal climate that make concerns about slippery slopes plausible in the area of gun policy.

Part II of this Article summarizes current federal law governing background checks and recordkeeping and explains how Manchin-Toomey and similar measures would change it. This Part also discusses the structure of slippery slope arguments in general and identifies some features that can make progression down a slippery slope more or less likely in particular circumstances.

Part III considers the severity of the current political opposition to gun rights, as shown in the actions taken by state legislatures and the recent statements of prominent federal elected officials.

Part IV shifts the focus to the judicial branch. Some may argue that, whatever the merit of slippery slope objections to recordkeeping laws in the past, such fears are adequately addressed today by the ability of individuals to bring Second Amendment claims in federal court, with confidence that the courts will serve as a backstop to prevent legislative excesses. That confidence, it turns out, is currently unjustified. This Part documents the history of enforcement of the Second Amendment in the lower federal courts in the years since the U.S. Supreme Court's landmark decision in *District of Columbia v. Heller*.[17] The litigation record displays a pattern of great deference to legislation—particularly on the part of judges nominated by Democratic presidents—that significantly weakens the argument that judicial enforcement of the Second Amendment can be relied upon to prevent gun restrictions from descending the slippery slope.

Part V concludes by assessing the prospects for legislative compromise in the future. Any expansion of federal regulation of firearm transfers will implicate to some degree the slippery-slope risks diagnosed in Parts II through IV. Still, it is possible to describe a "best-case" proposal for expanded background checks that would reflect a strong effort to ameliorate slippery-slope risks. The two most important features of the proposal are: (1) structuring the background-check requirement to generate as little recordable information as possible about particular firearm transfers; and (2) coupling new transfer regulations with legislative action

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[16] *See* Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 HAMLINE L. REV. 399, 462–63 (1999) (concluding that "registration of the property of persons who exercised the right" to have arms in the United Kingdom was a factor that contributed to the right's "destruction," because it "later . . . facilitate[d] confiscation" of that property when Parliament enacted bans on various firearms).

[17] 554 U.S. 570 (2008).

to remedy the lower federal courts' clearest shortfall in enforcing the post-*Heller* Second Amendment, by mandating nationwide handgun carry permit reciprocity.

II. SLIPPERY SLOPE SCENARIOS AND ANTI-SLIPPERY SLOPE PROTECTIONS

A. *The Structure of the Slippery Slope Argument Against Gun Registration*

How strongly do "the mechanisms of the slippery slope"[18] operate in the area of gun control today? Eugene Volokh has usefully schematized the distinctive way that slippery slope dangers influence policy choice. Such dangers produce "situation[s] where a potentially valuable option A, which would pass if considered solely on its own merits, is defeated because of swing voters' reasonable fears that [adopting] A will lead to B"—the adoption of a measure they view as unacceptable.[19]

As the reference to "reasonable fears" in this definition acknowledges, slippery slopes sometimes materialize.[20] It follows that some refusals to take the first step, *A*, may be reasonable even if one does not find *A* objectionable on its merits. And the more likely it is that adopting a particular, otherwise acceptable step *A* will lead to a future unacceptable outcome *B*, the greater the "slippery slope inefficiency"[21] that characterizes policy choice in this area. Likewise, the more substantively unacceptable *B* is, the greater the slippery slope inefficiency, which provides an independent reason to reject policy *A*. (The slippery slope inefficiency can be defined as the product of the net disutility of *B* multiplied by the likelihood that adopting *A* will lead to *B*.)

Volokh repeatedly draws upon background check recordkeeping laws for firearm transfers as an example of a situation in which slippery slope inefficiencies may importantly affect policy choice.[22] The slippery-slope risks raised by background check laws arise because such laws generate official records of firearms transactions.[23] These typically record both the individuals involved in each transfer and the specific firearm being

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[18] Volokh, *supra* note 12, at 1128.

[19] *Id*. at 1131.

[20] *See* Olson & Kopel, *supra* note 16, at 399–401 (documenting the progression of piecemeal gun control measures in the twentieth-century United Kingdom, beginning with modest and seemingly reasonable measures—and leading to a state at the turn-of-the millennium in which handgun ownership is illegal, many long guns are restricted, onerous storage and warrantless-search requirements are imposed on legal gun owners, and the use of firearms for self-defense is heavily stigmatized). More examples from the subject of gun control are listed later in this Part.

[21] Volokh, *supra* note 12, at 1131.

[22] *Id*. at 1033–34, 1039–40, 1044–45.

[23] *See* 18 U.S.C. § 923(g) (2012) (requiring licensed importers, manufacturers, and dealers to maintain records of sales or other dispositions of firearms).

transferred[24]—as Manchin-Toomey would have done for most private sales between individuals.[25]

Therefore, such laws generate data that is similar to the type of data created by laws that directly mandate gun registration. They thus raise the same slippery-slope risks as gun registration laws: namely, they enable future forms of gun confiscation that would not have been feasible prior to (official or de facto) registration.[26] In Volokh's terms, allowing the government to verify that each person acquiring a firearm is a legal purchaser (outcome *A*), which is presumed to be desirable or at least not harmful on its own merits, raises the risk that a future government will pursue broad gun bans and similar confiscatory measures (outcome *B*), which are made more practicable by the generation of data on firearms transactions that the passage of measure *A* enabled.[27]

The slippery-slope risk associated with a background recordkeeping measure depends on several factors. One is whether the existence of government records of firearms transactions makes confiscation practical in situations when it would otherwise not have been.[28] If confiscation is expected to fail in practice, or to be very costly, then confiscatory measures are less likely to be enacted, even if there is a considerable political will in favor of gun confiscation. But if a regime of criminally enforced recordkeeping requirements has reduced the practical difficulty of confiscation, then a political will in favor of such a choice is more likely to be translated into action. Volokh calls this sort of mechanism a "cost-lowering slippery slope."[29]

This factor is crucial in assessing the slippery slope risks of background checks. Gun rights supporters often intuit that the current proposals to bring private sales within the federal recordkeeping system are more consequential than they seem at first; such laws touch core political realities in the conflict over guns. But in the recent debate over Manchin-Toomey, the pro-gun side did not always do a good job of articulating those fears in a cogent manner. To appreciate the way that recordkeeping laws lower the practical cost of future restrictions, it will be useful to summarize current federal law governing background checks for gun transfers.

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[24] *Id*. §§ 922(t), 923(g).

[25] S. Amend. 715 to S. 649, 113th Cong. § 122 (2013).

[26] Volokh, *supra* note 12, at 1033–34.

[27] *See id*. (setting forth factors that may influence the seriousness of the slippery-slope risk that registration will lead to confiscation).

[28] *Id*.

[29] *Id*. at 1043.

B. *Current Federal Recordkeeping Laws*

Under the Gun Control Act of 1968,[30] as amended, a federal firearms license is required in order to "engage in the business" of dealing in firearms for a living.[31] The term "FFL" is commonly used to refer to such a license, as well as a business or individual who holds one.[32] Purchases of firearms from an FFL, such as a retail gun store, are subject to an automated background check conducted by federal employees (a procedure that the retailer normally conducts by telephone while the customer waits).[33] The FFL must record information from each purchase on the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Form 4473, including the name, address, and identifying characteristics of the purchaser, as well as the serial number and type of the firearm involved.[34]

The terms of the Gun Control Act require the federal government to "destroy" the information it creates in responding to the telephone background check, except for a unique number designating the particular transaction.[35] This requirement was meant to prevent the recordkeeping requirement from functioning as the equivalent of a national gun registry. Indeed, the text of the Act expressly prohibits federal and state

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[30] The Gun Control Act of 1968 established a federal regulatory scheme for the transfer and possession of ordinary firearms such as handguns, rifles, and shotguns. Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 (2012)). It has been amended a number of times since its enactment, most importantly in 1986 with the passage of the Firearms Owners' Protection Act, which, inter alia, provided that a culpable mens rea requirement applied to most federal firearms offenses and clarified when a person who engages in firearms sales should be deemed "engaged in the business" of dealing in firearms, thus triggering a federal license requirement. Pub. L. No. 99-308, § 101, 100 Stat. 449, 450 (1986). In 1993, the Brady Handgun Violence Prevention Act created a system of formal background checks required in order to purchase a firearm. Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1539 (1993). A version of the Brady Act's background check requirement, the National Instant Check System ("NICS"), remains in effect today for retail purchases of firearms. 18 U.S.C. § 922(t).

[31] 18 U.S.C. § 922(a)(1)(A). The Act defines a person who is "engaged in the business" of dealing in firearms as:

> [A] person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

Id. § 921(a)(21)(C).

[32] *How to Become a Federal Firearms Licensee (FFL)*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, http://www.atf.gov/firearms/how-to/become-an-ffl.html (last visited Apr. 15, 2014).

[33] *National Instant Criminal Background Check System*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/nics (last visited Apr. 15, 2014).

[34] 27 C.F.R. § 478.124(a) (2013); *see also* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FIREARMS TRANSACTION RECORD PART I – OVER-THE-COUNTER (2012), *available at* http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf (copy of the current Form 4473).

[35] 18 U.S.C. § 922(t)(2)(C).

governments from using the records generated by the instant background check system to maintain "any system of registration of firearms, firearm owners, or firearm transactions."[36]

Despite this prohibition on a "system of registration," the Gun Control Act does, in fact, impose substantial recordkeeping requirements on firearms transfers within its scope. The FFL is obligated to retain the Form 4473 from each transaction for at least twenty years and must allow ATF agents to inspect the forms during annual regulatory compliance inspections.[37] The ATF can also inspect the forms whenever needed for a bona fide law enforcement investigation.[38] Under current law, the ATF may employ a "demand letter" to obtain records for an investigation; it need not send an agent to personally inspect them at the FFL's place of business.[39] Finally, and importantly, when an FFL leaves the firearms business and wraps up its operations, the formerly decentralized records become centralized: the FFL is required to transfer its inventory of Form 4473s to the ATF, to be retained by that agency.[40]

It is most fair to characterize the background check and recordkeeping provisions of the Gun Control Act today as a program, if not of overt registration, then of *semi-registration* applied to personal firearms whose owners acquired them through retail purchases.[41] True, the decentralization of the records kept in the hands of FFLs does increase transaction costs on government action and thereby creates some obstacles to using them as a unified gun registry. Nevertheless, the existence of detailed official records on each retail gun transaction and the fact that the

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[36] *Id.* § 926(a). The provision reads:

> No such rule or regulation prescribed after [May 19, 1986] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the [Attorney General]'s authority to inquire into the disposition of any firearm in the course of a criminal investigation.

Id.

[37] *Id.* § 923(g)(1)(B); 27 C.F.R. § 478.129(b).

[38] 18 U.S.C. § 923(g)(1)(B)(iii).

[39] *See id.* § 923(g)(5) (referencing the Attorney General's ability to request records of sales by letter). Though it makes most sense to interpret this provision consistently with the rest of the Gun Control Act as merely stipulating a particular manner in which FFLs may be asked to produce records to which ATF is otherwise entitled, some federal courts have interpreted the provision as a freestanding source of power to access records. *See infra* Part IV.D.

[40] 18 U.S.C. § 923(g)(4); 27 C.F.R. § 478.127.

[41] *Cf.* Olson & Kopel, *supra* note 16, at 419 & n.86 (characterizing the current recordkeeping regime simply as "federal registration" of retail firearms purchases and the Form 4473 as a "registration form").

federal government knows where all of the records are (and gradually absorbs them into its own custody as FFLs go out of business), raises some of the concerns about abuse of information that characterize gun registration programs generally.

There is, however, an important limit on the scope of semi-registration under the Gun Control Act today. If one takes a broader view and asks about *all* lawful personally owned firearms in America, then it becomes more apt to describe current federal law as falling well short of full gun registration. That is because unlike retail sales, many *private* sales of firearms are not subject to a formal background check and recordkeeping requirements.

Private sales are occasional sales of guns between individuals, when neither the buyer nor the seller holds an FFL or engages in the business of dealing in firearms for a living.[42] Such sales take place at homes, at shooting club events, at gun shows, on Internet forums for firearm enthusiasts, and in other venues.[43] They have always been legal under federal law as long as the buyer and seller are both citizens of the same state and neither is legally prohibited from possessing a firearm.[44] Moreover, such intrastate private sales have traditionally been exempt from the formal background check and recordkeeping requirements that govern retail purchases of guns from an FFL; the participants need not create or maintain a Form 4473.[45] But it is still a crime for a non-FFL individual to sell a gun to another non-FFL individual if the seller knows or has reason to believe that the recipient is legally prohibited from possessing a firearm—for example, by having a prior felony conviction that disqualifies the buyer from firearms ownership.[46]

C. *How Federal Recordkeeping for Private Sales Would Change the Slippery Slope Calculus*

Manchin-Toomey would have extended the semi-registration regime of the Gun Control Act to most privately transferred firearms.[47] With a limited exception for transfers between family members, the bill proposed to extend the federal recordkeeping requirements for retail sales—and the associated felony penalties for noncompliance—to any private sale that took place at a gun show or "pursuant to an advertisement, posting, display or other listing on the Internet or in a publication by the transferor of his

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[42] 18 U.S.C. § 922(a)(3), (5).

[43] NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 17–18 (2012).

[44] 18 U.S.C. § 922(a)(5), (d).

[45] *See* 18 U.S.C. § 922(t) (only imposing recordkeeping requirements on sales involving an FFL).

[46] *See id*. § 922(d) (listing categories of prohibited persons).

[47] S. Amend. 715 to S. 649, 113th Cong. § 122 (2013).

intent to transfer, or the transferee of his intent to acquire, the firearm."[48] Any private sale covered by this broad definition would thenceforth have had to be conducted through a licensed FFL dealer as intermediary between the non-FFL buyer and non-FFL seller. The FFL would have been required to create and maintain a Form 4473 documenting the details of the transaction and, in most cases, to conduct a centralized telephone background check on the buyer.[49]

The Manchin-Toomey Amendment would have had a significant impact on the strategic politics of gun rights. Professor Nicholas Johnson has explored the issue in a recent writing.[50] Under federal law today, some significant fraction of the guns lawfully possessed in private hands cannot be traced by the government to their owners. These are the guns that have been transferred in private sales exempt from the federal recordkeeping requirements. Over the years, guns pass from their original retail purchaser (whom the government can readily trace via the federal Form 4473 created by the purchase), through one or more *unrecorded* private sales to their current owners, whose identity is often impracticable to reconstruct.[51] These "unpapered" guns are likely only a minority of the total gun supply.[52] Yet because of the sheer number of privately owned

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[48] *Id.*

[49] *Id.* The measure contained a limited exception allowing transferees who held a valid state-issued handgun carry permit to present it to the FFL in lieu of the federal instant background check, but did not exempt covered private transfers from the requirement that the FFL generate and retain a Form 4473 documenting the details of the transaction. *Id.*

[50] Nicholas J. Johnson, *Gun Control Advocates Are Playing Chess*, LIB. LIBERTY L. BLOG (Apr. 18, 2013), http://www.libertylawsite.org/2013/04/18/gun-control-advocates-are-playing-chess/ [hereinafter Johnson, *Playing Chess*]. Similar arguments are developed at greater length in Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837 (2008).

[51] Of course, many private sellers will know the identity of the buyer to whom they sold a firearm in a private sale, and in some cases this will enable the government to continue to trace a firearm past its original retail purchaser. But some private sellers will have forgotten the identity of the buyer with the passage of time, and this will prevent officials from tracking the firearm further. Or the sellers may never have learned it.

A simple procedure is sometimes used at gun shows and other locales to ensure the lawfulness of a private sale without disclosing the buyer's identity. The seller demands that the buyer display a current state-issued photo ID showing his or her picture, such as a driver's license or handgun carry permit, but the seller does not view or notate the buyer's name printed on the ID. This procedure verifies that the buyer is a resident of the same state as the seller (as required by federal law); and in the case of the handgun carry permit, it also verifies that the buyer is lawfully entitled to possess firearms. But it does not produce any record of the transaction that would enable the government to trace the firearm to its current owner. When one further considers that some firearms have passed through *multiple* lawful, but non-traceable, private sales of this type, it becomes evident how private sales function as a bulwark against the possibility of future gun confiscation. *See* Johnson, *Playing Chess*, *supra* note 50 (explaining how "no paper" guns are a "barrier" against gun bans).

[52] One figure employed by federal officials in the recent debate estimates that 40% of firearms transactions are private sales not subject to federal recordkeeping requirements. *See* Glenn Kessler, *Obama's Claim on Background Checks Based on Old Data*, WASH. POST, Jan. 27, 2013, at A2. This

firearms in America—over three hundred million guns by some estimates[53]—even a fraction of the total translates into many millions of unpapered guns. This massive residuum means that governments cannot easily get all the guns, even if they are willing to violate the Constitution to do so. It is a form of protection tailored to the most hardened realist, in that it does not depend on the good faith of officials to work. Johnson explains:

> If you don't know who has the guns, you can't really get at them because our pesky fourth amendment would bar random or house to house searches. . . . [E]ven if you passed sweeping gun bans, evidence from countries that have tried, shows that people who have guns that you don't know about will just keep them, fueling a tremendous black market inventory that will make things worse.
>
> So it turns out that the inventory of unrecorded, "no paper" guns, is a far stronger barrier against sweeping gun bans than any pronouncement of the Supreme Court or other such parchment limits. It is in fact a hard practical block that renders gun confiscation in America a pipe dream.
>
> . . . And while that scenario seems unlikely today, not so long ago, [confiscation] was the openly articulated agenda of many of the people and organizations in the vanguard of the current battle. And that helps explain the "bewildering" opposition to universal background checks.
>
> Mandatory checks on all secondary sales, supplemented by some type of data recording [as in the Manchin-Toomey Amendment] . . . means that within the life span of those alive today, the inventory of "no paper guns" (which again forms the hard practical barrier against sweeping gun confiscation in America) would evaporate. So the objection to universal background checks, which in isolation many find unobjectionable, is really rooted in a fear of gun registration.

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claim has been criticized: the 1997 report relied on for that statistic actually yielded a figure of 35.7% of firearms transactions involving an acquisition from someone other than an FFL. PHILIP J. COOK & JENS LUDWIG, NAT'L INST. OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 6 (1997), *available at* https://www.ncjrs.gov/pdffiles/165476.pdf. This figure included guns received as gifts from friends or family members. *See* Kessler, *supra* ("A reader expressed deep skepticism of this 40 percent figure when Obama used it. . . . [W]hen gifts, inheritances and prizes are added in, then the number shrinks to 26.4 percent."). But even if the true fraction of firearm transactions that are private sales is significantly less than forty percent, this would still yield tens of millions of lawfully owned firearms in private hands that are not tied to their current possessors by a federal Form 4473.

[53] JOHNSON ET AL., *supra* note 43, at 453.

> And the objection to registration is really an objection to the grand ambition of sweeping supply controls.[54]

So the status quo, which exempts intrastate private sales of firearms from the federal recordkeeping requirements that govern retail sales, is not usefully characterized as a "gun show loophole," or any kind of "loophole," a term which tends to connote an arbitrary or inadvertent omission from prohibitory legislation.[55] Rather, it is better viewed as reflecting an implicit substantive compromise on the scope of regulation. It balances, on one hand, the government's interest in generating records to aid enforcement of the prohibition on transfers to prohibited persons against, on the other hand, the liberty interests in safeguarding against long-term risks of firearms confiscation, as well as allowing people to dispose of their lawful property without expensive or time-consuming regulatory requirements.

The risks that recordkeeping laws will facilitate later confiscation have been borne out in practice. In the United Kingdom, the government required handguns to be registered beginning in 1920.[56] After decades of slowly increasing restrictions on registered owners, the British government banned handgun possession outright in the late 1990s.[57] The registration records were used to confiscate previously lawful handguns from approximately 57,000 owners.[58] The extensive twentieth-century gun registration laws in place in New York City likewise set the stage for legislation banning many types of formerly registrable semi-automatic rifles in 1991.[59]

The harsh new gun laws adopted in the New York State contemplate a slow-moving confiscation of many common semi-automatic rifles.[60]

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[54] Johnson, *Playing Chess*, *supra* note 50; *see* Volokh, *supra* note 12, at 1039–40 (outlining a progression of events similar to Johnson's version as one form of the slippery slope risk associated with gun registration).

[55] *Cf.* BLACK'S LAW DICTIONARY 1028 (9th ed. 2009) (defining "loophole" as "[a]n ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements").

[56] Olson & Kopel, *supra* note 16, at 433.

[57] *Id.* at 432.

[58] *See id.* at 430 (noting that before the confiscation, approximately one-third of Great Britain's 173,000 Firearms Certificate holders were handgun owners); *see also id.* at 433 ("Since . . . all lawfully-owned handguns in Great Britain are registered with the government, . . . handgun owners have little choice but to surrender their guns . . . for payment . . . according to government schedule. . . . The British Parliament who created the gun registration system in 1920 had no intention of banning handguns. But that 1920 Parliament failed to foresee the danger that a registration system, even if created with the best intentions, could later be used for confiscation.").

[59] *See* N.Y.C. ADMIN. CODE § 10-303.1(d) (2014) (requiring registered gun owners in possession of "assault weapon[s]" to "peaceably surrender" their guns to law enforcement within ninety days of the ban or remove them from the City).

[60] *See infra* Part III.A (discussing the NY SAFE Act of 2013).

Under the new law, such rifles can be lawfully possessed by their current owners but cannot be transferred to another person within the state.[61] Thus, as the current owners pass away or leave New York, the state will gradually become denuded of lawfully owned rifles of the covered types. As one might anticipate, the implementation of this goal is aided by a registration mechanism. The law required current lawful owners of the rifles to register their arms with the state by April 15, 2014, and to keep their address information regularly updated.[62]

III. WEIGHING THE RISKS: RECENT EVIDENCE FROM THE STATES AND THE FEDERAL GOVERNMENT

While the registration-to-confiscation slope is plausible, and has indeed transpired in some jurisdictions, various factors will influence the seriousness of the slippery slope risk in practice. One factor is the strength of the political desire of gun control supporters to pursue broadly confiscatory laws. Even if *A* makes *B* more practicable, adopting *A* still will not increase the net risk that *B* will come to pass if there is no reason to believe that anyone will ever actually attempt *B*.

As I discuss in this Part, recent state measures suggest that there is considerable political will for broadly prohibitory gun measures. There is also an emerging belief, among at least some gun control supporters, that such measures must be pursued with as little democratic deliberation as possible.

The mass murder committed at Sandy Hook Elementary School in December 2012 united Americans in grief and revulsion.[63] But the atrocity did not, as some expected, generate a political consensus in favor of increased gun control. Instead, gun policy has become increasingly polarized. In a series of parallel legislative pushes in the wake of Sandy Hook, some states—such as New York, Connecticut, and Colorado—enacted restrictive new gun laws.[64] Others, especially in the southern and

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[61] N.Y. PENAL LAW § 265.00.22(a), (f)–(h) (McKinney 2013).

[62] *Id.* §§ 265.00.22(h), 400.00.16(a).

[63] *See* Eli Saslow, *Seeking Calm Amid the Terror*, WASH. POST, Dec. 16, 2012, at A01 (unfolding the events at Sandy Hook Elementary). A twenty-year-old gunman killed his mother with a .22 rifle, stole her firearms, and traveled to a Connecticut elementary school that he had once attended. There he murdered twenty-six people, twenty of them children, before killing himself. It was the second-deadliest mass shooting in American history. Marc Fisher et al., *Gunman Kills Mother, Then 26 in Conn. Grade School Before Turning Gun on Himself*, WASH. POST, Dec. 15, 2012, at A1.

[64] New York's sweeping new gun control statute, the NY SAFE Act of 2013, is discussed in detail in Part III.A. Colorado enacted narrower limits, prohibiting the acquisition of new magazines holding over fifteen rounds and mandating background checks and official recordkeeping for private transfers of firearms and magazines. COLO. REV. STAT. §§ 18-12-301, 18-12-302, 18-12-112 (2013); *see* Matthew DeLuca, *Colorado Gov. Hickenlooper Signs Landmark Gun-Control Bills*, NBC NEWS (Mar. 20, 2013), http://usnews.nbcnews.com/_news/2013/03/20/17387348-colorado-gov-hickenlooper-signs-landmark-gun-control-bills (describing the effect of the new gun laws). The new restrictions were

western states, responded by expanding the ability of citizens to carry guns for the protection of themselves and others.[65] At both federal and state levels, we have seen an apparent return to the type of intense conflict over gun policy last witnessed in the early 1990s.[66]

The following Sections examine two recent pro-gun control legislative efforts, one at the state level and one at the federal level. It is important to consider what these proposals reveal about the risk of governmental overreaching.

A. *State Level Restrictions: The NY SAFE Act as a Sudden Descent of the Slope*

New York was the first state to enact new gun restrictions in the wake of the Sandy Hook murders.[67] The NY SAFE Act of 2013,[68] the state's

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politically controversial, and opposition to them played a key role in Colorado's unprecedented September 2013 special elections in which two state senators (including the then-serving senate president) were successfully recalled from office by voters, in part for their support of the new gun restrictions. *See* Lynn Bartels et al., *Democrats Giron and Morse Ousted*, DENVER POST, Sept. 11, 2013, at A11 (describing the recalls as a "message intended to stop other politicians for pushing for firearms restrictions").

Connecticut's Public Act 13-3 was enacted on April 4, 2013, and extensively amended by Public Act 13-220 on June 18, 2013. The state's definition of "assault weapons" now includes not only a lengthy list of specifically prohibited models, including AR-15 pattern rifles and any "copies or duplicates of those firearms," CONN. GEN. STAT. § 53-202a(1)(B) (2013), but also any semiautomatic centerfire rifle capable of accepting a detachable magazine that has any one of a list of common features, such as an adjustable stock, a thumbhole stock, or a pistol grip, *id.* § 53-202a(1)(E). The future sale or (in most cases) the transfer of firearm magazines capable of accepting more than ten rounds of ammunition is also prohibited. *Id.* § 52-202w(a)–(c). The many existing magazines with over ten-round capacities that were lawfully possessed by Connecticut citizens are required to be registered with the state. *Id.* § 53-202x(a)(1). A Second Amendment challenge to the main prohibitory features of Connecticut's new law was rejected in *Shew v. Malloy*, 994 F. Supp. 2d 234, 239 (D. Conn. 2014); the case is now on appeal before the U.S. Court of Appeals for the Second Circuit.

[65] *See, e.g.*, H.B. 1700, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (repealing, in effect, Arkansas's requirement for a state-issued permit in order to carry a concealed or open handgun for self-protection); H.B. 1622, 54th Leg., 1st Sess. (Okla. 2013) (freeing private schools to allow licensed individuals to carry handguns on school property); H.B. 1087, 2013 Leg., 88th Sess. (S.D. 2013) (authorizing public school districts to adopt policies for arming teachers); *see also* Jack Nicas & Joe Palazzolo, *Pro-Gun Laws Gain Ground: Since Newtown Massacre, More States Ease Regulations than Bolster Them*, WALL ST. J., Apr. 4, 2013, at A1 ("[S]ince [Newtown], states have passed more measures expanding rather than restricting the right to carry firearms.").

[66] *See, e.g.*, Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 419, 421, 424 (1995) (describing the "long and tortuous struggle" that led to the enactment of the 1993 Brady Handgun Violence Prevention Act, and observing that the debate over the Brady Act "divid[ed] gun control supporters and opponents with a vehemence generally reserved for the most contentious social issues").

[67] Shushannah Walshe, *New York Passes Nation's Toughest Gun Control Law*, ABCNEWS (Jan. 15, 2013), http://abcnews.go.com/Politics/york-state-passes-toughest-gun-control-law-nation/story?id=18224091#.UZKhIbVwrPo.

[68] New York Secure Ammunition and Firearms Enforcement Act (NY SAFE Act), N.Y. PENAL LAW § 265.00 (McKinney 2013).

new gun control package, is extraordinary in several respects, and the same can be said of the process by which it was enacted. The constitutionality of the Act's restrictions is being litigated before the U.S. Court of Appeals for the Second Circuit as this Article goes to publication.[69] Supporters of a robust Second Amendment right can justifiably conclude that the enactment of the NY SAFE Act marked a sudden movement by the nation's third largest state to a destination well down the slippery slope. The measure accordingly merits close attention.

1. *Scope of Prohibitions*

The NY SAFE Act imposes the most severe restrictions in American history on the ownership and use of ammunition magazines for handguns and rifles. Under the Act, it is illegal to load any magazine with more than seven rounds of ammunition—even for the purpose of self-protection within one's own home.[70] Several coastal states adopted ten round magazine limitations in the 1990s,[71] but there is no American precedent for a limitation to seven rounds. Many of the earliest self-loading pistols, such as the Colt Model 1903, were sold on the civilian commercial market over a century ago with magazine capacities larger than seven rounds.[72] Under the terms of the Act, it is a crime for a New Yorker who lawfully owns one of these century-old pistols to load it to its designed capacity.[73]

Today, many of the most commonly owned handgun models come with standard magazines holding ten to seventeen rounds.[74] There are also

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[69] A federal district court opinion upheld most of the restrictions in the Act against a Second Amendment challenge, but held unconstitutional its prohibition on loading more than seven rounds of ammunition in a firearm for self-defense. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349, 368–73 (W.D.N.Y. 2013). For a discussion of constitutional litigation regarding the NY SAFE Act, see *infra* Part IV.G.

[70] N.Y. PENAL LAW §§ 265.00(23), 265.37. A violation is punishable by imprisonment for the first offense if an individual possesses a magazine loaded with eight or more rounds outside the home and for second or subsequent offenses if an individual possesses such magazine inside the home. *Id.* § 265.37. This part of the Act has been held invalid by a federal district court. *Cuomo*, 990 F. Supp.2d at 372–73. The state of New York has cross-appealed that part of the district court's judgment.

[71] *See* VERONICA ROSE, OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMBLY, LAWS ON HIGH CAPACITY MAGAZINES R-0039 (2013), *available at* http://www.cga.ct.gov/2013/rpt/2013-R-0039.htm (noting that California, Hawaii, Massachusetts, and New York banned or restricted large capacity magazines, which they defined "as a magazine capable of accepting more than 10 rounds").

[72] *See* THE GUN DIGEST BUYER'S GUIDE TO GUNS 190 (Derrek Sigler ed., 2008) (noting that Colt Model 1903 Pocket Hammerless pistol was manufactured from 1903 to 1945 and that all models chambered for the .32 ACP cartridge used eight-round magazines); Rick Hacker, *Colt 1903 Pocket Hammerless*, AM. RIFLEMAN (June 19, 2013), http://www.americanrifleman.org/articles/colt-1903-pocket-hammerless (describing the introduction and popularity of the pistol).

[73] N.Y. PENAL LAW § 265.37.

[74] JOHNSON ET AL., *supra* note 43, at 9; *see* Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (acknowledging that firearms with magazine capacities larger than ten rounds were already widely owned by private citizens in the 1990s and are properly regarded as being in "common use" today).

popular pistol models with factory magazines holding seven rounds or less.[75] But these are mostly small, highly concealable pistols meant for routine carry by handgun carry permit holders.[76] Ironically, this is a purpose for which few New Yorkers can lawfully use a gun, given the state's restrictive laws governing carrying handguns for self-defense outside the home.[77]

As originally enacted, the SAFE Act prohibited the acquisition of any magazine capable of holding more than seven rounds.[78] Since the standard magazines for most semi-automatic pistols are designed to hold eight or more rounds, seven-round magazines are not even available for most pistols.[79] Thus, the rushed SAFE Act also originally functioned as a ban on most handguns. New York Governor Andrew Cuomo expressed surprise at this fact, admitting that he had inadvertently signed a bill that made it impossible to lawfully own most pistols in a functional condition.[80] An amendment altered the ban to permit New Yorkers to acquire magazines with capacities of up to ten rounds—but not to load more than seven rounds in them.[81]

Before the enactment of the legislation, Governor Cuomo stated that "confiscation [of assault weapons] could be an option,"[82] and the SAFE Act does include several confiscatory provisions. In 1994, New York had banned the sale of new magazines holding over ten rounds, with a

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[75] *See 12 Concealed Carry Guns 12 Ounces or Less*, PERSONAL DEF. SOLUTION, http://www.personaldefensesolutions.net/free-resources/concealed-carry-guns-12-ounces-or-less/ (last visited Apr. 15, 2014) (describing popular pistols with magazines holding seven or less rounds).

[76] Probably the best selling type of handgun over the past half-decade has been a new generation of tiny semi-automatic pistols chambered in the .380 ACP caliber that typically weigh less than twelve ounces loaded. *Id.* Between 2008 and 2011, just three major gun manufacturers—Ruger, Smith & Wesson, and Kel-Tec—together produced over one million concealable .380 pistols. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ANNUAL FIREARMS MANUFACTURERS AND EXPORT REPORT (2011); BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ANNUAL FIREARMS MANUFACTURERS AND EXPORT REPORT (2010); BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ANNUAL FIREARMS MANUFACTURERS AND EXPORT REPORT (2009); BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ANNUAL FIREARMS MANUFACTURERS AND EXPORT REPORT (2008). The magazine capacity of these pistols is typically six rounds. *See 12 Concealed Carry Guns 12 Ounces or Less*, *supra* note 75.

[77] *See* Kachalsky v. County of Westchester, 701 F.3d 81, 88, 98, 101 (2d Cir. 2012) (upholding New York's "may-issue" handgun carry law, under which officials may refuse to authorize a citizen to carry a handgun unless she can demonstrate a special need for armed self-defense beyond that of most of the population).

[78] Erik Kriss, *A Misfiring Squad Red-Faced NY Pols Rewrite 7-Bullet Law*, N.Y. POST, Mar. 22, 2013, at 8.

[79] *Id.*

[80] *Id.*

[81] N.Y. PENAL LAW §§ 265.36, 265.37 (McKinney 2013).

[82] Thomas Kaplan, *Cuomo Says He'll Outline Gun Proposal Next Month*, N.Y. TIMES, Dec. 21, 2012, at A29 (quoting remarks of Governor Andrew Cuomo during a radio interview about the upcoming gun control effort).

grandfathering provision that allowed owners of higher capacity magazines to continue to possess them.[83] The SAFE Act eliminated the grandfathering provision and requires owners of these magazines to destroy them, turn them in to the government, or remove them from the state by April 2014.[84]

The Act also expanded New York's definition of prohibited "assault weapons" to include a number of common semi-automatic rifles.[85] It requires currently possessed rifles to be registered with the state police and imposes a slow-moving program of confiscation by prohibiting their current possessors from selling or transferring them to another state citizen.[86]

2. *Impact on Legitimate Self-Defense*

Obeying the SAFE Act's magazine restrictions is likely to impair armed self-defense in the home, the interest that the U.S. Supreme Court stated the Second Amendment "elevates above all other interests."[87] Armed confrontations vary greatly from instance to instance, making it difficult to predict the effects of ammunition restrictions in a specific case. But there is extensive evidence to show that hitting an assailant with effective gunfire during the stress of a violent confrontation is a demanding task, even for trained law enforcement officers. The New York City Police Department reported in 2006 that its officers had a hit rate slightly below thirty percent in confrontations; that is, on average about seven rounds out of every ten fired by officers missed their target.[88] Although some private

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[83] ROSE, *supra* note 71.

[84] N.Y. PENAL LAW § 265.00.22(h).

[85] Any semi-automatic rifle that is in a centerfire caliber and accepts a detachable magazine is now classified as an "assault weapon" if it has any of the following features: a "folding or telescoping stock," "thumbhole stock," "protruding grip that can be held by the non-trigger hand," bayonet mount, flash suppressor, "muzzle break," or grenade launcher. *Id.* § 265.00.22(a). "Muzzle break" should be "muzzle brake," a piece of metal that attaches to the end of a gun's barrel and vents escaping gases to the side to reduce recoil.

[86] *Id.* §§ 265.00.22(h), 400.00.16(a); *see supra* text accompanying notes 61–62 (describing how the law will effectively remove these regulated guns from New York as the current owners pass away or leave the state). Possessors can lawfully sell the rifle to an out-of-state party. N.Y. PENAL LAW § 265.00.22(h).

[87] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[88] *See* Al Baker, *A Hail of Bullets, a Heap of Uncertainty*, N.Y. TIMES, Dec. 9, 2007, § 4, at 4 (reporting that statistics contained in the NYPD's 2006 Firearms Discharge Report produced a "hit rate" in officer-involved shootings of 28.3%). Interestingly, more recent NYPD annual reports have ceased disclosing the department's firearms "hit rate," choosing instead to disclose only the percentage rate at which officers ultimately resolved confrontations in their favor. *See, e.g.*, N.Y.C. POLICE DEP'T, ANNUAL FIREARMS DISCHARGE REPORT 2011, at 24 (2012), *available at* http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2011.pdf ("[T]he Department does not calculate average hit percentages. Instead, *the objective completion rate per incident* is employed as it is both more accurate and more instructive. . . . When an officer properly and lawfully adjudges a threat severe enough to require the use of his or her

citizens are highly proficient with firearms, others are not, and most private citizens are not required to qualify periodically with their firearms as police officers must.[89] Thus, one could reason that the SAFE Act confines the defender to a mean expected outcome of, perhaps, no more than two hits before having to stop and reload her handgun.

It is proverbial in self-defense training and law enforcement circles that handguns cannot be counted upon to stop an assailant with a single bullet; multiple hits are frequently required.[90] Thus, it is doubtful whether a SAFE-compliant citizen can expect to reliably defend herself with a handgun against a home invasion, particularly one involving more than a single perpetrator. That is a serious cost, since each year approximately a quarter million residential burglaries result in violence against the occupants.[91]

Other features of the SAFE Act imply a dismissive attitude to the use of firearms for self-defense. The text of the measure never acknowledges an interest in using privately owned firearms for self-defense, even though this is, in the words of the U.S. Supreme Court, the "core lawful purpose"

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firearm, and fires at a specific subject, the most relevant measure is whether he or she ultimately hits and stops the subject."). In one highly publicized recent episode in midtown Manhattan, two NYPD officers expended sixteen rounds of ammunition in order to stop a lone suspect who pointed a handgun at them at close range. Joseph Goldstein & Wendy Ruderman, *Decision by 2 Officers to Open Fire in Busy Midtown Leaves Bystanders Wounded*, N.Y. TIMES, Aug. 25, 2012, at A17. The officers' gunfire hit the suspect at least seven times. The suspect did not fire. Nine innocent bystanders were injured by the officers' gunfire. *Id.* Two weeks earlier, two other NYPD officers expended twelve rounds of ammunition in order to stop a single suspect armed with a kitchen knife. Patrick McGeehan, *Officials Defend Fatal Shooting of a Knife-Wielding Man Near Times Sq.*, N.Y. TIMES, Aug. 13, 2012, at A13.

[89] A few states do require holders of state-issued handgun carry permits to pass a live-fire requalification every few years. *See, e.g.*, N.M. STAT. ANN. § 29-19-6(F) (1978) (requiring a live-fire refresher course at four-year intervals for permit renewal); *id.* § 29-19-7 (defining the proficiency test requirements).

[90] *See* MASSAD F. AYOOB, IN THE GRAVEST EXTREME: THE ROLE OF THE FIREARM IN PERSONAL PROTECTION 105 (1980) ("Literally hundreds of shooting instances have shown that a gunman can take several .38 slugs in vital areas, and still keep coming."); UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF AND OTHERS . . . : ISSUES, FACTS & FALLACIES—THE REALITIES OF LAW ENFORCEMENT'S USE OF DEADLY FORCE 95 (2005) ("The will to survive and to fight despite horrific damage to the body is commonplace on the battlefield, and on the street. . . . This also explains why a police officer 'had to shoot him so many times' . . . ."). In one notable 2006 shooting, three Pennsylvania police officers were forced to fire over 100 rounds in a gunfight with a lone, handgun-armed suspect, hitting the suspect seventeen times with handgun *and rifle* bullets. PA. STATE POLICE, 2006 ANNUAL REPORT 109 (2007), *available at* https://www.portal.state.pa.us/portal/server.pt/document/336023/psp_2006_annual_report_pdf. The suspect injured two of the officers in a prolonged gunfight. *Id.* The suspect continued to physically resist arrest even after being shot seventeen times. *DA Rules Deeb Death Justifiable*, TIMES LEADER (Wilkes-Bare, Pa.) (Dec. 7, 2006), http://archives.timesleader.com/2006_03/2006_12_07_DA_rules_Deeb_death_justifiable_-tlnews.html.

[91] SHANNAN M. CATALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, VICTIMIZATION DURING HOUSEHOLD BURGLARY 1 (2010) [hereinafter HOUSEHOLD BURGLARY REPORT], *available at* http://www.bjs.gov/content/pub/pdf/vdhb.pdf. In the United States, each year approximately one million residential burglaries occur when occupants of the dwelling are home. About one in four of these burglaries results in injury to an occupant of the dwelling. *Id.*

for which the Second Amendment protects the right to keep and bear arms.[92] Perhaps the SAFE Act's most striking feature in this regard is its granting an express exemption from the seven-round limit to individuals who are participating in shooting sports at a gun range or organized competition.[93] So shooting sports participants may load up to ten rounds in their firearms, but the law contains no similar exception for self-defense in one's dwelling. This measure that lifts criminal penalties for citizens who wish to load their lawfully owned guns with eight rounds of ammunition to play a game, but imposes criminal fines or imprisonment on those who wish to do the same thing in order to defend their homes and families, is symptomatic of a legislative body that has relegated the constitutionally protected right of armed self-defense to a shockingly low status.

3. *Bypassing Legislative Deliberation*

Despite its unprecedented reach, the SAFE Act was enacted in a manner that appeared to be designed to minimize legislative deliberation. Governor Cuomo designated it as "emergency" legislation, which exempted the Act from the normal requirements of legislative committee hearings open to the public.[94] The need for the emergency designation was debatable. New York had witnessed a tragic and high-profile murder of two firefighters in the preceding month,[95] but there was no general trend of increasing homicide in New York State. To the contrary, the murder rate in New York in 2012 was forty-five percent lower than it had been just sixteen years earlier,[96] mirroring a national trend of declining crime since

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[92] *Heller*, 554 U.S. at 630. New York Governor Andrew Cuomo tried to reassure gun owners during the period leading up to the enactment of the SAFE Act, but he confined his approval to hunting and sporting uses of firearms, not their constitutionally protected defensive functions. *See* Kaplan, *supra* note 82 ("I don't think legitimate sportsmen are going to say, 'I need an assault weapon to go hunting', [Cuomo] said. At the same time, he noted that he owns a shotgun that he has used for hunting, and said, 'There is a balance here—I understand the rights of gun owners; I understand the rights of hunters.'").

[93] N.Y. PENAL LAW § 265.20.7-f (McKinney 2013). Certain handgun sports such as "practical shooting" are designed for competitors to use magazines with capacities of at least ten rounds, and often much higher. *See* U.S. PRACTICAL SHOOTING ASS'N, HANDGUN COMPETITION RULES 79 (2014), *available at* http://www.uspsa.org/uspsa-rules.php (noting that Production Division competition uses magazines with capacities of up to ten rounds); *id.* at 76 (showing that the Open Division competition allows magazines of any capacity to be used).

[94] Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES, Jan. 16, 2013, at A15.

[95] On December 24, 2012, a convicted felon—who had previously served seventeen years in prison for manslaughter—set a car on fire and then ambushed responding firefighters with an AR-15 rifle, killing two and wounding two more before committing suicide. Liz Robbins & Joseph Goldstein, *Gunman's Note Said "Killing People" Was What He Liked Best*, N.Y. TIMES, Dec. 26, 2012, at A20.

[96] *See Murder Rates Nationally and by State*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state (last visited Mar. 4, 2014) (listing murder rates by year and state). The murder rate in New York State in 1996 was 7.4 per 100,000 persons; it declined steadily over the intervening years to 3.5 per 100,000 persons in 2012. *Id.*

the early 1990s.[97] After the emergency designation, the votes in each chamber of the New York Legislature were extremely rapid. Less than forty-eight hours elapsed between the bill's initial introduction and the Governor's signature.[98] New Yorkers affected by the Act's criminalization of a wide range of previously lawful conduct were understandably disturbed at being shut out from the ordinary channels of public input into major legislation.[99]

The SAFE Act's bypassing of public input and legislative deliberation may be a harbinger of future gun control efforts. Professor Adam Winkler argues that the failure of federal legislation in 2013 occurred in part because the President and Congress allowed too much time to pass, both in the run-up to the Senate consideration of Manchin-Toomey, and during the Senate's formal deliberation on the bill.[100] Professor Winkler suggests that the President and his supporters should act quickly to capitalize on the temporary increase in support for gun control that follows a horrific and

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[97] The annual violent crime rate in the United States declined from 757.7 crimes per 100,000 people in 1992 to 386.3 per 100,000 in 2011, a reduction of almost half. *Crime in the United States 2011: Table 1*, FED. BUREAU INVESTIGATION, www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1 (last visited Apr. 15, 2014). The rate of murder and non-negligent manslaughter also declined by almost half in the same period—from 9.3 per 100,000 in 1992 to 4.7 per 100,000 in 2011. *Id.*

[98] *See* Kaplan, *supra* note 94 ("Mr. Cuomo signed the bill less than an hour after the State Assembly approved it by a 104-to-43 vote on the second full day of the 2013 legislative session.").

[99] In the wake of the SAFE Act's passage, Kahr Arms, a well-respected New York-based manufacturer of handguns, decided to begin moving its operations out of that state and into Pennsylvania. Rick Karlin, *A SAFE Move Out of the State: Swiftness of Gun Control Act Rattles Company*, TIMES-UNION (Albany, N.Y.), July 2, 2013, at A1. The gun maker stated that the rushed enactment of the SAFE Act destabilized its expectations and created a concern about slippery slopes:

> It wasn't so much that the measure bans certain kinds of guns and magazines, the company said. Instead, it was the suddenness with which the law was passed—less than 24 hours after being released to the public—leaving Kahr's executives to wonder what kind of unforeseen regulations or restrictions might lie ahead. "One of our big concerns was, OK, the SAFE Act was passed in the middle of the night. You wake up the next morning and boom, that was it," said Frank Harris, Kahr's vice president of sales and marketing. "We just felt like, gee, if they can do this, what can they do next?["] "It's not just the SAFE Act, but the uncertainty." Harris said.

Id.

[100] Adam Winkler, *Who Killed Gun Control?: The Gun Control Bill Is Dead. Why?*, NEW REPUBLIC (Apr. 17, 2013), http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible. The author faults President Obama for appointing a commission to study the issue and prepare legislative recommendations, contending that "[w]hile the commission acted unusually fast by Washington standards, in effect it served to delay unnecessarily the announcement of proposed reforms," which he argues should have been advanced within "days" of the horrifying mass shooting. *Id.* Instead, a few months after the Sandy Hook shooting, public opinion began to revert to normal levels of support and opposition to gun control. Professor Winkler views this not as a vindication of a deliberate approach to enacting major new federal criminal laws affecting millions of American gun owners, but as a missed opportunity. *See id.* (wondering "what might have been").

widely publicized murder committed with a gun.[101] It is not hard to imagine some observers reflecting that Congress proceeded in a deliberate and transparent fashion after Newtown and did not end up enacting new gun restrictions, while the New York Legislature brutally streamlined the legislative process and enacted gun restrictions of unprecedented breadth and depth.[102] Conversely, gun rights supporters may conclude from the events in New York, and the advocacy for Congress to "do it faster" next time, that the deliberative features of the legislative process may not always be available to ward off future excesses. In short, they may conclude that the slope is growing steeper.

4. *Social Divisiveness*

The SAFE Act proved highly divisive, particularly along regional lines and rural versus urban lines. It has pitted the greater New York City area against the less densely populated remainder of the state, with especially intense opposition in northern and western New York.[103]

Fifty-two of New York's sixty-two counties and over two hundred municipalities in the state have enacted resolutions calling for repeal or revision of the SAFE Act, many asserting that portions of the Act are unconstitutional.[104] The New York Sheriffs Association likewise called for the repeal of the magazine and rifle ban provisions, and some county sheriffs in upstate and western New York have publicly refused to enforce

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[101] *See id.* ("After Newtown, it was clear to everyone on the gun control side that speed was of the essence. The longer it took to move a bill to the floor for a vote, the harder it would be to win.").

[102] *See* Joe Mahoney, *Guns, Manor Fueled Yearlong Feuds*, DAILY STAR (Dec. 28, 2013), http://www.thedailystar.com/localnews/x1221283740/Guns-Manor-fueled-yearlong-feuds (noting that New York was the first state to enact gun control legislation in response to the Newtown shooting, coming even before the Obama Administration could react). It is important to be clear: Professor Winkler did not endorse or even discuss New York's drastic procedure in enacting the SAFE Act. In fact, he expresses regret that President Obama entangled the Manchin-Toomey effort to expand recordkeeping on gun transfers with the more galvanizing issue of "assault weapon" bans. *See* Winkler, *supra* note 100 (stating that the proposed rifle and magazine bans "played right into the hands" of opponents). But the argument is capable of extension. One could infer that the relative circumspection and public debate that led up to the Manchin-Toomey vote should be avoided generally in future gun control pushes, which should rely as much as possible on leveraging the understandable and appropriate surge of outrage and disgust that follows atrocities—even in a country that is actually experiencing a secular decline in the rate of violent crime. *See supra* note 97.

[103] *See* NY SAFE RESOLUTIONS, http://www.nysaferesolutions.com/resolutions/#counties (last visited Apr. 15, 2014) (illustrating the divide between cities that support the SAFE Act and the areas that oppose it, which include most of the more rural areas of upstate New York).

[104] *Id.* For an example of the county resolutions, consider Onondaga County's enactment calling for the repeal of the SAFE Act, criticizing its passage as having taken place "without meaningful public input," and declaring that "multiple provisions" of the act "infringe upon Constitutional rights of law-abiding citizens to keep and bear arms." Onondaga County, N.Y., Memorializing Opposition to the New York Safe Act (Mar. 5, 2013), *available at* http://ongov.net/legislature/documents/3.5.13Adopted LegislationOCR.pdf.

the Act, citing constitutional concerns.[105]

B. *Misinformation from Prominent Federal Officials*

The actions and statements of prominent federal officials are also relevant to gauging the political threat to gun rights. President Obama did not merely press for expanded transfer recordkeeping after the Sandy Hook atrocity, but also pursued bans on future sales of the AR-15, the best-selling type of rifle in the country, as well as types of magazines owned in the tens of millions by private citizens.[106] Within days of the Sandy Hook murders, President Obama appointed as the head of his gun control task force Vice President Joseph Biden.[107] During the public debate that led to the Manchin-Toomey vote, Biden made several strikingly ignorant or misleading public statements about armed self-defense.

In a Facebook interview, Biden responded to a citizen's concerns that the bans the President was seeking would restrict her ability to acquire effective firearms for self-defense.[108] Biden reassured her that she would be adequately protected from home invasions by "get[ting] a double-barreled shotgun" and "fir[ing] two blasts outside the house" if she perceived a threat.[109] Biden specifically denigrated the self-defense utility of modern rifles like the AR-15.[110] In an interview with *Field & Stream* magazine, the Vice President doubled down, remarking that "[if] you want to keep someone away from your house, just fire the shotgun through the

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[105] Mark Boshnack, *Local Sheriff: I Won't Enforce Gun Law*, DAILY STAR (Sept. 7, 2013), http://thedailystar.com/localnews/x312424432/Local-sheriff-I-wont-enforce-gun-law/. Media reports suggest that other police officers in the state are also reluctant to actively enforce the Act's unprecedented prohibitions. *See* Joseph Spector, *State Police Issue "Field Guide" for N.Y.'s Gun Law*, ROCHESTER DEMOCRAT & CHRON. (Oct. 8, 2013), http://www.democratandchronicle.com/story/news/local/2013/10/07/state-police-issue-field-guide-for-nys-gun-law/2939035/ (quoting a state legislator's remark that police have told him that they would not seek out violators of the Act: "These guys want nothing to do with the SAFE Act, and they are not going to enforce the SAFE Act, except if they have a bad guy and they are putting him under arrest and there are other charges").

[106] Winkler, *supra* note 100. Even some gun control supporters criticized this decision. *See id.* ("Focusing on assault weapons played right into the hands of the NRA, which has for years been saying that Obama wanted to ban guns. Gun control advocates ridiculed that idea—then proposed to ban the most popular rifle in America.").

[107] Jonathan Lemire, *President Obama Appoints Vice President Biden to Lead Gun Violence Task Force*, N.Y. DAILY NEWS (Dec. 19, 2012), http://www.nydailynews.com/news/politics/obama-appoints-biden-lead-gun-violence-task-force-article-1.1223549.

[108] Andrew Johnson & Eliana Johnson, *Biden to Woman: You Don't Need an AR-15, It's Harder to Aim, It's Harder to Use*, NAT'L REV. ONLINE (Feb. 19, 2013), http://www.nationalreview.com/corner/341055/biden-woman-you-dont-need-ar-15-its-harder-aim-its-harder-use-andrew-johnson.

[109] The exchange occurred during an online "town hall" meeting sponsored by *Parents* magazine. *See id.* (including a video clip of Biden's remarks).

[110] *See id.* ("You don't need an AR-15, it's harder to aim, it's harder to use.").

door."[111]

It is not easy to know where to begin detailing the misinformation in these statements. A double-barreled shotgun is a notoriously heavy-recoiling weapon, particularly when loaded with appropriate ammunition for self-defense, such as buckshot shells. A 12 gauge shotgun with buckshot shells kicks as much as a large-caliber rifle that a hunter might use to hunt large game like elk or moose.[112] In contrast, an AR-15 carbine (or compact rifle) firing its small .223 Remington cartridge has less than one-fifth as much recoil energy as the shotgun.[113] This difference is immediately obvious in use. It makes the light-kicking carbine less physically punishing to train with and more manageable for small statured shooters, and aids in firing accurate follow up shots if needed. And unlike a typical double-barreled shotgun, most AR-15s come with adjustable stocks that can be shortened or lengthened to fit the owner's body type.[114] This is not to deny that a shotgun can be a good home defense tool for a user with the ability, training, and inclination to choose it. But many users who make the comparison will find the Vice President's description of the two firearms to be plainly wrong, noting that the carbine's pinpoint accuracy[115] and soft recoil make it more controllable than the hard-kicking shotgun and its cloud of shot.

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[111] Anthony Licata, *The F&S Gun Rights Interviews: Joe Biden, Vice President of the United States*, FIELD & STREAM (Feb. 25, 2013), http://www.fieldandstream.com/articles/guns/2013/02/gun-control-joe-biden-interview.

[112] I calculated recoil for typical buckshot loads in a shotgun and typical .223 rifle loads in an AR-15 carbine, using the guidelines and formulae supplied by the Sporting Arms and Ammunition Manufacturers Institute ("SAAMI"), the chief professional standards organization for arms and ammunition manufacturers. *See Gun Recoil Formulae*, SPORTING ARMS & AMMUNITION MANUFACTURERS' INST., INC. (May 1, 1976), http://www.saami.org/PubResources/GunRecoilFormulae.pdf. The figures used for the shotgun represented 12 gauge 2 3/4 inch 9 pellet 00 buckshot load: 492 grains (1 and 1/8 ounces) projectile; 43 grains wad; 30 grains powder charge; velocity 1325 feet per second; 7.5 pound shotgun. This yields a total of about 25 pounds of free recoil energy from firing the gun. *Id*. This is equivalent to firing a powerful hunting rifle in a cartridge like the .300 Winchester Magnum, which is often used for hunting large game like elk or moose and has recoil energy of about 23 to 25 pounds in a typical rifle. Chuck Hawks, *Rifle Recoil Table*, CHUCKHAWKS.COM, http://www.chuckhawks.com/recoil_table.htm (last visited Jan. 28, 2014).

[113] *Gun Recoil Formulae*, *supra* note 112. The method used to calculate AR-15 recoil was the same one described in the immediately preceding note. I used the following figures, typical of a full metal jacket loading in a .223 Remington or the very similar 5.56x45 mm NATO (M193) cartridge fired in an AR-15 rifle: 55 grain bullet; 25 grains powder charge; velocity 3200 feet per second; 7 pound rifle. This yields a total of just 4.5 pounds of free recoil energy for the AR-15. *Id*.

[114] Courtland Milloy, *Gun Bans Are No Silver Bullet*, WASH. POST, Feb. 6, 2013, at B01. Adjustable stocks on semi-automatic rifles are criminal under the "assault weapon" laws of some states, *e.g*., N.Y. PENAL LAW §§ 265.00.22(a), 265.02 (McKinney 2013), but are legal and commonplace in many parts of America, *see* Editorial, *The Guns of Clinton*, WALL ST. J., Jan. 6, 1994, at A12.

[115] *See, e.g*., PATRICK SWEENEY, MODERN LAW ENFORCEMENT WEAPONS & TACTICS 181–82 (3d ed. 2004) (noting that law enforcement officers choose rifles from the AR-15 family in part because of their accuracy; such rifles can easily produce groups of less than two inches at one hundred yards).

Vice President Biden also bizarrely chose to recommend a *double-barreled* shotgun, a type of gun that has been obsolete for defensive purposes for well over a century because it holds a perilously low two shots—fine for a sporting challenge when hunting doves, but not for protecting one's life.[116] Even police officers well trained with shotguns commonly miss with a significant number of shots fired in the stress of a lethal force confrontation;[117] a lone householder is likely subject to the same risk.

Instead of an appropriate repeating firearm such as a semi-automatic shotgun, a handgun, or a carbine like an AR-15—or even a pump action shotgun, a repeating design that dates from the nineteenth century[118]—Biden recommended acquiring an obsolete, hard-kicking two-shot firearm, and then discharging it (twice) *prior* to encountering or identifying intruders.[119] Following this advice would of course leave the householder temporarily unarmed in any subsequent confrontation. Equally bad, firing off a lethal weapon when one has not visually confirmed one's target is a gross violation of firearm safety rules.[120] It is a criminal offense in most places.[121] If an innocent person were injured by the sort of blind warning shots recommended by Vice President Biden, the homeowner's conduct would certainly be deemed tortious and would likely constitute a felonious

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[116] *See* AYOOB, *supra* note 90, at 101 ("Don't rely on a double-barrel shotgun. It *looks* frightening, but a one-or-two shot weapon is not something to rely on against even one opponent . . . ."); JOHN S. FARNAM, THE FARNAM METHOD OF DEFENSIVE SHOTGUN AND RIFLE SHOOTING 47 (2d ed. 2010) ("The repeater (pump or auto-loader) is the only shotgun type that I recommend for defensive use. With the repeater, the [o]perator is able to fire quickly and accurately at multiple targets and still retain control. Bolt-action, double-barrel, and single-shot shotguns are best confined to sport and recreational shooting.").

[117] *See* Massad Ayoob, *Consider the 20 Gauge Shotgun*, BACKWOODS HOME MAG., Nov./Dec. 2009, at 74, 78 (reporting that well-trained officers of the Los Angeles Police Department maintained a hit rate of fifty-eight percent with their shotguns in armed confrontations). This is better accuracy than the sub-30% hit rate reported by the NYPD several years ago. *See supra* note 88. The difference may reflect a focus on shootings involving one type of long gun (LAPD) versus all guns, including handguns (NYPD). It may also reflect differences in training and/or proficiency between the two departments in different periods.

[118] The Winchester Model 1893 pump action shotgun was introduced to the market in its namesake year. R.L. WILSON, WINCHESTER: AN AMERICAN LEGEND 212, 214 (1991). Its successor, the Model 1897, became a wide commercial success, with over one million copies sold by the time the shotgun was discontinued in 1945. *Id.* at 214.

[119] Johnson & Johnson, *supra* note 108 (emphasis added).

[120] One of the canonical rules of gun safety, widely taught in firearms safety and familiarization classes, commands against firing a gun before one has visually confirmed one's target and what may be behind it. JOHNSON ET AL., *supra* note 43, at 6–7; *see NRA Gun Safety Rules*, NRA, http://training.nra.org/nra-gun-safety-rules.aspx (last visited Jan. 28, 2014) ("Know your target and what is beyond. Be absolutely sure you have identified your target beyond any doubt. Equally important, be aware of the area beyond your target.").

[121] *See, e.g.*, MICH. COMP. LAWS SERV. § 752.863a (LexisNexis 2013) (classifying "recklessly or heedlessly . . . discharg[ing] any firearm without due caution and circumspection for the rights, safety or property of others" as a misdemeanor).

criminal offense.[122]

In sum, the advice given by the Vice President was so obviously counterproductive that it appears to reflect a disdain for the very practice of defensive gun ownership, or a gross ignorance of basic aspects of the subject on which he was then the acting chair of a national policy task force. Many citizens were understandably outraged in 2012 by Representative Todd Akin's uninformed remarks about rape and abortion, a matter that—like self-defense—touches upon the right to bodily integrity and issues of life or death.[123] In a country with over one million home invasion burglaries a year, about a quarter of which result in injury to an occupant,[124] Vice President Biden's deeply uninformed remarks on armed self-defense were similarly unsettling.

Unfortunately, some other federal elected officials have also demonstrated comparable ignorance while advocating for gun control in the aftermath of Sandy Hook.[125]

These attitudes have a broader effect that destabilizes efforts at compromise. This does not even require gun rights supporters to question

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[122] *Cf.* Steven Nelson, *Biden Advises Shooting Shotgun Through Door: Virginia Beach Man Charged for Doing Exactly That*, U.S. NEWS & WORLD REP. (Feb. 28, 2013), http://www.usnews.com/news/articles/2013/02/28/biden-advises-shooting-shotgun-through-door (noting that a Virginia homeowner was charged with reckless handling of a firearm after discharging his shotgun through windows and a closed door when he believed intruders were present). The same article reports the opinions of attorneys from Biden's home state of Delaware that discharging a shotgun into the air in the absence of an imminent threat could lead to felony charges of reckless endangerment. *Id*.

[123] Catalina Camia, *Todd Akin Says He'd Take Back Rape Comments*, USA TODAY ON POL. BLOG (Apr. 26, 2013), http://www.usatoday.com/story/onpolitics/2013/04/26/akin-rape-senate-missouri/2115311/. Akin, then a U.S. Congressman, responded to a question about whether women should be able to obtain abortions when pregnancy results from rape. His answer was factually ungrounded, claiming that this risk rarely arose because in cases of "legitimate rape," the "female body has ways to try to shut that whole thing down." *Id*. The remarks were widely covered in the media, prompted an outcry, and are generally credited with changing the course of Akin's bid for a Missouri U.S. Senate seat, leading to his defeat by Claire McCaskill in the 2012 general election. *Id*.

[124] HOUSEHOLD BURGLARY REPORT, *supra* note 91, at 1.

[125] U.S. Representative Diana DeGette of Colorado, a gun control supporter who has sponsored several bills seeking to restrict firearm magazines, drew criticism in the spring of 2013 for declaring at a public forum that banning magazines with higher capacities would succeed because "the people who have those now, they're going to shoot them, so if you ban them in the future, the number of these high-capacity magazines is going to decrease dramatically over time because the bullets will have been shot and there won't be any more available." Allison Sherry, *Inaccurate Remarks on Gun Magazines Put Rep. Diana DeGette Under Scrutiny*, DENVER POST (Apr. 7, 2013), http://www.denverpost.com/news/ci_22971620/inaccurate-remarks-gun-magazines-put-rep-diana-degette. In reality, of course, a detachable magazine can easily be reloaded with ammunition once it is fired empty—that is precisely what it is for. *See* Allison Sherry, *Inaccurate Remarks on Gun Magazines Put Rep. Diana DeGette Under Scrutiny*, DENVER POST (Apr. 7, 2013), http://www.denverpost.com/news/ci_22971620/inaccurate-remarks-gun-magazines-put-rep-diana-degette (quoting a political scientist's conclusion that DeGette's remarks were significant because they showed she was "clearly uninformed about the basic mechanics of the item she wants to further regulate"). A single competent staff briefing could have conveyed this information in a few minutes.

opponents' good faith. It is hard for one side to trust that its counterparts will refrain in the future from enacting restrictions that end up profoundly impairing the exercise of gun rights when it becomes evident that some of those counterparts—including highly placed officials—do not understand basic facts about how the right to arms is practiced in American society.

IV. JUDICIAL (UNDER-) ENFORCEMENT OF THE SECOND AMENDMENT IN THE LOWER FEDERAL COURTS IN THE FIRST HALF-DECADE AFTER *D.C. V. HELLER*

Another important factor in measuring the slippery-slope risk is how willing *courts* are to act as a backstop to block restrictive legislation by holding it unconstitutional, and thus to prevent a progression from sliding down the slope. Courts that recognize and credibly enforce constitutional rights provide assurance that legislation imposing additional regulation (*A*) will not be allowed to lead to drastic or prohibitory restrictions (*B*), and this should make *A* more potentially acceptable to those who believe in the importance of the regulated activity.[126]

For much of the past half-century, elite legal and cultural commentary denied the premise of this anti-slippery slope argument. This view, expressed by the American Bar Association's legislative counsel as recently as 1995, was that individuals had no personal right to arms: "[T]he Second Amendment, with regard to gun-control legislation affecting private individuals, is not relevant in a prohibitive sense."[127] Or as U.S. Solicitor General Seth Waxman famously affirmed in responding to a citizen's letter in 2000, the executive branch believed that government could (in the letter's words) lawfully "take guns away from the public" and "restrict ownership of rifles, pistols and shotguns from all people," since the Second Amendment did not "extend an individual right to keep and bear arms."[128] Federal courts of appeals' opinions from the latter part of the twentieth century similarly proclaimed "there can be no serious claim to any express constitutional right of an individual to possess a firearm."[129]

This was surprising in light of the Amendment's recognition of a "right

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[126] *See* Volokh, *supra* note 12, at 1047–48 (stating that the rigorous protection of constitutional rights could lead to compromise in positions on gun control); *see also* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 294–95 (2011) (expressing hope that the Supreme Court's recognition of an individual right to arms will reduce the plausibility of slippery-slope arguments and thereby facilitate compromise in gun control legislation).

[127] DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA 27 (1995) (noting the statement of ABA legislative counsel E. Bruce Nicholson).

[128] Letter from Seth P. Waxman, Solicitor Gen., U.S. Dep't of Justice, to Anonymous Recipient (Aug. 22, 2000) (internal quotation marks omitted), *available at* http://www.nraila.org/Waxman.pdf.

[129] United States v. Warin, 530 F.2d 103, 106 (quoting Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1974)) (internal quotation marks omitted).

of the people to keep and bear Arms," similar to other provisions of the Bill of Rights protecting rights of the people.[130] Moreover, it had not been the view of nineteenth century American courts or commentators, which regularly interpreted the Second Amendment and parallel state constitutional provisions to protect individual rights to own and use a variety of common weapons.[131] Outside of the judiciary and the elite commentariat,[132] twentieth-century voices frequently agreed that an individual right was conferred. Most Americans supported the individual right in polls,[133] and, in the past thirty years, majorities of Congress twice enacted major legislation premised on the belief that the right to arms is a fundamental individual right.[134]

All this made the pre-*Heller* Second Amendment right to keep and bear arms a strong candidate for membership in Lawrence Sager's famous category of "underenforced constitutional norms."[135] On the other hand, the Supreme Court's recognition in 2008 that the Second Amendment protects a fundamental, individual "right to keep and bear arms for the purpose of self-defense"[136] raised the prospect that the right to arms would emerge from its status as an underenforced norm and become "part of

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[130] U.S. CONST. amend. II.

[131] *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1377–78 (noting that, in 1803, Henry St. George Tucker believed the Second Amendment provided an individual right to bear arms); *see also* JOHNSON ET AL., *supra* note 43, at 251, 318 ("Many other late nineteenth-century legal commentators discussed the right to bear arms in the context of both the federal and state constitutions. . . . [Joel] Bishop viewed the right to bear arms mainly in the context of the criminal law of the carrying of weapons."); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 623 (2012) (noting that the courts during the antebellum period often interpreted the Constitution as guaranteeing a right to carry weapons).

[132] *See* David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 113, http://www.davekopel.org/2A/LawRev/Second-Amendment-in-the-Living-Constitution.pdf (noting that, in the twentieth century, many lower federal courts asserted that the Second Amendment conferred either a collective, state, or militia-only right).

[133] *Id*. at 117 n.78.

[134] *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(a)(2), 119 Stat. 2095 (2005) ("The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms."); Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, § 1(b), 100 Stat. 449, 449 ("The Congress finds that the rights of citizens to keep and bear arms under the second amendment . . . require[s] additional legislation to correct existing firearms statutes and enforcement policies . . . .").

[135] Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm*,*"* 21 HARV. J.L. & PUB. POL'Y 719, 787 (1998). *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (describing the concept of underenforced constitutional norms).

[136] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3026, 3036–37 (2010) (plurality opinion) (identifying the recognition of such a right as part of what *Heller* "held" and holding that the right is fundamental); *id*. at 3059 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with both conclusions).

ordinary constitutional law."[137] Has this occurred?

This Symposium Issue provides an appropriate vantage to look back at what is now over half a decade of post-*Heller* Second Amendment litigation in the lower federal courts. My analysis of the case law will focus primarily on the period from June 26, 2008, when *Heller* was decided, through October 15, 2013. During this period, which I will refer to as the *study period*, hundreds of opinions addressed Second Amendment challenges to particular federal, state, and local gun restrictions. This activity requires a fresh consideration of whether the right remains underenforced.

My analysis focuses on litigation in the lower federal courts. Some might interject here that these courts' relevance to the slippery-slope question is dwarfed by a threshold issue: *What about the Supreme Court?* Indeed, if the critical Supreme Court precedents recognizing an individual Second Amendment right are not themselves secure, then it is unwise to rely on judicial enforcement to avert slippery-slope risks (particularly with respect to federal laws, which are not constrained by state constitutional protections). *Heller* and *McDonald* were each five to four decisions. A switch of a single vote in the majority would have produced either a rejection of a meaningful Second Amendment right (in *Heller*) or a non-incorporated right only applicable against the federal government and federal enclaves like the District of Columbia (in *McDonald*).[138] The principal dissent in *McDonald v. Chicago* remained opposed to *Heller*'s basic holding, contending that "the Framers did not write the Second Amendment in order to protect a private right of armed self-defense."[139] Justices have continued to criticize *Heller* in public remarks.[140]

This is obviously a basic consideration in gauging the ability of judicial enforcement of the Second Amendment to mitigate future slippery

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[137] Brannon P. Denning & Glenn Harlan Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL'Y 273, 274 (2011).

[138] Indeed, in *McDonald v. Chicago*, there was no majority opinion on which clause of the Fourteenth Amendment renders the Second Amendment applicable against the states. 130 S Ct. at 3026. Justice Alito's opinion for a four-Justice plurality concluded that the Fourteenth Amendment's Due Process Clause incorporates the right to arms, *see id.* at 3050 (plurality opinion), while Justice Thomas concurred separately to argue that the right to arms should instead be treated as a "privilege or immunity" of American citizenship that the states are barred from abridging by the Privileges or Immunities Clause of the Fourteenth Amendment, *id.* at 3059, 3063–83 (Thomas, J., concurring in part and concurring in the judgment).

[139] *Id.* at 3136 (Breyer, J., dissenting). Justice Breyer's *McDonald* dissent was also joined by Justices Ginsburg and Sotomayor.

[140] In recent interviews, Justice Ruth Bader Ginsburg expressed her continued disagreement with the *Heller* decision. Jessica Chasmar, *Justice Ruth Bader Ginsberg Predicts Another Democrat in 2016*, WASH. TIMES (Oct. 7, 2013), http://www.washingtontimes.com/news/2013/oct/7/ruth-bader-ginsberg-predicts-another-democrat-2016/; *Ginsburg Draws Connection Between Immigration Reform, Fair Pay for Women*, PRI (Sept. 18, 2013), http://www.pri.org/stories/2013-09-18/ginsburg-draws-connection-between-immigration-reform-fair-pay-women.

slope risks. I acknowledge the point's merit, but note that it is hard to measure this risk, particularly given the low number of Second Amendment cases addressed by the Court[141] and the comparative rarity of confirming new Supreme Court Justices. In contrast, the extent of Second Amendment enforcement in the lower courts can be analyzed in detail now, even holding *Heller* and *McDonald* constant. Nevertheless, this is a basic risk that obviously tends to further volatilize slippery slope concerns.

A. *Distinguishing Institutional vs. Analytical Rationales for Narrow Enforcement*

Professor Sager carefully distinguished situations in which federal courts enforce constitutional provisions narrowly due to *institutional* concerns about the appropriate role of courts, from those in which the courts give a narrow scope to a provision on *analytical* grounds—that is, because they think such an interpretation results from conventional legal methods of ascertaining the provision's textual meaning and scope.[142] In Sager's usage of the term, only the former situation, where the narrow application rests on institutional concerns, properly qualifies as an example of an "underenforced constitutional norm."[143]

That distinction was critical to Sager because his analysis focused on the issues posed by the Equal Protection Clause of Section 5 of the Fourteenth Amendment.[144] While the Equal Protection Clause is directly enforceable in court in many circumstances, the Fourteenth Amendment's fifth section also gives Congress an express power "to enforce, by appropriate legislation," the Equal Protection Clause, as well as the other provisions of the amendment.[145] Sager's point was that if federal courts chose to limit their enforcement of the Equal Protection Clause on

[141] The Supreme Court's refusal to accept any Second Amendment cases for review since deciding *McDonald* in 2010 has itself prompted speculation about the Court majority's attitude toward the right to arms. *See, e.g.*, Josh Blackman, *Our Gun-Shy Justices: The Supreme Court Abandons the Second Amendment*, AM. SPECTATOR, http://spectator.org/articles/59552/our-gun-shy-justices (last visited Apr. 15, 2014) ("Over the last four years, in case after case, lower courts have accepted interpretations of the Second Amendment that have rendered it weak or nonexistent. . . . Each time . . . the Supreme Court declined to review the ruling. . . . The Supreme Court, content with the status quo, has knowingly and willingly abandoned the Second Amendment to the judges below."); Adam Winkler, *UCLA Faculty Voice: Why the Supreme Court Got 'Gun-Shy' This Summer* (June 20, 2014), http://newsroom.ucla.edu/stories/ucla-faculty-voice:-why-the-supreme-court-got-gun-shy-this-summer ("The justices understand the nation's need for uniformity, especially when it comes to individual rights. This term, however, the justices weren't inclined to sort out any such inconsistencies involving the Second Amendment. Indeed, when expressly invited to wade in, they balked.").

[142] *See* Sager, *supra* note 135, at 1239–40 (differentiating between situations in which the Supreme Court enforces judicial norms on institutional grounds versus on analytical grounds).

[143] *Id.* at 1240.

[144] *Id.* at 1239.

[145] U.S. CONST. amend. 14, § 5.

institutional grounds relating to the structural limits of the judiciary, that choice gave no reason to think that the scope of the Fourteenth Amendment as it could be *legislatively* enforced by Congress pursuant to Section 5 must be similarly narrowed.[146] Rather, in Sager's view, "Congress can legislate against a broader swath of state practices than the [U.S. Supreme] Court has found or would find to violate the norm of equal protection, because the federal judiciary's enforcement of that norm fails to exhaust its scope."[147] But where, "because of *analytical* rather than institutional concerns, the Court has determined that given conduct does no violence to the substantive norm of the fourteenth amendment," the underenforcement thesis does not apply; hence, "Congress cannot use section 5 as authority to legislate against that conduct."[148]

Sager's narrow definition of "judicial underenforcement" remains quite relevant to the post-*Heller* Second Amendment. As I will discuss momentarily, a number of lower courts continue to use institutional rationales for taking a minimalist approach to the Second Amendment. But there is a broader and less technical sense in which one can describe a right as underenforced. Judicial decisions, even when relying fully or partially on analytical rationales, may consistently take a markedly narrow view of a right, especially if the judicial view upholds restrictions that render it impractical to engage in conduct that is plausibly viewed as constitutionally protected. This broader sense of underenforcement, too, is relevant to the gun control debate. First, it matters because legislators who decide whether to support legislation may wish to consult their own independent sense of whether proposed laws—or possible future laws that currently proposed enactments would make more probable—contravene constitutional guarantees. The mainstream view in the American political tradition holds "that legislators and executive officials have an independent duty to interpret and implement the Constitution" in choosing how to exercise their lawmaking and law-implementing functions.[149] In saying no to legislation because of constitutional concerns, a legislator is not bound to defer to either analytically *or* institutionally narrowed constructions given to constitutional rights by federal courts. The degree of judicial enforcement we can expect for a given constitutional right is also an

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[146] *See* Sager, *supra* note 135, at 1239 (explaining that Congress may enforce substantive norms even though such norms may have been unenforced by the judiciary).

[147] *Id.*

[148] *Id.* at 1240 (emphasis added).

[149] H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 241 (2011); *see* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 601 (1975) (arguing that legislators have a duty to independently evaluate constitutionality); Denning, *supra* note 135, at 787 ("[T]his division of labor among the branches of government whereby the other branches ignore questions of constitutionality and leave those for the courts has not been, in balance, a good thing.").

important factor in gauging whether slippery slopes are plausible. Legislators who are worried about descending the slope may care about whether courts refrain from closely scrutinizing gun restrictions, regardless of whether the courts justify those decisions primarily on analytical grounds or institutional grounds.

Even if one sticks to a narrow, strictly Sagerian concept of "underenforcement,"[150] there is evidence that the Second Amendment remains judicially underenforced after *Heller*. Lower federal courts have indeed continued to offer what Sager would recognize as frankly institutional, rather than analytical, rationales for adopting narrow views of Second Amendment rights.[151] In a 2011 case, the Fourth Circuit declared that "[t]here may or may not be a Second Amendment right in some places beyond the home," but declined to undertake that question as a matter "of simple caution," asserting that "we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions."[152] (That assertion was mistaken; there is a long American state court tradition of applying the right to bear arms for self-defense to restrictions on bearing handguns outside the home, and courts can draw on this tradition for guidance.[153]) But the Fourth Circuit continued, "We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights."[154]

This reasoning is clearly institutional, not analytical. It emphasizes the perceived difficulty of judicial line-drawing in applying the Second Amendment to bearing arms outside the home[155] and seems to express an attitude that judges' institutional position should make them especially reluctant to impose Second Amendment limits on legislative decisions. Other lower courts have expressed similar sentiments, seeming to shrink from elaborating on Second Amendment doctrine in conventional fashion, but instead adopting a presumption against further judicial recognition of the right in cases that are not factually indistinguishable from binding

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[150] *See* Sager, *supra* note 135, at 1218–19 ("While there is no litmus test for distinguishing [underenforced constitutional] norms, there are indicia of underenforcement. These include a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies.").

[151] *See id.* at 1226 (describing how institutional concerns can result in decisions by the courts that "do[] not do full justice to the invoked constitutional concept").

[152] United States v. Masciandaro, 638 F.3d 458, 475–76 (4th Cir. 2011).

[153] *See generally* O'Shea, *supra* note 131 (explaining how the right to carry arms outside the home is rooted in longstanding tradition and state precedent).

[154] *Masciandaro*, 638 F.3d at 475.

[155] *See id.* (referring to the subject of applying the Second Amendment in places beyond the home "as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree").

precedent.[156]

The tenor of the lower federal courts' post-*Heller* orientation toward the Second Amendment can also be suggested by summarizing their holdings and reasoning in prominent cases.

B. *Defining the Study Period and the Database*

The start date of the study period, June 26, 2008, is the date on which the U.S. Supreme Court decided *Heller*, rendering the individual right to keep and bear arms enforceable in all federal courts. The right was not generally held applicable against state and local governments until the Court's June 28, 2010 decision in *McDonald*, but some lower federal courts did entertain—often arguendo—Second Amendment challenges to state and local laws before *McDonald*.[157] The end date of the study period, October 15, 2013, is largely an artifact of the timing of the Symposium at which the material in this Article was initially presented. However, this date does have the merit of encapsulating the first half-decade (and a bit more) of the Second Amendment individual right's career in the lower federal courts.

With the help of research librarians and staff, I performed *Westlaw* searches to identify opinions in the lower federal courts issued during the main study period that addressed Second Amendment claims.

The project began with a focus on President Obama's judicial appointees, then broadened to encompass all lower court federal judges. First, in summer 2013, we performed a *Westlaw Classic* search for federal circuit and federal district court opinions issued between June 26, 2008 and June 2013 that included the phrase "Second Amendment." To this search we added a filter for each serving lower federal court judge appointed by President Obama for whom an authorship filter was available.

We later broadened the search to encompass post-*Heller* Second Amendment decisions by lower federal court judges appointed by

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[156] *See* Pizsczatoski v. Filko, 840 F. Supp. 2d 813, 829 (D.N.J. 2012) ("[T]his Court does not intend to place a burden on the government to endlessly litigate and justify every individual limitation on the right to carry a gun in any location for any purpose. The risks associated with a judicial error in discouraging regulation of firearms carried in public are too great."); Williams v. State, 10 A.3d 1167, 1177 (Md. 2011) (failing to offer an interpretive argument for why the "right to bear arms" should not include carrying them outside the home, but stating, "[i]f the [U.S.] Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly"); *accord Masciandaro*, 638 F.3d at 475 ("[W]e think it prudent to await direction from the [U.S. Supreme] Court itself.").

[157] *E.g.*, Justice v. Town of Cicero, 577 F.3d 768, 774 (7th Cir. 2009) ("[E]ven if we are wrong about [rejecting] incorporation, the [challenged] ordinance, which leaves law-abiding citizens free to possess guns, appears to be consistent with the ruling in *Heller*."); Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) (holding that Second Amendment right was fully incorporated against the states under the Due Process Clause of the Fourteenth Amendment).

presidents of all parties. For this query, we used a *WestlawNext* search for all decisions within the study period that were designated under the West Key Number 406k102 (Constitutional, Statutory, and Regulatory Provisions), within the Topic of Weapons (406). This yielded a database of 278 decisions. After removing those opinions that, on inspection, did not involve Second Amendment claims, we had 205 lower court Second Amendment opinions. Finally, we added 20 Second Amendment opinions that had been found by the original search and were not included in the results for the second search. This yielded a final database of 225 opinions.

This database underlies the analysis and conclusions presented in this Part. I first summarize the lower court decisions at a general level, then add a factor that proves significant: the party of the president that appointed a given lower court judge.

The, in Part IV.G, I extend the analysis past the study period, offering a less formal discussion of important Second Amendment opinions issued by the lower federal courts *after* October 15, 2013. I consider to what extent they are consistent with the trends identified in the main study. Finally, Part IV.H briefly discusses the lower courts' record of enforcing *statutory* protections against gun registration, since these are also relevant to diagnosing slippery-slope risk.

C. *Cases on the Right to Carry Handguns for Self-Defense*

Heller and *McDonald* recognized an individual "right to . . . bear arms for the purpose of self-defense."[158] By doing so, the decisions assimilated the Second Amendment to one of the major strands of right-to-arms jurisprudence in American tradition.[159] One of the most strongly attested features of the right to bear arms for self-defense has been the carrying of handguns outside the home. In nearly two centuries of state court jurisprudence, this issue has been repeatedly litigated, and American courts

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[158] *See supra* note 136 and accompanying text.

[159] *See* O'Shea, *supra* note 131, at 609–11 (explaining that *Heller* and *McDonald* not only held that self-defense is the core component of the right to bear arms, but also assimilated the Second Amendment right to state constitutional provisions protecting the right of citizens to bear arms "in the defense of themselves," or of each citizen to bear arms "in defense of [him]self," both of which have historically been interpreted to protect weapons carrying). The other major strand of jurisprudence is that of the so-called "hybrid" right to arms, which protects a personal right to own militia-type firearms, but views the right to bear arms as focused primarily upon the civic purposes of deterring government tyranny. *See id*. at 642–48, 653–56 (canvassing sources and distinguishing the "defense-based right" tradition in nineteenth- and early twentieth-century jurisprudence from the "hybrid right" tradition). *See generally* Michael P. O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597 (2014) (providing a discussion of the hybrid right to arms and how it might apply to gun controversies today).

have frequently interpreted self-defense-based arms rights provisions in state constitutions as protecting the carrying of handguns and other common weapons.[160] If the Supreme Court's decision to ground the Second Amendment right in personal defense puts *any* type of contemporary gun restriction in constitutional jeopardy, then it should be state laws that forbid or substantially impair citizens' ability to carry outside the home. That ought to be a natural part of the "cash value" of *Heller*'s adoption of a personal defense-based conception of the right.

Yet in the study period, most lower federal courts proved reluctant to enforce this aspect of the right. Three federal courts of appeals held that the right to keep and bear arms for self-defense was *not* infringed by restrictive "may-issue" state laws that require a citizen to make an unusual showing of a heightened threat to obtain a license to carry a handgun outside her home.[161] Such laws foreclose most citizens from having any lawful way to bear those arms in public places. While the Supreme Court in *Heller* described the handgun as the "class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense,[162] the Second Circuit emphatically quoted—twice—the words of a 1913 state court decision characterizing the handgun as "*the handy, the usual and the favorite weapon of the turbulent criminal class*."[163] The Second Circuit concluded its opinion by emphasizing the government's "authority to extensively regulate handgun possession in public."[164]

During the study period, two federal district court decisions (later reversed on appeal) also rejected Second Amendment challenges to state laws that confined citizens to carrying only *unloaded* handguns for self-

[160] O'Shea, *supra* note 131, at 589, 596–98.

[161] *See* Drake v. Filko, 724 F.3d 426, 429–30 (3d Cir. 2013) (holding that a New Jersey law requiring an applicant to demonstrate a "justifiable need," which was defined as an "urgent necessity for self-protection," in order to carry a handgun for self-defense was "presumptively lawful"), *cert. denied sub nom.* Drake v. Jerejian, 134 S. Ct. 2134 (2014); Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013) (holding that a Maryland statute that required an applicant to satisfy a "good-and-substantial-reason requirement," which did not include a simple desire for self-defense, in order to be issued a handgun permit was "reasonably adapted" to substantial government interests of public safety and preventing crime), *cert. denied*, 134 S. Ct. 422 (2013); Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) (upholding a New York law that conditioned the issuance of a concealed handgun license on the applicant's showing of "proper cause," defined as a special need for self-protection beyond that of the general population), *cert. denied*, 133 S. Ct. 1806 (2013).

[162] District of Columbia v. Heller, 554 U.S. 570, 628 (2008); *see also id.* at 628–29 (describing handguns as "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family" (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)) (internal quotation marks omitted)).

[163] *Kachalsky*, 701 F.3d at 85, 99 n.23 (quoting People *ex rel.* Darling v. Warden, 139 N.Y.S. 277, 285 (App. Div. 1913)) (internal quotation marks omitted).

[164] *Id.* at 101.

defense.[165] The courts offered the dismissive theory that debarring most citizens from loaded carry did not meaningfully burden their Second Amendment rights, since state law still allowed a citizen to carry an *unloaded* gun on her person, plus separate ammunition.[166] These federal judges (themselves protected at the public expense by trained officers with fully loaded guns) deemed it adequately respectful of self-defense to compel a citizen to spend several seconds, using both hands, to load her handgun once a felonious assailant began attacking her.

One federal district court, surveying the case law on the right to carry, appeared to acknowledge an unusual hesitancy of federal courts to act in this area, opining that the lower courts' reluctance to enforce Second Amendment limits outside the home "says more about the courts than the Second Amendment."[167]

D. *Other Types of Gun Restrictions*

1. *Enforcement of Gun Restrictions*

The pattern is similar when we turn to other types of gun restrictions. In the post-*Heller* study period, lower federal courts upheld a range of restrictions as being consistent with the Second Amendment.

a. High Registration Fees

Among the measures upheld was a New York City law requiring a $340 registration fee, paid every three years, to exercise the very constitutional right recognized in *Heller*—personal ownership of a handgun at home.[168] This fee is roughly equivalent to a 100% tax on a quality used handgun. In upholding this fee scheme, the Second Circuit expressed doubt that the fee even imposed a "substantial burden" on individuals' right to keep arms, but added that if it did so, it was still constitutional.[169]

b. Severe Restrictions on Home Possession of Handguns.

Another panel of the Second Circuit even refused to assume that the Second Amendment right to keep a handgun extends to the summer

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[165] *See* Richards v. County of Yolo, 821 F. Supp. 2d 1169, 1175 (E.D. Cal. 2011), *rev'd sub nom.* Richards v. Prieto, 560 Fed. App'x 681 (9th Cir. 2014); Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010), *rev'd*, 742 F.3d 1144 (9th Cir. 2014).

[166] *Richards*, 821 F. Supp. 2d at 1176; *Peruta*, 758 F. Supp. 2d at 1114.

[167] United States v. Weaver, No. 2:09-cr-00222, 2012 WL 727488, at *4 n.7 (S.D. W. Va. Mar. 6, 2012); *see also id.* ("Limiting this fundamental right to the home would be akin to limiting the protection of First Amendment freedom of speech to political speech or college campuses.").

[168] Kwong v. Bloomberg, 723 F.3d 160, 172 (2d Cir. 2013).

[169] *See id.* at 167–68 (expressing doubt that this fee amounted to anything more than a "marginal, incremental or even appreciable restraint" on Second Amendment rights).

residence of a person who has two residences.[170] Moreover, a federal district judge held—in a decision that was reversed on appeal to the Seventh Circut—that there was no Second Amendment problem with a municipal law that simultaneously (1) required all handgun owners to obtain training at a gun range, and (2) prohibited gun ranges.[171] Federal laws received similar treatment. The Fifth Circuit upheld a federal law prohibiting otherwise law-abiding eighteen- to twenty-year olds from buying a handgun at retail, despite considerable evidence that Founding Era sources considered eighteen- to twenty-year olds—who can vote, marry, sign contracts, join the military, and be drafted—to be adults and potential members of the militia.[172] A federal provision that imposes a retroactive, lifetime ban on exercising the right to keep and bear arms, premised on a single misdemeanor conviction for domestic violence, has also been upheld.[173]

c. Rifle Bans

A ban of the AR-15, the best-selling kind of rifle in America, along with a wide range of other semi-automatic rifles in common use, was also deemed permissible.[174] The D.C. Circuit's decision rested in part on the district court's decision to defer to a legislative committee's conclusion that these rifles were "'military-style' weapons designed for offensive use"[175]—even though, like countless other jurisdictions, the District of Columbia employed AR-15 rifles as standard equipment for its civilian police force, describing them more innocuously as "patrol rifles" in that context.[176] And once again, the federal court's opinion ranged further than necessary, musing that even a ban on all semi-automatic pistols (which comprise the large majority of all handguns sold in America today) might

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[170] Osterweil v. Bartlett, 706 F.3d 139, 144 (2d Cir. 2013).

[171] Ezell v. City of Chicago, No. 10 C 5135, 2010 WL 3998104, at *1 (N.D. Ill. Oct. 12, 2010), *rev'd*, 651 F.3d 684 (7th Cir. 2011).

[172] NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 188, 212 (5th Cir. 2012), *reh'g denied*, 714 F.3d 334 (5th Cir. 2013). *But see NRA*, 714 F.3d at 335 (Jones, J., dissenting from denial of rehearing *en banc*) (arguing that § 922(b)(1) violates the Second Amendment rights of eighteen- to twenty-year-old adults).

[173] *E.g.*, United States v. Booker, 644 F.3d 12, 26 (1st Cir. 2011); United States v. White, 593 F.3d 1199, 1200, 1206 (11th Cir. 2010). *But see* United States v. Skoien, 614 F.3d 638, 644–45 (7th Cir. 2010) (en banc) (upholding the statute facially, and as applied against recidivist misdemeanant, but reserving the issue of whether as-applied Second Amendment challenges to § 922(g)(9) by "a misdemeanant who has been law-abiding for an extended period" might have merit); Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1117, 1126 (N.D. Ill. 2012) (holding that municipal ordinance barring any "nonviolent" misdemeanant from gun ownership facially violated the Second Amendment).

[174] Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

[175] *Id.*

[176] *See* D.C. METRO. POLICE DEP'T, GENERAL ORDER GO-RAR-901.01, HANDLING OF SERVICE WEAPONS 3 (2008) (adopting the Colt AR-15A3 as the standard "patrol rifle" for District of Columbia police).

not violate the Second Amendment.[177]

2. *Enforcement of the Second Amendment*

Despite the general post-*Heller* trend of strong deference, some cases in the study period reached merits dispositions that held government action violative of the Second Amendment. Moreover, the generally deferential trend was met with a number of strong dissenting opinions.

a. Bans on Handgun Carrying

The Seventh Circuit invalidated a state's complete ban on handgun carrying (a decision echoed by that state's supreme court).[178] In a related vein, one federal district court struck down a statewide ban on possessing firearms outside the home or purchasing firearms during a declared state of emergency,[179] while another found unconstitutional, as applied, a federal regulation prohibiting the presence of otherwise lawfully possessed guns in a post office parking lot.[180] One federal judge also held that Maryland's restrictive "may-issue" handgun carry permit law violated the Second Amendment right to bear arms,[181] but this ruling was overturned on appeal.[182]

b. Restrictions on Gun Possession

The Seventh Circuit granted a preliminary injunction blocking a citywide ban on gun ranges when the city simultaneously required gun

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[177] *See Heller*, 670 F.3d at 1267–68 ("The dissent . . . insists it is 'implausible' to read *Heller* as 'protect[ing] handguns that are revolvers but not handguns that are semi-automatic.' We do not, however, hold possession of semi-automatic handguns is outside the protection of the Second Amendment. We simply do not read *Heller* as foreclosing every ban on every possible sub-class of handguns or, for that matter, a ban on a sub-class of rifles." (quoting *id.* at 1289 n.16 (Kavanaugh, J., dissenting))). *But see id.* at 1289 n.16 (Kavanaugh, J., dissenting) ("I find that an utterly implausible reading of *Heller* given the [U.S. Supreme] Court's many blanket references to handguns and given that most handguns are semi-automatic.").

[178] Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); *see also* People v. Aguilar, 2 N.E.3d 321, 328 (Ill. 2013) (agreeing with the analysis in *Moore* and likewise holding unconstitutional the Illinois ban on carrying handguns in public).

[179] Bateman v. Perdue, 881 F. Supp. 2d 709, 711 (E.D.N.C. 2012).

[180] Bonidy v. U.S. Postal Serv., No. 10-CV-02408-RPM, 2013 WL 3448130, at *4, *6 (D. Colo. July 9, 2013). The court upheld a prohibition of guns in the post office building itself. *Id.* at *6.

[181] Woollard v. Sheridan, 863 F. Supp. 2d 462, 479–80 (D. Md. 2012), *rev'd*, Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013). The district court in *Woollard* rightly rejected Maryland's argument that its restrictive approach to issuing handgun licenses was justified by a desire to "minimiz[e] the proliferation of handguns among those who do not have a demonstrated need for them." *Id.* at 475. The court concluded that accepting such a broadly defined governmental interest as legitimate would negate the existence of the right to bear arms itself: "A law that burdens the exercise of an enumerated constitutional right by simply making that right more difficult to exercise cannot be considered 'reasonably adapted' to a government interest, no matter how substantial that interest may be." *Id.*

[182] *Gallagher*, 712 F.3d at 882–83.

range training in order to legally own a handgun.[183] Federal district court decisions granted relief from a law prohibiting nonviolent misdemeanants from owning a handgun,[184] and a law banning all legal resident aliens from handgun ownership.[185]

c. Dissenting Votes to Grant Relief on Second Amendment Grounds

Finally, there have been a few federal circuit cases in which a majority of the court rejected the Second Amendment claim at issue, but one or more dissenting judges would have held that the Second Amendment was violated by a particular regulation. Thus, these dissenting votes also deserve to be counted as votes for relief on the merits on Second Amendment grounds. Such votes were cast to overturn a prohibition on modern semi-automatic rifles,[186] to overturn a restrictive "may-issue" handgun permitting law,[187] and in dissent from a refusal to rehear an en banc decision upholding a federal ban on retail handgun purchases by eighteen- to twenty-year-old adults.[188]

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The data suggests a general pattern of strong judicial deference to legislation, even when legislatures choose to enact restrictions that significantly restrict the ownership and use of firearms. This pattern is interspersed with occasional decisions invalidating very restrictive laws, typically those that approximate total bans on possession or carrying of weapons.

In *Heller*, the Supreme Court indicated that Second Amendment claims should receive a form of heightened scrutiny.[189] Taken as a whole, the case law in the study period is consistent with the position that Second Amendment claims in the lower federal courts have generally received "a deferential, reasonableness review under which nearly all gun control laws would survive judicial scrutiny."[190] At face value, it might be argued that

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[183] Ezell v. City of Chicago, 651 F.3d 684, 690 (7th Cir. 2011).

[184] Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1117, 1126 (N.D. Ill. 2012).

[185] Fletcher v. Haas, 851 F. Supp. 2d 287, 303 (D. Mass. 2012).

[186] Heller v. District of Columbia, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[187] Drake v. Filko, 724 F.3d 426, 440, 443, 446–58 (3d Cir. 2013) (Hardiman, J., dissenting).

[188] NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 714 F.3d 334, 335 (5th Cir. 2013) (Jones, J., joined by five other judges, dissenting from denial of rehearing en banc).

[189] *See* District of Columbia v. Heller, 554 U.S. 570, 628 & n.27 (2008) (rejecting rational basis review of Second Amendment claims while holding that a handgun ban would violate "any of the standards of scrutiny that we have applied to enumerated constitutional rights").

[190] Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007) Professor Winkler argues that this standard characterizes the jurisprudence of state courts applying state

this low level of enforcement could nevertheless suffice to protect the right against truly severe "slippery slope" scenarios involving prohibition,[191] although the long-term efficacy of such protection is questionable.[192]

E. *The Political Variable: Judicial Enforcement of the Second Amendment by Party of Appointing President*

This picture deepens, and further details emerge, when we add one more variable to the data: the political party of the president that nominated each judge. This variable reveals a profound partisan divide. In the studied database of opinions, encompassing over five years since *Heller*, the use of the Second Amendment in the lower federal courts to impose limits on governmental action was carried out entirely by judges appointed by a Republican president, with a solitary (rather ambiguous) exception.[193] In every opinion described above that found a Second Amendment violation, every vote in favor of relief on the merits from government action—whether in a majority opinion, a dissent, or a dissent from denial of rehearing—was cast by a Republican-appointed judge.

President Obama's judicial nominees had a uniform record in the Second Amendment cases in the database. Obama-appointed judges began assuming the federal bench in 2009, and issued or joined over dozens of opinions during the study period in cases addressing Second Amendment claims. None voted to grant relief on any Second Amendment claim.[194]

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constitutional right to arms guarantees in the years since World War II. *Id*. at 687. It should be noted that many state courts in earlier periods applied significantly more stringent forms of review to the right to arms. O'Shea, *supra note* 131, at 623–32. Moreover, even in the period Winkler discusses, a significant number of state courts actually applied an analytically distinct standard, asking instead whether gun control laws "frustrated" the exercise of the right to arms—a standard that even an otherwise ostensibly "reasonable" law could fail. *Cf*. Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1590 n.13 (2014) (presenting state cases employing the "frustration" standard).

[191] *Cf*. Winkler, *supra* note 190, at 722–26 (discussing "total prohibitions" and other extreme laws that violate the deferential type of "reasonableness" review).

[192] It is doubtful that the limited scope of firearms-related activity that is judicially protected by a reasonableness review would be enough to sustain a culture of legitimate gun ownership strong enough to prevent the right's eventual abrogation. *See* Olson & Kopel, *supra* note 16, at 421 ("Reducing the number of people who will, one day in the future, care about exercising a particular right is a good way to ensure that, on that future day, new restrictions on the right will be politically easier to enact."); Volokh, *supra* note 12, at 1116–17 (discussing how regulation can create "political power slippery slopes" by creating barriers to the exercise of a right that reduce the number of individuals who are motivated to defend it, and thus make future restrictions possible).

[193] For a discussion of the exception, which involved a judge who was a former Republican congressional staffer appointed by Democratic President Bill Clinton as part of a compromise deal, see *see infra* notes 200–03 and accompanying text.

[194] I treated opinions as granting merits relief if they supported injunctive relief (including preliminary injunctive relief) or summary judgment on a Second Amendment claim, reversed a conviction or dismissed a criminal charge on the ground of a Second Amendment violation, or found a triable issue on a Second Amendment claim. I did not count as "granting relief" opinions that held that

Admittedly, not all of these cases are equally probative of judicial attitudes toward the Second Amendment. A fair number of them involved low-probability claims such as convicted felons seeking relief from federal felon-in-possession convictions.[195] *Heller* specifically discussed such laws and said that they were presumptively constitutional,[196] so it is no surprise that lower federal courts have turned away challenges to them. But as the previous discussion illustrates, many of the Second Amendment claims adjudicated during the study period dealt with challenges to laws that were not presumptively blessed by *Heller* and involved plausible extensions or applications of *Heller*'s reasoning, such as a right to carry a handgun in public or protection for other classes of common arms beyond handguns, such as semi-automatic rifles. During *Heller*'s first half-decade, Democrat-appointed federal judges consistently rejected such claims.

Findings of this sort are not unprecedented. Previous studies of federal judges' attitudes in other substantive areas of law have also identified differences in outcomes based on the party of the appointing president.[197] It is worth noting, however, that the fact that Democrat-appointed federal judges have taken an exceptionally narrow view of Second Amendment rights post-*Heller* does not imply that Republican-appointed federal judges have generally taken a broad view of those rights.[198] To the contrary,

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a Second Amendment plaintiff had merely stated a claim for relief, such as opinions denying a motion to dismiss or opinions finding that a Second Amendment claimant had standing to sue.

[195] For examples rejecting Second Amendment challenges to convictions under 18 U.S.C. § 922(g)(1), the principal federal felon-in-possession statute, see *United States v. Kline*, 494 Fed. App'x 323, 325 (4th Cir. 2012) (per curiam) (panel including two Obama-appointed circuit judges); *United States v. Woodson*, No. 09-117-LPS, 2013 WL 817071, at *4 (D. Del. Mar. 5, 2013); and *United States v. Pulley*, 2013 WL 453279, at *1 (E.D. Cal. Feb. 6, 2013).

[196] District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (stating that nothing in the majority's decision should be construed so as to cast doubt on established prohibitions against felons possessing firearms).

[197] *See* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 24 (2006) ("From 1978 through 2004, Republican appointees cast 275 total votes [in cases involving affirmative action], with 129 or 47 percent, in favor of upholding an affirmative action program. By contrast, Democratic appointees cast 208 votes, with 156, or 75 percent, in favor of upholding an affirmative action program.") Sunstein and his co-authors identified significant differences in voting outcomes among federal circuit judges based on party of appointing president in a variety of controversial areas of law, such as abortion, affirmative action, campaign finance, capital punishment, and several others. *Id.* at 8–13, 19–45.

[198] The voting behavior of lower federal court judges in post-*Heller* Second Amendment cases is most similar (though of course not identical) to the behavior Professor Sunstein and his co-authors observed in post-*Lopez* federalism cases resolving enumerated powers challenges to federal laws enacted under the interstate commerce power. *See* United States v. Lopez, 514 U.S. 549 (1995) (invalidating a previous version of the federal Gun-Free School Zones Act as exceeding congressional power under the Commerce Clause, marking the first time in almost sixty years that a federal statute had been invalidated on Commerce Clause grounds). In each area, judges appointed by both parties reject claims at high rates, yet there is a significant difference by appointing party in the rates at which such claims are accepted. *See* SUNSTEIN ET AL., *supra* note 197, at 18, 50–51 (reporting a statistically

Republican appointees have authored many important opinions rejecting plausible Second Amendment claims or expressing skepticism about broadened Second Amendment rights.[199] We can more correctly sum up the results of Second Amendment litigation in the lower federal courts during the first half-decade since *Heller* in this way: judges selected by Republican presidents occasionally held that government action violates the Second Amendment while judges selected by Democratic presidents essentially never did so.

The lone exception to the partisan divide in Second Amendment cases during the study period ends up proving the rule with an amusing precision. In *United States v. Engstrum*,[200] a 2009 case involving the lifetime prohibition on gun ownership by domestic violence misdemeanants,[201] a federal district court judge held that the defendant could be entitled to a jury instruction that he should not be convicted under the statute if the jury found that he did not pose a future risk of violence: otherwise, in the judge's view, allowing conviction would impermissibly deprive him of his Second Amendment rights.[202] The judge was appointed by President Bill Clinton—but was actually a former Republican

significant difference from 1995 to 2004 where Republican appointees rejected Commerce Clause challenges 94% of the time but Democratic appointees did so 97% of the time).

It is thus interesting, and somewhat surprising, that Sunstein and his co-authors nevertheless label the Commerce Clause as an area in which their hypothesis (that partisan effects would occur) was "rebutted," *id*. at 48, evidently because of the low overall rate of acceptance of such claims, *id*. at 50. It seems to me that the post-*Heller* Second Amendment cases illustrate that there can indeed be consequential differences between judges who occasionally uphold a particular type of claim and those who practically never do so—or, in the case of Obama appointees during the study period, never do so. These differences would seem particularly relevant in public law issues like the Second Amendment (or enumerated powers), where a single successful claim can have far-reaching consequences for statewide or indeed national legislation.

[199] *See, e.g*., Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) (upholding New York's restrictive handgun carry license issuing statute); Heller v. District of Columbia, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (upholding handgun registration law and ban on popular rifles such as the AR-15 and common magazines holding more than ten rounds); United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (expressing great reluctance to recognize Second Amendment rights outside the home); NRA v. City of Chicago, 567 F.3d 856, 857 (7th Cir. 2009) (rejecting incorporation of Second Amendment against state and local governments), *rev'd sub nom*. McDonald v. City of Chicago, 561 U.S. 742 (2010); Richards v. County of Yolo, 821 F. Supp. 2d 1169, 1175 (E.D. Cal. 2011) (holding that county's restrictive program of issuing permits to carry a loaded handgun for self-defense would receive only "rational basis" scrutiny, because the ability to carry an *unloaded* handgun was sufficient to preserve individuals' Second Amendment right to bear arms for self-defense), *rev'd sub nom*. Richards v. Prieto, No. 11-16255, 2014 WL 843532, at * 1 (9th Cir. Mar. 5, 2014).

[200] No. 2:08-CR-430 TS, 2009 WL 1683285 (D. Utah June 15, 2009).

[201] 18 U.S.C. § 922(g)(9) (2012).

[202] *See Engstrum*, 2009 WL 1683285, at *1, 3–4 (stating that 18 U.S.C. § 922(g)(9) passed strict scrutiny, but that its constitutionality could be rebutted if application was sought against an individual who posed no prospective risk of violence). Securing the jury instruction would have required the defendant to present evidence at trial to support the claim that he posed no prospective risk of violence. *Id*. at *3.

congressional staffer whose appointment was part of a compromise offered to Republicans.[203] *Engstrum* was swiftly reversed by the Tenth Circuit pursuant to a writ of mandamus,[204] but one circuit judge, also a Clinton appointee, expressed sympathy with the district court's approach and argued that the issue should have received full briefing.[205]

What does this litigation record, enriched by the party-of-appointment variable, imply about slippery-slope concerns? It suggests that gun rights supporters cannot even count on Second Amendment rights receiving the modest level of judicial enforcement that they now receive. The proportion of federal judges appointed by Democratic presidents will increase in the remaining two years of the Obama Administration, and it may increase still more depending on the results of the 2016 elections.[206] Unless Second Amendment enforcement becomes a more "bipartisan" issue in the federal judiciary, the existence of judicial review deserves little weight in offsetting slippery-slope concerns.

To be sure, many of the decisions listed above drew dissenting votes; a few were later overturned by higher courts. And some decisions have upheld Second Amendment claims. One certainly need not think that the decisions rejecting plausible Second Amendment arguments were all wrongly decided. Moreover, one need not single out any particular judge from this list or conclude that the judge concerned was not pursuing his or her best lights in respect to the Second Amendment. It is enough to focus

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[203] *See* Sam Fulwood III, *Clinton Calls on Senate to Confirm Judicial Nominees*, L.A. TIMES (Aug. 10, 1999), http://articles.latimes.com/1999/aug/10/news/mn-64301 (noting that Republican Senator Orrin Hatch obtained Stewart's nomination as part of a compromise offered by the Clinton Administration); *Judge Ted Stewart*, U.S. DISTRICT CT., DISTRICT UTAH, http://www.utd.uscourts.gov/judges/stewart.html (last visited Apr. 15, 2014) (stating that Judge Stewart served as Congressman Jim Hansen's (R-Utah) Chief of Staff).

[204] *In re* United States, 578 F.3d 1195, 1197 (10th Cir. 2009).

[205] *Id*. at 1195 (Murphy, J., dissenting from order granting petition for writ of mandamus); *see also Biographical Directory of Federal Judges: Murphy, Michael R*, FED. JUD. CENTER http://www.fjc.gov/servlet/nGetInfo?jid=1725&cid=999& ctype=na&instate=na (last visited Apr. 15, 2014) (noting that Judge Murphy was nominated by President Clinton). In one other opinion in the database, a panel that included one Clinton-appointed judge joined a disposition that came fairly close to finding a Second Amendment violation. In *United States v. Rehlander*, the First Circuit reasoned that the canon of constitutional avoidance counseled it to interpret 18 U.S.C. § 922(g)(4) narrowly, which prohibits gun possession by persons "committed to a mental institution." 666 F.3d 45, 46–47 (1st Cir. 2012). The court held that a temporary emergency hospitalization that required only ex parte procedures was not encompassed by the statute. *Id*. at 47. Otherwise, a serious question concerning due process violations would arise. *Id*. at 48–50. The court's reasoning was informed by the recognition of an individual right to arms in *Heller*. *See id*. at 48 ("*Heller* now adds a constitutional component.").

[206] In recent interviews, Supreme Court Justice Ruth Bader Ginsburg expressed her continued disagreement with the *Heller* decision and predicted that a Democratic President will be elected in 2016. Chasmar, *supra* note 140; *Ginsburg Draws Connection Between Immigration Reform, Fair Pay for Women*, TAKEAWAY, PRI (Sept. 18, 2013), http://www.pri.org/stories/2013-09-18/ginsburg-draws-connection-between-immigration-reform-fair-pay-women.

on the overall effect and tenor of the decisions, whatever their cause. That tenor is deeply skeptical, bordering on hostile, to claims that the Second Amendment limits government action.

F. *A Note on Recent Developments*

In this Section, I will briefly discuss some notable Second Amendment decisions from lower federal courts in the months following the study period and ask how well these more recent decisions conform to the patterns identified in the previous Sections.

At the end of 2013, a federal district court invalidated the unprecedented seven-round ammunition limitation in the NY SAFE Act.[207] The authoring judge was a Republican appointee.[208]

The most notable Second Amendment decision of 2014 so far has been *Peruta v. County of San Diego*,[209] in which a divided panel of the Ninth Circuit struck down San Diego County's restrictive "may-issue" implementation of California's concealed carry permit statute.[210] The majority held that the County's policy, which specified that a typical citizen's interest in self-defense was not a "good cause" justifying the granting of a permit, amounted to a "destruction" of the Second Amendment right to bear arms for self-defense and was therefore unconstitutional.[211] *Peruta* is the first decision by a federal court of appeals to strike down a "may-issue" carry permit requirement.[212] The *Peruta* panel decision conforms to the ideological pattern discussed earlier: the two panel judges who voted to grant relief on Second Amendment grounds were both appointees of Republican presidents,[213] while the

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[207] N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349, 371–73 (W.D.N.Y. 2013).

[208] *See Biographical Directory of Federal Judges: Skretny, William M.*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=2205&cid=999&ctype=na&instate=na (last visited Apr. 15, 2014) (noting that Chief Judge Skretny was appointed by President George H.W. Bush).

[209] 742 F.3d 1144 (9th Cir. 2014).

[210] *Id*. at 1178–79.

[211] *Id*. at 1167–70.

[212] Decisions from the Second, Third, and Fourth Circuits during the study period rejected Second Amendment challenges to restrictive "may-issue" state statutes. *See supra* note 161 and accompanying text. The Seventh Circuit in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), held that the Second Amendment was violated by Illinois's handgun carrying statute, but this was a "no issue" statute banning all handgun carry, not a "may-issue" statute authorizing issuance of a permit in limited circumstances. The federal district court in *Woollard v. Sheridan*, 863 F. Supp. 2d 462 (D. Md. 2012), held that Maryland's "may-issue" statute violated the Second Amendment, but this decision was reversed on appeal. Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

[213] Judge Diarmuid O'Scannlain, a Ronald Reagan appointee, wrote the majority opinion, joined by George W. Bush appointee Judge Consuelo Callahan. *See The Judges of This Court in Order of Seniority*, U.S. CT. APPEALS FOR NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (last updated Apr. 2014) (listing appointing president of each judge).

dissenting judge, who found no constitutional violation,[214] was a Democratic appointee.[215] As this Article goes to publication, the judgment in *Peruta* is stayed and petitions for rehearing by the *en banc* Ninth Circuit are pending.[216]

And yet, in recent months, three federal district court decisions have deviated from the party-of-appointment pattern identified in the main study. In January 2014, a district court struck down Chicago's post-*McDonald* ban on the sale and transfer of firearms as a Second Amendment violation.[217] This marked the first time that an Obama-appointed judge found that government action violated the Second Amendment.[218] In the same month, a district court judge appointed by President Clinton[219] protected Second Amendment rights outside of one's primary residence by entering a preliminary injunction against the U.S. Army Corps of Engineers's ban on possessing firearms and ammunition on Corps property.[220] Finally, another Clinton-appointed district court judge[221] held that a municipal authority's denial of a state-required permit to purchase a handgun violated a citizen's Second Amendment right when

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[214] *See Peruta*, 744 F.3d at 1179–99 (Thomas, J., dissenting). Judge Thomas's dissent rested, in part, on a historical argument that the concealed carrying of firearms was categorically excluded from the scope of the Second Amendment's protections. *Id*. at 1182–91. This position leaves open the question of whether the *open* carrying of handguns outside the home (such as in a visible holster) may be entitled to some constitutional protection. *Cf*. Jonathan Meltzer, Note, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1510–22 (2014) (examining early nineteenth-century sources and arguing that a proper application of *Heller*'s originalist method to the question of carry rights implies an individual Second Amendment right to carry weapons outside the home—but a right that is exclusively limited to open carry).

[215] *See The Judges of This Court in Order of Seniority*, *supra* note 213 (noting that Judge Sidney R. Thomas was appointed by President Clinton).

[216] Order, Peruta v. County of San Diego, No. 10-56971 (9th Cir. Feb. 28, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/03/10-56971_order.pdf; Motion of the State of California to Intervene and Petition for Rehearing En Banc, Peruta v. County of San Diego, No. 10-56971 (9th Cir. Feb. 27, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/02/28/10-56971_motion_to_intervene.pdf.

[217] *See* Ill. Ass'n of Firearms Retailers v. Chicago, 961 F. Supp. 2d 928, 936–40, 946–47 (N.D. Ill. 2014) (applying a high level of scrutiny close to strict scrutiny to the city's ban on gun sales and transfers because it substantially burdened the exercise of the right to possess arms).

[218] *Biographical Directory of Federal Judges: Chang, Edmond E-Min*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=2133&cid=999&ctype=na&instate=na (last visited Apr. 15, 2014).

[219] *Biographical Directory of Federal Judges: Winmill, B. Lynn*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=2617&cid=999&ctype=na&instate=na (last visited Apr. 15, 2014).

[220] *See* Morris v. U.S. Army Corps of Engineers, 990 F. Supp. 2d 1082, 1085–86 (D. Idaho 2014) (applying strict scrutiny to the Corps's ban on firearms as it applied to a citizen's possession of a firearm for self-defense in his or her tent).

[221] *Biographical Directory of Federal Judges: Stearns, Richard Gaylore*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=2278&cid=999&ctype=na&instate=na (last visited Apr. 15, 2014).

the denial was premised solely on a decades-old misdemeanor marijuana conviction.[222]

These recent decisions, while few in number, are notable because they are decisions by Democratic appointees that reflect a willingness to block highly restrictive gun legislation. Thus, they tend to mitigate one of the chief lessons of the main study: that Second Amendment enforcement since *Heller* has been conducted, essentially without exception, by judges appointed by presidents belonging to only one of the two major political parties. If Second Amendment enforcement by the federal courts is indeed becoming a more "bipartisan" issue (particularly if such a shift migrates to the courts of appeals and the Supreme Court), then it will deserve more weight in gun policy debates as a mechanism that tends to mitigate slippery slope concerns.

G. *A Note on Statutory Protections of Gun Rights*

I will also say a few words about judicial attitudes toward *statutory* protections of gun rights, since these also influence the plausibility of slippery slopes. Someone might accept the conclusion that federal judges have proven strikingly reluctant to impose Second Amendment limitations on government action, yet respond that one could still foreclose slippery slope concerns about expanded recordkeeping legislation, by embedding *statutory* protections against abuse in the legislation itself.

This is not implausible, and Manchin-Toomey itself contained provisions meant to function as statutory safeguards of just this sort. It provided: "The Attorney General may not consolidate or centralize the records of the acquisition or disposition of firearms . . . maintained by . . . [a FFL or] an unlicensed transferor."[223] Unfortunately, these anti-registry provisions were poorly drafted in ways that would have reduced the protections offered by the measure and perhaps also weakened previously existing protections.[224]

From a broader standpoint, the lower courts' track record of enforcing

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[222] Wesson v. Town of Salisbury, No. 13-10469-RGS, 2014 WL 1509562, at *4 (D. Mass. Apr. 18, 2014).

[223] S. Amend. 711 to S. 649, § 122, 113th Cong. (2013).

[224] David Kopel has analyzed the intended anti-registry provisions of Manchin-Toomey in detail and identified several serious drafting problems that would have greatly reduced its protections. As relevant here, the most important were: (1) Manchin-Toomey's new language prohibiting the Attorney General from maintaining a registry would create a strong expression unius argument, not available under current law, that other federal agencies are not subject to the existing anti-registry provisions; and (2) the proposed new language specifically prohibited the Attorney General from consolidating or centralizing purchase records, thereby implying that other forms of data gathering and recordkeeping by officials might not violate the anti-registry prohibitions. David B. Kopel, *The Problems of Toomey-Manchin*, NAT'L REV. ONLINE (Apr. 17, 2013), http://www.nationalreview.com/corner/345845/problems-toomey-manchin.

statutory protections of gun rights displays similar problems to the treatment of constitutional claims. In *NRA v. Reno*,[225] the leading case interpreting the scope of the Brady Act's anti-registry provisions, the D.C. Circuit upheld a lenient approach to the prohibitions.[226] The statutory language required federal officials to "destroy" the records of transactions that had been approved following a background check.[227] However, an ATF regulation allowed information about the identity of persons who were subjected to a background check to be retained for up to six months' time, ostensibly for the purpose of internal auditing of the National Instant Check System ("NICS").[228] A dissenting judge described the Agency's view—that a statute commanding it to "destroy" records also authorized it to retain them for six months—as "reminiscent of a petulant child pulling her sister's hair. Her mother tells her, 'Don't pull the baby's hair.' The child says, 'All right, Mama,' but again pulls the infant's hair. Her defense is, 'Mama, you didn't say I had to stop right now.'"[229] Yet the agency's interpretation was upheld by a majority of the D.C. Circuit panel pursuant to the *Chevron* doctrine.[230]

Similarly, another provision of the federal Gun Control Act creates a narrow exception to the Act's decision to decentralize records of gun transactions by keeping them in the hands of FFLs rather than the federal government.[231] The Act requires FFLs to notify the ATF when an individual attempts to purchase two or more "pistols[] or revolvers" in a single purchase or within a five-business-day period.[232] The entire structure and context of the statute suggests that this exception's textual limitation to reports of multiple sales of *handguns* is a material aspect of the legislative compromise embodied by the statute, and that the limitation should accordingly be enforced by courts. The Gun Control Act contains many provisions that regulate handguns separately from long guns, such as rifles and shotguns.[233] Moreover, the anti-registration provisions in the Act disclaim "any system of registration" of firearms,[234] implying that any provision that requires the generation of additional information on firearm purchases should be construed narrowly.

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[225] 216 F.3d 122 (D.C. Cir. 2000).

[226] *Id.* at 138.

[227] *Id.* at 128 (quoting 18 U.S.C. § 922(t)(2)(C) (1996)) (internal quotation marks omitted).

[228] *Id.* at 126.

[229] *Id.* at 142 (Sentelle, J., dissenting).

[230] *Id.* at 138 (majority opinion).

[231] 18 U.S.C. § 923(g)(3)(A) (2012).

[232] *Id.*

[233] *See, e.g.*, *id.* § 922(x) (imposing extensive restrictions on possession by juveniles of a "handgun" and "ammunition that is suitable for use only in a handgun," but not of other common firearms or their ammunition).

[234] *Id.* § 926(a).

But again, the lower federal courts have failed to take statutory limits on gun regulation seriously. In 2010, the Obama Administration unilaterally imposed an additional requirement on FFLs in states along the southern U.S. border to report all sales of two or more of certain semi-automatic *rifles*[235]—and the requirement has been promptly upheld by lower federal court judges against a challenge that it was ultra vires.[236] The courts also adopted a broad view of ATF's authority to use "demand letters" to obtain a wide range of information about firearms transactions from FFLs, and rejected arguments that this activity contravened the statutory anti-registry provisions in the Gun Control Act.[237]

The pattern of lower federal court holdings has a corrosive effect on efforts to shape legislative compromises on firearms regulation. Consistent with the constitutional case law, government authority is regularly construed broadly and statutory protections against government action regularly prove to be worth less in practice than they appear on the page. This will lead rational gun rights supporters to increasingly discount the value of statutory rights as well as protections in staving off slippery slopes. They will increasingly value protections that work simply by keeping information from coming into existence in the first place, and thus do not depend on cooperation from judges or the executive branch in order to function.

V. A COMPROMISE: SEPARATING BACKGROUND CHECKS FROM FEDERAL RECORDKEEPING, WHILE AFFIRMING THE RIGHT TO BEAR ARMS FOR SELF-DEFENSE

Some will conclude that the current judicial and legislative climate—and the skepticism it may foster in congressional Second Amendment supporters—preclude a consensus on additional federal firearms regulation. I take this view seriously. However, I wish to conclude by examining a possible approach to background check legislation that is far more responsive than Manchin-Toomey to the dangers that such regulations pose to gun rights, and discussing how it might form part of a genuine compromise. While the proposal has potential problems that raise concern—particularly about data security and implementation—it is worth study as a serious attempt to detach the idea of *background checks* for gun

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[235] Application and Permit for Importation of Firearms, Ammunition, and Implements of War, 75 Fed. Reg. 79,020, 79,021 (Dec. 17, 2010).

[236] Ron Peterson Firearms, LLC v. Jones, Nos. 12-2054, 13-2055, 2014 WL 3703825, at *4 (10th Cir. July 28, 2014); Nat'l Shooting Sports Found., Inc. v. Jones, 840 F. Supp. 2d 310, 323 (D.D.C. 2012), *aff'd*, 716 F.3d 200 (D.C. Cir. 2013).

[237] *See, e.g.*, Blaustein & Reich, Inc. v. Buckles, 365 F.3d 281, 291–92 (4th Cir. 2004) (applying an arbitrary and capricious standard of review to the ATF's decision to issue demand letters, thus giving the agency wide leeway in deciding when to issue such demands).

acquisition from the more controversial idea of *registration and recordkeeping* of the results of those checks. Enforcing this separation should be central to any future effort to craft compromise legislation.

A. *Easing the Slope (I): A More Rights-Protective Approach to "Background Checks" for Private Sales*

During the Senate's consideration of Manchin-Toomey, Senator Tom Coburn introduced his own background checks proposal, Amendment 727,[238] which I will call the Coburn proposal. It was tabled without debate and received little national discussion. Yet Coburn's proposal is worth consideration, even by those who rejected Manchin-Toomey. It differed from Manchin-Toomey in numerous respects that reflect a clearer appraisal of the risks created by federal background check legislation.

The centerpiece of the Coburn proposal was the creation of a "consumer portal" that would allow individuals wishing to buy firearms from a private seller to use a computer to perform an NICS check upon themselves.[239] Upon passing the check, the individual could print out a certificate showing his or her approval, which would be good for thirty days from the date the check was performed.[240] Then, to purchase a firearm from a private seller, the individual would be required to provide the seller with a copy of a valid certificate of the NICS check performed on the consumer portal.[241] The seller would be free to retain a copy of this document (and the proposal called upon ATF to promulgate an optional sample bookkeeping form that sellers could use to record the disposition of their firearms), but would not be required to retain any such copy.[242] As an alternative to the certificate, the buyer in a private sale could also simply show the seller a currently valid, state-issued handgun carrying permit.[243] Private sales of firearms to a buyer who had not presented a valid NICS portal certificate or a valid state handgun carry permit would be criminal.[244]

Thus, under the Coburn proposal, every private sale of firearms would be required to take place in the shadow of an official background check. But while an official record that a particular individual conducted an NICS self-check would remain, this record would not be tied to a particular

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[238] S. Amend. 727 to S. 649, 113th Cong. (2013).

[239] *Id.* § 202(a)(4)(D)(3)(A).

[240] *Id.* § 202(a)(4)(D)(3)(B).

[241] *Id.*

[242] *Id.* The proposal called upon ATF to promulgate an optional sample bookkeeping form that sellers could use to record the disposition of their firearms. *Id.* § 202(a)(4)(D)(6).

[243] *Id.* State handgun carry permits generally require extensive, fingerprint-based background checks. *E.g.*, Oklahoma Self-Defense Act, OKLA. STAT ANN. tit. 21, § 1290.12 (West 2013).

[244] S. Amend. 727 to S. 649, § 202(c).

firearm, a particular seller, or even to the occurrence of a sale.[245] Similarly, an individual gun owner who has gone through the state-supervised background checks associated with acquiring a handgun carry permit would not need to generate additional check records in order to acquire firearms from a private seller: the background check for the carry permit would stand in place of the portal check.

In a sharp departure from the Manchin-Toomey proposal, private sales under the Coburn proposal would not generate any federal Form 4473s documenting the details of the transaction.[246] Nor, under the Coburn proposal, would the individual seller in a private transaction be required to keep a record documenting the sale.

These are important practical differences in the eyes of many gun rights advocates that would reduce, although not completely eliminate, the slippery slope risks created by more intrusive recordkeeping legislation. The Coburn proposal is what "background checks" for private sales look like after a genuine effort has been made to detach the checks from federal recordkeeping, especially the kind of detailed records on transactions whose abuse could easily create the functional equivalent of gun registration.

The most important objections to the Coburn proposal are feasibility and technical concerns about security for the consumer portal. Well-documented problems with the federal government's rollout of its web-based enrollment portal for the Patient Protection and Affordable Care Act[247] prompt skepticism about its ability to implement this new web-based regulatory program. It would be particularly important to secure access to the consumer portal so that unauthorized persons could not run a check on others and learn potentially damaging information about whether a person is precluded from gun ownership under federal law. These objections deserve to be taken seriously; the viability of the proposal I sketch here

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[245] Many individuals would perform the self-check and print out the certificate, but not engage in a private purchase within the thirty-day period.

[246] As a reminder, Manchin-Toomey did generate such forms. *See supra* text accompanying notes 23–25. It would have required them to remain in the inventory of a firearms retailer for twenty years, subject to ATF inspection, and be delivered to the federal government if the retailer went out of business.

[247] In Congressional testimony, the U.S. Government Accountability Office reported extensive failures of government officials to adequately oversee the development of the enrollment website for the new health care law. *See Healthcare.gov: Contract Planning and Oversight Practices Were Ineffective Given the Challenges and Risks: Testimony Before the Subcomm. On Oversight and Investigations of the H. Comm. on Energy and Commerce*, 113th Cong. (2014) (statement of William T. Woods, Director, Acquisition & Sourcing Management); *see also* Sam Baker, *Obamacare Website Has Cost $840 Million*, NAT'L J. (July 30, 2014), http://www.nationaljournal.com/health-care/obamacare-website-has-cost-840-million-20140730 ("[C]ost overruns went hand-in-hand with the management failures that led to the disastrous launch of *HealthCare.gov* and the 36 state insurance exchanges it serves.").

depends on whether they can be answered. In an age where numerous government records concerning gun ownership have been the subject of public leaks,[248] such concerns are reasonable. It would be valuable to hear informed commentary on the possible implementation of the Coburn Amendment from technically savvy privacy experts and scholars. But if it can be shown as feasible, the Coburn proposal is more rights-protective than Manchin-Toomey and deserves to be preferred to it.

B. *Easing the Slope (II): Nationalizing "Shall-Issue" Defensive Handgun Carrying*

The Second Amendment protects a right to "carry weapons in case of confrontation."[249] The most obvious application of this right is to liberalize restrictive laws governing the carrying of handguns for lawful self-defense. State court precedents spanning generations demonstrate that the carrying of handguns outside the home is basic conduct protected by the right to bear arms for self-defense.[250]

At the same time, the right to bear arms for self-defense can be regulated in ways consistent with its exercise. The Supreme Court has acknowledged this,[251] and the state court tradition supports the conclusion.[252] In the last three decades, a remarkable regulatory success story has gradually swept the nation: the spread and normalization of "shall-issue," permit-based handgun carrying laws.[253] "Shall-issue" denotes that all citizens who fulfill the training requirements are presumed entitled to receive the permit unless there is a specific reason for denial.[254]

"Shall-issue" permitting laws reflect considerable regulation of the right. The applicant must apply for and obtain a permit in order to carry.[255] He or she must pass a fingerprint-based background check.[256] Applicants

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[248] *See* Duane Lester, *Comprehensive Timeline of Missouri's CCW List Scandal*, MO. TORCH (May 6, 2013), http://themissouritorch.com/blog/2013/05/06/complete-timeline-missouris-ccwdepartment-revenue-scandal/ (detailing a leak of Missouri's concealed carry weapons list to the ATF).

[249] District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

[250] *See supra* text accompanying note 160.

[251] *Heller*, 554 U.S. at 625–27.

[252] *See* O'Shea, *supra* note 131, at 597–98 (noting that courts have historically upheld restrictions on modes of carrying, such as prohibitions on concealed carry).

[253] *See* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 687–707 (1995) (describing the passage of shall-issue carrying laws in more than a dozen states).

[254] *See id.* at 688 (providing an example of the relevant language that identifies nondiscretionary permitting regimes).

[255] *Shall-Issue, May-Issue, No-Issue and Unrestricted States*, BUCKEYE FIREARMS ASS'N, http://www.buckeyefirearms.org/shall-issue-may-issue-no-issue-and-unrestricted-states (last visited Mar. 5, 2014).

[256] *Id.*

must also generally receive training on gun safety and complete a live-fire marksmanship test.[257] The permit must be kept on one's person when carrying.[258]

If the point of regulating the exercise of the right to bear arms is to insure that handgun carrying is done by peaceable citizens, then statistical evidence indicates that shall-issue laws are a conspicuous success. Official data from numerous states indicates that shall-issue permit holders are unusually law-abiding compared to the population as a whole and do not commit a significant proportion of violent crimes committed with guns.[259]

But if the meaning of "regulating" the exercise of the right to bear arms is really to render this constitutional right difficult or impossible to exercise in practice, then shall-issue laws are a conspicuous failure on that score. A recent congressional study estimated the number of valid state-issued handgun carry permits as approximately eight million at the end of 2011.[260]

So federal legislation extending the "shall-issue" regulatory regime to the holdout states would not be a repudiation of regulation. Rather, it would be an eloquent affirmation that defensive handgun carrying is a basic expression of the constitutional right to bear arms, that this right exists in all fifty states, and that "regulation" is not a code word for obstructing and harassing the right's exercise. Such a recognition would go far toward assuaging concerns that the Second Amendment right recognized in *Heller* is not accepted as "ordinary constitutional law," and that a significant political effort is underway to vitiate or even remove the right.[261] As such, it would do a good deal—even in the current absence of strong Second Amendment enforcement by most lower federal courts—to alleviate the justified slippery-slope objections that arise to proposals to expand federal background check requirements.

National concealed carry reciprocity is not an exotic suggestion. In recent years, it has twice come within a handful of votes of obtaining a

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[257] *Id.*

[258] *E.g.*, *Firearms/Concealed Handguns: Frequently Asked Questions*, VA. ST. POLICE, http://www.vsp.state.va.us/Firearms.shtm (last visited Mar. 5, 2014).

[259] *See* David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 564–69 (2009) (examining published rates of permit revocations in six "shall-issue" states and concluding that concealed carry permit holders are an unusually law abiding demographic compared to the adult population at large).

[260] U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-12-717, GUN CONTROL: STATES' LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION 1 (2012).

[261] *See* David Kopel, *Sotomayor Targets Guns Now: Justice's Dissent Contradicts Confirmation Testimony*, WASH. TIMES, June 30, 2010, at B1 (noting that a number of Supreme Court Justices apparently do not consider *Heller* to be settled law and explaining how their records do not inspire confidence in gun owners).

filibuster proof majority in the Senate.[262] It should be a part of any future effort to create compromise legislation expanding federal background checks. A combination of a national reciprocity bill with a revamped background check statute modeled on the lines of the Coburn proposal, and not the failed Manchin-Toomey legislation, would merit both a presumption of good faith and consideration by Second Amendment supporters in Congress.

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[262] *See* Dan Freedman & Harvey Rice, *Cornyn Introduces Concealed-Carry Reciprocity Bill*, HOUS. CHRON. (Jan. 10, 2014), http://www.houstonchronicle.com/news/politics/us/article/Cornyn-introduces-concealed-carry-reciprocity-bill-5132935.php#/0 (reporting that the proposal received fifty-seven votes in the Senate when it was voted on in 2013); Ed O'Keefe & Tom Hamburger, *Could National Reciprocity of Concealed-Carry Permits Kill the Gun Bill?*, WASH. POST. (Apr. 12, 2013), http://www.washingtonpost.com/politics/could-national-reciprocity-of-concealed-carry-permits-kill-the-gun-bill/2013/04/12/7cb4131a-a38d-11e2-9c03-6952ff305f35_story.html (reporting that the proposal received fifty-eight votes in the Senate when it was considered in 2009).