

MICHAEL P. O'SHEA

## Why Firearm Federalism Beats Firearm Localism

*Americans are increasingly polarized on gun rights and gun policy, leading some scholars to ask whether the Second Amendment provides a tool to manage disagreement and promote decentralization. Joseph Blocher's Firearm Localism takes up this perspective and makes a case for deference to local and municipal gun control laws, including the revision or repeal of statewide firearms preemption statutes. In this Essay, Professor O'Shea argues that neither judicial tradition nor the priorities of contemporary urban gun owners support such deference. Moreover, unlike traditional federalism, Blocher's localism would undermine the compromise value that was supposed to be decentralization's strength: the prospect of piecemeal local regulation could threaten the practical exercise of gun rights even in generally pro-gun areas. In short, if one adopts a decentralizing approach to the Second Amendment, then its proper form is a conventional, state-based federalism backed by preemption.*

Americans disagree persistently on gun policy, and the disagreement tends to follow geographic and cultural lines.<sup>1</sup> Beginning with this premise, Joseph

- 
1. Increased polarization has been the central feature of recent American gun control politics. States such as New York and Connecticut enacted extensive new restrictions on ownership of common firearms in the wake of the atrocious mass murder in Newtown, Connecticut, while some southern and western states responded by easing restrictions on carrying handguns for self-defense in schools and other places. See 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, <http://online.wsj.com/news/articles/SB10001424127887324883604578398843653264474>. Some states are even beginning to revisit their state constitutional guarantees of the right to arms in order to strengthen the level of scrutiny courts must apply to gun restrictions. See LA. CONST. art. I, § 11 (reflecting a 2012 amendment to require that "any restriction on th[e] right [to keep and bear arms] shall be subject to strict scrutiny"). The divergence on gun rights may reflect a broader American trend toward political polarization along state lines. See Dan Balz, *Red, Blue States Move in Opposite Directions in a New Era of Single-Party Control*, WASH. POST, Dec. 28, 2013, <http://www.washingtonpost.com/politics/red-blue-states-move-in-opposite-directions-in-a-new-era-of-single-party-control/2013/12/28/9583d922-673a-11e3-ae56-22de072140a2>

Blocher's *Firearm Localism* seeks to articulate one way that courts might use Second Amendment doctrine to mitigate the effects of our disagreement<sup>2</sup> and thus offer a "truce" on the gun issue.<sup>3</sup>

The project merits attention. As I have argued,<sup>4</sup> there are two basic ways to conceive of the task of implementing the individual right to keep and bear arms in the wake of *District of Columbia v. Heller*.<sup>5</sup> One can simply be called the *human rights approach*. It assimilates the Second Amendment to the treatment of most other constitutional liberties: courts impose basic substantive norms against national, state, and municipal governments on a uniform basis, establishing a floor for liberty beneath which regulation cannot descend. This approach underpins the Supreme Court's decision in *McDonald v. Chicago*<sup>6</sup> that the Second Amendment right to keep and bear arms applies fully against state and local governments.<sup>7</sup> I continue to believe that it is, on balance, the most appropriate way to implement the right, particularly because of the strong grounding of *Heller*'s self-defense-based conception of the right to arms in the nineteenth-century background of the Fourteenth Amendment.<sup>8</sup> In the half-decade since *Heller*, scholars following this perspective have offered both

---

\_story.html (reporting that "today, three-quarters of the states—more than at any time in recent memory—are controlled by either Republicans or Democrats" in all chambers of the state legislature plus the governorship).

2. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013). Blocher diagnoses a "well-established and long-standing" cultural division on guns between urban and rural areas, and argues that it should be regarded "as an opportunity rather than an obstacle" in applying the Second Amendment. *Id.* at 86.
3. *Id.* at 104.
4. Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201 (2008).
5. 554 U.S. 570 (2008) (recognizing an individual Second Amendment right to keep and bear arms for the purpose of self-defense and invalidating the District of Columbia's ban on handgun possession and trigger-lock requirement for firearms in the home).
6. 130 S. Ct. 3020 (2010).
7. *Id.* at 3036-42 (plurality opinion) (concluding that the right to keep and bear arms is a "fundamental" individual right and characterizing self-defense as "a basic right, recognized by many legal systems from ancient times to the present day"). The lead *McDonald* opinion rejected the idea that federalist or localist concerns should prevent the total incorporation of the right. *Id.* at 3046 ("[I]f a Bill of Rights guarantee is fundamental from an American perspective, then . . . that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.").
8. See Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 370-72, 374-76 (2009) (summarizing *Heller*'s reliance on nineteenth-century sources to arrive at a self-defense-based, individual right to arms).

relatively broad<sup>9</sup> and (particularly in elite law reviews) very narrow<sup>10</sup> views of the Second Amendment right.

The other, *decentralizing approach* envisions using the Constitution to promote autonomy in subnational jurisdictions by subjecting gun controls enacted by larger jurisdictions to more scrutiny than those enacted by smaller jurisdictions. There has been less scholarly discussion of this perspective.<sup>11</sup> When *Heller* was decided, I published an essay exploring the arguments for the decentralizing perspective.<sup>12</sup> I concluded: (1) because Americans are divided, nationwide gun restrictions raise special constitutional concerns,<sup>13</sup> and (2) to the extent it is proper to allow such concerns to influence constitutional analysis, the primary locus of subnational authority to regulate guns should be the states, not municipalities.<sup>14</sup> State firearms preemption statutes, which bar municipalities from adopting piecemeal firearms restrictions, help to preserve

- 
9. See, e.g., David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167 (2013) (arguing that knives are entitled to Second Amendment protection comparable to handguns and casting doubt on the constitutionality of many state and municipal knife restrictions); 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 (2012) (using the nineteenth- and twentieth-century state court tradition to argue that *Heller* and *McDonald*’s recognition of an individual “right to . . . bear arms for the purpose of self-defense” implies a right to carry a handgun outside the home); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytic Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) (proposing tools to approach questions of scope, burden, danger reduction, and other factors in resolving Second Amendment claims).
  10. See, e.g., Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012) (contending that the Second Amendment right “to keep and bear arms” should imply a right, not only to choose whether to possess or carry weapons oneself, but also to prevent others from doing so in some instances); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (contending that the scope of the Second Amendment’s core protections should be determined by a First Amendment analogy, not with core modes of expression, but rather with marginal categories of speech such as obscenity).
  11. For an older discussion authored by a member of Congress, see James A. McClure, *Firearms and Federalism*, 7 IDAHO L. REV. 197, 211 (1970), which argues: “[T]he right to have . . . rifles, handguns and shotguns . . . could be set free of federal interference. . . . When we reach the question of State regulation of the possession and use of firearms, the problem takes on a different complexion.” For a thoughtful critique of arguments for gun rights decentralization, see Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL’Y 951, 992-1004 (2011).
  12. O’Shea, *supra* note 4.
  13. *Id.* at 203-04; see *id.* at 205 n.21 (arguing that there are good reasons to “[p]ut[] the national government largely out of the gun control business—thereby allowing different American jurisdictions leeway to enact gun laws that concretely embody different cultural aspirations”).
  14. *Id.* at 212-13.

the integrity of state approaches to gun policy and uphold the settlement implicit in federalism.<sup>15</sup> These statutes, I argued, are not merely *consistent* with a sound approach to decentralization, but rather form a crucial part of it.

*Firearm Localism* takes up the decentralizing approach, enriching it with new observations and arguments. Blocher ultimately accepts the first conclusion but not the second. In his view, gun controls enacted by urban municipalities deserve “special deference” in constitutional analysis.<sup>16</sup> Broad state preemption laws, which prevent municipalities from adopting additional gun regulations, should be revised or repealed.<sup>17</sup>

Thus, Blocher and I part ways in answering a critical question: if one seeks decentralization, then what is the lowest appropriate level of government for firearms policy?<sup>18</sup>

In this response, I defend and extend my position that the right answer is the state—not, as Blocher argues, the municipality. A decentralized firearms policy and gun-rights jurisprudence should take the form of a traditional, state-based federalism, for three reasons. First, firearm localism cannot be justified by a rural-urban divide on attitudes toward hunting, a practice that, although important, is peripheral to current gun control controversies. Second, firearm localism is not supported by traditional judicial approaches to the right to keep and bear arms. Finally, there is a strong pragmatic case against according deference to local firearm regulations. Firearm localism would destroy the compromise benefits of federalism by burdening the exercise of the right to keep and bear arms in ways that gun rights supporters would justifiably view as unacceptable.

#### **I. HUNTING IS (MOSTLY) A RED HERRING; MODERN GUN CONTROL EFFORTS TARGET SELF-DEFENSE FIREARMS THAT URBAN GUN OWNERS VALUE**

*Firearm Localism* begins with a discussion of rural gun culture that touches repeatedly upon the importance of hunting to that culture<sup>19</sup> compared to that

---

15. *Id.*

16. Blocher, *supra* note 2, at 87 (“[T]he fact that the United States has a deeply rooted tradition of comparatively stringent urban gun control is an argument for treating contemporary urban gun control as . . . meriting special deference.”).

17. *Id.* at 133-37.

18. A European jurist would call it a dispute about applying the principle of subsidiarity, which holds “that action should be taken at the lowest level of government at which particular objectives can adequately be achieved.” George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994).

19. Blocher, *supra* note 2, at 93-98.

of urban areas, where hunters are scarce. Blocher is properly cautious in drawing constitutional lessons from this divergence, but it is worth emphasizing the point: a focus on hunting tends to obscure rather than clarify the issues raised by his proposal. It is true that many rural dwellers identify hunting as an important reason why they choose to own guns.<sup>20</sup> The right to arms has traditionally been valued, in part, for hunting purposes,<sup>21</sup> and I agree with Blocher that hunting arms, as such, deserve “penumbral” protection under the Second Amendment.<sup>22</sup> But the central holding of the Supreme Court’s landmark cases is that the Second Amendment protects an “individual right to keep and bear arms for the purpose of *self-defense*.”<sup>23</sup> Personal defense, not hunting, is the right’s “core lawful purpose.”<sup>24</sup>

Furthermore, the most divisive gun control controversies today do not arise from the practice of hunting, and they are not directed at traditional hunting weapons.<sup>25</sup> Rather, attempts at prohibition focus on self-defense guns that are useful in a conflict, particularly semiautomatic handguns and rifles (and their magazines),<sup>26</sup> some of which are produced and sold in very large numbers in the United States.<sup>27</sup> The restrictive handgun carrying laws of some coastal

---

20. *Id.* at 95 & n.60.

21. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (“[P]reserving the militia was [not] the only reason Americans valued the ancient right [to arms]; most undoubtedly thought it even more important for self-defense and hunting.”).

22. Blocher, *supra* note 2, at 96. Beginning in the 1980s, numerous states have adopted or revised constitutional right-to-arms provisions to expressly protect arms for hunting. *See, e.g.*, WIS. CONST. art. I, § 25 (“The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.”).

23. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (plurality opinion) (emphasis added); *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

24. *Heller*, 554 U.S. at 571.

25. Some of the targeted weapons, such as AR-15 pattern rifles, however, are also readily usable for hunting purposes.

26. These rifles and their magazines are targeted by “assault weapons” restrictions of the type recently enacted or increased by several states. *See, e.g.*, N.Y. PENAL LAW §§ 265.00.22(h), 265.00.23 (2013) (requiring surrender of semiautomatic rifle magazines holding over ten rounds of ammunition and prohibiting citizens from loading more than seven rounds of ammunition in their guns’ magazines, even at home). Such restrictions are directly relevant to the defensive capability of these guns, but they have little effect on hunting use, since hunting regulations commonly limit hunters to very low ammunition capacities for sporting purposes.

27. The federal Annual Firearms Manufacturing and Export Reports, compiled by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, give detailed information on annual firearm production from data supplied by licensed gun manufacturers. While the reports do not break down rifle production by type, they do provide separate production figures for each manufacturer. Most AR-15 makers (including Smith & Wesson, Colt Defense, Bushmaster, Rock River Arms, DPMS, and many others) do not produce any other types of rifles. Thus, one can use the AFMER reports for these manufacturers to obtain a (highly)

municipalities<sup>28</sup> are another major Second Amendment battleground: again, these laws impinge directly on the defensive use of guns, but have little to do with hunting or sporting uses. Such regulation is more likely to collide with the priorities of urban gun owners than of rural ones. Urbanites are more likely than rural owners to acquire their guns for the constitutionally central purpose of self-defense,<sup>29</sup> and there is evidence that the types of firearms urban dwellers favor are precisely the kinds of defensive firearms targeted by current gun control efforts.<sup>30</sup>

## II. HISTORICAL APPLICATIONS OF THE RIGHT TO BEAR ARMS TO GUN CARRYING LAWS REFLECT A DIFFERENT SPIRIT FROM CONTEMPORARY URBAN GUN CONTROL

*Firearm Localism* seeks to build a historical-traditional case for “broad leeway to urban gun control,”<sup>31</sup> and amasses a lengthy list of local or municipal

---

conservative estimate of over 430,000 AR-15 pattern rifles manufactured in the United States in 2011 alone. See Firearms & Explosives Servs. Div., *Annual Firearms Manufacturing and Export Report*, ATF (2011), <http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf>. See also *America’s Gun: The Rise of the AR-15*, CNBC, <http://www.cnbc.com/id/100606839> (last visited Jan. 24, 2014) (describing the AR-15 as “the most popular rifle in America, with an estimated 4 million in circulation”).

28. E.g., D.C. CODE § 22-4504(a) (2011) (prohibiting private citizens from carrying a handgun in public places under any circumstances).
29. NAT’L SHOOTING SPORTS FOUND., NATIONAL SHOOTING SPORTS FOUNDATION REPORT: FIRST-TIME GUN BUYERS (2013), [https://www.nssf.org/members/viewFile.cfm?where=PDF/pubs&what=NSSF\\_FirstTimeGunBuyersReport2013.pdf](https://www.nssf.org/members/viewFile.cfm?where=PDF/pubs&what=NSSF_FirstTimeGunBuyersReport2013.pdf). This extensive telephone survey of recent first-time gun owners yielded illuminating responses when broken down into the categories of urban, suburban, and rural dwellers. Interestingly, urban first-time gun buyers were *more* numerous among the survey respondents than rural buyers. In all, 60.5% of urban dwellers and 60.2% of suburban dwellers identified either “self defense” or “home defense” as the single most important reason why they became a gun owner. Only 52.5% of rural dwellers cited these reasons as most important. *Id.* at 41. These numbers appear generally consistent with other data. A 2013 national survey found that 48% of gun owners give self-protection as the primary reason why they chose to own guns; only 32% cite hunting as their primary purpose. *Why Own a Gun?: Protection Is Now Top Reason*, PEW RES. CENTER FOR PEOPLE & PRESS 1 (Mar. 12, 2013), <http://www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason>.
30. In the National Shooting Sports Foundation telephone survey, urban gun buyers reported that they were mainly interested in acquiring types of modern guns that are good for self-defense—the very guns usually targeted by restrictive gun control proposals. “Urban and suburban buyers are more similar to each other than to rural buyers. . . . Respondents in urban and suburban areas also tend to buy semiautomatic pistols, revolvers, and to a lesser extent, AR Platform [semiautomatic] rifles whereas rural respondents buy shotguns [and] other types of rifles . . . . Rural buyers appear to be focused mainly on hunting.” NAT’L SHOOTING SPORTS FOUND., *supra* note 29, at 40.
31. Blocher, *supra* note 2, at 108.

gun restrictions from the Founding era and the nineteenth century.<sup>32</sup> However, many of the prohibitions Blocher lists were simply general prohibitions on discharging firearms in settled areas. Such prohibitions are commonplace today, including in areas that are quite protective of gun rights.<sup>33</sup> But for that very reason, they do not advance Blocher’s argument. These are laws about, for example, target practice; they are not relevant to whether urban areas were historically considered to have special leeway to restrict the right to own and use arms *for self-defense*. They would only shed light on *that* question if we had evidence that the prohibitions on discharging firearms did not include the ordinary implied exceptions to criminal statutes that allow individuals to engage in the restricted conduct (here, the discharge of their firearms) in cases of necessary self-defense.<sup>34</sup>

Like the *Heller* majority,<sup>35</sup> I believe the historical record teaches a different lesson, particularly when one keeps the focus where it belongs: on the judicial review of laws that impair the use and carrying of weapons for self-defense. Before *Heller*, enforcement of the right to keep and bear arms was largely left to state courts, which have been adjudicating individual right-to-arms claims since the 1820s.<sup>36</sup> Blocher compiles various historical restrictions on gun carrying in or near American towns and cities,<sup>37</sup> and unlike laws governing the storage of kegs of gunpowder, or the wanton firing of guns on holidays, these examples really do constitute potential evidence for his claims. It is notable, however, that many were territorial laws that preceded statehood. For example, Blocher cites an 1888 law that prohibited “carry[ing] . . . any . . . pistol, gun or other deadly weapons, within the limits or confines of any city, town or village or in any public assembly of Idaho Territory”<sup>38</sup> as evidence of deference to

---

32. *Id.* at 114-21.

33. See, e.g., OKLA. CITY, OKLA., CODE § 30-308 (2008); KNOXVILLE, TENN., CODE § 19-109(a) (1990); FT. WORTH, TEX., CODE § 23-6 (2005).

34. See, e.g., *State v. Crawford*, 521 A.2d 1193 (Md. 1987) (holding that a self-defense situation could establish a necessity defense to liability for illegal handgun possession, even though the statute in question did not contain an express self-defense exception). See generally 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.1 (Supp. 2013-2014) (discussing the doctrine of necessity).

35. See *District of Columbia v. Heller*, 554 U.S. 570, 631-34 (2008) (rejecting the relevance of colonial “fire safety” laws governing the storage of quantities of gunpowder, or laws prohibiting discharge of firearms in public streets, to the question of whether the keeping and bearing of firearms for lawful self-defense is constitutionally protected).

36. See, e.g., *Bliss v. Commonwealth*, 12 Ky. 90 (1822) (striking down a ban on carrying concealed weapons as a violation of the right to bear arms for self-defense in the Kentucky Constitution). See generally O’Shea, *supra* note 9, at 623-64 (canvassing the state court tradition).

37. Blocher, *supra* note 2, at 119 n.195.

38. *Id.* (citing An Act Regulating the Use and Carrying of Deadly Weapons in Idaho Territory, § 1, 1888 Idaho Sess. Laws 23).

urban gun restrictions. But following statehood, this territorial-era prohibition was struck down by the Idaho Supreme Court as a violation of both the Second Amendment and the Idaho Constitution's right to bear arms.<sup>39</sup> In fact, the court specifically considered and rejected the firearm localist argument that a law restricting the carrying of handguns for self-defense could be saved from invalidation on the ground that it applied only to urban areas:

Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages. . . . [T]he statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void.<sup>40</sup>

Throughout the next century, courts regularly scrutinized municipal prohibitions on gun carrying for self-defense, and not infrequently struck them down.<sup>41</sup> The case law tradition reflects no pattern of special deference to local enactments. To the contrary, municipal and local restrictions on handgun carrying are among the types of law that have most often been held to violate constitutional provisions securing an individual right to bear arms.

The Idaho court's words above also reveal another way in which the American tradition conflicts with Blocher's argument for deference to contemporary urban sensibilities. That is the courts' treatment of regulations of the *mode* in which handguns can be carried. One author recently opined that today there is "no clearer picture of the cultural divide around the Second Amendment" than the "jarring" practice of the "open wearing of firearms on

---

39. *In re Brickey*, 70 P. 609 (Idaho 1902); see IDAHO CONST. of 1889, art. I, § 11 ("The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.").

40. *Brickey*, 70 P. at 609.

41. See, e.g., *City of Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972) (striking down a municipal ban on handgun carrying as a violation of the Colorado right to bear arms); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. App. 1971) (striking down a municipal ban on handgun carrying as a violation of the New Mexico right to bear arms); *State v. Kerner*, 107 S.E. 222 (N.C. 1921) (striking down, as a violation of the North Carolina right to bear arms, a county law that banned handgun carrying without a permit from local officials); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928) (striking down, as a violation of the Tennessee right to keep and bear arms, a municipal ban on handgun carrying); *State v. Rosenthal*, 55 A. 610 (Vt. 1903) (striking down, as a violation of the Vermont right to bear arms, a city ordinance that banned carrying a handgun without a permit from local officials); see also *City of Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979) (striking down a municipal ban on handgun carrying on overbreadth grounds).

the streets of a modern American city.”<sup>42</sup> Yet the judicial record reflects a very different view. Historically, the most common approach of American courts has been to *privilege* the open carry of defensive weapons (such as by wearing them visibly holstered on one’s belt), while taking a skeptical or hostile attitude to the carrying of weapons in a less conspicuous, concealed manner.<sup>43</sup> The *locus classicus* is *State v. Chandler*,<sup>44</sup> an 1850 Louisiana Supreme Court decision cited repeatedly by the U.S. Supreme Court in *Heller*.<sup>45</sup> *Chandler* turned aside a constitutional challenge to a conviction for carry of a concealed pistol, reasoning that although the Second Amendment does protect defensive weapons carrying, it encompasses only open carry, not the practice for which the defendant had been convicted:

[The statute responds to] the habit of carrying concealed weapons[.] . . . It interfere[s] with no man’s right to carry arms . . . “in full open view,” which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.<sup>46</sup>

*Heller* approvingly cited this line of authority and suggested that prohibitions on concealed carry might be constitutional.<sup>47</sup> I acknowledge that it is fairly debatable whether this passage from *Heller* ought to be read as categorically excluding concealed carry (so that only openly carrying handguns would fall within the scope of the Second Amendment right), or, in a more pragmatic fashion, as simply authorizing governments to *choose* between open and concealed carry, prohibiting either mode as long as the other mode

---

42. James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 908 (2012).

43. Examples are copious. *E.g.*, *Nunn v. State*, 1 Ga. 243, 251 (1846) (upholding ban on pistol carrying insofar as it “seeks to suppress the practice of carrying certain weapons *secretly*,” but holding “that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*”); *Brickey*, 70 P. at 609 (condemning concealed carry as a “pernicious practice,” but upholding a broad constitutional right to carry handguns openly); *Kerner*, 107 S.E. at 224-25 (holding that right to arms excludes small weapons “which are generally carried concealed,” but includes a right to carry pistols “openly”).

44. 5 La. Ann. 489 (1850).

45. *District of Columbia v. Heller*, 554 U.S. 570, 585 n.9, 613, 626 (2008).

46. *Chandler*, 5 La. Ann. at 490.

47. *Heller*, 554 U.S. at 626 (“Like most rights, the right secured by the Second Amendment is not unlimited. . . . [T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”).

remains available and effective.<sup>48</sup> Yet some lower courts have indeed suggested post-*Heller* that the right is scope-limited to open carry.<sup>49</sup> What we can say with certainty is that the case law tradition does not support a special deference to (what some identify as) contemporary urban sensibilities about gun carrying. It would be easier to argue that it supports the opposite attitude.

### III. STATES, NOT LOCALITIES, SHOULD BE THE LOCUS FOR MOST ARMS REGULATION

#### A. *The Pragmatic Problems with Firearm Localism*

Today, the most serious pragmatic objection to firearm localism is that it would tend to destroy the conflict-management benefits that were supposed to be a major advantage of decentralization. Federalism promises to increase overall preference satisfaction on divisive issues by allowing individuals to satisfy different preferences by living in different subnational jurisdictions.<sup>50</sup> But for this kind of settlement to work, jurisdictions must be large enough to live in—that is, large enough to coherently embody different policy options as a lived possibility.

That poses a problem for firearm localism, because most Americans are commuters. Their daily lives are geographically localized, but only somewhat so. An average American of driving age drives thousands of miles per year,<sup>51</sup> and regularly eats away from home, often several times per week.<sup>52</sup> Work

---

48. See Volokh, *supra* note 9, at 1521-24 (outlining alternative understandings of concealed carry laws).

49. Peterson v. Martinez, 707 F.3d 1197, 1209-10 (10th Cir. 2013); Bonidy v. U.S. Postal Serv., No. 10-cv-02408, 2013 WL 3448130 (D. Colo. July 9, 2013); see also People v. Yanna, 824 N.W.2d 241 (Mich. Ct. App. 2012) (holding that the Second Amendment protects a right to carry stun guns openly).

50. See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 763, 779 (1995); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987).

51. The average American of driving age drives 13,476 miles per year, which yields an average of 36.9 miles per day. Office of Highway Policy Info., *Average Annual Miles per Driver by Age Group*, U.S. DEP’T TRANSP. FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/ohim/onhoo/bar8.htm> (last visited Jan. 24, 2014).

52. *Compare Americans Eat Out About Five Times a Week*, UPI HEALTH NEWS (Sept. 19, 2011, 11:42 PM), [http://www.upi.com/Health\\_News/2011/09/19/Americans-eat-out-about-5-times-a-week/UPI-54241316490172](http://www.upi.com/Health_News/2011/09/19/Americans-eat-out-about-5-times-a-week/UPI-54241316490172) (reporting the titular finding, based on a market research survey), with Hayden Stewart, Noel Blisard & Dean Jolliffe, *Let’s Eat Out: Americans Weigh Convenience, Taste, and Nutrition*, USDA 5 (Oct. 2006), <http://www.ers.usda.gov/ersDownloadHandler.ashx?file=/media/860870/eib19.pdf> (reporting that over three-fourths of Americans eat out in a typical week, with thirty-five percent eating out several times per week).

patterns tell a similar story: the average American's commute to work is nearly a half hour each way,<sup>53</sup> and more than a quarter of Americans routinely travel outside of their home county for work.<sup>54</sup> Major government offices and other public institutions are also often concentrated in urban centers; rural dwellers are required to travel through the state to interact with them. In sum, the experience of a few coastal cities, where an individual may live, work, recreate, and engage in civic activity, all within the confines of a single municipality, is atypical. In most of the country, a simple trip to visit friends, to shop at the mall, to eat dinner, or to practice at an outdoor gun range will often require crossing county and municipal boundaries. Citizens who take seriously the right to bear arms for self-defense will understandably reason that this fundamental interest should follow them in their ordinary activities: "self-defense has to take place wherever [a] person happens to be."<sup>55</sup>

If one accepts a right to bear arms for self-defense of even moderate breadth, it follows that citizens will not be able to exercise that right effectively when they face a patchwork of conflicting municipal regulations—even if no particular municipal regulation would be clearly objectionable when considered in isolation. The Supreme Court has observed in another constitutional context that "[p]roliferous laws chill [protected conduct] for the same reason that vague laws chill [protected conduct]: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"<sup>56</sup> Replacing a single, statewide body of regulation with potentially hundreds of municipal regulatory codes can be viewed as introducing a similarly harmful prolixity. And this has important costs, since most violent crimes occur away from the home and its curtilage—including the kinds of serious violent crimes

- 
53. See *American Community Survey*, U.S. CENSUS BUREAU, [http://www.census.gov/newsroom/releases/archives/american\\_community\\_survey\\_acs/cb13-41.html](http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb13-41.html) (last visited Jan. 24, 2014) (reporting that the average American's commute is over twenty-five minutes each way). This is part of the motivation for the "parking lot protection" or "commuter protection" statutes enacted by several states in recent years. These laws require business owners to allow customers or employees to store otherwise lawfully owned firearms in their vehicles in designated parking lots. See, e.g., ARIZ. REV. STAT. ANN. § 12-781 (2009); OKLA. STAT. tit. 21, §§ 1289.7a, 1290.22.B (2004). Such laws typically do not interfere with a business's ability to regulate firearms possession inside its actual places of business, but do make it easier for legally armed persons to go to work or stop to patronize a business without having to be unarmed during the (sometimes lengthy) journeys between business and home. (Blocher has criticized these statutes in another context. See Blocher, *supra* note 10, at 41-45.)
54. See *American Community Survey*, *supra* note 53 (reporting that 27.4% of Americans travel outside their county for work at least once a week).
55. *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (opinion of Niemeyer, J.) (quoting Volokh, *supra* note 9, at 1515).
56. *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)) (applying this reasoning to a Free Speech Clause challenge to complex regulations of political speech).

against which one may typically lawfully defend with a firearm or other potentially lethal weapon.<sup>57</sup>

Statewide firearms<sup>58</sup> preemption laws thus prevent chilling effects on the exercise of the right to arms—and particularly the right to bear arms outside the home—by ensuring that individuals can deal with a single, relatively predictable set of statewide regulations as they carry out their activities.<sup>59</sup>

Consider Ohio. This geographically typical American state is comparable in size to many nation-states; Ohio's total area is a bit larger than Austria and Belgium combined. But Ohio includes eighty-eight counties and over nine hundred different incorporated cities and towns.<sup>60</sup> Thus, for an Ohioan, the difference between preemption-backed firearm federalism and Blocher's firearm localism represents a thousandfold increase in the number of regulatory authorities with jurisdiction over gun policy. This huge difference of degree gives localism a qualitatively different character from federalism.

Blocher closes by discussing how his brand of firearm localism might apply to handgun carrying. This subject is already extensively regulated by most state governments, typically through a "shall issue" carry permit system.<sup>61</sup> Blocher

---

57. See O'Shea, *supra* note 9, at 610-11 & nn.105-10 (collecting federal sources showing that 64.4% of violent crimes occur *away* from the victim's home and the areas near it, including 51% of sexual assaults and over two-thirds of armed robberies).

58. While most states currently confine their statutory preemption of local weapons laws to restrictions on firearms, there is a strong recent trend to extend statewide preemption to other arms in common use, such as knives. For examples of "knife preemption" statutes, see KAN. STAT. ANN. § 12-16,134 (2013); and N.H. REV. STAT. ANN. § 159:26 (2013) (reflecting a 2011 amendment adding knives).

59. Thus, in *City of Cleveland v. State*, 942 N.E.2d 370 (Ohio 2010), the state court correctly upheld Ohio's broad firearms preemption statute against a challenge that it conflicted with municipal "home rule" protections in the Ohio Constitution. Noting the substantial framework of gun regulations that Ohio maintained at the state level (including a modern "shall issue" handgun carry permit statute), the court concluded that the preemption statute was a "general law" affecting matters of statewide, not merely local importance. It struck down a wide range of restrictive gun laws adopted by the city of Cleveland, including handgun registration, so-called "assault weapons" bans, and laws that added further prohibited places to those specified by the state concealed carry law.

60. *Annual Estimates of the Resident Population for Incorporated Places: April 1, 2010 to July 1, 2011*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/cities/totals/2011/SUB-EST2011-3.html> (last updated June 27, 2012) (reporting 938 incorporated cities and towns in Ohio, based on 2010 Census and 2011 estimates); *Ohio by the Numbers*, OHIO SEC'Y ST. (2011), <http://www.sos.state.oh.us/SOS/ProfileOhio/numbers.aspx>.

61. See O'Shea, *supra* note 9, at 598-601 (summarizing state laws on handgun carrying). Since the publication of that article, the number of states that either allow citizens to carry handguns under a "shall issue" permit statute, or require no permit, has risen to at least forty-one. Illinois adopted a "shall issue" statute in 2013 after its former statewide ban on carrying was struck down as a Second Amendment violation in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). The new Illinois statute also contains several statewide firearms preemption provisions. See Firearm Concealed Carry Act, 2013 Ill. Legis. Serv. P.A. 98-63.

suggests that municipalities should be able to supersede state choices on the permissible mode of carry (open versus concealed), and even that municipalities should be able to insist on a “may issue” permit, available only at the discretion of *local* authorities, to bear arms within each municipality’s boundaries.<sup>62</sup> If Blocher is right about the salience of the urban/rural cultural divide on guns, then we might expect that many municipalities will exercise this regulatory prerogative, even in “pro-gun” states. Such laws often carry substantial criminal penalties.<sup>63</sup> The iterated effect of such shifting requirements, on a typical “shall issue” permittee passing through several municipalities en route to a destination, would be a virtually insurmountable burden to the exercise of the right. That prospect is enough to profoundly undermine the mitigation of social conflict we might otherwise expect from decentralization.

*B. Traditional Concepts of State Sovereignty Apply with Particular Strength to Gun Rights and Gun Policy*

I have focused on pragmatic difficulties with firearm localism, but that is not because I discount traditional, formal arguments for state priority. *Firearm Localism* fits naturally with a localist strand in the recent federalism literature that seeks to downplay traditional analysis based on state sovereignty, and argues for replacing it with “federalism all the way down” to the local level.<sup>64</sup> Whatever merits this perspective might have in other areas, it is an awkward fit for the subject of gun rights. There is no area of contemporary American life in which state governments so clearly and consistently assert their traditional self-conception as possessors of what the U.S. Supreme Court calls “a substantial portion of the Nation’s primary sovereignty.”<sup>65</sup> The ubiquity of statewide firearms preemption statutes<sup>66</sup> is one expression of this conviction; states preempt municipal regulation on this subject more often than perhaps any

---

And a 2013 Alabama law abrogated that state’s former, fairly liberal “may issue” policy, making it fully “shall issue.” Act of May 21, 2013, Ala. Laws Act 2013-283.

62. Blocher, *supra* note 2, at 89.

63. Handgun carry permits issued by other counties in the state of New York are not valid in New York City unless endorsed by that city. N.Y. PENAL LAW § 400.00(6) (McKinney 2013). A first-time violation by an upstate New York permit holder who carries his gun in New York City is a felony with a maximum sentence of fifteen years imprisonment. *See id.* §§ 70.00(2)(c), 265.03(3).

64. Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 22-23 (2010).

65. *Alden v. Maine*, 527 U.S. 706, 714 (1999).

66. Blocher, *supra* note 2, at 133 (“[T]he preemption campaign was incredibly successful. As of 2002, forty-one states had preempted some or all local gun control . . . .” (footnote omitted)).

other. So is the presence of individual right-to-arms guarantees in a growing supermajority of state constitutions.<sup>67</sup> Perhaps the boldest expression is the recent flowering of statewide “Firearms Freedom Acts,” which seek to challenge broad understandings of federal regulatory power over guns and their components.<sup>68</sup> Preemption supporters may seek to liken municipal gun restrictions to “rules governing traffic and speed limits [and] the sale and consumption of alcohol,”<sup>69</sup> which often vary along municipal lines. But different, more plausible comparisons suggest that we ought to find anomalous the idea of broad local control over keeping and bearing arms for self-defense, as we might in similar areas of life-or-death choice—such as the prospect of municipal capital punishment, or municipal control of abortion.<sup>70</sup>

## CONCLUSION

I’ve argued that firearm localism would interfere with the exercise of gun rights to a degree that would undermine the compromise value of decentralization. Nevertheless, it is worth noting that some aspects of Blocher’s argument might actually lead to more judicial enforcement of Second Amendment rights than we see today.

If one does not follow Second Amendment litigation closely, it might seem natural to assume, from Blocher’s call for special deference to urban gun control, that statewide and national gun laws are receiving genuinely demanding constitutional scrutiny by lower courts applying *Heller*. However, with some exceptions, that is not so. The record of Second Amendment cases in most lower federal courts since *Heller* is one of substantial deference nearly across the board.<sup>71</sup> The deference extends not only to draconian *municipal* laws,

---

67. See NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 26-36 (2012) (chronicling the development of state right-to-arms guarantees from 1787-2012).

68. See Matt Gouras, *Gun Advocates Appeal “Firearms Freedom Act” Ruling*, AP, Nov. 26, 2013, <http://bigstory.ap.org/article/gun-advocates-appeal-firearms-freedom-act-ruling> (reporting that eight states have enacted such statutes, and that ten attorneys general from “pro-gun states” joined a recent U.S. Supreme Court certiorari petition seeking to uphold the laws).

69. Blocher, *supra* note 2, at 136.

70. Cf. Fernanda Santos, *Albuquerque Voters Defeat Anti-Abortion Measure*, N.Y. TIMES, Nov. 20, 2013, <http://www.nytimes.com/2013/11/20/us/albuquerque-voters-defeat-anti-abortion-referendum.html> (reporting Albuquerque voters’ rejection of a “first of its kind” attempt to prohibit late-stage abortion by a municipal referendum and noting that this local restriction, if enacted, would have had statewide effects because other New Mexicans have to travel to Albuquerque clinics to obtain late-stage abortions).

71. Michael P. O’Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Federal Background Recordkeeping Legislation*, 46 CONN. L. REV. (forthcoming 2014).

such as New York City’s \$340 fee for a three-year permit to engage in the very act held constitutionally protected by *Heller* (owning a handgun at home),<sup>72</sup> but also to statewide laws prohibiting most citizens from ever lawfully carrying handguns outside the home,<sup>73</sup> and even to nationwide laws categorically prohibiting young adults from acquiring a handgun at retail.<sup>74</sup> So far, lower courts appear reluctant to question legislative judgments when applying this enumerated constitutional right,<sup>75</sup> and reluctant to extend the highest levels of constitutional scrutiny to Second Amendment claims at all.

This record leaves little work for a doctrine of “additional” deference to urban laws to do. If anything, the most natural consequence of Blocher’s argument about the salience of the rural-urban divide would run in the opposite direction. As Blocher hints, it might cast doubt on the cogency of post-*Heller* opinions upholding restrictive statewide or federal laws—particularly on their compliance with narrow tailoring.<sup>76</sup> But to say that regulators should be aware of local or regional differences does not always entail that regulation should be devolved to the regional or local level. I have argued that the characteristic benefits of decentralization are best realized by vesting authority for firearms regulation in the state governments. If one accepts the decentralizing project, one should pursue it in the form of a traditional federalism.

---

72. *Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013) (expressing doubt that this exaction even imposes a “substantial burden” on the right to keep and bear arms).

73. *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) (upholding a New Jersey law banning citizens from carrying handguns for self-defense unless they could demonstrate an unusual, “urgent necessity” for self-defense to the satisfaction of a local official).

74. *Nat’l Rifle Ass’n of Am. v. ATF*, 700 F.3d 185 (5th Cir. 2012).

75. *See, e.g., Drake*, 724 F.3d 426.

76. *See* Blocher, *supra* note 2, at 108 (stating that judicial deference to urban gun control implies a “symmetrically” increased protection of rural gun rights). An example of a current case in which attention to the rural-urban divide would support invalidation of a state law is the Second Amendment litigation arising from the recent gun control campaign in New York State. Rushed into law with minimal legislative deliberation, the NY SAFE Act of 2013 imposes unprecedented statewide restrictions on the ownership of common guns and magazines. *See* O’Shea, *supra* note 71 (discussing the SAFE Act and its enactment). It has proven sharply divisive along rural (and suburban) versus urban lines, pitting the New York City area against the entire remainder of the state, with especially intense opposition in northern and western New York. Fifty-two of New York’s sixty-two counties and over two hundred municipalities have enacted resolutions calling for SAFE’s revision or repeal, many asserting that parts of the act are unconstitutional. *See* NY SAFE RESOLUTIONS, <http://www.nysaferesolutions.com> (last visited Jan. 24, 2014) (gathering anti-SAFE Act resolutions). A federal district court recently held that some of the magazine restrictions in the SAFE Act violated the Second Amendment. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, No. 13-CV-291S, 2013 WL 6909955, at \*18-19 (W.D.N.Y. Dec. 31, 2013) (holding that the prohibition on the possession of a magazine loaded with more than seven rounds of ammunition failed intermediate scrutiny).

*Michael P. O'Shea is a Professor of Law and Associate Director of the Center for the Study of State Constitutional Law and Government at Oklahoma City University. B.A. Harvard, 1995; M.A. University of Pittsburgh, 1998; J.D. Harvard, 2001. Professor O'Shea is a co-author of the first law school textbook on firearms law and the constitutional right to keep and bear arms, NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (2012). He thanks Shannon Roesler and Andy Spiropoulos for comments on an earlier version of this response.*

Preferred citation: Michael P. O'Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359 (2014), <http://yalelawjournal.org/2014/2/3/oshea.html>.