

Federalism Implications of Non-Recognition of Licensure Reciprocity under the Gun-Free School Zones Act

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INTRODUCTION

Federal firearms regulation has provided the context in which courts have developed legal principles governing a much wider domain. For example, *Printz v. United States*,¹ a seminal contemporary decision addressing limits on federal commandeering of state officials, arose from federally mandated background checks of firearms purchases. *Abramski v. United States*,² in which the Court announces a rule under which administrative interpretations of statutes criminalizing conduct are not entitled to deference, involves criminalization of false statements made in connection with firearms purchases. The contemporary limitation of Commerce Clause power

¹ 521 U.S. 898 (1997).

² 134 S. Ct. 2259, 2274 (2014).

initiated by the decision in *United States v. Lopez*³ also, of course, involves regulation of firearms possession, although, somewhat ironically, in another case eighteen years earlier also involving firearms possession, the Supreme Court affirmed a holding that “the interstate commerce nexus requirement of [a federal] possession offense was satisfied” merely “by proof that the firearm . . . had previously traveled in interstate commerce.”⁴ Lastly, the foundational determination in *United States v. Biswell*,⁵ validating a warrantless regulatory inspection, involves a firearms dealer. This Article examines another aspect of the federal regulation of firearms possession that presents fundamental issues with wide-ranging implications.

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has expressed an opinion on the scope of the Gun-Free School Zones Act, as amended,⁶ presenting core federalism issues and what appears to be a mirror image of the statutory interpretation issue in *King v. Burwell*,⁷ where the Court struggles with extending the term “established by the State” to entities that are most certainly not “established” by a state.

Subject to certain exceptions, the Gun-Free School Zones Act prohibits firearms possession within 1000 feet of an elementary or secondary school by a person who is not licensed to do so by the state.⁸ Specifically, the language references one who “is licensed to do so by the State in which the school zone is located”⁹ The ATF takes the anomalous position that licensure through reciprocity is not authorized by the federal statute.¹⁰ This position gives rise to a number of issues, which this Article develops as follows:

The ATF’s interpretation and the articulated rationale are detailed in Part I. As will be seen, the ATF’s discussion is conclusory. The ATF merely asserts that the term “licensed by,” when followed by reference to a governmental entity, excludes licensure through reciprocity.

The manner in which states opt to authorize public firearms possession varies widely. Part II briefly sketches some of the variation, which puts in context the interpretive issue raised by the GFSZA.

Parts III through V then illustrate that the ATF’s interpretation, which the ATF asserts is commanded by a literal interpretation of the statute, is not in

³ 514 U.S. 549 (1995).

⁴ *Scarborough v. United States*, 431 U.S. 563, 566 (1977).

⁵ 406 U.S. 311, 315–17 (1972).

⁶ 18 U.S.C.A. § 922(q) (Westlaw through Pub. L. No. 114–327).

⁷ 135 S. Ct. 2480, 2490 (2015).

⁸ 18 U.S.C.A. §§ 921(a)(25), 922(q)(2) (Westlaw through Pub. L. No. 114–327).

⁹ 18 U.S.C. § 922(q)(2)(B)(ii).

¹⁰ See *infra* note 18 and accompanying text.

fact so compelled. Part III collects assorted authority where the term “licensed by” includes licensure through reciprocity or other automatic authorization without the licensing entity taking any licensee-specific action. Part IV then contrasts the outcome in *King v. Burwell*¹¹ to the position being taken by the ATF, concluding that finding the ATF’s interpretation is not required by the statute is easier than supporting the interpretive outcome reached in *Burwell*. Part V then briefly discusses a part of the statute not prominently addressed by the ATF’s interpretation, concluding that other language also does not mandate the interpretive outcome the ATF urges, at least as to reciprocity granted to out-of-state holders of otherwise satisfactory actual (physical) permits.

Understanding that the statutory language does not unambiguously command the interpretation the ATF proffers, Parts VI through VIII then turn to interpreting the relevant language in light of canons of construction applicable to facially ambiguous statutory language.

This particular statute, unlike many, expressly codifies its purposes. Part VI demonstrates that those purposes do not necessitate the interpretation the ATF pronounces.

Parts VII and VIII then survey the federalism implications of the ATF’s interpretation. As noted in Part VII, in brief, the ATF’s interpretation yields a federal framework under which either states are compelled to adopt a licensing scheme or persons may not possess firearms within 1000 feet of a school. The first option alone cannot be dictated by the federal government. That would be improper commandeering. So, the interpretation yields an unconstitutional statute, unless the federal government would have the authority to ban firearms possession in school zones. Although this subject receives only cursory analysis by courts, the scope of such a ban would present substantial constitutional issues.

Part VIII then examines ordinary principles of federalism that require a clear mandate to alter substantially the balance between federal and state authority. As illustrated in Part VIII, this principle has been applied in the particular context of restrictively interpreting federal statutes that would burden a state’s choices in allocating its authority among subdivisions or to third parties. That is, it is not the case that this interpretive principle has been applied only in circumstances altering the balance between state and federal authority in contexts well removed from the one at hand. *Nixon v. Missouri Municipal League*¹² is illustrative. In *Nixon*, the Court holds a federal statute

¹¹ 135 S. Ct. 2480.

¹² 541 U.S. 125 (2004).

preempting state laws prohibiting the provision of services by “any entity” does not operate to preempt state laws restricting services by municipalities, “so as to affect the power of states and localities to restrict their own (or their political inferiors’) delivery of such services.”¹³

This ATF interpretation would do so, as to a core matter — ordinary crime — of the type regulated by states. For these reasons, ATF’s interpretation is unsound.

I. THE ATF’S INTERPRETATION

The Gun-Free School Zones Act, as amended (the “GFSZA”), criminalizes, with assorted significant exceptions, the possession of a firearm in a school zone.¹⁴

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.¹⁵

A “school zone” consists of the area within 1000 feet of an elementary or secondary school.¹⁶ There are a number of exceptions to the prohibition. One

¹³ *Id.* at 128–29.

¹⁴ The Act is examined in, *inter alia*, Gerald F. Dusing, *Arming School Employees: Considering Its Legal Feasibility and Potential for Liability*, in EMERGING TRENDS IN EDUCATION LAW: LEADING LAWYERS ON UNDERSTANDING RECENT DEVELOPMENTS ON K–12 CAMPUSES 25 (2013); David B. Kopel, *Pretend “Gun-Free” School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515 (2009) (also discussing corresponding state provisions); Grant Arnold, Note and Comment, *Arming the Good Guys: School Zones and the Second Amendment*, 2015 B.Y.U. EDUC. & L.J. 481, 495–98 (2015); Amy Hetzner, Comment, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 MARQ. L. REV. 359 (2011).

¹⁵ 18 U.S.C.A. § 922(q)(2)(A) (Westlaw through Pub. L. No. 114–327). The statute was amended in 1996 to add an interstate commerce nexus, following the Supreme Court’s decision in *United States v. Lopez*, 514 U.S. 549 (1995). See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 657, 110 Stat. 3009, 3009–369 to –371 (1996). Courts have held this change adequately addressed the constitutional infirmity identified in *Lopez*. *E.g.*, *United States v. Nieves-Castano*, 480 F.3d 597, 602 (1st Cir. 2007); *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999); *United States v. Hall*, No. CRIM.05–00332–CG, 2006 WL 752986, at *1 (S.D. Ala. Mar. 22, 2006); see generally Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control*, 94 N.C. L. REV. 7, 82 (2015); but see *United States v. Hoffmeyer*, No. 00–CR–91–C, 2001 WL 34372871, at *21 (W.D. Wis. Jan. 25, 2001) (Magistrate’s report recommending *Danks* not be followed).

¹⁶ The definitions provide in pertinent part:

(25) The term “school zone” means —
 (A) in, or on the grounds of, a public, parochial or private school; or

is that states are permitted to authorize possession in a school zone by license; the possession is not criminalized

if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license¹⁷

The ATF has taken the position that a nonresident who is licensed by a state through reciprocity alone, giving recognition to a permit issued by another state, is not “licensed to do so by the State in which the school zone is located” — licensure by that state through reciprocity is not, in their view, licensure by a state. The ATF’s analysis, set forth informally in a letter in response to a citizen inquiry, implements their literal reading of the statute. The analysis, insofar as one is articulated, is:

The law clearly provides that in order to qualify as an exception to the general prohibition of the GFSZA, the license must be issued by the State in which the school zone is located or a political subdivision of that State. A concealed weapons license or permit from any other State would not satisfy the criteria set forth in the law.¹⁸

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term “school” means a school which provides elementary or secondary education, as determined under State law.

18 U.S.C.A. § 921 (Westlaw through Pub. L. No. 114–327). To illustrate, Missouri law provides the definition of “elementary school” as “a public school giving instruction in a grade or grades not higher than the eighth grade.” MO. ANN. STAT. § 160.011 (Westlaw through end of the 2016 Regular Session and Veto Session of the 98th General Assembly).

The relationship between proof of proximity and knowledge is addressed *infra* note 204.

¹⁷ 18 U.S.C.A § 922(q)(2)(B)(ii) (Westlaw through Pub. L. No. 114–327).

¹⁸ A more comprehensive selection from the language is as follows:

First, you ask if an Oklahoma license holder possessing a loaded handgun would be in violation of the GFSZA while traveling on public streets and highways which are known to the individual to be within 1,000 feet of the grounds of any school as defined by Title 18 United States Code (U.S.C.), Section 921(a)(26), while in another State that recognizes Oklahoma’s license by statute or legal agreement.

This Article examines the validity of that interpretation.

There is delegated authority to adopt rules implementing the chapter containing this federal statute, although it is somewhat curiously circumscribed.¹⁹ Assorted authority defers to ATF interpretations in a

. . .

The law provides certain exceptions to the general ban on possession of firearms in school zones. One exception is where the individual possessing the firearm “is licensed to do so by the State in which the school zone is located or a political subdivision of the State” (Title 18 [sic] U.S.C. Section 922(q)(2)(B)(ii)). A license qualifies as an exception only if the law of the State or political subdivision requires law enforcement authorities to verify that the individual is qualified under law to receive the license.

The law clearly provides that in order to qualify as an exception to the general prohibition of the GFSZA, the license must be issued by the State in which the school zone is located or a political subdivision of that State. A concealed weapons license or permit from any other State would not satisfy the criteria set forth in the law.

Letter from Ashan Benedict, Chief, Intergovernmental Affairs Division, Public and Governmental Affairs, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Tim Gillespie, at 1 (July 25, 2013) (on file with author). One can find on the internet reproductions of an unauthenticated document, partially redacted, that purports to be an April 17, 2002, letter from the ATF reaching a similar conclusion. See http://www.handgunlaw.us/documents/batf_school_zone.pdf (visited Mar. 6, 2017).

Some Federal agencies make informal letter advice conveniently available to the public, e.g., the Securities and Exchange Commission, for which releases since January 15, 2002 (or earlier for some divisions) are posted on the internet, <https://www.sec.gov/interps/noaction.shtml>, and for which that correspondence going back to 1970 is available in Westlaw (Westlaw, SEC No-Action Letters database, stating coverage begins with 1970). The ATF, however, is not one of them. See Ronald Turk, Federal Firearms Regulation: Options to Reduce or Modify Firearms Regulations, White Paper (Not for public distribution), at 6 (Jan. 20, 2017) (on file with Author) (“ATF lacks a consistent internal database to maintain and readily access private letters and ruling. The public also has no direct access to public rulings in a manageable format. The inability to access these rulings can create inconsistent agency interpretations of agency guidance.”) This letter to Tim Gillespie was forwarded to the author by letter of April 27, 2016, thirteen months after it was requested by the author in a Freedom of Information Act request. See Letter from Stephanie M. Boucher, Chief, Disclosure Division, Bureau of Alcohol, Tobacco, Firearms and Explosives to Royce de R. Barondes, at 1 (Apr. 27, 2016) (referencing March 2, 2015, FOIA request; forwarding Letter from Ashan Benedict to Tim Gillespie, *supra*) (on file with author).

¹⁹ The general provision is as follows (there being a separate restriction on issuance of regulations concerning purchase of black powder):

The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter, [18 U.S.C. §§ 921–931.] including —

- (1) regulations providing that a person licensed under this chapter, when dealing with another person so licensed, shall provide such other licensed person a certified copy of this license;
- (2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection; and
- (3) regulations providing for effective receipt and secure storage of firearms relinquished by or seized from persons described in subsection (d)(8) or (g)(8) of section 922.

variety of contexts.²⁰ For example, in *United States v. Douglas*,²¹ the court defers to an ATF interpretation in addressing whether a dealer's sales were lawful under 18 U.S.C. § 925(b), which allows a dealer who is indicted for a crime that would bar his acting as a dealer, a year to wind-down lawfully his business.²²

As a preliminary matter, in determining whether the ATF's interpretation of the GFSZA is correct, a contemporary court would provide no deference to the ATF's interpretation of this language. This ATF statement is not an

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act 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 Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation.

18 U.S.C.A. § 926(a) (Westlaw through Pub. L. No. 114–327).

National Rifle Ass'n v. Brady, 914 F.2d 475, 478 (4th Cir. 1990), notes that the delegated authority was limited by the Firearms Owners' Protection Act, Pub. L. No. 99–308, § 106, 100 Stat. 449, 459–60 (1986), prior to which “the Gun Control Act's enabling provision stated that “[t]he Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.”

“Since its inception, the Gun Control Act of 1968 (‘GCA’) was administered and enforced by the Secretary of the Treasury (‘the Secretary’), who delegated these duties to the Bureau of Alcohol, Tobacco and Firearms (‘ATF’ or ‘BATF’).” STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 2:3 (Westlaw, database updated Oct. 2015). Authority of the Secretary of the Treasury was delegated to the Bureau of Alcohol, Tobacco, and Firearms under, *inter alia*, 18 U.S.C. Chapter 44, in Treasury Department Order 221, Bureau of Alcohol, Tobacco, and Firearms: Establishment, Organization, and Functions, 37 Fed. Reg. 11,696, 11,696–97 (June 10, 1972). The Bureau of Alcohol, Tobacco, Firearms, and Explosives was created by the Homeland Security Act of 2002, Pub. L. No. 107–296, § 1111(a)(1), 116 Stat. 2135, 2274 (Nov. 25, 2002), currently codified at 28 U.S.C.A. § 599A (Westlaw through Pub. L. No. 114–327), by which act the newly created Bureau was transferred the functions of the Bureau of Alcohol, Tobacco and Firearms, and the related functions of the Secretary of the Treasury. Although one will occasionally encounter the Bureau's name abbreviated as “BATFE,” *e.g.*, Amendment to the International Traffic in Arms Regulations: International Import Certificate BIS–645P/ATF–4522/DSP–53 and Administrative Changes, 77 Fed. Reg. 22,668, 22,669 (Apr. 17, 2012), the Bureau itself typically adopts the acronym “ATF.” *See, e.g.*, Identification Markings Placed on Firearm Silencers and Firearm Mufflers, 81 Fed. Reg. 26,764, 26,764 (May 4, 2016).

²⁰ *E.g.*, *Springfield, Inc. v. Buckles*, 292 F.3d 813, 817–19 (D.C. Cir. 2002) (following the ATF's interpretation of what arms are “particularly suitable for” “sporting purposes,” as required to allow their importation under 18 U.S.C.A. § 925(d)(3) (Westlaw through Pub. L. No. 114–327), as amended by Homeland Security Act of 2002, Pub. L. No. 107–296, § 1112(f)(1), 116 Stat. 2135, 2276 (Nov. 25, 2002); and stating the result is the same applying either *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

²¹ 974 F.2d 1046 (9th Cir. 1992), *as amended on denial of reh'g* (Oct. 14, 1992).

²² *See id.* at 1048–49. As the court notes, “[T]he irony in this case is that the BATF's interpretation of the statute, as discussed below, supports rather than undermines Douglas's interpretation. Moreover, it is unclear whether an agency's interpretation of a *criminal* statute is entitled to deference under *Chevron*.” *Id.* at 1047 n.1 (citing *Chevron*, 467 U.S. 837).

interpretation of an extant agency rule, potentially within the scope of *Auer v. Robbins*.²³ Nor is it part of a duly promulgated rule filling an explicit gap left in the legislation for the agency, which could be binding “unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.”²⁴ Because the interpretation does not constitute the filling of such a gap, it is not entitled to deference. The simplest reason is that, as the Supreme Court has noted — in fact in construing a different paragraph of the same section of Title 18 of the U.S. Code — administrative interpretations of criminal statutes are not entitled to deference:

The critical point is that criminal laws are for courts, not for the Government, to construe. We think ATF’s old position no more relevant than its current one — which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to in construing § 922(a)(6)), a court has an obligation to correct its error.²⁵

²³ 519 U.S. 452, 461 (1997) (stating, as to the Secretary of Labor’s interpretation of a rule promulgated by the Secretary, “[H]is interpretation of it is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The ongoing vitality of *Auer* is, in any case, somewhat uncertain. See, e.g., Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 945 (2017) (“The days of *Bowles v. Seminole Rock & Sand Co.* [, 325 U.S. 410 (1945),] may be numbered. At least as it has come to be understood, *Seminole Rock* deference — also commonly called *Auer* deference — commands courts to defer to an agency’s interpretation of its own ambiguous regulations. . . . [T]he U.S. Supreme Court in recent years has questioned this deference.”).

²⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“When Congress has ‘explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,’ and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.” (quoting *Chevron*, 467 U.S. at 843–44)).

²⁵ *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). *Abramski* involves the purchase of a firearm by a former police officer for his uncle, arranged to take advantage of law enforcement officer discount pricing. *Id.* at 2264–65. The purchase required the nephew to identify himself as the “actual transferee/buyer.” *Id.* at 2264. Both parties could lawfully have purchased the firearm. *Id.* at 2275 (Scalia, J., dissenting). The court holds the nephew/initial buyer improperly identified himself as the actual transferee/buyer, *id.* at 2274 (majority opinion), notwithstanding that for approximately twenty-five years, *id.* at 2280 (Scalia, J., dissenting), the ATF took the view that this action was not unlawful, the ATF having changed its mind about twenty years before the Court’s decision. *Id.* at 2274 (majority opinion).

In support of the first quoted sentence, the Court quotes *United States v. Apel*²⁶ as follows, “[W]e have never held that the Government’s reading of a criminal statute is entitled to any deference.”²⁷

In addition, because the question involves interpretation of a criminal statute, to patch together extracts from a more lengthy paragraph in the plurality opinion in *United States v. Thompson/Center Arms Co.*, if “[a]fter applying the ordinary rules of statutory construction”, a court is “left with an ambiguous statute,” “[i]t is proper . . . to apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”²⁸ There is thus a heavy burden necessary to sustain the ATF’s interpretation — one it appears ATF is unable to carry.

II. VARIATION IN THE MANNER OF STATE LICENSURE

Placing in context the interpretive issue presented by the GFSZA requires some reference to the diverse ways in which states authorize the public possession of firearms generally, whether or not in proximity to elementary or secondary schools. The mere possession of a firearm anywhere in the state may require licensure through licensee-specific application.²⁹ For example, Illinois requires the possession of a Firearm Owner’s Identification Card to

²⁶ *United States v. Apel*, 134 S.Ct. 1144 (2014).

²⁷ *Abramski*, 134 S. Ct. at 2274 (quoting *Apel*, 134 S. Ct. at 1151) (alteration brackets in original). One therefore need not enter the morass of whether the interpretation, though not the result of notice and comment proceedings, were it not involving interpretation of a criminal statute, would be entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). See generally *Mead Corp.*, 533 U.S. at 235 (stating, “A classification ruling in this situation may therefore at least seek a respect proportional to its ‘power to persuade,’ ” (citing *Skidmore*, 323 U.S. at 140); *Mead Corp.*, 533 U.S. at 237 (“Whether courts do owe deference in a given case turns, for him, on whether the agency action (if reasonable) is ‘authoritative.’ The character of the authoritative derives, in turn, not from breadth of delegation or the agency’s procedure in implementing it, but is defined as the ‘official’ position of an agency and may ultimately be a function of administrative persistence alone.” (citations omitted)); *id.* at 234, 238–39 (requiring application of *Skidmore* deference, and stating, “In sum, classification rulings are best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines.’ ”); *id.* at 230–31 (2001) (“That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”).

²⁸ 504 U.S. 505, 517–18 (1992) (noting, *inter alia*, “The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. It is proper, therefore, to apply the rule of lenity”) (Souter, J., announcing the judgment of the Court) (joined by Rehnquist, C.J., and O’Connor, J.).

²⁹ See generally *Mishaga v. Schmitz*, 136 F. Supp. 3d 981, 997 (C.D. Ill. 2015) (identifying seven states requiring acquisition of a permit or license to purchase or possess certain firearms).

possess a firearm in the state,³⁰ with limited exceptions, e.g., for nonresidents who are at recognized shooting ranges³¹ and nonresident hunters with valid nonresident hunting licenses.³² Another exception in Illinois, the subject of litigation discussed below,³³ includes certain possession by “[n]onresidents who are currently licensed or registered to possess a firearm in their resident state.”³⁴

Separate from requiring authorization to possess a firearm at all — in any fashion — in a state, state law may regulate the extent to which a firearm may be possessed in public areas generally (and, therefore, may regulate possession in those public areas in the state regulated by the GFSZA).

State law may simply authorize the possession in public for those whose firearms possession generally is lawful, without possessor-specific authorization having been granted by the state.³⁵ This authorization may be for both concealed and open (non-concealed) possession,³⁶ or it may be limited to possession in a particular manner, e.g., openly carried.³⁷

³⁰ 430 ILL. COMP. STAT. ANN. 65/2(a) (Westlaw through P.A. 99–938 of the 2016 Reg. Sess.).

³¹ *Id.* § 2(b)(7).

³² *Id.* § 2(b)(5).

³³ See *infra* notes 59–81 and accompanying text.

³⁴ 430 ILL. COMP. STAT. ANN. 65/2(b)(10).

³⁵ See, e.g., *State v. Rosenthal*, 55 A. 610, 610–11 (1903) (“Under the general laws, therefore, a person not a member of a school may carry a dangerous or deadly weapon, openly or concealed, unless he does it with the intent or avowed purpose of injuring another; and a person who is a member of a school, but not in attendance upon it, is at liberty, in a similar way, to carry such weapons.”); see also 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, 654 & n. 351 (2012) (citing *Rosenthal* and stating, “As a result, the legal, permitless carrying of a concealed handgun often takes the colloquial name of ‘Vermont carry.’”).

³⁶ See, e.g., *Rosenthal*, 55 A. at 610–11.

³⁷ The jurisdictional counts are a rapidly moving target. The count of jurisdictions provided in 2013 in *Drake v. Filko*, 724 F.3d 426, 440–41 (3d Cir. 2013) is:

Thirty-one States currently allow open carry of a handgun without a permit, twelve States (including New Jersey) allow open carry with a permit, and seven States prohibit open carry entirely. By contrast, four States and parts of Montana allow concealed carry without a permit and forty-four States allow concealed carry with a permit. One State, Illinois, prohibited public carry of handguns altogether, but that law was struck down as violative of the Second Amendment by the United States Court of Appeals for the Seventh Circuit in December 2012.

However, in 2016 alone, Idaho, Mississippi, Missouri and West Virginia eliminated the permit requirement to carry a concealed weapon. IDAHO CODE ANN. § 18–3302(4)(f) (Westlaw through 2016 Second Regular Session), *amended by* 2016 Idaho Senate Bill No. 1389, Idaho Sixty-Third Idaho Legislature, Second Regular Session–2016 (adding, “(f) A concealed handgun by a person who is: (i) Over twenty-one (21) years of age; (ii) A resident of Idaho; and (iii) Is not disqualified from being issued a license under subsection (1) of this section.”); MISS. CODE ANN. § 45–9–101(24) (Westlaw through 2016 First and Second Extraordinary Sessions and the 2016 Regular Session), *amended by* 2016 Miss. Laws, H.B. No. 786 (approved April 15, 2016); MO. ANN. STAT. § 571.030 (Westlaw through the end of

Alternatively, state law may condition all or some types of public possession on issuance of possessor-specific authorization.³⁸

Among states that do not provide a blanket authorization for persons to possess firearms in public, but, rather, require some possessor-specific authorization to have been granted, there is a variation in the extent to which nonresidents can be licensed and whether their out-of-state licenses will be recognized. Some jurisdictions recognize all firearms permits;³⁹ others recognize only some;⁴⁰ others do not recognize permits issued by other

the 2016 Regular Session and Veto Session of the 98th General Assembly), *amended by* 2016 Mo. Legis. Serv. S.B. 656 (amending MO. ANN. STAT. § 571.030(1), which defines “unlawful use of weapons” as including some carrying of a concealed weapon, to limit the offense of unlawful use of weapons arising from the carrying of a concealed weapon by adding the geographic limitation “into any area where firearms are restricted under section 571.107”); W. VA. CODE ANN. § 61–7–3 (Westlaw through legislation of the 2016 Regular Session), *amended by* West Virginia House Bill 4145, at 2 (passed Feb. 24, 2016).

New Hampshire and North Dakota eliminated their permit requirements in 2017. S.B. 12, 2017 N.H. Laws ch. 1; H.B. 1169, 2017 N.D. Legis. Serv. No. 161 (West). Missouri’s neighbor to the West, Kansas, eliminated the permit requirement to possess a concealed firearm in 2015. *See* 2015 Kan. Sess. Laws 231, 237.

³⁸ *See supra* note 37.

³⁹ *E.g.*, Iowa, IOWA CODE ANN. § 724.11A (Westlaw through 2016 Reg. Sess.); South Dakota, S. D. CODIFIED LAWS § 23–7–7.4 (Westlaw through 2016 Session Laws), *explained by* South Dakota Secretary of State, Which Out-of-State Permit Holders Can Carry Concealed in South Dakota? (“Any valid resident or nonresident permit from another state is valid in South Dakota according to the terms of the issuing state, as long as the South Dakota laws and rules are complied with (SDCL 23–7–7.4).” <https://sdsos.gov/services-for-individuals/concealed-pistol-permits/concealed-carry.aspx> (last visited July 19, 2016).

Kansas law formerly expressly recognized licenses and permits to carry concealed weapons issued by other jurisdictions possessed by nonresidents of Kansas. *See* 2015 Kan. Sess. Laws 231, 244 (striking subsection (c)(1) of § 75–7c03, which provided, “(c)(1) Subject to the provisions of subsection (c)(2), a valid license or permit to carry concealed weapons, issued by another jurisdiction, shall be recognized by this state, but only while the holder is not a resident of Kansas.”). Those 2015 statutory amendments now no longer require a license for a person at least 21 to carry a firearm. 2015 Kan. Sess. Laws 231, 237, 244 (amending KAN. STAT. ANN. § 21–6302) (deleting the provision, “Subject to the provisions of subsection (c)(2), a valid license or permit to carry concealed weapons, issued by another jurisdiction, shall be recognized by this state, but only while the holder is not a resident of Kansas.”). For unclear reasons, the web site of the Kansas Attorney General seems to continue to reference recognition of out-of-state licenses (the distinction between recognition of out-of-state licenses and permit-free licensure of out-of-state residents being significant for our purposes). Out-of-State License Recognition, <http://ag.ks.gov/licensing/concealed-carry/out-of-state-license-recognition> (last visited July 19, 2016).

⁴⁰ *E.g.*, Minnesota, MINN. STAT. ANN. § 624.714, subdiv. 16 (Westlaw through laws of the 2016 Regular Session effective through July 1, 2016) (providing state officer to publish a list of states having laws governing permit issuances not similar to Minnesota, for which recognition is denied); Nevada, NEV. REV. STAT. ANN. §§ 202.3688.1, 202.3689 (Westlaw through the end of the 78th Regular Session (2015) and 29th Special Session (2015)).

jurisdictions.⁴¹ Some jurisdictions will not license nonresidents;⁴² others will.⁴³

A state may issue its residents permits (possessor-specific authorization) even if resident possession does not require a permit,⁴⁴ although it may not.⁴⁵ This apparently anomalous process does have advantages beyond any possible implications of the GFSZA. It can allow that state's residents to benefit from reciprocity in other states that do not authorize public permit-free carry or possession.

⁴¹ *E.g.*, District of Columbia, D.C. CODE ANN. § 7-2509.01(4) (Westlaw through July 1, 2016) (“‘License’ means a license to carry a concealed pistol issued pursuant to § 22-4506.”), *id.* § 22-4506 (not listing persons only licensed outside the District); Maryland, MD. CODE ANN., PUB. SAFETY § 5-303 (Westlaw through 2016 Regular Session of the General Assembly in effect through July 1, 2016) (“A person shall have a permit issued under this subtitle before the person carries, wears, or transports a handgun.”), the pertinent subtitle, Title 5, Subtitle 3, does not contain any of “resident,” “non-resident” and “nonresident.”

⁴² *E.g.*, California, CAL. PENAL CODE § 26150(a)(3) (Westlaw through urgency legislation through Chapter 893 of 2016 Reg. Sess., Ch. 8 of 2015–2016 2nd Ex. Sess., and all propositions on 2016 ballot) (limiting issuance to persons resident in the county or city or having a principal place of employment or business in the county or city); Kansas, KAN. STAT. ANN. § 75-7c04(a)(1) (Westlaw through laws enacted during the 2016 Regular Session of the Kansas Legislature effective through June 30, 2016, and chs. 1, 3 to 5, 7, 8, 10, 13 to 16, 18 to 26, 28, 30 to 35, 42, 43, 49, 52, 53, 56, 60, 61, 63, 65 to 69, 71 to 75, 77, 80 to 82, 86, 87, 90, 91, 96, 98 to 101, 103, 104, 106 to 109 and 112); Missouri, MO. ANN. STAT. § 571.101.2(1) (limiting licenses to Missouri residents, armed forces members stationed in Missouri and spouses of such members) (Westlaw through 2016 Regular Session and Veto Session of the 98th General Assembly). Delaware allows the issuance to a nonresident of up to three temporary licenses, each lasting 30 days. DEL. CODE ANN. tit. 11, § 1441(k) (Westlaw through 80 Laws 2016, ch. 427).

⁴³ *E.g.*, Utah, UTAH CODE ANN. § 53-5-704(4)(a) (Westlaw through 2016 Second Special Session); Virginia, VA. CODE ANN. § 18.2-308.06 (Westlaw through end of the 2016 Reg. Sess.).

⁴⁴ *E.g.*, KAN. STAT. ANN. § 75-7c03 (Westlaw through laws enacted during the 2016 Regular Session of the Kansas Legislature effective through June 30, 2016, and chs. 1, 3 to 5, 7, 8, 10, 13 to 16, 18 to 26, 28, 30 to 35, 42, 43, 49, 52, 53, 56, 60, 61, 63, 65 to 69, 71 to 75, 77, 80 to 82, 86, 87, 90, 91, 96, 98 to 101, 103, 104, 106 to 109 and 112); MO. ANN. STAT. § 571.107 (Westlaw through the end of the 2016 Regular Session and Veto Session of the 98th General Assembly, pending changes received from the Revisor of Statutes) (allowing for issuance of permits); *id.* § 571.030, *amended by* 2016 Mo. Legis. Serv. S.B. 656 (amending MO. ANN. STAT. § 571.030(1), which defines “unlawful use of weapons” as including some carrying of a concealed weapon, to limit the offense of unlawful use of weapons arising from the carrying of a concealed weapon by adding the geographic limitation “into any area where firearms are restricted under section 571.107”).

⁴⁵ *E.g.*, Jay Buckley, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 VT. L. REV. 957, 958 & n.8 (“Vermont does not at this time require or issue gun permits.”) (quoting Frequently Asked Questions, Vermont State Police, <http://www.dps.state.vt.us/vtsp/faq1.html#VermontGun> (last visited Mar. 28, 2011) (2011); Veronica Rose, *Reciprocity Agreements for Gun Permits*, OLR Research Report 2007–R-0116 (Jan. 23, 2007), <https://www.cga.ct.gov/2007/rpt/2007-R-0116.htm> (“Vermont does not issue handgun permits. People from any state including Connecticut, may carry handguns in the state without a permit.”).

III. LITERAL INTERPRETATION OF “LICENSED BY”

The pertinent provisions of the GFSZA present two separate interpretive issues involving sets of persons who might benefit from the exemption from the GFSZA. We may frame the interpretive issues as:

- (i) whether the GFSZA allows reciprocity (specifically, whether it prohibits delegation of an otherwise recognized licensure process to a nonresident’s state of residence); and
- (ii) whether the GFSZA does not recognize licensure unless it involves some possessor-specific action.

The more compact set of claimants presenting an interpretive issue includes those who are nonresidents in the state containing the relevant school zone, where the state containing the school zone has delegated to each person’s respective state of residence the determination of suitability to possess a firearm through some form of licensure involving actual application and issuance of some form of physical, licensee-specific permit. One might think of this set of claimants as presenting the issue of recognition of physical licenses through reciprocity of permits.

The broader set of claimants includes those who are authorized to possess firearms in public spaces in a state, even if no licensee-specific application has been approved. That could include a state that generally authorized possession in proximity to a school zone without the need for any possessor-specific application. In such a jurisdiction, there would be a question whether the state authorization was effective under the GFSZA to authorize possession of a firearm in proximity to an elementary or secondary school, for residents and nonresidents alike.

Another, somewhat anomalous circumstance could present an issue of authorization that was not licensee-specific. A state could require licensee-specific authorization for its residents but authorize some possession by nonresidents whose possession was lawful in their states of residence, whether by permit or simply by a general (blanket) statutory provision. Although such a statute would seem odd, a federal court recently reached an analogous construction of the Illinois regulatory scheme as applied to a nonresident’s possession in a private home.⁴⁶

In sum, then, we can identify two qualitatively different interpretive issues associated with this exception to the GFSZA. One issue is whether the GFSZA prohibits delegation of an otherwise sufficient licensure process

⁴⁶ *Mishaga v. Schmitz*, 136 F. Supp. 3d 981 (C.D. Ill. 2015). See *infra* notes 59–67 and accompanying text.

to a nonresident's state of residence — whether it prohibits reciprocity. The second issue is whether automatic authorization to possess a firearm, without any possessor-specific action having been taken, allows the authorized person to be classified as “licensed.”

This Article focuses on whether the GFSZA prohibits delegation of the licensure process to a nonresident's state of residence. However, brief discussion of whether the GFSZA recognizes all state authorization, including authorization without licensee-specific action, is helpful in illuminating the primary issue, for the following reason: If the GFSZA is ambiguous as to whether the GFSZA restricts the manner in which a state authorizes firearms possession, so that, *inter alia*, blanket authorization (one not involving licensee-specific action) may be licensure, principles of federalism, discussed below,⁴⁷ will require the GFSZA be construed as recognizing that licensure. Or, if the GFSZA is construed as to require some possessor-specific action but is ambiguous as to whether the state where the school zone is located can delegate the determination, the ambiguity will be construed to allow the possession by the more narrow set of persons having otherwise satisfactory out-of-state licenses.

A. Ambiguity Concerning Whether Licensure Includes Authorization not Involving Possessor-Specific Action

Let us first examine whether, by virtue of the meaning of the term “licensed,” the GFSZA recognizes all state authorization — the potential claim being that the GFSZA requires the authorization involve some possessor-specific action. We can illustrate that the language is at least ambiguous by reference to a few circumstances where a different statutory scheme seems to contemplate one being treated as “licensed” even where no licensee-specific action is taken by the putative licenser.

The Louisiana Nuclear Energy and Radiation Control Law provides for assorted state licensing of activity.⁴⁸ As detailed immediately below, the regulatory scheme contemplates certain persons are treated as “licensed by” a state agency automatically, i.e., without any licensee-specific activity.

The regulatory scheme provides for “general licenses” and “specific licenses.” The former are granted without any application.⁴⁹ The definitions provide, “ ‘Licenses’ means general licenses and specific licenses.”⁵⁰

⁴⁷ See *infra* Part VII.

⁴⁸ LA. STAT. ANN. §§ 30:2101–30:2119 (Westlaw through the 2016 First Extraordinary Session).

⁴⁹ *Id.* § 30:2103(5)(a).

⁵⁰ *Id.* § 30:2103(5).

The statute and implementing regulations define the term “licensee.” The term means “any person who is *licensed by the department* in accordance with this Chapter and regulations promulgated by the secretary.”⁵¹

Holders of general licenses, meaning persons whose activity is authorized without any licensee-specific action having been taken by the state agency, are necessarily treated as “licensees” and, therefore, are considered as “licensed by” the state agency. That follows because that is necessary to give effect to the regulations implementing the statute.

For example, a regulation exempts “licensees” from “all the requirements of this Chapter with respect to shipment or carriage of [specified] low-level materials.”⁵² Giving effect to these provisions requires “licensees” to include those who are licensed under a general license (i.e., without any agency having taken a licensee-specific action). So, giving effect to these provisions requires persons authorized by statute, without any licensee-specific activity, be considered as “licensed by [the state agency].”

We can turn to Pennsylvania to find a second example. Pennsylvania law provides one cannot act as an agent of a dealer or hauler of domestic animals unless “licensed by” a state department.⁵³ The statute indicates what is necessary to “license” an agent is mere designation of the agent by a private person.⁵⁴ Although the statute allows for the department to require additional information,⁵⁵ the form would suggest that is unlikely to occur, as it only requires the agent’s name — it does not require even address information.⁵⁶

⁵¹ *Id.* § 30:2103(4) (emphasis added).

⁵² 33 LA. ADMIN. CODE Pt. XV, 1505(b) (Westlaw through rules published in Louisiana Register Vol. 42, No. 5, May 20, 2016).

⁵³ 3 PA. STAT. AND CONS. STAT. ANN. § 2342(a) (Westlaw through 2016 Regular Session Act 24).

⁵⁴ The statute provides in part:

(a) General rule.—Except as provided in subsection (b), a domestic animal or dead domestic animal dealer or hauler who applies for or holds a dealer’s or hauler’s license may designate any person to act as an agent on behalf of that dealer or hauler. The designation shall be made either on the domestic animal or dead domestic animal dealer’s or hauler’s license application form or by a written notice to the department requesting the issuance of an agent’s license. The department may require such additional information as is necessary to determine the identity, competency and eligibility of an applicant for an agent’s license. A dealer or hauler shall be accountable and responsible for contracts made by any of its licensed agents.

Id. § 2343(a).

⁵⁵ *Id.*

⁵⁶ See Commonwealth of Pennsylvania, Department of Agriculture, Bureau of Animal Health and Diagnostic Services, Application for Domestic Animal Dealer and Hauler License ¶ 9 (Feb. 2016), <http://www.agriculture.pa.gov/Protect/AHDServices/Domestic%20Animal%20Dealers%20and%20Haulers%20License/Pages/default.aspx#.VOrQOOTAZrY> (last visited May 30, 2016).

Thus, for this purpose, one can be “licensed by” Pennsylvania without the state doing anything licensee-specific.⁵⁷

It turns-out that interpretation of this aspect of the term “licensed,” as used in the Illinois statutes governing firearms possession, has been litigated.⁵⁸ The authority is in conflict. One case interprets the term as including one who is authorized by generally applicable statute (i.e., without licensee-specific action by the state), and one does not.

The former case is *Mishaga v. Schmitz*.⁵⁹ It involves a challenge to Illinois law that restricts issuance of Firearm Owner’s Identification Cards to state residents. The plaintiff applied for a FOID, which was denied for want of Illinois identification that, as a nonresident, she did not have.⁶⁰ An Ohio resident, she allegedly wished to possess a firearm for self-defense while staying at her friends’ home in Illinois.⁶¹ The opinion notes:

[The plaintiff] also does not have any sort of firearm permit from her state of residence, Ohio, because Ohio does not issue permits merely to possess a firearm and because [the plaintiff] does not want the permit Ohio does issue that

⁵⁷ One can encounter similar examples. *See, e.g.*, CAL. BUS. & PROF. CODE § 2636.5(c) (Westlaw through urgency legislation through Ch. 14 of 2016 Reg. Sess. and Ch. 8 of 2015–2016 2nd Ex. Sess.) (allowing physical therapists licensed out-of-state to practice in-state temporarily following receipt of notice an application is on-file); Los Angeles Municipal Code, Ch. I (Planning & Zoning Code), Art. 2, §§ 12.70(B)(8), 12.70(B)(17), 12.70(C) (current through Revision No. 54, including legislation adopted through March 31, 2016) (Michael N. Feuer, City Attorney, ed.), <http://library.amlegal.com> (separately regulating massage parlors, with an exception for businesses providing services of physical therapists “licensed by the State of California”).

⁵⁸ Somewhat comparable language was also construed by a Michigan court in *People v. Miller*, 604 N.W.2d 781 (Mich. Ct. App. 1999). There the court finds that a blanket approval in a nonresident’s home state does not result in that “person holding a valid license to carry a pistol concealed upon his or her person issued by another state.” *Id.* at 782–83 (emphasis omitted) (construing MICH. COMP. LAWS § 750.231a(1)(a), amended by 2002 Mich. Legis. Serv. P.A. 82 (H.B. 5026) (West 2002)). A basic difference in that language is its reference to one “holding” a license, which connotes something that is physical that can be possessed. The court’s analysis does not focus on that, however, and is simply conclusory:

Defendant’s argument would have us read into the statute a provision that it should not apply under circumstances where a general exemption from concealed weapons proscriptions would apply in some other state. Had the Legislature intended that broader protection for out-of-state residents found with weapons in Michigan, it could easily have written the statute in this fashion. The Legislature did not take that approach, and we are without authority to rewrite the statute as defendant suggests.

Miller, 604 N.W.2d at 783.

⁵⁹ 136 F. Supp. 3d 981 (C.D. Ill. 2015).

⁶⁰ *Id.* at 985.

⁶¹ *Id.* at 984.

would license her to carry a concealed firearm outside of the home.⁶²

The relevant statutory scheme prohibits nonresident firearms possession unless the nonresident was “licensed or registered to possess a firearm in [his or her] resident state.”⁶³ The court holds the plaintiff’s statutory authorization to possess a firearm in Ohio makes her “licensed . . . to possess [a] firearm[] in [her] resident state[],”⁶⁴ i.e., that authorization not involving possessor-specific action constitutes licensure.

To reach that conclusion, the court first references assorted dictionary definitions of “license” and correlative terms, concluding the term is ambiguous in this regard:

Due to the consistent occurrence of equally valid, competing definitions, then, an examination of dictionaries to discern the plain meaning of the words “license” and “licensed,” alone, does not resolve the parties’ dispute. Though many definitions show that a document generally or usually manifests the official permission granted in a “license,” as [the plaintiff] contends, the same definitions make clear that such official permission in the absence of a document is also central to the concept of “license,” supporting Defendants’ view.⁶⁵

Ultimately, the court relies on the canon for avoiding surplusage (in light of the disjunctive statutory reference to persons “licensed or registered”⁶⁶) in reaching its conclusion.⁶⁷

This court’s conclusion that licensure includes authorization not requiring licensee-specific action operated to limit the extent to which a private person’s firearms rights were vindicated. In something of a common theme,⁶⁸ a subsequent Illinois case also construed this language against one asserting firearms rights, albeit in that case to reach the conclusion that licensure requires licensee-specific action.

⁶² *Id.* at 984–85.

⁶³ 430 ILL. COMP. STAT. ANN. 65/2(b)(10) (Westlaw through P.A. 99–912 of the 2016 Reg. Sess.) (amended in 2012 and 2015).

⁶⁴ *Mishaga*, 136 F. Supp. 3d at 996.

⁶⁵ *Id.* at 992.

⁶⁶ *See supra* note 6363.

⁶⁷ *Mishaga*, 136 F. Supp. 3d at 992–93.

⁶⁸ *See supra* note 58.

*People v. Wiggins*⁶⁹ involves a Texas resident convicted in Illinois of aggravated unlawful use of a weapon.⁷⁰ Earlier Illinois authority, *People v. Holmes*,⁷¹ holds the above-referenced exemption⁷² for “licensed” nonresidents at issue in *Mishaga v. Schmitz*⁷³ “functions as an exception to liability under the [aggravated unlawful use of a weapon] statute.”⁷⁴ Although defendant Wiggins could lawfully possess a firearm in his home state of Texas without a permit,⁷⁵ the court concludes the term “licensed” in this statute is not ambiguous,⁷⁶ and the term does not extend to the blanket authorization provided by Texas law.⁷⁷ It bolsters its conclusion by reference to legislative history⁷⁸ and the need to harmonize this language with other statutory language.⁷⁹ And it makes the interesting argument that because the statutory language is part of creation of an administrative scheme, the term “licensed” is to be read as excluding some form of authorization not involving licensee-specific action,⁸⁰ which is, of course, at odds with the import of the Louisiana regulation of hazardous waste referenced above that does create an administrative regulatory scheme.⁸¹

One can distinguish the approach taken in *Wiggin* from the interpretive issue presented by the GFSZA in the following fashion. The statutory

⁶⁹ 68 N.E.3d 457 (Ill. App. Ct. 2016).

⁷⁰ *Id.* at 461.

⁷¹ 948 N.E.2d 617 (Ill. 2011).

⁷² See *supra* note 63 and accompanying text.

⁷³ 136 F. Supp. 3d 981 (C.D. Ill. 2015).

⁷⁴ *Wiggins*, 68 N.E.3d at 462.

⁷⁵ *Id.* at 463.

⁷⁶ *Id.* at 468.

⁷⁷ *Id.* at 470.

⁷⁸ *Id.* at 467–68.

⁷⁹ *Id.* at 466–67.

⁸⁰ The opinion states:

This point is significant because, in the sense of a regulatory statute, the word “licensed” does not strike us as ambiguous at all. “In the context of professional regulation, a license is defined as ‘a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful.’ ” *Christmas v. Dr. Donald W. Hugar, Ltd.*, 409 Ill. App. 3d 91, 96 (2011) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1304 (1981)); see also *Wilkie v. City of Chicago*, 188 Ill. 444, 453 (1900) (defining “license” in context of regulatory statute governing plumbing to be “a formal permission from proper authorities to perform certain acts or carry on a certain business which without such permission would be illegal”). Again, the point is that there must be official action by the government to permit the activity, which otherwise has been rendered illegal by that government.

Id. at 465–66.

⁸¹ See *supra* notes 48–52 and accompanying text.

scheme at issue in *Wiggin* necessarily involves some licensee-specific activity in some contexts. It creates a mechanism in which the governmental unit adopting the regulatory scheme in fact issues some permits to specific individuals. Of course, the GFSZA does not involve the federal government issuing any permits, and to say that it necessarily contemplates states doing so assumes the conclusion.

In sum, there are regulatory schemes that use the term “license,” and correlative terms, to include authorizations not involving the licensing jurisdiction taking licensee-specific action. And there is judicial authority to the contrary. Whether the meaning becomes clear when placed in the context of the relevant statutory purposes is examined below.⁸²

B. Efficacy of Recognition through Reciprocity of Another State’s Licensure Involving Licensee-Specific Activity

Part III.A urges that the GFSZA’s use of “licensed” likely is, before reference is made to the statutory purposes, ambiguous as to whether “licensed” excludes persons authorized by statute without any licensee-specific action being taken. If that term is ambiguous in this regard, and, under federalism principles discussed below,⁸³ it is construed so as not to prevent a particular manner in which a state decides to act (whether through broad statutory grant as opposed to licensee-specific action), then nonresidents authorized by a state’s reciprocity to possess firearms would be persons licensed by that state.

Were a court to reject that approach, there remains a more narrow path to recognition of those nonresidents benefitting from reciprocity as licensed. That would depend on finding that the term “licensed . . . by the State,” as used in the GFSZA, did not unambiguously prohibit the relevant state’s delegation of authorization to nonresidents’ jurisdictions of residence — unambiguously allowed it or at least is ambiguous in that regard.

In a variety of contexts, the term “licensed by the state,” or the phrase “licensed by” preceding reference to some other governmental entity, is used where the term would seem naturally to extend to one who has been licensed by reciprocity — licensed without any licensee-specific affirmative act of the jurisdiction whose licensing is in issue. We can provide a few illustrations.

⁸² See *infra* Part VI.

⁸³ See *infra* Part VII.

Of course, automatic recognition of a nonresident’s driver’s license is a very familiar form of automatic reciprocity.⁸⁴ State statutory schemes involving drivers’ licenses often use language more explicit than “licensed by the state” in addressing licensees and application of reciprocity principles — the language often is drafted in a fashion that very directly clarifies its application to nonresidents.⁸⁵ One exception, where there is statutory language using the construct “licensed by the state,” without express discussion of reciprocity, is provided by Louisiana law.

By way of background, section 32:404 of the Louisiana Driver’s License Law expressly contemplates recognition of a nonresident minor’s⁸⁶ out-of-state license:

A. A nonresident or a nonresident minor, who has been licensed to drive or operate a motor vehicle under the laws of his home state and who has in his immediate possession a valid license issued to him by his home state, shall be permitted to drive a motor vehicle in this state without examination or license for a period not to exceed ninety days

B. A student attending a Louisiana school but who is domiciled in another state, and who has in his immediate possession both a valid license issued to him by his home state and a current student identification card, shall be permitted to drive a motor vehicle in this state without

⁸⁴ See, e.g., FLA. STAT. ANN. § 322.04 (Westlaw through 2016 Second Regular Session) (“(1) The following persons are exempt from obtaining a driver license: . . . (c) A nonresident who is at least 16 years of age and who has in his or her immediate possession a valid noncommercial driver license issued to the nonresident in his or her home state or country operating a motor vehicle of the type for which a Class E driver license is required in this state.”); TEX. TRANSP. CODE ANN. § 521.030 (Westlaw through 2015 Regular Session).

⁸⁵ See, e.g., *supra* note 84; *infra* note 87 and accompanying text.

⁸⁶ The section of the code providing definitions for this chapter does not include a definition of minor. See LA. STAT. ANN. § 32:401 (Westlaw through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions). There is, however, a general statutory definition of the converse case. LA. CIV. CODE ANN. art. 29 (Westlaw through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions) (“Majority is attained upon reaching the age of eighteen years.”) One can see, however, administrative rule reference confirming the term “minor” is used in this portion of the Louisiana statutes to reference persons not yet eighteen. See 55 LA. ADMIN. CODE Pt. III, § 147(B)(3) (Westlaw through 42 La. Reg. No. 11, Nov. 20, 2016) (imposing the following obligation on driving schools: “The school shall provide a written document detailing the services to be provided for the fee charged. This document shall be signed by the parent (if the student is a minor) or a student (if over the age of eighteen) and the school owner.”).

examination or Louisiana license during his enrollment as a student and for not more than ninety days thereafter.⁸⁷

The relevant language using the phrase “licensed by the state” is in a separate provision addressing vehicle operation by persons under seventeen:

No person shall cause or knowingly permit his child or ward, under the age of seventeen years, to drive a motor vehicle or a power cycle upon any public road or highway unless such child or ward is licensed by the state to do so.⁸⁸

As used there, “licensed by the state” would appear to include minors licensed by reciprocity. If not, it contemplates that licensed nonresidents sixteen years of age either cannot lawfully drive in Louisiana (which does not seem intended by the quoted section 32:404), or they can, but a parent is not to authorize it. Neither seems likely intended, although authority directly on the matter has not been located.

This illustration from Louisiana law is imperfect, because one might quibble with the conclusion that the statute intends to license the nonresidents who are sixteen. We began with that statute, because drivers’ licensure immediately comes to the mind of many when considering licensure reciprocity. The following illustration from Maryland law, albeit involving a less familiar form of reciprocity, unambiguously contemplates licensure involving automatic recognition.⁸⁹

Section 5–512 of Maryland’s Family Law allows for automatic reciprocity to those licensed by another state for “exercis[ing] care, custody, or control of minor children or . . . engag[ing] in the placement of minor children.”⁹⁰ A separate section, section 5–507, states, “Except as otherwise provided in this section, a person shall be licensed by the Administration as

⁸⁷ LA. STAT. ANN. § 32:404.

⁸⁸ *Id.* § 32:416.

⁸⁹ One can find other examples. *See* N.M. STAT. ANN. § 61–27B–3(A) (Westlaw through the Second Regular and Special Sessions of the 52nd Legislature (2016)) (requiring one be “licensed by the department” to act as a private investigator); *id.* § 61–27B–33 (allowing the department to develop rules allowing for reciprocity on a temporary or limited basis “without requiring an applicant licensed or registered in another state subject to a reciprocity agreement to be licensed or registered in New Mexico”).

⁹⁰ MD. CODE ANN., FAM. LAW § 5–512 (Westlaw through Chapters 1 to 9, 12, 16, 26 (except secs. 4 & 5), 28, 100, 103, 116, 142, 160, 180, 237, 241, 294 (except sec. 2), 305, 472, 525, 526, 558 & 559 of the 2016 Regular Session of the General Assembly) (“If the other state extends the same recognition and reciprocal relations to licensees under this subtitle, the Administration may recognize and deal with a person licensed or recognized by any other state as being authorized to exercise care, custody, or control of minor children or to engage in the placement of minor children.”).

a child placement agency before the person may engage in the placement of minor children in homes or with individuals.”⁹¹ The efficacy of the reciprocity provided to place minors in section 5–512 requires that one authorized by automatic reciprocity in section 5–512 be treated as “licensed by the Administration” in section 5–507.⁹²

C. Illustrations Where not Treating Reciprocity as Making One “Licensed by” an Entity Creates Anomalies

We also have circumstances where (i) there is statutory language making reference to one “licensed by” a governmental entity, (ii) there is some form of automatic reciprocity, and (iii) it makes little sense for one who benefits from reciprocity not to be treated as “licensed by” the governmental entity. That is, it would be possible for one who benefits from reciprocity not to be treated as “licensed by” the government granting reciprocity, but there is not an evident reason why that should be the case.

These illustrations are different from those provided in Part III.B, in that in those illustrations, the statutory language would not work (or work as very likely intended) absent treating one as being “licensed by” a government that took no action other than the adoption of reciprocity. In the following illustrations, the statutory language could work were reciprocity not treated as making one “licensed by” the jurisdiction, although it would not produce sensible results and is, therefore, not a suitable interpretation of the meaning of “licensed by.”⁹³

South Carolina law provides certain certified public accountants having out-of-state principal places of business “may exercise all the privileges of

⁹¹ *Id.* § 5–507.

⁹² One might argue reciprocity is given effect under the statutory scheme without requiring one granted reciprocity be treated as “licensed by” the state agency, for the following reason: Section 5–507 does not prohibit child placement by licensed persons, and it also does not prohibit child placements “as otherwise provided.” So, one might argue that recognition by reciprocity is “as otherwise provided.” Thus, one might argue, persons recognized by reciprocity can place children, but are not treated as “licensed by” the state agency.

That argument, however, does not track the full statutory language. The authorization of child placement by persons who are not licensed is limited to “as otherwise provided in this section.” The section reference there is section 5–507. The reciprocity is provided in a different section, section 5–512. So, giving effect to reciprocity requires persons benefitting from reciprocity are considered as “licensed by” the state agency.

⁹³ See generally 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45:12 (7th ed.) (Westlaw, database updated Nov. 2015) (“A statute is the solemn and purposeful result of a state acting through its legislature to achieve an effective, operative, nonfutile end. Consonant with this idea of a deliberate, rational, and sensible legislative process, a golden rule of statutory interpretation instructs that, when one of several possible interpretations of an ambiguous statute produces an unreasonable result, that interpretation should be rejected in favor of another which produces a reasonable result.” (footnotes omitted)).

licensees of this State without the need to obtain a license.”⁹⁴ The statute expressly provides, “[N]o notice, fee, or other submission may be required of the individual.”⁹⁵

South Carolina law further provides, in section 15–36–100, an additional precondition to maintaining a professional negligence lawsuit against certain professionals “licensed by or registered with the State of South Carolina” — the filing of an affidavit of an expert witness specifying at least one negligent act or omission.⁹⁶ So, an out-of-state certified public accountant benefitting from reciprocity either (i) is treated as “licensed by . . . the State,” as used in section 15–36–100, or (ii) does not benefit from the procedure limiting non-meritorious malpractice litigation. Although no authority addressing the issue has been found,⁹⁷ there does not appear to be any reason why an out-of-state certified public accountant, authorized to practice by automatic reciprocity, would not be treated as “licensed by” South Carolina for purposes of this statute. Thus, one supposes those certified public accountants benefitting from reciprocity are treated as “licensed by” the state.

Pennsylvania allows “vehicle dealers licensed under [the Pennsylvania Board of Vehicles Act] or by any other state or jurisdiction” to sell vehicles at auction in Pennsylvania.⁹⁸ Pennsylvania law elsewhere provides “an assignment and warranty of title” for a transfer of ownership of a vehicle is to be verified by a notary, a similar official or, *inter alia*, an “issuing agent who is licensed as a vehicle dealer by the State Board of Vehicle Manufacturers, Dealers and Salespersons, or its employee.”⁹⁹ The phrase “licensed as a vehicle dealer by the State Board” would here seem necessarily to include persons licensed by automatic reciprocity.

D. Conclusion

The ATF’s proffered interpretation of the term “licensed . . . by the State” in the Gun-Free School Zones Act relies on an assumption that the term “licensed by,” when followed by “the state” or reference to some other governmental unit, requires some licensee-specific affirmative act of the

⁹⁴ S.C. CODE ANN. § 40–2–245(A) (Westlaw through 2016 Act No. 147).

⁹⁵ *Id.* § 40–2–245(B).

⁹⁶ *Id.* § 15–36–100.

⁹⁷ Westlaw search: adv: “15–36–100” & “accountant,” Jurisdiction South Carolina & All Federal (May 30, 2016), identifying only one case, *Hays v. Pearlman*, No. 2:10–CV–1135–DCN, 2010 WL 4510956 (D.S.C. Nov. 2, 2010); the case does not involve a certified public accountant as a defendant.

⁹⁸ 63 PA. STAT. AND CONS. STAT. ANN. § 818.5 (Westlaw through 2016 Regular Session Act 24); *see also* 63 PA. STAT. AND CONS. STAT. ANN. § 818.1 (providing the short title of the act).

⁹⁹ 75 PA. STAT. AND CONS. STAT. ANN. § 1111 (Westlaw through 2016 Regular Session Act 24).

licensing state (or other governmental unit). However, the use of the term “licensed by the state,” and correlative terms, are not so restricted.

Giving evident effect to statutory language in a number of contexts requires that one authorized by a governmental entity simply by statute making it so for numerous people is sufficient for one to be “licensed.” Although there is inconsistent treatment in judicial opinions, that inconsistency at least creates ambiguity. The conclusion that at least ambiguity is present is even more compelling in determining whether the term “licensed by . . . the State” extends to licensure through reciprocity where the state whose licensure is recognized granted licensee-specific approval. And, as shown below,¹⁰⁰ in this context ambiguity would be construed so as to find the activity constitutes licensure.

IV. PROMINENT REFERENCE TO PURPOSE-CENTRIC INTERPRETATION: “ESTABLISHED BY THE STATE”

A detailed discussion of the terms of the Patient Protection and Affordable Care Act¹⁰¹ would be too far afield. But because construction of the term “established by the State,” as used there, was prominently addressed in *King v. Burwell*,¹⁰² and that construct is similar to “licensed by the State,” as used in the GFSZA, some brief mention of *King v. Burwell* is appropriate.

In *Burwell*, the Court concludes the term “established by the State” is ambiguous, because taking the term in “its most natural sense”¹⁰³ — to exclude an exchange that was not established by a state but, rather, was established by the federal government — would yield results that “would be odd indeed.”¹⁰⁴ Moreover, the court reaches that conclusion even though it results in the usage of the phrase, in the critical location, being entirely superfluous,¹⁰⁵ contrary to the cardinal¹⁰⁶ principle of construction requiring avoidance of interpretations that make some language surplusage.¹⁰⁷

In both cases, the question is whether the activity — “licens[ing]” for purposes of the GFSZA, and “establish[ing]” for purposes of The Patient

¹⁰⁰ See *infra* Part VII.F.

¹⁰¹ Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010).

¹⁰² 135 S. Ct. 2480 (2015).

¹⁰³ *Id.* at 2490.

¹⁰⁴ *Id.* at 2490 n.1.

¹⁰⁵ *Id.* at 2492.

¹⁰⁶ *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

¹⁰⁷ 135 S. Ct. at 2492.

Protection and Affordable Care Act — is required to be done by a referenced state. It would seem easier to conclude the term “licensed . . . by the State” includes a state voluntarily licensing firearms possession through reciprocity than it is to conclude that an exchange established by the federal government, after a state declined, is “established by the State.”

Or, to put it another way, the ATF’s view is that the GFSZA is unambiguous in rejecting licensure by reciprocity. The ATF states the statutory language “*clearly provides . . . the license must be issued by the State in which the school zone is located or a political subdivision of that State.*”¹⁰⁸ Focusing on the literal terms, this language in the GFSZA is more easily found ambiguous than the corresponding language construed in *Burwell*, which the Supreme Court holds is ambiguous. And that conclusion is further cemented by the fact that rejecting the ATF’s reasoning, unlike the interpretation adopted in *Burwell*, does not require making the last three words in the phrase being construed, “licensed . . . by the State,” surplusage.

V. INTERPRETATION OF “LAW ENFORCEMENT
AUTHORITIES OF THE STATE OR POLITICAL SUBDIVISION
VERIFY”

A. *Recognition through Reciprocity of Out-of-State Licensure Involving Licensee-Specific Action*

Parts III and IV have demonstrated that the phrases “licensed by the state” and “licensed by [a governmental entity]” at times are used to reference circumstances where the licensing state or other governmental entity takes no action other than the prior adoption of a law or regulation (whether by some blanket authorization or by reciprocity, delegating licensure decision-making as to nonresidents to another state). However, there is a second part of the exclusion in the GFSZA that must be parsed to conclude the language does not prohibit licensure by automatic reciprocity. The statutory exclusion also requires “the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license.”¹⁰⁹

As an initial matter, one can note that ATF’s analysis does not focus on the additional language. So, ATF apparently does not rely on this additional language as the basis for its conclusion.

¹⁰⁸ Letter from Ashan Benedict to Tim Gillespie, *supra* note 17, at 1 (emphasis added).

¹⁰⁹ 18 U.S.C.A. § 922(q)(2)(B)(ii) (2015) (Westlaw through Pub. L. No. 114–327).

The primary reason why this part of the GFSZA also does not prohibit licensure through reciprocity is that it cannot be intended that this verification will be effected without delegation. Confirming firearms possession is lawful under federal law will require delegation. For example, the actual verification contemplated by Missouri law, beyond Missouri-based officials taking the licensee's fingerprints, is performed only by federal officials.¹¹⁰

Legislation is construed so as to make it effective in achieving its purposes.¹¹¹ Because delegation is necessary to effective implementation of the scheme, it cannot be intended that a state cannot delegate this checking to another governmental entity.

Some of the language in *United States v. Tait*¹¹² provides a second, independent basis for concluding that this reference to verification does not prohibit delegation. The case involves someone who had been issued a firearms permit in Alabama, notwithstanding prior convictions in another state (Michigan). Alabama law at the time had only limited restrictions on the prior bad acts that would absolutely disqualify one from receiving a firearms permit — restrictions as to criminal acts more narrow than the federal prohibition on firearms possession:

(i) that the person not have been convicted of a crime of violence; or

¹¹⁰ MO. ANN. STAT. § 571.101.5(1) (Westlaw through emergency legislation approved through February 18, 2016, of the 2016 Second Regular Session of the 98th General Assembly).

Note, for example, that where Virginia licenses a nonresident, the fingerprints are not taken by Virginia officials. VA. CODE ANN. § 18.2-308.06 (Westlaw through the end of 2015 Reg. Sess. and includes 2016 Reg. Sess. cc. 1 to 4, 19, 55, 71, 79 to 80, 279, 290, 385 and 648). It is implausible that Federal law dictates which state's employees take fingerprints. There is no nexus between that and any justification for burdening an enumerated right. It would be dubious even under rational basis review.

¹¹¹ *E.g.*, *Bird v. United States*, 187 U.S. 118, 124 (1902) (“There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.”); *Civil Serv. Comm’n v. Pinder*, 812 P.2d 645, 648 (Colo. 1991) (“Our primary task in interpreting a statute is to give it a construction and interpretation that will render it effective in accomplishing the purpose for which it was enacted.”); *Ortiz v. N. Amherst Auto Rental, Inc.*, 834 N.E.2d 273, 275–76 (Mass. App. Ct. 2005) (“In analyzing § 32C, ‘[w]e must ascertain the intent of a statute from all of its parts, from the subject matter to which it relates, and we must [then] construe it so as to render the legislation effective, consonant with reason and common sense.’ . . . If the [international driving permit] cannot be used as a representation of the fact that the driver has a driver’s license, then it would have no real use at all, aside from serving as another form of photographic identification. We regard the language in the Convention on Road Traffic . . . as an indication that the countries involved meant to introduce the IDP as a proxy for a driver’s license in a limited number of circumstances, and we conclude that this is one of those circumstances.” (quoting *Bay Colony Mktg. Co. v. Fruit Salad, Inc.*, 672 N.E.2d 987, 989 (Mass. App. Ct. 1996)); 73 AM. JUR. 2D *Statutes* § 156 (Westlaw, database through July 2016 update) (“A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective.”).

¹¹² 202 F.3d 1320, 1324 (11th Cir. 2000).

(ii) that the person not be a drug addict or habitual drunkard.¹¹³

The defendant's prosecution for violation of the GFSZA was dismissed, which was affirmed on appeal.¹¹⁴ The appellate court reaches the conclusion, disputed by the government, that Michigan law automatically restoring the defendant's rights following release from custody¹¹⁵ operated to allow his firearms possession under Alabama law.¹¹⁶

With that background, we can turn to the issue at hand: the court's holding concerning what verification prior to issuance of a permit is necessary if the permit is to satisfy the requirements of the GFSZA. Somewhat surprisingly, both the appellate court's and the trial court's opinions are cryptic in a crucial regard: whether the sheriff who issued the permit did any checking to assure that the defendant was not prohibited from receiving a license. But the appellate opinion apparently reaches the following conclusion: Whether the sheriff checked that the licensee could

¹¹³ See ALA. CODE § 13A-11-72(a)-(b) (Westlaw Alabama Statutes Annotated-1997) (amended 2013 & 2015) (“(a) No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence shall own a pistol or have one in his or her possession or under his or her control. (b) No person who is a drug addict or an habitual drunkard shall own a pistol or have one in his or her possession or under his or her control.”).

The district court details how the statutory provisions operate to provide this result. The permit statute, at the time, generally allowed issuance if “it appears that the applicant has good reason to fear injury to his person or property or has any other proper reason for carrying a pistol, and that he is a suitable person to be so licensed.” *Id.* § 13A-11-75 (quoted in part in *Tait*, 202 F.3d at 1324). That part of the statute did not expressly reference specific wrongful acts that would constitute an outright prohibition. However, the district court noted prior authority “has interpreted this law as prohibiting a sheriff ‘from issuing a license to carry a pistol to a person who, by operation of law, would be ineligible for such a license.’” *United States v. Tait*, 54 F. Supp. 2d 1100, 1104 (S.D. Ala. 1999), *aff’d*, 202 F.3d 1320 (11th Cir. 2000) (quoting *E.M. v. State*, 675 So.2d 90, 92 (Ala. Crim. App. 1995)).

¹¹⁴ 202 F.3d at 1321.

¹¹⁵ *Id.* at 1322.

¹¹⁶ *Id.* at 1325.

lawfully receive a permit under Alabama law is irrelevant, because the license in fact was not prohibited by Alabama law¹¹⁷ from being issued.¹¹⁸

¹¹⁷ The GFSZ requires verification that the person be “qualified under law to receive the license.” See 18 U.S.C.A. § 922(q)(2)(B)(ii) (Westlaw through Pub. L. No. 114–327). The statutory language does not expressly indicate that it means one is qualified under state law, even if the possession would violate federal law. The *Tait* court only obliquely addresses a possible argument that the GFSZA conditions the efficacy of a permit on a background check not revealing any violation of *federal* law in the applicant’s possession of a firearm. It simply concludes the relevant law is state law. *Tait*, 202 F.3d at 1324 (“By its basic terms, the statute merely requires that the Alabama sheriff ensured that Tait was qualified *under Alabama law* to receive the license.”).

The district court discusses the federal government’s apparent claim that state licensure does not satisfy the GFSZA unless it confirms the firearms possession is lawful under federal law, by referencing the background check necessary to purchase a firearm in section 922(t):

The government argues that Congress intended that the verification of licensees include background checks and that Alabama’s licensing procedure does not meet this requirement. First, the government offers a letter issued by the Bureau of Alcohol, Tobacco and Firearms explaining to Alabama firearm’s [sic] licensees regarding their responsibilities under a separate firearms provision. Apparently, the government would have the Court infer from this letter that the ATF believes that Alabama’s licensing procedure does not satisfy the verification requirements of § 922(t) and, therefore, does not meet the verification requirements of § 922(q)(2)(B).

United States v. Tait, 54 F. Supp. 2d 1100, 1104 (S.D. Ala. 1999).

It bears mentioning that were *Tait* not to have rejected the federal government’s construction of the GFSZA, the implications would have been quite broad. For example, federal law makes unlawful the possession of a firearm by one who is an unlawful user of any controlled substance (as defined), subject to an interstate commerce nexus. 18 U.S.C.A. § 922(g)(3) (Westlaw through Pub. L. No. 114–327). Marijuana is such a controlled substance. 21 U.S.C.A. §§ 802(6), 812, Schedule I(c)(10) (Westlaw through Pub. L. No. 114–327). And the federal prohibition on its use is not eliminated by alleged medicinal purposes. See *Gonzales v. Raich*, 545 U.S. 1, 27 (2005); see also *Wilson v. Lynch*, No. 14–15700, 2016 WL 4537376 (9th Cir. Aug. 31, 2016) (rejecting a challenge to 18 U.S.C. § 922(d)(3)’s ban on sales of firearms to individuals whom sellers have reasonable cause to believe are drug users, along with ATF guidance to firearms licensees stating persons using medical marijuana are prohibited by federal law from possessing firearms or ammunition) (citing Arthur Herbert, Assistant Director, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms and Explosives, Open Letter to all Federal Firearms Licensees (Sept. 21, 2011), <https://www.atf.gov/files/press/releases/2011/09/092611-atf-open-letter-to-all-ffls-marijuana-for-medicinal-purposes.pdf>).

Oregon, for example, maintains a registry entitling persons to use medical marijuana, evidenced by identification cards. OR. REV. STAT. § 475B.415 (Westlaw through 2016 Reg. Sess. legislation eff. through July 1, 2016). As noted below, see *infra* notes 178–181 and accompanying text, the Oregon Supreme Court has held that a local official cannot decline to issue a state firearms permit to one possessing a state medical marijuana card. Were the construction of the GFSZA proffered by the federal government in *Tait* correct, and the required background check needed to be at least marginally adequate, an Oregon firearms permit would not entitle a licensee who could possess a firearm under federal law to possess a firearm in an area covered by the GFSZA.

To detail the analysis: The felon prohibition addressed in *Tait* is in the same section as the prohibition on unlawful users of controlled substances. If the federal government had been correct in *Tait* that the effectiveness of a license, under the GFSZA, required the issuing state to check records of felony convictions, it would also require checking of records of unlawful users of marijuana. And, because Oregon does not prohibit issuance of firearms licenses to medical marijuana users, under the federal government’s approach, the private bearing of firearms in covered locations would be prohibited in Oregon (and other states with similar laws).

B. Recognition of Permit-Free Licensure — Licensure not Involving Licensee-Specific Action

If licensure involves no governmental unit actually ascertaining that the licensee is authorized to possess a firearm, e.g., permit-free carry, there is a substantial question whether the principle against construction of statutory language as surplusage would result in such licensure not satisfying the requirements of the GFSZA. As noted above,¹¹⁹ there clearly is authority that would indicate a person authorized by statute to engage in some activity, without any licensee-specific action by any state, can be considered “licensed by the State.” However, construing the language to extend to someone who is authorized under these permit-free procedures could make redundant the following statutory language:

¹¹⁸ In particular, the court states:

The government argues that Alabama’s licensing requirements are so relaxed that they will always fail to qualify their licensees for the § 922(q)(2)(B)(ii) exception. The government maintains that Congress envisioned a background check when drafting the exception. This would require states to check for prior felonies before issuing firearms licenses. If the state failed to do so, their licenses would be valid for state purposes, but the licensees would not garner the § 922(q)(2)(B)(ii) protections. While the government’s argument is persuasive, it misses the point. Tait’s civil rights were fully restored by operation of Michigan law; hence, even if Alabama had conducted a background check, Tait would have qualified for the license so long as Alabama allowed former felons to possess firearms. Whether Tait qualified for a license under Alabama laws is discussed later in this opinion. Having determined that Alabama’s licensing procedure is not relevant to this appeal, we decline to decide whether, in general, Alabama’s licensing procedure qualifies its licensees for § 922(q)(2)(B)(ii) protections.

Tait, 202 F.3d at 1324 n.7.

The district court, on the other hand, took the position that the permit satisfied the GFSZA because the sheriff was required to engage in some verification but, evidently, that it need not include a background check (perhaps simply an affirmation from the applicant):

Since a sheriff must [sic] may issue a license only to a suitable person and state law defines who is suitable, *i.e.* who is eligible to possess a pistol, it follows that the sheriff must verify that any person to whom he issues a license is “qualified under law” as required by § 922(q)(2)(B).

The government argues that Congress intended that the verification of licensees include background checks and that Alabama’s licensing procedure does not meet this requirement. . . . [I]f Congress intended that the § 922(q)(2) exception would apply only if the state used a specific type of verification procedure it could have said so. It did not.

Tait, 54 F. Supp. 2d at 1104 (citation omitted).

¹¹⁹ See *supra* Part III.A.

the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license.¹²⁰

Although it is a cardinal canon of construction that statutory language not be construed so as to make some language surplusage, *Burwell* illustrates that canon can be avoided where its application yields odd results.¹²¹ The interpretive principles arising from federalism norms, referenced below,¹²² could also be sufficient to negate application of that canon — and in fact have in other litigation negated that canon.¹²³ We shall leave our observations on permit-free carry at that.

VI. LEGISLATIVE PURPOSES DO NOT SUPPORT THE ATF’S INTERPRETATION

Of course, a statute is construed in light of its purposes.¹²⁴ Those may be divined from the structure of the statute as a whole.¹²⁵ Or, as in the case of the GFSZA in its current form, the statutory language may expressly state the intended purposes.¹²⁶ Reference to those purposes might, in some cases, eliminate ambiguity otherwise present. However, as we shall see, neither

¹²⁰ 18 U.S.C.A. § 922(q)(2)(B)(ii).

¹²¹ See *supra* notes 105–106 and accompanying text.

¹²² See *infra* Part VIII.

¹²³ See *infra* notes 294–296 and accompanying text.

¹²⁴ *E.g.*, *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (“[T]he decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute As Holmes, J., said in a much-quoted passage from *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908): ‘it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.’ Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” (citations and parallel citation omitted)), *aff’d*, 326 U.S. 404 (1945); *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1050 (R.I. 1994) (“Thus, our primary task in construing a statute is to attribute to the enactment the meaning most consistent with its policies and with the obvious purposes of the Legislature, by viewing the statute in light of the circumstances that motivated its passage.” (citation omitted)). See *generally* 2A SINGER & SINGER, *supra* note 93, § 45:9 (discussing legislative purpose and public policy).

¹²⁵ *E.g.*, 2A SINGER & SINGER, *supra* note 93, § 46:5 (“The meaning of a statute is determined, not from special words in a single sentence or section, but from the statute as a whole and viewing the legislation in light of its general purpose.”).

¹²⁶ See *infra* text accompanying note 127.

reference to the currently codified purposes nor reference to the structure of the act as a whole eliminates ambiguity, so that it is not clear that licensure through reciprocity is intended to be excluded as a permitted method.

A. *The Codified Purposes*

Let us first turn to the codified purposes. In essence, they assert that firearms crime in school zones has an adverse impact on education, and states (and their subdivisions), even those that have made substantial efforts to prevent firearms-related crime, “find it almost impossible to handle gun-related crime by themselves . . . due in part to the failure or inability of other states or localities to take strong measures.”¹²⁷ This author’s ultimate conclusion is that these codified purposes do not illuminate the meaning of the licensure exception, because those express purposes are difficult to harmonize with the contours of the exception for licensed persons. Were the federal statute simply to enhance enforcement of violations of state law, by making violation of state law a federal crime, that would address the concern that states need assistance in enforcing their laws. Those purposes do not support a federal limit on the manner in which a state can license possession. So, they do not support adding content to the relevant statutory language concerning the manner of licensure.

The express purposes are, frankly, cryptic in light of the relevant statutory language concerning licensure mechanisms. The purposes were codified in 1994,¹²⁸ four years after initial adoption of the GFSZA,¹²⁹ following the prosecution of one Lopez but before the Court’s decision in the litigation on

¹²⁷ The statute identifies assorted harms sought to be addressed, including:

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States; [and]

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves — even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures[.]

18 U.S.C.A. § 922(q)(1)(E)–(H) (Westlaw through Pub. L. No. 114–327).

¹²⁸ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 320904, 108 Stat. 1796, 2125–26 (1994).

¹²⁹ Gun-Free School Zones Act of 1990, Pub. L. No. 101–647, § 1702, 104 Stat. 4789, 4844–45 (1990) (codified as amended at 18 U.S.C.A. § 922(q)).

appeal in *United States v. Lopez*¹³⁰ that the then-existing statute was not authorized by the Commerce Clause.¹³¹ Consistent with that context, the purposes are clearly designed to pronounce alleged adverse impacts.

The reference to conduct in one state influencing activity in another state might support, if constitutional, a federally mandated minimum review prior to licensure to possess a firearm in a school zone. But the prohibition does not provide such a substantive minimum. So, as the statutory language does not provide such a floor that states are required to adopt, the express purposes cannot realistically be construed as representing a finding that it is necessary to require some minimum set of criteria persons are to meet in order to possess a firearm within a school zone.

Crucially for our purposes, nothing in the express purposes delves into the manner by which a state implements determination of whatever minimum criteria for possession are in fact met. So, the expressly articulated purposes cannot fairly be said to support the ATF's interpretation of the GFSZA.

B. Purposes Culled from the Overall Statutory Scheme

Passing beyond the codified purposes, one might hypothesize a number of potential purposes that could support the ATF's interpretation of one being "licensed . . . by the State." We can first reject some possible purposes that might come to mind that the structure of the actual statutory language does not support.

1. Potential Purposes Negated by the Holding in Tait

The statute requires governmental officials to verify the individual is "qualified under law to receive the license."¹³² The federal government in *Tait* argued that the statute was designed to require a background check as a component of licensure recognized by the GFSZA.¹³³ In *Tait*, the court finds that the language "qualified under law" refers to state law.¹³⁴ Taking that to be the case, requiring a background check would make no sense, as a state need not prohibit issuance based on criteria that would be revealed by a background check.

¹³⁰ 514 U.S. 549, 615–18 (1995) (Breyer, J., dissenting) (noting, "Congress did make findings (though not until after Lopez was prosecuted) . . ."). An interstate commerce nexus for the crime is reflected in the statute as amended in 1996. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, Tit. VI, § 657, 110 Stat. 3009–369 to 3009–371 (1996).

¹³¹ See *Lopez*, 514 U.S. at 551.

¹³² 18 U.S.C.A. § 922(q)(2)(B)(ii).

¹³³ *United States v. Tait*, 202 F.3d 1320, 1324 (11th Cir. 2000).

¹³⁴ *Id.* at 1324.

This language, if interpreted to require some form of licensee-specific checking, could be efficacious if it were to refer to the possession being lawful under federal law as well. But federalism principles, discussed below,¹³⁵ would militate against such an interpretation, commandeering state enforcement of federal law, absent a clear statement¹³⁶ (which is missing).

This line of analysis does not render statutory language surplusage. Rather, it would operate to deprive recognition from licenses issued in violation of state law, which occasionally happens.¹³⁷

2. Potential Purposes Negated by the Statutory Language — Licensure Required to Reflect State-Specific Factors

The federal statute does not identify state-specific factors necessary for the licensure.¹³⁸ If it did, one might find a purpose that required the language to be read as mandating a state make the assessment without delegation.

For example, the federal government might have concluded that different training is required to use a firearm safely in an urban school zone as opposed to one in a rural area. Had it done so, it might have required state-specific training in order to possess a license authorizing firearms possession in a school zone. And such a scheme might not be implemented effectively where the licensee was licensed through reciprocity. But the federal statute does not reveal such a scheme.

As suggested by the statutory language, some licensing is done within states at the state level, whereas in other states it is done at a local level, e.g., by sheriffs. Where it is done at a local level, one can see an astonishing disparity within a state in the frequency with which licenses are granted. For example, over the period 1987 through 2007, one sees in California only a handful of licenses issued in San Francisco (annual counts ranging between 2 to 11), compared to Kern County (annual counts ranging from 2961 to 4314).¹³⁹ Perhaps it is county-specific circumstances that justify the vastly

¹³⁵ See *infra* notes 232–2345 and accompanying text.

¹³⁶ See *infra* Part VIII.

¹³⁷ See *infra* note 152.

¹³⁸ See *supra* note 17 and accompanying text.

¹³⁹ See CCW Counts by County, <http://ag.ca.gov/firearms/forms/pdf/ccwissuances2007.pdf> (last visited July 3, 2016). This cryptic document does not unambiguously state whether it identifies outstanding licenses for a year or issuances in the year. It may well reference outstanding licenses, because there were only three licenses outstanding in 2009 issued by San Francisco law enforcement personnel. See *Pizzo v. City & Cty. of San Francisco*, No. C 09-4493 CW, 2012 WL 6044837, at *8–10 (N.D. Cal. Dec. 5, 2012) (noting a total of three permits outstanding in 2009, one issued by San Francisco Police Department and two by the San Francisco Sheriff's Department; one James F. Harrigan, legal counsel to the sheriff, stated the sheriff has not issued a permit to "any private citizen," though he himself had been issued one of the two permits, notwithstanding his being only a civilian employee of the Sheriff's Department.). See generally Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New*

different requirements for the issuance of permits among various California counties (or other disparities throughout other states). But for purposes of the GFSZA, a permit issued by a state subdivision often is satisfactory throughout the entire state.¹⁴⁰

So, the GFSZA already contemplates that a state may identify different geographic concerns that influence permitting, but those differences do not make the licensure unsatisfactory, for purposes of the GFSZA, in locales that operate under different regimes. There is not a reason, identified in the GFSZA, why interstate variation would be inconsistent with the objectives of the GFSZA where such intrastate variation exists.

The GFSZA does not require an intrusive review of an applicant's character involving the exercise of judgment. Some state licensing regimes can involve that.¹⁴¹ Insofar as that kind of review was thought desirable, it surely would be more effective if done in a jurisdiction of residence, where applicant-specific factors would be more readily assessed.¹⁴²

3. Potential Purposes Negated by the Statutory Language — A Purpose Simply to Prohibit the Practice

One might be inclined to conclude that interpretation of the GFSZA is to be guided by a purpose simply to prohibit firearms possession in school zones. Senator Kohl introduced the Gun-Free School Zones Act in the Senate.¹⁴³ He recited an estimate that “more than 100,000 students carry guns to school every day,”¹⁴⁴ further noting:

Wave of Concealed Handgun Permit Laws, 62 TENN. L. REV. 679, 712–16 (1995) (discussing the variation within California and its relation to the rates of various crimes).

¹⁴⁰ *E.g.*, *Scocca v. Smith*, 912 F. Supp. 2d 875, 883 (N.D. Cal. 2012). However, in California, if the permit was issued on the basis of the licensee's place of employment (as opposed to the licensee's place of residence), the license is only valid in the county of issuance. CAL. PENAL CODE § 26220(b) (Westlaw through urgency legislation through Chapter 893 of 2016 Reg. Sess., Ch. 8 of 2015–2016 2nd Ex. Sess., and all propositions on 2016 ballot).

¹⁴¹ *E.g.*, N.Y. PENAL LAW § 400.00 (“No license shall be issued or renewed except for an applicant . . . (b) of good moral character . . .”) (Westlaw through L.2016, chs. 1 to 332); *Velez v. DiBella*, 77 A.D.3d 670, 670–71 (N.Y. App. Div. 2010) (affirming denial of permit issuance where the licensing officer referenced applicant's criminal history comprising one disorderly conduct conviction and five arrests resulting in dismissal of charges or resolution in the applicant's favor; stating, “The fact that five of the petitioner's arrests resulted in the dismissal of the charges against him or were resolved in his favor, did not preclude the respondent from considering the underlying circumstances surrounding those arrests in denying the application.” (citations omitted)).

¹⁴² *See, e.g.*, *Osterweil v. Bartlett*, 819 F. Supp. 2d 72, 85 (N.D.N.Y. 2011) (applying intermediate scrutiny in rejecting a Second Amendment claim, finding “The State is in a considerably better position to monitor its residents' eligibility for firearms licenses as compared to nonresidents.”), *vacated*, 738 F.3d 520 (2d Cir. 2013). That suggests licensure through reciprocity may be superior.

¹⁴³ 136 Cong. Rec. 1161, 1165 (Feb. 5, 1990).

¹⁴⁴ 136 Cong. Rec. 27,431 (Oct. 4, 1990) (statement of Sen. Herbert Kohl).

As a step in the right direction, I am pleased that this body unanimously adopted S. 2070, my Gun-Free School Zones Act, as part of the omnibus crime bill. The act would make it a [f]ederal crime to bring a gun within 1,000 feet of a school or to fire a gun in that zone.¹⁴⁵

The act as adopted by Congress contained the identical language introduced by Senator Kohl in February concerning an exception for licensed persons (but for one comma).¹⁴⁶ Because the statutory language contained from the time it was proposed an exception for licensed persons, it is not amenable to being construed as having an outright ban as its purpose.

It might be amenable to construction indicating a purpose to require someone to check that any subject's possession of a firearm was lawful before the licensure. But, as noted above,¹⁴⁷ that construction was directly rejected by the court in *United States v. Tait*.¹⁴⁸ And, in any case, the interpretive issue that is the subject of this Article involves whether any required checking can be delegated to the subject's state of residence. If the purpose is to assure the checking is done, such a delegation is not inconsistent with the purpose, unless the purpose represents malignant suppression of exercise of firearms rights, by simply making it more burdensome for a state to effect the licensure it wants to allow. Were there such a malignant purpose, it should be disregarded.¹⁴⁹

4. Facilitating State Control of Its Inferiors

It is at least conceivable that a state might benefit from federal assistance in assuring the state's inferior officers, or its subdivisions, do not violate state

¹⁴⁵ 136 Cong. Rec. 27,431 (Oct. 4, 1990). In February of that year, in introducing the bill, he referenced additional exceptions (for school-approved programs, law enforcement officers, unloaded guns in locked containers and possession on private property that is not part of school grounds), but did not reference the licensure exception. 136 Cong. Rec. 1165 (Feb. 5, 1990).

¹⁴⁶ See 136 Cong. Rec. 1165 (Feb. 5, 1990). The only differences between the language of the exception as first proposed in the Senate by Senator Kohl and the currently codified version are the addition of one comma and the correction of a typographical error. Compare 136 Cong. Rec. 1165 (Feb. 5, 1990) and Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (codified as amended at 18 U.S.C.A. § 922(q) (Westlaw through Pub. L. 114-327) (adding 18 U.S.C.A. § 922(q)(B)(ii), as part of the newly adopted 18 U.S.C.A. 922(q)), with 18 U.S.C.A. § 922(q)(2)(B)(ii) (providing identical language, other than punctuation and the substitution of "obtains" for "obtain").

¹⁴⁷ See *supra* notes 112-118, 132-136 and accompanying text.

¹⁴⁸ 202 F.3d 1320, 1324 (11th Cir. 2000).

¹⁴⁹ Such a purpose would be in tension with interpretive notions under which federal statutes are construed so as not to interfere with a state's discharge of its sovereign functions. See generally *infra* note 161. It would turn such a purpose on its head.

law in permit issuance.¹⁵⁰ One can readily locate circumstances involving the alleged failure to conform to the obligations imposed by the permitting process, resulting in allegedly wrongful denial of a permit.¹⁵¹ The other type of malfeasance, a wrongful issuance of a permit, is more difficult, but not impossible, to identify.¹⁵² One might venture that the statute is designed to restrain faithless functionaries bent on wrongfully issuing permits to some select set of favored persons, by substantially restricting the utility of those permits. One supposes a legislature might conjecture that the improper issuance of permits is more widespread than evidenced by litigated cases, by virtue of the typical absence of standing to litigate, or an actual interest in litigating, an allegedly improper issuance of a permit. So, the under-identified problem might warrant a remedy.

But even were one to extract this purpose from the statutory language, that would not support either a conclusion that the GFSZA requires some licensee-specific action be taken or a conclusion that the GFSZA prohibits delegation of the licensure process to a nonresident's state of residence. This purpose would influence the manner in which delegates went about the process of issuing permits, not what is to be checked and to whom a state chose to delegate the performance.

¹⁵⁰ The local licensure of firearms possession can be haphazard. *See generally* Cramer & Kopel, *supra* note 139, at 683 (discussing the 1992 issuance of a permit to the new police chief of Los Angeles, the first issuance of a permit after 1984 in the City of Los Angeles; the chief could not qualify to be a police officer in Los Angeles, for failure of the Police Officer Standards and Training test, though he could retain his appointed post).

¹⁵¹ *E.g.*, *Miller v. Collier*, 878 P.2d 141, 143, 145 (Colo. App. 1994) (reinstating claims alleging police chief, in violation of state law, failed to promulgate rules concerning issuance of permits and alleging "while defendants issue concealed weapons permits to law enforcement officers, government employees, and private citizens who are former law enforcement officers 'on a select basis,' they have refused since May of 1992 to issue permits to other private citizens such as plaintiffs."); *Comm'r of Pub. Safety v. Bd. of Firearms Permit Exam'rs*, 21 A.3d 847 (Conn. App. Ct. 2011) (affirming administrative review reversing revocation of permit); *De La Cruz v. Parella*, Nos. 16-167-M.P., 16-168-M.P., 16-190-M.P., 2016 WL 6395934 (R.I. Oct. 25, 2016) (ordering police chief to enter new decisions on applications, setting forth factual findings, stating the chief had failed to follow the court's prior holding in *Gadomski v. Tavares*, 113 A.3d 387 (R.I. 2015)). *See generally* Ann K. Wooster, Annotation, *Judicial Review of State or Local Administrative Order Approving, Denying, or Revoking Permit or License to Carry, Possess, or Own Firearm*, 91 A.L.R.6th 435 (2014).

¹⁵² *See, e.g.*, Wooster, *supra* note 151 (providing limited illustrations). *Crawford v. State*, 356 So. 2d 690 (Ala. Crim. App. 1978), holds that a permit unlawfully issued to one previously convicted of a crime of violence was invalid and was, therefore, not a basis to invalidate a subsequent conviction of possessing a pistol after having been convicted of committing a crime of violence. The opinion does not clarify why the permit was issued, though it references an unanswered application question concerning prior criminal convictions. *Id.* at 690. Another invalid permit issuance is discussed in *Ex parte Johnson*, 620 So. 2d 665, 666 (Ala. 1993).

5. Capturing the Identities of Licensed Persons & Facilitating Searches

One might envision that the federal government had in mind certain procedures that would allegedly enhance the effectiveness of law enforcement in school zones. That could include requiring that the licensure process necessarily allow generation of a list of persons authorized to carry firearms in a school zone. This purpose would not support a conclusion that the GFSZA prohibits delegation of the licensure process to a nonresident's state of residence. There would still be a list that could be checked.¹⁵³ This purpose, were it clearly adopted, would, however, militate against recognition of authorization not involving licensee-specific acts.

Occasionally, an argument is made that it is desirable to be able to extend the circumstances where persons can be searched for firearms possession absent probable cause and a warrant (or exigent circumstances). For example, one amicus brief in *McDonald v. City of Chicago*¹⁵⁴ unsuccessfully sought to support a claim that “[t]he Second Amendment’s right to bear arms is not enforceable against state and local governments by virtue of the Fourteenth Amendment”¹⁵⁵ by arguing the opposite result would decrease the ability to “frisk” members of the public for firearms.¹⁵⁶

¹⁵³ One might quibble that the list is of less practical utility. That does not seem well-founded. If state permits had a limited scope, so that one could easily identify a limited number of persons who had authority to possess a firearm in a particular school zone, there might be an issue.

Let’s say that a state’s permits were only valid in a particular county, and there was no reciprocity. That would allow generation of a relatively compact list of persons authorized to possess a firearm in a particular school zone. So, were one to seek to identify the persons authorized to possess a firearm in a particular school zone for some law enforcement purpose, that list might be rather short. And it would be more practical to investigate the identified persons than would be the case were all permit holders from a number of other states required to be checked.

However, state permits are not necessarily restricted to some state subdivision. *See, e.g., supra* note 140. So, for example, even without reciprocity, were one to seek, for law enforcement purposes, to get a list of all persons authorized to possess firearms in a particular school zone, the list would extend to all persons authorized by the state. So, allowing reciprocity does not necessarily give rise to a transition between being able to check a compact list and having to check a very lengthy list. That permits can be valid state-wide means there will be a long list in either case.

¹⁵⁴ 561 U.S. 742 (2010).

¹⁵⁵ Brief of the United States Conference of Mayors as Amicus Curiae Supporting Respondents at 2–3, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08–1521) (citations omitted).

¹⁵⁶ For example, a brief filed by the General Counsel of the U.S. Conference of Mayors and Prof. Lawrence Rosenthal of Chapman University in *McDonald v. City of Chicago* argues:

Firearms regulation plays a central role in enhancing police authority to engage in stop-and-frisk tactics. When applicable law bans the possession or carrying of firearms, a stop and frisk conducted by an officer who reasonably suspects that an individual is illegally carrying a firearm — such as a suspicious bulge in a waistband — is considered constitutionally reasonable. When applicable law generally permits individuals to carry firearms, however, the Fourth Amendment does not permit a stop-and-frisk even when there is reason to believe that a suspect is armed or dangerous because there is no indication of a violation of law.

This odious¹⁵⁷ objective would nevertheless be capable of realization, at least in some jurisdictions,¹⁵⁸ if the GFSZA recognized licensure through reciprocity. But it would be inconsistent with blanket authorization (not involving licensee-specific acts).

6. Conclusion

In sum, the term “licensed . . . by the State” does not, by itself, i.e., without reference to anything else, unambiguously prohibit delegation of an otherwise satisfactory licensure process to a nonresident’s state of residence — either it is ambiguous in that regard or it unambiguously allows that delegation. The discussion in this Part VI supports the determination that conclusion is not varied by referencing the evident purposes of the act as a whole. And if that is the case, the federalism principles examined below¹⁵⁹ would require the ambiguity to be construed in favor of allowing the delegation.

Some possible purposes might support exclusion, from licenses effective for purposes of the GFSZA, of licensure not involving licensee-specific action. As that broader question is not at the heart of this Article’s investigation, we shall not dally further on that issue.

VII. FEDERALISM MILITATES AGAINST THE ATF’S INTERPRETATION

A. Introduction

An interpretation of the Gun-Free School Zones Act, as amended, under which a state cannot license through reciprocity nonresident firearm

Brief of the United States Conference of Mayors as Amicus Curiae Supporting Respondents at 14, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08–1521) (citations omitted).

There is authority allowing a *Terry* stop of an individual identified as carrying a firearm where a license is a defense to a crime involving possession of a firearm and the officer does not know whether the possessor is licensed. *E.g.*, *GeorgiaCarry.Org, Inc. v. Metro. Atlanta Rapid Transit Auth.*, No. CIV.A 109–CV–594–TWT, 2009 WL 5033444, at *5 (N.D. Ga. Dec. 14, 2009) (citing, *e.g.*, *State v. Timberlake*, 744 N.W.2d 390 (Minn. 2008)). *But see, e.g.*, *United States v. Ubiles*, 224 F.3d 213, 217 (3d Cir. 2000) (stating, “[N]or does a mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry* . . .”). But where the possession is generally allowed, the fact that a person possesses a firearm does not, “by itself, create a reasonable suspicion sufficient to justify an investigatory detention.” *St. John v. McColley*, 653 F. Supp. 2d 1155, 1161 (D.N.M. 2009).

¹⁵⁷ See generally *Pulley v. Commonwealth*, 481 S.W.3d 520, 526 (Ky. Ct. App. 2016) (“[A] *Terry* search may not be conducted to discover evidence of crime.”) (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

¹⁵⁸ See *supra* note 156.

¹⁵⁹ See *infra* Part VII.

possession in covered areas raises a number of federalism issues. A number of components of those federalism concerns representing different levels of abstractions (some are subsets of another) are examined in this Part VII and Part VIII.¹⁶⁰ To be clear, this listing represents the topics explored in further detail below; the descriptions of the topics are not summaries of the relevant analyses or conclusions.

First, “the Constitution was . . . intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise.”¹⁶¹ Under *Printz v. United States*,¹⁶² the federal government is restricted in commandeering states for the implementation of federal regulatory schemes.

Second, “How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”¹⁶³ That issue is presented because the ATF’s interpretation of the GFSZA impinges on the manner in which a state may engage in decision-

¹⁶⁰ There are other potentially relevant principles. For example, one might consider whether at least some reciprocity arrangements are compacts subject to the Constitution’s Interstate Compact Clause, Art. I, § 10, cl. 3. These reciprocity arrangements do not seem to be within the scope of compacts requiring congressional approval under the Constitution’s Interstate Compact Clause. “The application of the Compact Clause is limited to agreements that are ‘Directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.’” *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). Licensure of firearms possession by reciprocity would not seem to tend to increase the political power of the states. Moreover, modern application of this restriction is toothless. *See, e.g.,* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 766 (2010) (“In fact, no court, at any level, has ever found an interstate agreement lacking congressional approval to encroach on federal supremacy.”). *See generally* *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (finding the Interstate Compact on Placement of Children does not need congressional approval, citing the compact’s regulation of “areas of jurisdiction historically retained by the states”).

¹⁶¹ *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (Black, J., announcing judgments of the Court). *See also, e.g.,* *New York v. United States*, 505 U.S. 144, 162–63 (1992) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)); *South Carolina v. United States*, 199 U.S. 437, 451 (1905) (“Among those matters which are implied, though not expressed, is that the nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government . . .”), *abrogated by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543 (1985); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (“Without the States in union there could be no such political body as the United States. . . . [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.”); *see also infra* notes 218–222 and accompanying text.

This Article focuses on the application of case law to a precise context. A broader survey of the relevant scholarship is beyond the scope of this Article. For a recent, apt, broader relevant discussion of scholarly perspectives, *see* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016).

¹⁶² 521 U.S. 898 (1997).

¹⁶³ *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

making. So, federalism principles could restrict federal dictation of the manner of state decision-making.

Third, the extent to which those federalism principles may restrict federal limits on the manner of state decision-making often is not resolved by litigation. That is a consequence of the following interpretive principle: “[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”¹⁶⁴

Fourth, the validity of the ATF’s position requires that the federal government would have the authority to impose an outright ban on firearms possession in school zones. One might question whether the federal government does have that authority, given the scope of the possible¹⁶⁵ impingement on the rights secured by the Second Amendment.

The above order seems to be the easiest way to list the relevant issues and some of their components. However, the textual development of these issues is most suitably presented in a different order. We shall first examine, in Part VII.B, perhaps the most prominent issue: the extent to which the federal government may commandeer state actors in implementing a federal regulatory scheme.

However, as interpreted by the ATF, the GFSZA is not simple commandeering. Rather, it leaves states with a second choice — having private firearms possession banned in the covered areas. Part VII.C details the principles involving such choices, which often arise in the context of challenges to federal spending programs. As noted there, a federal regulation is infirm where a state is relegated to a set of choices none of which the federal government can command. Part VII.C then details the substantial question of whether the federal government could impose the choice not involving commandeering — whether it could ban private firearms possession in covered areas. The questions are substantial.

Lastly, Part VIII turns to the interpretive bias, under which courts avoid such problems by “construing” statutes so as not to raise federalism concerns.¹⁶⁶ To put the issue in context, Part VIII examines a quite limited

¹⁶⁴ *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

¹⁶⁵ “Possible” because the Supreme Court apparently has not held the Second Amendment protects firearms possession outside the home. *But see infra* notes 186–193 and accompanying text.

¹⁶⁶ A related theory might result in a court rejecting the ATF’s interpretation. The ATF’s interpretation produces anomalous results. Some states do not license nonresidents; others will. Of those that do not, some rely on reciprocity, e.g., Missouri, MO. ANN. STAT. § 571.030.4 (Westlaw through emergency legislation approved through July 5, 2016) (recognizing all permits); *id.* § 571.101.2(1) (limiting licenses to Missouri residents, armed forces members stationed in Missouri and spouses of such

set of authority that suggests the intrusion into the state sphere is too great even if there is an alternative option that the federal government could require (banning firearms possession in the covered area). Part VIII then details the manner in which the interpretive bias is applied, under which courts avoid federalism concerns by what is styled as interpretation.

B. Commandeering: The Federal Government Cannot Require States to License Firearms Possession in a Particular Manner

As the Supreme Court notes in *New York v. United States*,¹⁶⁷ delegates to the Constitutional Convention contemplated the possibility that a new Constitution would exercise authority directly over states.¹⁶⁸ The Court notes the following in discussing the Constitutional Convention's rejection of that approach: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."¹⁶⁹

Under these principles, Congress would not have the authority to commandeer states to engage in licensing persons entitled to possess firearms in school zones, even if Congress could directly prohibit possession

members; not authorizing general issuance of permits to nonresidents). On the other hand, Idaho, which recognizes all out-of-state permits, IDAHO CODE ANN. § 18-3302(5)(g), will issue permits to nonresidents. IDAHO CODE ANN. § 18-3302(11) (Westlaw through the 2016 Second Regular Session of the 63rd Idaho Legislature).

This circumstance creates a regulatory patchwork completely unrelated to any legitimate governmental interest if the ATF's interpretation is correct. States that recognize all out-of-state permits have, from their perspective, concluded those nonresidents licensed out-of-state are suitable to carry concealed firearms generally throughout the state. However, for the subset of states comprising those that do not license nonresidents, the ATF's interpretation, if correct, would result in all nonresidents being banned from possessing firearms in covered areas. There are not heightened federal governmental interests in banning private firearms possession in the states that license nonresidents only by reciprocity. And the lines drawn also are unrelated to any federal governmental interest because, according to *United States v. Tait*, 202 F.3d 1320, 1324 (11th Cir. 2000), in adopting the GFSZA, Congress sought to defer to whatever licensure regulations the relevant state has adopted.

These circumstances would make it very difficult to conclude that the ban is consistent with whatever level of scrutiny would apply, *see generally infra* notes 197-200 and accompanying text, if the Second Amendment extends to possession outside the home. *See infra* notes 186-195 and accompanying text. Understanding the existence of a substantial constitutional question arises from the ATF's interpretation on this basis as well, a court could similarly be inclined to avoid the ATF's construction. *See generally* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (describing that approach as "modern avoidance").

¹⁶⁷ 505 U.S. 144 (1992).

¹⁶⁸ *Id.* at 164-65.

¹⁶⁹ *Id.* at 166 (citations omitted).

of firearms in school zones.¹⁷⁰ We are here discussing a direct requirement, as opposed to conditioning a state's receipt of federal funds on the state participating in that activity, which would be subject to a different analysis.¹⁷¹

*Printz v. United States*¹⁷² presents a circumstance similar to any attempt by the federal government to require that states participate in licensing firearms possession in areas covered by the GFSZA. It involves a statute requiring that for handgun sales by dealers, some local chief law enforcement officers “make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.”¹⁷³ In concluding the statute is infirm, the Court notes that the Constitution obligates the President to execute federal law.¹⁷⁴ It continues:

The Brady Act effectively transfers this responsibility to thousands of CLEOs[, chief law enforcement officers,] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive — to ensure both vigor and accountability — is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively

¹⁷⁰ See *id.* (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”). Whether the federal government could prevent that possession is discussed *infra* notes 197–216 and accompanying text.

¹⁷¹ See generally *South Dakota v. Dole*, 483 U.S. 203 (1987); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (discussed *infra* note 183 and accompanying text).

¹⁷² 521 U.S. 898 (1997).

¹⁷³ *Id.* at 903. The statute excluded officers in states that developed an instant background check system or that issued handgun permits after a statutorily-described background check. *Id.*

¹⁷⁴ See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2181 (1998) (discussing the historical support for, and lack of support for, the holding in *Printz*); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, The New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1603–04 (2012) (discussing the possibility that vesting of executive powers in states “encroach[es] on the president’s duty to superintend the implementation of federal law”).

without the President as with him, by simply requiring state officers to execute its laws.¹⁷⁵

The Court concludes that it does not make a difference whether the federal statute directs the states themselves or their officers.¹⁷⁶ And it concludes balancing of burdens on the state, compared to the benefits of the act, is inapposite where the object of the federal statute is to direct the functioning of state officers, as opposed to merely imposing an incidental burden on them.¹⁷⁷

Additionally apt is comparison with *Willis v. Winters*,¹⁷⁸ in which local sheriffs asserted that they need not issue concealed handgun licenses to persons who met the requirements of state law but who, as unlawful users of controlled substances,¹⁷⁹ would violate federal law were they to possess firearms:¹⁸⁰

It follows from that “anti-commandeering” principle that Congress lacks authority to require the states to use their gun licensing mechanisms to advance a particular federal purpose. . . . The state’s decision not to use its gun licensing mechanism as a means of enforcing federal law does not pose an obstacle to the enforcement of that law. Federal officials can effectively enforce the federal prohibition on gun possession by marijuana users by arresting and turning over for prosecution those who violate it.¹⁸¹

¹⁷⁵ 521 U.S. at 922–23 (citations omitted). Gerken describes the commandeering principles as follows: “The prohibition on commandeering may be fuzzy at the edges, but it’s a workable rule that corresponds to a basic intuition: Congress can’t take over states’ governing apparatuses and force them to do its bidding.” Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 101 (2014).

¹⁷⁶ 521 U.S. at 930 (“The Brady Act, the dissent asserts, is different from the “take title” provisions invalidated in *New York* because the former is addressed to individuals — namely, CLEOs — while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one.”).

¹⁷⁷ *Id.* at 931–32.

¹⁷⁸ 253 P.3d 1058 (Or. 2011).

¹⁷⁹ *See id.* at 1060 (referencing possession of medical marijuana pursuant to registry identification cards issued under the state’s medical marijuana act).

¹⁸⁰ *See* 18 U.S.C.A. § 922(g)(3) (Westlaw through Pub. L. No. 114–327) (criminalizing, *inter alia*, the possession by such a person of a firearm or ammunition that has been shipped in interstate or foreign commerce).

¹⁸¹ *Willis*, 253 P.3d at 1066 (citations omitted) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)). *See generally supra* note 117.

Directly commandeering state or local officials to ascertain those persons who are entitled to possess a firearm in a school zone, by mandating the type of background check at issue in *Printz*, is clearly invalidated by the analysis in *Printz*. Because *Printz* expressly rejects balancing of the state burdens and the federal benefits,¹⁸² it is irrelevant whether there may be heightened needs to assure firearms are not possessed in school zones. *Printz* expressly rejects balancing for this type of direct commandeering.

C. Prohibited Alternative

1. Overview

Of course, the Gun-Free School Zones Act, as amended, does not effect such a direct commandeering. It does not expressly require a state to participate in any way in licensing private party possession of a firearm in a covered area. Rather, it provides each state a choice: either the state chooses to license a person, in the fashion contemplated by the statute, or that person's possession in a covered area is prohibited under federal law. This distinction is significant in analyzing the ATF's interpretation.

This type of choice is often encountered in cases upholding federal regulation of interstate commerce. Where the federal government has the authority to regulate activity in a state directly, that regulation is not rendered infirm by providing a state with an alternative under which the state participates in implementation of a federal scheme. The state's option to decline to participate, and subject its citizens to lawful, direct federal regulation, validates the arrangement.

This approach would fail to validate the ATF's interpretation, of course, if the federal government would not have the authority to ban firearms possession in the covered areas. This Part VII.C examines the arguments supporting each side. Each position is at least plausible and could be asserted in good faith.

New York v. United States articulates the basic framework for examining federal statutory regulation of state action that presents states with the type of choice at issue in the Gun-Free School Zones Act, as amended:

First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending;

¹⁸² See *supra* note 177 and accompanying text.

otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices. [*South Dakota v.*] *Dole* was one such case: The Court found no constitutional flaw in a federal statute directing the Secretary of Transportation to withhold federal highway funds from States failing to adopt Congress' choice of a minimum drinking age. Similar examples abound.

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes.¹⁸³

¹⁸³ 505 U.S. 144, 167 (1992) (citations omitted) (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)). See generally Krotoszynski, *supra* note 174, at 1645–53 (discussing the implications of accountability of cooperative federalism); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 617 (2011) (stating, "[T]he Court has routinely upheld clearly stated funding conditions that violate no independent constitutional bar, no matter the amount of funds involved or the tangential relationship a funding condition may bear to the federal program of which it is part." (citing Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 464–69 (2003))).

In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), seven justices found an invalid exercise of spending authority the "threatening to withhold all of a State's Medicaid grants, unless" the "State[] . . . expand[s] . . . [its] Medicaid program[] by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line." 135 S. Ct. at 2601 (Roberts, C.J., joined by Breyer & Kagan, JJ.); see *id.* at 2662 (dissenting joint opinion of Scalia, Kennedy, Alito & Thomas, JJ.) ("In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the ant coercion rule does not apply in this case, then there is no such rule."); *id.* at 2666. Following *Dole*, Justice Roberts' opinion states, "We accordingly asked whether 'the financial inducement offered by Congress' was 'so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 2604 (Roberts, C.J., joined by Breyer & Kagan, JJ.) (quoting *Dole*, 483 U.S. at 211). Justice Roberts, speaking for himself and Justices Breyer and Kagan, concludes, "In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' — it is a gun to the head. . . . The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 2604–05. The dissenting joint opinion of Justices Scalia, Kennedy, Alito and Thomas also concludes the act is impermissibly coercive. See *id.* at 2666 (dissenting joint opinion of Scalia, Kennedy, Alito & Thomas, JJ.).

The Court ties these principles to a notion that federal compulsion of state regulation problematically attenuates political accountability. The Court states, “Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”¹⁸⁴

In *New York v. United States*, the Court applies these principles to a federal regulation that requires a state either to take title to radioactive waste or to regulate it according to federally mandated instructions. The Court concludes that mandating this choice, involving options neither of which the federal government could individually command, is infirm:

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.¹⁸⁵

The Gun-Free School Zones Act, as amended, as it is interpreted by the ATF, presents a choice to states. Each state can:

- ban nonresident possession of firearms in covered areas; or
- allow it to those nonresidents whom the state itself directly licenses, without having delegated processing of the licensure to another state.

Given the scope of the area covered by the GFSZA, there is a substantial question whether a federal ban on private firearms possession in the covered areas would comport with the Second Amendment.

Whether the federal government could ban private firearms possession in locations covered by the Gun-Free School Zones Act, as amended, is not resolved by incontestable authority. There are two primary factors relevant to analyzing the issue:

¹⁸⁴ 505 U.S at 168.

¹⁸⁵ *Id.* at 176. *See generally* *Mickelsen Farms, LLC v. Animal & Plant Health Inspection Servs.*, No. 1:15-CV-00143-EJL-CWD, 2016 WL 1048857, at *6 (D. Idaho Mar. 11, 2016) (holding a plaintiff adequately alleges violation of the Tenth Amendment by an agency rule, *see* 7 C.F.R. § 301.86-2(b) (Westlaw through June 30, 2016), that provided that assorted crops from an entire state will be quarantined unless a Federal agency administrator determines the state “has adopted restrictions on the intrastate movement of regulated articles that are equivalent to the interstate requirements promulgated by [the agency].”).

(i) whether any right to bear arms secured by the Second Amendment is limited to the home or some subset of private locations (and does not extend to bearing arms while traveling between those locations); and

(ii) if not, whether the geographic restriction would comport with whatever type of scrutiny a court found applicable.

2. *Whether Any Right to Bear Arms Secured by the Second Amendment Is Limited to Private Locations*

Contemporary authority does not unambiguously hold that the Second Amendment secures a right to bear arms in public. One could argue that the language in *District of Columbia v. Heller*¹⁸⁶ compels the conclusion that it does. In seeking a rehearing in *Peruta v. County of San Diego*,¹⁸⁷ Donald Kilmer and Alan Gura unsuccessfully so argued.¹⁸⁸

Although one can make that argument, precedents in the Federal Courts of Appeals have not consistently read *District of Columbia v. Heller* in that manner. However, those courts typically have either found such a right to bear arms in public exists¹⁸⁹ or assumed that it does,¹⁹⁰ although there is

¹⁸⁶ 554 U.S. 570 (2008).

¹⁸⁷ Nos. 10–56971 & 11–16255, 2016 WL 3194315 (9th Cir. June 9, 2016).

¹⁸⁸ They argued:

It is also incorrect to claim that the question of whether there is a right to carry a handgun “was left open by the Supreme Court in *Heller*.” As Justice Ginsburg’s definition of “bear arms” makes clear, “[a]t the time of the founding, as now, to ‘bear’ meant to ‘carry.’” The Supreme Court repeatedly referred to “the Second Amendment right, protecting only individuals’ liberty to keep *and carry arms*.” This was not mere dicta. The Supreme Court expounded on the meaning of “bear arms” because the District of Columbia and its allies argued that the term had an exclusively militaristic idiomatic meaning that informed a collectivist purpose of the “right.” To decide the case, the Supreme Court was called upon to define the term “bear arms,” and found that “it in no way connotes participation in a structured military organization.” “In numerous instances, ‘bear arms’ was unambiguously used to refer to the carrying of weapons outside of an organized militia.”

Appellants’ Petition for Full Court en Banc Rehearing, *Richards v. Prieto* at 8–9, No. 11–16255 (9th Cir. June 23, 2016) (citations omitted), *reh’g denied*, *Peruta v. County of San Diego*, No. 10–56971 (9th Cir. Aug. 15, 2016).

¹⁸⁹ *Wrenn v. District of Columbia*, No. 16–7025, 2017 WL 3138111, at *4 (D.C. Cir. July 25, 2017) (“[T]he Amendment’s core generally covers carrying in public for self-defense.”); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (“A right to bear arms thus implies a right to carry a loaded gun outside the home.”); *cf. Norman v. State*, 215 So. 3d 18, 36 (Fla. 2017) (stating, “The law prohibits, in most instances, one manner of carrying arms in public, thereby implicating the ‘central component’ of the Second Amendment — the right of self-defense.”), *reh’g denied*, No. SC15–650, 2017 WL 1365211 (Fla. Apr. 13, 2017), *petition for cert. filed*, No. 17–68 (U.S. July 13, 2017); *People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013).

¹⁹⁰ *Drake v. Filko*, 724 F.3d 426, 434 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (“[T]he Amendment

some contrary authority.¹⁹¹ Moreover, assorted older authority¹⁹² holds that the Second Amendment does extend to possession in public.¹⁹³

must have some application in the very different context of the public possession of firearms. Our analysis proceeds on this assumption.” (citation omitted)); *Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) (“We agree with Judge Wilkinson’s cautionary holding in *United States v. Masciandaro*, that we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home, including as to ‘what sliding scales of scrutiny might apply.’ As he said, the whole matter is a ‘vast terra incognita that courts should enter only upon necessity and only then by small degree.’” (citation omitted) (quoting *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011))). *See generally* *Wesson v. Town of Salisbury*, 13 F. Supp. 3d 171, 178 (D. Mass. 2014) (invalidating restriction, including on transport to training, of one having an out-of-state marijuana conviction of the type that, had it been in-state, would not have prohibited licensure); *State v. DeCiccio*, 105 A.3d 165, 210 (Conn. 2014) (invalidating proscription on possession outside the home as applied to transportation to a new home).

¹⁹¹ *E.g.*, *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008) (“Important questions about the reach of *Heller* remain to be answered, but what assuredly is not ‘clear’ and ‘obvious’ from the decision is that it dictates an understanding of the Second Amendment which would compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined.”); *Williams v. State*, 10 A.3d 1167, 1169 (Md. 2011) (“We shall hold that Section 4–203(a)(1)(i) of the Criminal Law Article, which prohibits wearing, carrying, or transporting a handgun, without a permit and outside of one’s home, is outside of the scope of the Second Amendment.”); *Commonwealth v. Caetano*, 26 N.E.3d 688, 695 (Mass. 2015) (cryptically eliding the issue, where the person asserting the right had been homeless and was living in a hotel), *judgment vacated sub nom.* *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016). *See generally* *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (“There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here.”).

¹⁹² The Supreme Court addresses in *Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833), whether a different provision in the Bill of Rights is applicable to the states. The Court states, “We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.” The incorporation of the Second Amendment as applicable to the states was modernly confirmed in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In the intervening period, i.e., after the Supreme Court’s decision in *Barron*, some authority nevertheless treated the Second Amendment as extending to the states. *See Nunn v. State*, 1 Ga. 243, 250 (Ga. 1846) (“The language of the second amendment is broad enough to embrace both Federal and State governments — nor is there anything in its terms which restricts its meaning.”).

¹⁹³ *E.g.*, *Nunn*, 1 Ga. at 251; *In re Brickey*, 70 P. 609, 609 (Idaho 1902) (relying on both the Second Amendment and the state constitution); *State v. Chandler*, 5 La. Ann. 489, 489–90 (La. 1850). *See* NICHOLAS J. JOHNSON ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY* 253–88 (2012), for a cogent presentation of much of the relevant authority discussed in this note. The pertinent authority often holds the manner of possession can be restricted. *E.g.*, *Nunn*, 1 Ga. at 251 (“We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence, or of his constitutional right to keep and bear arms.”); *Chandler*, 5 La. Ann. at 489–90.

Some older authority allowed bans on the concealed carrying of a firearm where open carrying was permitted. *E.g.*, *State v. Reid*, 1 Ala. 612, 616–17 (1840) (upholding an act styled, “To suppress the evil practice of carrying weapons secretly,” stating, “We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”). In the Nineteenth Century, concealing a carried firearm was then viewed with substantial suspicion. *E.g.*, *Owen v. State*, 31 Ala. 387, 388–89 (1858) (stating, as to a statute

One may contextualize the interpretive issue by referencing the circumstances surrounding the adoption of the Fourteenth Amendment. Clayton Cramer concludes that racially tinged state firearms regulations precipitated the adoption of the Fourteenth Amendment.¹⁹⁴ Nicholas

criminalizing the concealed carrying of a firearm, “It is a mere regulation of the manner in which certain weapons are to be borne; a regulation, the object of which was to promote personal security, and to advance public morals. To that end, it prohibits the bearing of certain weapons, ‘in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others.’” (quoting *State v. Reid*, 1 Ala. at 617); *Dunston v. State*, 27 So. 333, 334 (Ala. 1900) (“One of the objects of the law is the avoidance of bad influences which the wearing of a concealed deadly weapon may exert upon the wearer himself, and which in that way, as well as by the weapon’s obscured convenience for use, may tend to the insecurity of other persons.”); *Chandler*, 5 La. Ann. at 489–90 (“The act of the 25th of March, 1813, makes it a misdemeanor to be ‘found with a concealed weapon, such as a dirk, dagger, knife, pistol, or any other deadly weapon concealed in his bosom, coat, or any other place about him, that does not appear in full open view.’ This law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man’s right to carry arms (to use its words) “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.”). Cf. *Ex parte Luening*, 84 P. 445, 446 (Cal. Ct. App. 1906) (stating, “The habit of carrying concealed weapons is one of the most fruitful sources of crime, and, in our opinion, may be entirely prohibited by the proper authorities,” and implying the practice “is a menace to public safety, injurious to the public welfare”); *In re Brickey*, 70 P. at 609 (stating a particular statute “does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice”).

In the contemporary construct, the open carrying of firearms is often viewed as more confrontational than the concealed carrying of firearms. See MASSAD F. AYOUB, *THE GUN DIGEST BOOK OF CONCEALED CARRY* 208 (2d ed. 2012) (discussing the relative merits of open carry and concealed carry, identifying as a factor militating against the former, “Open carry makes enemies for the pro-gun movement, instead of friends. The vast majority of the American public does not see others that they know to be law-abiding private citizens do so. Therefore, says this argument, they are frightened when they observe guns worn openly by people not readily identified as those they are ‘socialized’ to seeing armed, such as armed guards and police officers, and are therefore frightened when they see ordinary folks with guns on their hips.”); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1521 (2009) (“In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.”); James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry after Heller*, 97 CORNELL L. REV. 907, 924 (2012) (discussing the transition from open carry to concealed carry regimes).

¹⁹⁴ Cramer writes:

The end of slavery in 1865 did not eliminate the problems of racist gun control laws. The various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms or bowie knives. These Codes are sufficiently well-known that any reasonably complete history of the Reconstruction period mentions them. These restrictive gun laws played a part in provoking Republican efforts to get the Fourteenth Amendment passed. Republicans in Congress apparently believed that it would be difficult for night riders to provoke terror in freedmen who were returning fire. It appears that the Fourteenth Amendment’s requirement to treat blacks and whites equally before the law led to the adoption of restrictive firearms laws in the South that were equal in the letter of the law, but unequally enforced.

Johnson et al. note a repeating pattern in which freedmen would be forcibly disarmed, facilitating subsequent intimidation and violence.¹⁹⁵ Insofar as a purpose of the Fourteenth Amendment was to allow citizens to defend themselves from those who were threatening violence motivated by racial animus, limiting the Second Amendment rights to one's home is inconsistent with effectuating the purpose. A restriction on the time or place of the exercise of a right to bear arms is, of course, not comparable to such a restriction on free speech rights. Being able to defend oneself at some time or place cannot substitute for being unable to do so at another time or place.¹⁹⁶ Physical injury or death arising from being defenseless at some time or location is in no way mitigated by having been able to defend oneself at another time or location.

3. Constitutionality of a Ban Were a State Opt-Out Absent

If we take it, then, that the Second Amendment's protection extends to bearing arms in public, there is a substantial question whether the federal government could lawfully prohibit private firearms possession in school zones (as defined in the GFSZA). Although the Supreme Court expressly declined to develop a standard for assessing compliance with the Second Amendment,¹⁹⁷ it did note that the standard is above mere rational basis

Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 20 (1995) (footnote omitted).

The context of the adoption of the Fourteenth Amendment may be illuminated by reference to the view it negates, expressed by the Supreme Court to support the conclusion in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, that the converse outcome would, *inter alia*, allow Black residents "to keep and carry arms wherever they went." The opinion states:

More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, . . . it would give them the full liberty . . . to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

Dred Scott, 60 U.S. at 416–17 (1856). *See generally* JOHNSON ET AL., *supra* note 193, at 277–78 (2012) (noting the language); Cramer, *supra*, at 19–20 (same).

¹⁹⁵ JOHNSON ET AL., *supra* note 193, at 292.

¹⁹⁶ *See generally* Volokh, *supra* note 193, at 1515 ("But self-defense has to take place wherever the person happens to be.").

¹⁹⁷ *E.g.*, *United States v. Chester*, 628 F.3d 673, 676 (4th Cir. 2010); *see generally* *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (merely rejecting rational basis review); *id.* at 634 ("Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions.").

review.¹⁹⁸ Federal Courts of Appeals have typically applied some form of intermediate scrutiny,¹⁹⁹ after making a preliminary determination that the activity in question is within the scope of the Second Amendment's protection.²⁰⁰

There is a strong case that whatever the level of review is, beyond mere rational basis review, a federal prohibition on private firearms possession in the covered areas would not meet that standard. That is because the covered areas include vast portions of non-rural areas, preventing possession of an arm in a state suitable for self-defense purposes,²⁰¹ and would simply make the possession generally impracticable in others.

The Crime Prevention Research Center has illustrated the vast scope of the covered areas in selected locations.²⁰² The below figure shows a location in Chicago that was the subject of litigation.²⁰³ Significant portions are covered by the prohibition.²⁰⁴ Because residential sidewalks have been held not to be private property for purposes of this act,²⁰⁵ bearing arms for self-

¹⁹⁸ *Heller*, 554 U.S. at 628 n.27.

¹⁹⁹ See, e.g., *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (Gibbons, J.) (plurality opinion); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

²⁰⁰ See, e.g., *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

²⁰¹ An unloaded firearm in a locked container would not be suitable. See *infra* note 207.

²⁰² *The Very Real Limits on Constitutional Carry: The Problem with Gun-Free School Zones*, CRIME PREVENTION RESEARCH CENTER (Mar. 30, 2016), <http://crimeresearch.org/2016/03/the-very-real-limits-on-constitutional-carry/>; cf. *Hetzner*, *supra* note 14, at 389–90.

²⁰³ *United States v. Redwood*, No. 16 CR 00080, 2016 WL 4398082 (N.D. Ill. Aug. 8, 2016).

²⁰⁴ A conviction requires proof of possession at a place the defendant “knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C.A. § 922(q)(2)(A) (Westlaw through Pub. L. No. 114–327). Mere proof that the school was in proximity to the defendant is insufficient to meet this element. E.g., *United States v. Guzman-Montanez*, 756 F.3d 1, 10–12 (1st Cir. 2014) (rejecting the position that mere proximity to the school itself, 300 feet, adequately proves this element); *United States v. Haywood*, 363 F.3d 200, 208–09 (3d Cir. 2004) (discussing a 500-foot distance).

²⁰⁵ *Redwood*, 2016 WL 4398082, at *2. Cf. *People v. Tapia*, 129 Cal. App. 4th 1153, 1164, 1166 (2005) (holding a sidewalk is not “private property,” as used in California’s Gun-Free School Zones Act of 1995, CAL. PENAL CODE § 626.9 (Westlaw through Ch. 4 of 2017 Reg. Sess.) (amended 2012 and 2016), which the court describes as modeled on the federal GFSZA).

defense while traveling between residential locations in these areas is substantially restricted.

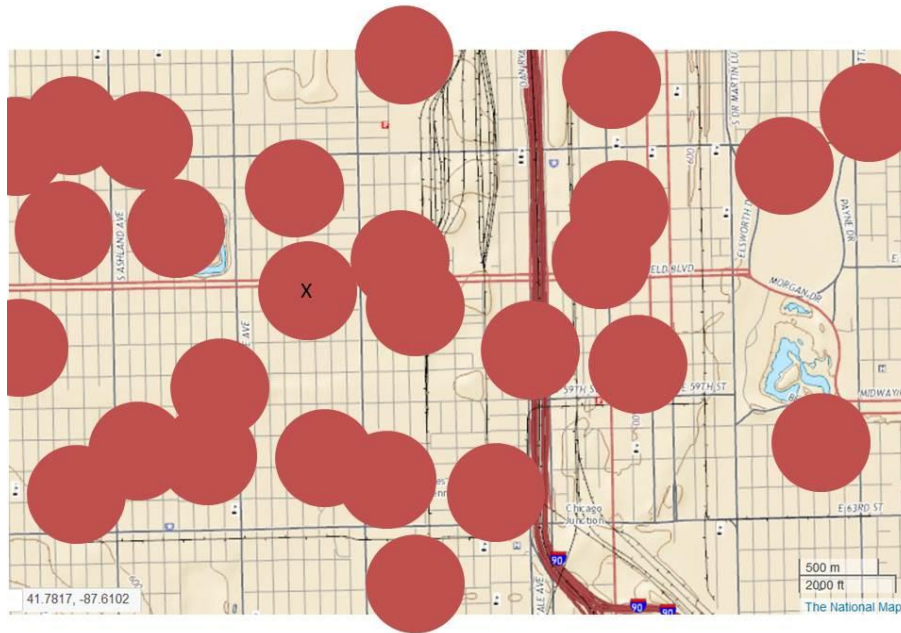


Figure 1. Circles are 1000' radius, each centered on a school. The circle for the relevant school is shown with an "X." Unannotated map courtesy of the U.S. Geological Survey. www.usgs.gov (visited Jan. 31, 2017). The government asserted that defendant possessed a firearm in front of the sidewalk at 942 W. Garfield Boulevard, Chicago, Illinois. Government's Surreply to Defendant's Motions to Dismiss Counts One and Two at 8, *United States v. Redwood*, No. 16 CR 00080, 2016 WL 4398082 (N.D. Ill. Aug. 8, 2016).

Were an absolute prohibition applicable in these types of covered areas throughout the United States, the scope of non-rural areas covered by the prohibition would be vast. In other cases, access to those locations would require Byzantine routes making travel impracticable.

Crucially, a ban that would prevent possession during travel to uncovered areas often would effectively prevent bearing arms in those uncovered areas. The statute does allow possession in covered areas of unloaded firearms in

locked containers.²⁰⁶ However, a ban on possession of a loaded firearm in transit through a covered location, while traveling to and from an uncovered area, would frequently prevent bearing arms in the uncovered areas, because bearing arms in the uncovered areas would be impracticable. For those traveling by car, it would require repeatedly handling a loaded firearm within the confines of a vehicle.

Namely, as one approached the perimeter of a covered area, one would have to:

- un-holster one's loaded weapon;
- unload the weapon;²⁰⁷ and
- secure it in a locked container.

If traveling by car, safely doing so, when seated in a vehicle, would require one to assure the arm was, throughout this process, never pointed at a person.²⁰⁸ This excessive handling of a firearm creates unsupported safety hazards.²⁰⁹

What would be involved for a person traveling by foot would vary depending on the circumstances. No option might well be desirable. The repeated handling of a firearm in the open might be unlawful (where the jurisdiction required the firearm to remain concealed),²¹⁰ or anxiety-

²⁰⁶ 18 U.S.C.A. § 922(q)(2)(B)(iii) (Westlaw through Pub. L. No. 114-327).

²⁰⁷ Handguns carried for defensive purposes are typically carried with a round chambered. *E.g.*, Transcript of Deposition of Tim La France at 301-02, *Mickle v. Glock, Inc.*, No. 02 CV 2227J(RBB), 2004 WL 5659191 (S.D. Cal.) (indicating firearms carried defensively are to be carried with a round chambered); Expert Report and Affidavit of Steven C. Howard at 5, 7, *Mantooth v. Glock.*, No. 2:09-CV-13125-DPH-RSW, 2011 WL 7268335 (E.D. Mich.) (stating, "Glock knew, or should have known, that if people are carrying pistols (Glock's or anyone else's) for protecting their lives, they are not going to leave the chamber empty"; noting the manual indicates the firearm is to be kept unloaded and stating, "With this warning, the people at Glock are attempting to relieve themselves of ALL responsibility to the consumer by, in effect, saying: 'You have to keep the gun unloaded until just before you are ready to fire.' With this warning, Glock has basically destroyed the usefulness of the firearm to the consumer and, one way or another, places the consumer at risk. The consumer either risks hurting himself or others with the unsafe design or risks being hurt by someone else because he cannot bring his own firearm into a firing position before someone else can kill him.").

²⁰⁸ The customary four rules of firearms safety contemplate one is not to point a firearm at something one is unwilling to destroy. *See* AYOOB, *supra* note 193, at 254 (summarizing Jeff Cooper's Four Rules as, "(1) All guns are always (considered) loaded. (2) Never point the gun at anything you are not prepared to see destroyed. (3) Never touch the trigger until the gun is on target and you are in the act of intentionally firing. (4) Always be certain of your target and what is behind it.").

²⁰⁹ *See generally Give UT Austin Gun Advocates a Chamber Round*, STAR-TELEGRAM (July 13, 2016), <http://www.star-telegram.com/opinion/editorials/article89463047.html> (noting a University of Texas at Austin proposed rule revision to eliminate requirement that firearm not have a chambered round, referencing expert opinions that "[m]ost accidental discharges happen when weapons are being loaded or unloaded").

²¹⁰ It could be unlawful *per se*. Alternatively, the repeated public handling of a firearm could increasingly give rise to a risk that the handling would be charged as a form of reckless misconduct. *See generally* ARIZ. REV. STAT. ANN. § 13-2904(A) (Westlaw through Second Regular Session of the Fifty-Second Legislature (2016)) (defining disorderly conduct as including reckless handling of a firearm with

inducing. Private locations might or might not be available in particular circumstances.

It seems unlikely any of this could be supported under some form of review that is more intrusive than mere rational basis. Nevertheless, it is entirely possible that a court would fail to grasp the significance of the issue. By way of illustration, a conclusory and unexpectedly shoddy District Court opinion in *United States v. Redwood*²¹¹ addresses the GFSZA as applied to possession of a firearm across the street from a school, in the area depicted in Figure 1.

The opinion involves a person whose possession would be unlawful under any interpretation of the GFSZA. The analysis does not address the nuance of one being licensed in some fashion or not by the state. Rather, the analysis simply focuses on a determination that the federal government can ban possession in the covered areas. The opinion does not identify the extent to which the statute would prevent possession of a firearm outside the home by persons not possessing a license that the federal government finds conforming to the GFSZA, and actually analyze the impact that the restriction would have on the ability to defend oneself generally. Rather, it primarily parrots a conclusion that the restriction does not “ ‘meaningfully impede’ the core of the Second Amendment,”²¹² and provides an

knowledge of disturbing the peace); TEX. PENAL CODE ANN. § 42.01 (Westlaw through the end of the 2015 Regular Session of the 84th Legislature) (criminalizing one who “displays a firearm or other deadly weapon in a public place in a manner calculated to alarm”).

²¹¹ No. 16 CR 00080, 2016 WL 4398082 (N.D. Ill. Aug. 18, 2016) (St. Eve, J.).

²¹² The relevant discussion is:

Section 922(q)(2)(A)’s compliance with the core rights guaranteed by the Second Amendment further supports its constitutionality. The “core component” of the Second Amendment, as identified in *Heller*, is the right to possess firearms for self-defense, notably in the home. In *Hall v. Garcia*, a district court determined that a California statute modeled on § 922(q)(2)(A) did not burden the core rights guaranteed by the Second Amendment and, consequently, was “substantially related to the objective of creating a safe zone around schools.” Moreover, the Ninth Circuit found that a similar law, which banned firearms on county property, including various “public, open spaces, did not ‘meaningfully impede’ the core of the Second Amendment.”^[”] *Nordyke v. King*.

Similarly, § 922(q)(2)(A) does not infringe upon the core component of the Second Amendment. Notably, § 922(q)(2)(A) “does not apply to the possession of a firearm . . . on private property not part of school grounds.” 18 U.S.C. § 922(q)(2)(B)(i). This exception expressly preserves the rights of individuals to possess firearms in their homes for the purposes of self-defense. The statute also includes various other exceptions allowing for the continued possession of a firearm in a school zone under certain circumstances. *See* 18 U.S.C. § 922(q)(2)(B)(ii)–(vii). Taken together, these exceptions conscientiously restrict the reach of § 922(q)(2)(A) and preserve the core component of the Second Amendment.

unsupported assertion that it does not infringe upon “the core component of the Second Amendment,” notwithstanding that, as noted elsewhere,²¹³ courts presented with the issue typically find or assume that the Second Amendment protects possession outside one’s home.

And the District Court makes the inapt analogy to banning pornographic theaters within 1000 feet of a school zone.²¹⁴ The court fails to note the basic difference: viewing pornography outside 1000 feet of a school can substitute for viewing it in that area. In contrast, being able to defend oneself in one location does not substitute for being unable to defend oneself elsewhere.²¹⁵

Note, for example, in Figure 1, that the areas covered include an interstate. This illustrates the impracticability of reliance on the exception for unloaded firearms in locked containers. The ban would require that anyone without a permit who intended to carry a firearm for self-defense while walking in areas outside school zones and, at some time during the day, drove on this portion of the interstate, would need to engage in excessive handling of the firearm. He or she would have to handle the arm repeatedly, including loading and unloading, often in the confined space of a vehicle.

Figure 1, however, only represents an initial step in identifying the covered areas. To identify additional covered areas, after considering that the covered schools extend from not point restrictions but at least buildings,²¹⁶ one can note that the street layout makes additional areas difficult or impossible to access without entering a covered area. At a minimum, entry to the centrally depicted area often would require a very circuitous route.

Redwood, 2016 WL 4398082, at *5 (citation omitted) (quoting *Nordyke v. King*, 563 F.3d 439, 459 (9th Cir. 2009), *vacated on other grounds*, 611 F.3d 1015 (9th Cir. 2010)) (citing *Hall v. Garcia*, No. C 10-03799 RS, 2011 WL 995933 (N.D. Cal. Mar. 17, 2011)).

One may contrast that approach with that taken in *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *reh’g denied* (Sept. 15, 2016), *petition for cert. filed*, 2016 WL 7335854 (U.S. Dec. 14, 2016) (No. 16-768). There, the court describes a similar geographic restriction applicable only to sex offender registrants “living, working, or ‘loitering’ within 1,000 feet of a school,” as “very burdensome, especially in densely populated areas.” *Id.* at 698, 701. The prohibition in the GFSZA, which is generally applicable to any transit within such a location, is inherently substantially broader. The exception for private property in the GFSZA does not undercut that conclusion, because one will need to transit non-exempt public property to get to private property.

²¹³ See *supra* notes 186–193 and accompanying text.

²¹⁴ *Redwood*, 2016 WL 4398082, at *6 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

²¹⁵ See *id.*; see also *supra* note 196.

²¹⁶ Definitive authority including open spaces owned by schools as part of the area from which one measures the 1000-foot zone has not been located. *United States v. Nieves-Castano*, 480 F.3d 597, 604 (1st Cir. 2007), makes ambiguous reference to the location of a fence at a school.

VIII. INTERPRETIVE BIAS IMPLEMENTING FEDERALISM
PRINCIPLES AND INTERPRETIVE BIAS

But let us say a court were to find the federal government could ban private possession of firearms for self-defense in the covered areas, i.e., a court reached an alternative conclusion from that found in Part VII. There is a remote possibility that a contemporary court would find federalism principles invalidate a statute that allowed the possession only if the state licensed the possession directly, i.e., without relying on reciprocity.²¹⁷ Now moribund authority from before the second third of the Twentieth Century would more comfortably support that conclusion than contemporary jurisprudence. Nevertheless, one can see at least some contemporary vestiges of that older jurisprudence.

To illustrate the temporal shift, one can start with *Texas v. White*, where the Court states, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”²¹⁸ In *Lane County v. Oregon*, the Court states, “Without the States in union there could be no such political body as the United States. . . . [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.”²¹⁹ In that case, the Court concludes that federal law making federal notes legal tender for debts does not operate to invalidate state law requiring taxes be paid in gold and silver coin.²²⁰ That old approach was manifested in, for example, limits on federal taxation of income paid by states²²¹ and

²¹⁷ Federalism concerns with the act were referenced by President George Bush in a signing statement:

Most egregiously, section 1702 inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress.

Statement by President George Bush upon Signing S. 3266, 1990 U.S.C.C.A.N. 6696–1 (Nov. 29, 1990) (referencing section 1702, the section containing the Gun-Free School Zones Act).

²¹⁸ 74 U.S. (7 Wall.) 700, 725 (1868), *overruled by* *Morgan v. United States*, 113 U.S. 476, 496 (1885).

²¹⁹ 74 U.S. (7 Wall.) 71, 76 (1868).

²²⁰ *Id.* at 81. Illustrating the merging of interpretation and doctrinal determination, *see infra* notes 239–241 and accompanying text, that case equivocates as to whether it bases its conclusion on a matter of construction. *Id.* at 81.

²²¹ *See, e.g., Collector v. Day*, 78 U.S. 113, 125–26 (1870) (holding the federal government cannot impose an income tax on the income of a state probate judge, stating, “[T]he means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and

invalidation of limitations placed on states during their admission to the Union.²²²

Occasionally one still sees contemporary reference to limits on federal intrusion into some core sphere of state activity. Perhaps the most apt recent illustration is provided by *In re Vargas*.²²³ The case invalidates a federal statute that purported to limit the manner in which a state sought to exercise authority relinquished under federal law. A federal statute provides that aliens not lawfully present are eligible for local public benefits “only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”²²⁴ Bar admission, according to the court, is one of those public benefits.²²⁵ Notwithstanding the plenary authority that the federal government has over immigration,²²⁶ the court concludes that New

fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.”), *overruled by Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 486 (1939). *See generally* *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 522 (1926) (“Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. Thus the employment of officers who are agents to administer its laws, its obligations sold to raise public funds, its investments of public funds in the securities of private corporations, for public purposes, surety bonds exacted by it in the exercise of its police power, are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it, and forbids an occupation tax imposed on its use.” (citations omitted)). *Metcalf & Eddy* articulates the underlying principle as follows: “But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it.” *Id.* at 523–24 (citations omitted).

In something of an interesting twist on these federalism issues, *Interior Airways, Inc. v. Wien Alaska Airlines, Inc.*, 188 F. Supp. 107, 112 (D. Alaska 1960), holds that a state may properly delegate to the federal government regulation of purely intrastate air commerce.

²²² *See generally* *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (“The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers.”); Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 178 (2004); Colby, *supra* note 161, at 1120 (“It was within Congress’s power to regulate navigable rivers, but Congress could not use that power to grant Illinois less sovereign authority to regulate her rivers than other states have to regulate theirs.”).

²²³ 131 A.D.3d 4 (2015).

²²⁴ *See* 8 U.S.C.A. § 1621 (Westlaw through Pub. L. No. 114–327).

²²⁵ 131 A.D.3d at 18.

²²⁶ *Id.* at 21–22 (“It is well settled that the federal government is possessed of broad and undoubted plenary authority over matters involving immigration arising from its constitutional power to, inter alia, ‘establish a[] uniform Rule of Naturalization.’ Absent a constitutional conflict, a federal statute limiting the conduct or activities of aliens, immigrants, and those who are present in the United States without

York can act through its judiciary to approve the benefit, i.e., the federal limit requiring the approval be by specified state enactment is unconstitutional.²²⁷

Those inclined to make lists of contemporary authority²²⁸ providing content to federalism norms would surely reference *Shelby County, Alabama v. Holder*.²²⁹ One encounters other references to limits;²³⁰ the extent to which they are contemporary is in the eye of the beholder.²³¹

legal authorization is binding upon the states by virtue of the Supremacy Clause of the United States Constitution.” (citations omitted)).

²²⁷ *Id.* at 25.

²²⁸ Katyal and Schmidt endeavor to “identif[y] every majority opinion since Chief Justice Roberts joined the Court that expressly relies, at least in part, on the avoidance canon in reaching its conclusion about the meaning of a statute.” Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2120 & n.42 (2015) (citing nine cases (excluding *Bond v. United States*, 134 S. Ct. 2077 (2014)) in their 2015 article).

²²⁹ 133 S. Ct. 2612, 2623 (2013). There the Court invalidates Section 4(b) of the Voting Rights Act of 1965 (currently codified at 52 U.S.C.A. § 10303(b) (Westlaw through Pub. L. No. 114–327)), 133 S. Ct. at 2631, which “required States to obtain federal permission before enacting any law related to voting — a drastic departure from basic principles of federalism.” *Id.* at 2618. The Court states, “Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives.” *Id.* at 2623.

For a sample of the voluminous scholarly discourse addressing *Shelby County*, see, e.g., James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote: Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39 (2014); Colby, *supra* note 161; Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

²³⁰ For example:

(i) the manner in which state judges memorialize their opinions. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991) (stating, in discussing the scope of habeas review, “[W]e have no power to tell state courts how they must write their opinions.”);

(ii) the circumstances resulting in state judge disqualification. *Bardsley v. Lawrence*, 956 F. Supp. 570, 573 (E.D. Pa. 1997) (“We also lack jurisdiction over Plaintiff’s request to disqualify Judge Lawrence as the presiding judge in *Bardsley I* Plaintiff points to no authority suggesting that we may act contrary to the fundamental tenets of federalism by usurping Pennsylvania’s authority over the supervision and administration of its own courts.”), *aff’d*, 124 F.3d 185 (3d Cir. 1997); and

(iii) the availability of interlocutory appellate review. *Bush v. Paragon Prop., Inc.*, 997 P.2d 882, 887 (Or. Ct. App. 2000) (“Whether or not Congress intended to require state courts to provide interlocutory appellate review of orders denying arbitration when state law does not permit them to conduct that review, it is constitutionally prohibited from imposing that requirement.”).

²³¹ *Compare* Nat’l League of Cities v. Usery, 426 U.S. 833, 851 (1976) (holding application of federal “minimum wage and the maximum hour provisions” to employees of states and state subdivisions “will impermissibly interfere with the integral governmental functions of these bodies”), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 536, 547–48 (1985), *with* *Garcia*, 469 U.S. at 536, 547–48 (overruling *National League of Cities* and “reject[ing], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’ ”).

Authority also references an interpretive bias, which might be conceptualized as qualitatively different from an actual limit on federal authority. To turn to a contemporary statement, *Bond v. United States* references the following “well-established” *interpretive* principle:

“[I]t is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ ” the “usual constitutional balance of federal and state powers.” To quote Frankfurter again, if the Federal Government would “ ‘radically readjust[] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit’ ” about it.²³²

This approach is sometimes termed a *clear statement principle*²³³ or the *plain statement rule*²³⁴ of statutory construction.²³⁵ Application of the principle in the context of concerns that the federal government is encroaching on some sphere of state autonomy is a subset of the wider scope of constitutional avoidance. The principle applies to cases presenting constitutional issues generally (not limited to those involving possible encroachment on state authority).²³⁶ And, though there is some quibble concerning whether the taxonomy properly includes it as constitutional avoidance,²³⁷ courts avoid consideration of claims presenting issues under the Constitution where a matter can be decided on another ground.²³⁸

Contemporary jurisprudence has receded from the high water mark of the formal limits on federal authority. But this process is one of ebb and flow. And, as one sees in other areas,²³⁹ one might claim that a particular

²³² 134 S. Ct. 2077, 2089 (2014) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40 (1947) (first and second alterations in original)).

²³³ *E.g.*, *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002).

²³⁴ *E.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

²³⁵ A 1999 Executive Order also illustrates the bias against interpretations of federal law that implicate federalism concerns. Exec. Order No. 13,132, *Federalism*, 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999).

²³⁶ *E.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (applying the principle to a proffered statutory construction that would pose “serious questions of . . . validity . . . under the First Amendment”). See generally Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997) (discussing avoidance).

²³⁷ See Katyal & Schmidt, *supra* note 228, at 2115 n.21 (excluding this from the “avoidance canon” and “constitutional avoidance,” but including it in reference to “varieties” of avoidance).

²³⁸ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

²³⁹ *E.g.*, K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 702–03 (1939) (“A court can ‘construe’ language into patently not meaning what the language is patently trying to say. . . . [S]ince

determination purportedly made of an ambiguous statute,²⁴⁰ simply on an interpretive ground (that the language of a statute does not in fact create a constitutional issue), is in fact grounded on some other basis.²⁴¹

Bond involves a conflict between two women with amorous interests in a man, where one woman sought to give the other an uncomfortable rash through exposure to common, toxic chemicals.²⁴² Scalia's concurrence persuasively demonstrates that, under a literal interpretation, the defendant unlawfully used a "chemical weapon" as defined in the statute.²⁴³

Nevertheless, the Court, relying on interpretive principles derived from notions of federalism, concludes that the federal statute does not criminalize these acts.²⁴⁴ In reaching that conclusion, the *Bond* Court references, *inter alia*, *Jones v. United States*,²⁴⁵ which narrowly construes a federal state criminalizing arson. The *Bond* court notes that *Jones* similarly relies on federalism principles in construing the federal statute as not extending to criminalization of "paradigmatic common-law state crime[s]."²⁴⁶

they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.").

²⁴⁰ Whether language is ambiguous is not measured solely by the literal terms. "A statute can be ambiguous if giving it a literal interpretation would lead to an unreasonable, unjust or absurd consequence. This is based on 'the presumption that the legislature did not intend an unreasonable, absurd or unworkable result.' Therefore, the court is not compelled to give a strict literal meaning to the statute when it would depart from the statute's true intent and purpose." *Brady v. White*, No. CIV.A.04C-09-262FSS, 2006 WL 2790914, at *4 (Del. Super. Ct. Sept. 27, 2006) (footnotes omitted).

Some authority expressly indicates reference can be made to matters extrinsic to the statutory language itself in order to determine that the language is ambiguous. See *Hayden v. Pataki*, 449 F.3d 305, 325 (2d Cir. 2006) (discussing *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005), in the context of application of the interpretive principle where federalism issues are raised and stating, "Therefore, we will apply the clear statement rule when a statute admits of an interpretation that would alter the federal balance but there is reason to believe, either from the text of the statute, the context of its enactment, or its legislative history, that Congress may not have intended such an alteration of the federal balance.").

²⁴¹ See generally Gerken, *supra* note 175, at 89-90 ("The Court could only see what it believed, and it couldn't bring itself to believe that Congress had, in fact, passed a statute broad enough to reach *Bond*'s conduct. That's why the Court thought the statute was ambiguous. Because it had to be."); Katyal & Schmidt, *supra* note 228, at 2112 ("[T]he so-called 'avoidance' canon now camouflages acts of judicial aggression in both the constitutional and statutory spheres. . . . First, the Court has used avoidance cases to announce new rules of constitutional law and major departures from settled doctrine. . . . Second, the Court seems indifferent to whether the resulting statutory interpretations are at all plausible.").

²⁴² 134 S. Ct. at 2085.

²⁴³ *Id.* at 2094-95 (Scalia, J., concurring).

²⁴⁴ *Id.* at 2083.

²⁴⁵ 529 U.S. 848 (2000).

²⁴⁶ 134 S. Ct. at 2089-90 (noting, "[T]he Government's proposed broad reading would 'significantly change[] the federal-state balance,' mak[ing] virtually every arson in the country a federal offense' "; and stating, "[W]e can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police

In reaching this conclusion, the Court indicates that circumstances such as the punishment of local criminal activity — circumstances of the type implicated by ATF’s interpretation of the GFSZA — are “perhaps the clearest example” of circumstances where this interpretive presumption should apply.²⁴⁷

So, there may be a less-than-gossamer distinction between merely interpreting a federal statute so as to avoid it encroaching on state authority in a fashion that is potentially infirm as a constitutional matter, and reaching a substantive determination that there is a constitutional violation. The best that can be said in support of the ATF’s interpretation of the GFSZA is that the statute is ambiguous. In any case, the ambiguity of the GFSZA is well above the threshold level for application of the clear statement principle. Continuing the analysis of the ATF’s interpretation of the GFSZA requires only that we examine contemporary authority supporting application of the interpretive principle of avoidance to ambiguous statutes. So, we shall restrict our discussion to that authority, leaving to other sources collection and synthesis of the federalism concerns applicable in a wider context.²⁴⁸

Abundant authority compels the conclusion that if the GFSZA is ambiguous concerning whether it fails to recognize state licensure through reciprocity, these federalism principles will require the act to be construed as recognizing licensure through reciprocity. Perhaps most on-point, authority holds that these federalism principles are raised by a federal statute that restricts a state’s choices concerning how it delegates its governing authority to others, whether subdivisions²⁴⁹ or third parties.²⁵⁰ (They are also presented in federal regulation of the qualifications for senior state positions.²⁵¹) And authority holds that they are raised by federal law imposing regulation of areas that are typically regulated by the states.²⁵² Because the GFSZA as interpreted by the ATF trenches on the manner in

power of the States.” (quoting *Jones*, 529 U.S. at 858 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

²⁴⁷ *Id.* at 2089. See also *McDonald v. City of Chicago*, 561 U.S. 742, 922 (2010) (Breyer, J., dissenting) (“Private gun regulation is the quintessential exercise of a State’s ‘police power’ . . .”).

²⁴⁸ See generally, e.g., Colby, *supra* note 161; Jackson, *supra* note 174, at 2181; Katyal & Schmidt, *supra* note 228, at 2111–12 (examining the avoidance canon in the Roberts Court and asserting, “Though it originated as a ‘cardinal principle’ of judicial self-restraint, the so-called ‘avoidance’ canon now camouflages acts of judicial aggression in both the constitutional and statutory spheres.” (footnote omitted)); Krotoszynski, *supra* note 174.

²⁴⁹ See *infra* notes 254–269 and accompanying text.

²⁵⁰ See *infra* notes 284–285 and accompanying text.

²⁵¹ See *Gregory v. Ashcroft*, 501 U.S. 452, 460–61, 473 (1991) (holding a federal statute prohibiting a mandatory retirement age is not sufficiently clear to impinge upon state sovereignty by invalidating a judicial retirement age mandated by a state’s constitution).

²⁵² See *infra* notes 280–283 and accompanying text.

which a state determines to delegate authority and on state regulation in an area typically regulated by the states — the federal government does not generally affirmatively license firearms possession — multiple prongs of the authority combine to reject the ATF’s position.

These interpretive principles are applied to a broad range of interpretive issues: (i) the interpretation of individual words and phrases; (ii) parsing language and attributing reference to modifiers; and (iii) filling-in details of federal regulatory schemes not limited to parsing specific language. And they have been used to overcome some customary canons of construction.

A. *Relevant Contexts Presenting the Interpretive Principle*

“How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”²⁵³ One thus encounters a number of circumstances in which the clear statement principle is applied to federal regulation that would restrict the manner in which a state chooses to delegate its regulatory authority.

For example, *Wisconsin Public Intervenor v. Mortier*²⁵⁴ addresses a federal regulation of pesticides that expressly declines to preempt regulation by a “State.”²⁵⁵ The Court holds that, notwithstanding a statutory definition of “State” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa,”²⁵⁶ the exclusion for a “State” is to be considered as extending to regulation by a subdivision of a state.²⁵⁷

In sum, notwithstanding an express statutory definition, this statutory reference to “State” means “State or a State subdivision.” In reaching this conclusion, the Court quotes from prior authority, *Sailors v. Board of Education of Kent*,²⁵⁸ that provides a full-throated federalism justification for allowing states to delegate authority to inferior units.²⁵⁹

²⁵³ *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

²⁵⁴ 501 U.S. 597 (1991).

²⁵⁵ *Id.* at 606.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 616.

²⁵⁸ 387 U.S. 105 (1967).

²⁵⁹ 501 U.S. at 607–08 (quoting in part the language reproduced *infra* text accompanying note 279).

The *Mortier* court also references deference on the basis that the action being regulated is typically within the state sphere. *Id.* at 605 (“When considering pre-emption, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

A similar conclusion is reached in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*,²⁶⁰ construing a federal statute that excluded from preemption safety regulatory authority of “a State.”²⁶¹ The Court there holds that safety regulation by a municipality also is not preempted, i.e., reference to “a State” includes a state subdivision.²⁶² Moreover, it does so relying on “the basic tenets of our federal system pivotal in *Mortier*,”²⁶³ even though the statutory scheme elsewhere makes express reference to “a State [or] political subdivision of a State.”²⁶⁴ That is, the Court rejects application of the interpretive presumption²⁶⁵ that a variation of language in a statutory scheme is intended to connote a variation in meaning.²⁶⁶

*Nixon v. Missouri Municipal League*²⁶⁷ involves a somewhat convoluted issue of potential infringement on the manner in which a state chooses to delegate authority to a subdivision. The Court frames the issue as follows:

Section 101(a) of the Telecommunications Act of 1996 authorizes preemption of state and local laws and regulations expressly or effectively “prohibiting the ability of any entity” to provide telecommunications services. The question is whether the class of entities includes the State’s own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors’) delivery of such services. We hold it does not.²⁶⁸

There, the Court references a “working assumption that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in

²⁶⁰ 536 U.S. 424 (2002).

²⁶¹ *Id.* at 428.

²⁶² *Id.* at 428–29.

²⁶³ *Id.* at 434.

²⁶⁴ *Id.* at 428.

²⁶⁵ *See id.* at 433–34.

²⁶⁶ *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *See generally infra* notes 297–300 and accompanying text.

²⁶⁷ 541 U.S. 125 (2004).

²⁶⁸ *Id.* at 128–29 (citation omitted). One might endeavor to recast the federalism issue as whether a state cannot delegate general authority to a municipality without also granting the municipality authority to decide to provide telecommunications services — a grant of general local authority has to include a grant of authority to provide telecommunications services.

a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory [v. Ashcroft]* requires."²⁶⁹

Lastly, turning to state authority, *Edwards v. State*²⁷⁰ involves application of this interpretive principle to address whether a federal statute specified means, other than those provided by state law, by which a state could elect to participate in federal funding. South Carolina Governor Sanford evidently disagreed with the contemplated use of funds.²⁷¹ The Governor vetoed a budget including use of those federal funds — a veto that was subsequently overridden.²⁷² The Governor thereafter refused formally to apply for the federal funds.²⁷³

The Governor's position was that federal law "grants him the sole discretion to determine whether to apply for the [federal] funds."²⁷⁴ The South Carolina Supreme Court relies on the clear statement principle to hold that the federal statute did not alter the extant allocation of responsibility of branches of government under state law — did not vest that discretion in the Governor.²⁷⁵

One inclined to quibble as to the applicability of this authority to interpretation of the GFSZA might note that the interference with delegation found to raise federalism issues there involves delegation to political subdivisions or branches of the delegating state.²⁷⁶ Of course, the GFSZA

²⁶⁹ *Id.* at 140 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

²⁷⁰ 678 S.E.2d 412 (S.C. 2009).

²⁷¹ *Id.* at 415–16.

²⁷² *Id.* at 416.

²⁷³ *Id.*

²⁷⁴ *Id.* at 418.

²⁷⁵ *Id.* See generally Richard A. Epstein, *A Speech on the Structural Constitution and the Stimulus Program*, 4 CHARLESTON L. REV. 395, 396 (2010) ("It may be that the federal government could overrule the state constitution as it applies to the internal distribution of powers within the state by allowing the state's governor to decide whether or not to make the appropriate applications for federal funds. But it would be most unwise to read that aggressive intention into federal legislation when there is any ambiguity in the language of the statutory command." (discussing *Edwards*)); Metzger, *supra* note 183, at 593–94 (2011) (contrasting the outcome in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), with that in *Lawrence County v. Lead-Deadwood School District No. 40–1*, 469 U.S. 256, 257–58 (1985) (invalidating a state statute imposing restrictions on use of funds received by local governmental units from the federal government inconsistent with the federal authorization), and stating, "Yet instances of the federal government authorizing localities or other state-created entities to act in ways that violate state law are more infrequent and more fraught from a federalism perspective, raising concerns of federal commandeering of state institutions and undermining the integrity and sovereignty of state governments. Although the Court has recently signaled that such federal authorization of local violations of state law may raise federalism concerns, in the past it has sustained federal power to preempt state-law limits on actions by localities." (footnote omitted)).

²⁷⁶ The above recitation of authority does not purport to be comprehensive. For example, *City of Lafayette v. Louisiana Power & Light Co.* states that although "[c]ities are not themselves sovereign," 435 U.S. 389, 412 (1978) (plurality opinion), the same principles urging against construction of a statute to infringe on the sovereignty of a state will be applicable to restrictions on the acts of state subdivisions

interpretation would inhibit delegation to another state (or the other state's subdivisions). One can summarily reject that quibble, both by reference to basic principles and by reference to other authority. Let us do so in that order.

1. Reference to Basic Principles

The plain statement rule is not a freestanding legal principle. Rather, it is part of a mosaic that collectively creates federalism and that emerges from the existence and functioning of states contemplated by the Constitution.²⁷⁷ We have a premise that states will be able to discharge their necessary roles effectively. The premise is not merely that states can discharge their necessary roles to the extent that can be done directly or by delegation to subdivisions. If performance of a traditional state function involves the operation of persons other than that state and its subdivisions, federalism principles contemplate that activity involving third parties also not be inhibited.

The underlying rationale, identified by the Court in *Sailors v. Board of Education of Kent*,²⁷⁸ is in accord with the view that these principles are not inherently limited to delegations to political subdivisions of the delegator. In *Sailors*, the Court states, in referencing political subdivisions:

[T]hese governmental units are “created as convenient agencies for exercising such of the governmental powers of the state, as may be entrusted to them,” and the “number, nature and duration of the powers conferred upon (them) * * * and the territory over which they shall be exercised rests in the absolute discretion of the state.”²⁷⁹

The inconvenience may arise from the inability to make a delegation to a suitable delegate; it is not limited to circumstances where the delegate is a political subdivision.

We can confirm that by noting that the interpretive principle applies to a variety of contexts not focusing on a delegation of state authority. For example, the interpretive principle has been applied by the Supreme Court

“pursuant to state policy.” *Id.* at 413. According to the Court, principles of federalism dictate that state antitrust immunity extend to municipalities where the municipalities act “pursuant to state policy” that is “clearly articulated and affirmatively expressed.” *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 50–51 (1982) (quoting and analyzing *City of Lafayette*).

²⁷⁷ See generally *supra* note 232 and accompanying text.

²⁷⁸ 387 U.S. 105 (1967).

²⁷⁹ *Id.* at 108 (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)).

in determining whether a lender's foreclosure sale²⁸⁰ resulted in receipt of "reasonably equivalent value," as used in federal debtor/creditor law. In light of a perceived "profound" impact on an "essential" state interest in security of real estate titles that would arise from not treating amounts received by a private lender in a foreclosure sale as "reasonably equivalent value," the Court, relying on the underlying federalism principles,²⁸¹ holds those amounts are "reasonably equivalent value."²⁸² There, applying the principle is about private party conduct; it is not about a delegation, and it is not about a delegation to a municipality. There are other illustrations.²⁸³

2. Other Authority

This assessment is confirmed *a fortiori* by noting that the Supreme Court itself in 2016 applied this federalism principle to support a conclusion that federal law did not burden delegation of a state function to third parties (in that case, outside counsel).²⁸⁴ The Court did so without any quibble arising

²⁸⁰ See *BFP v. Imperial Sav. & Loan Ass'n (In re BFP)*, 974 F.2d 1144, 1145 (9th Cir. 1992), *aff'd sub nom. BFP v. Resolution Tr. Corp.*, 511 U.S. 531 (1994).

²⁸¹ *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994) ("Federal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'") (quoting *Frankfurter*, *supra* note 232, at 539–40)).

²⁸² *BFP*, 511 U.S. at 545 (1994) ("We deem . . . that a 'reasonably equivalent value[]' for foreclosed property[] is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.").

²⁸³ *E.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (addressing federal regulation of warehouses); *Ho v. ReconTrust Co.*, 840 F.3d 618, 620, 623–26 (9th Cir. 2016) (holding a trustee foreclosing on a California deed of trust is not a "debt collector" as used in federal law, relying on, *inter alia*, *BFP*, *Rice*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004)); *Hayden v. Pataki*, 449 F.3d 305, 325–26 (2d Cir. 2006) (applying the principle to the "sensitive topic" of federal restriction on voting rights of criminals; holding New York's prisoner disenfranchisement statute, N.Y. ELEC. LAW § 5–106 (Westlaw through L.2016, chs. 1 to 64), is not within the scope of activity proscribed by the Federal Voting Rights Act (currently codified at 52 U.S.C.A. § 10301 (Westlaw through Pub. L. No. 114–327) (formerly codified at 42 U.S.C.A. § 1973)).

²⁸⁴ The relevant federalism discussion in *Sheriff v. Gillie*, 136 S. Ct. 1594, 1602 (2016) (citation omitted) (quoting *Order Denying Rehearing En Banc*, *Gillie v. Law Office of Erica A. Jones*, No. 14–3836 (6th Cir. July 14, 2015) and *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004)), a case that raises whether outside counsel appointed by Ohio's Attorney General were state officers exempt from a federal statute regulating debt collection and whether alleged acts were violations, is as follows:

We further note a federalism concern. "Ohio's enforcement of its civil code — by collecting money owed to it — [is] a core sovereign function." Ohio's Attorney General has chosen to appoint special counsel to assist him in fulfilling his obligation to collect the State's debts, and he has instructed his appointees to use his letterhead when acting on his behalf. There is no cause, in this case, to construe federal law in a manner that interferes with "States' arrangements for conducting their own governments."

from the delegation being to someone other than a political subdivision of the delegator.²⁸⁵

B. Language to Which the Principle Applies; Influencing the Determination as to Ambiguity

Understanding the scope of the application of the clear statement principle benefits from a survey of the different types of constructs to which it has been applied. As one might expect, the approach has been applied to construe phrases that are inherently vague, *e.g.*, “reasonably equivalent value”²⁸⁶ and “navigable waters.”²⁸⁷ It also has been referenced to exclude from an inherently vague term, “financial institution,” a rather unnatural reading sought to be ascribed by a federal agency (inclusion of lawyers).²⁸⁸

But the interpretive principle has more force. It has been applied so as to take individual words at other than their natural, literal meaning. As noted above, in *Wisconsin Public Intervenor v. Mortier* and *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, the term “State” is construed to mean “State or State subdivision.”²⁸⁹ In *Nixon v. Missouri Municipal League*,²⁹⁰ the word “any,” in the phrase “any entity,” is construed so as not to refer to “any” entity but only “some” entities.²⁹¹ That the *Nixon* Court rejects a natural reading is evidenced by a number of subsequent cases rejecting *Nixon*’s construction of “any” in other contexts.²⁹²

That conclusion was perhaps previewed by *American Bar Ass’n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005). There, the court rejects the argument that these principles requiring a clear statement should not apply to alleged federalism implications arising from construction of a federal statute insofar as it regulates the conduct of private parties. *Id.* at 472. The court declines to hold a federal statute authorizes the federal regulation of the practice of law. *Id.* at 467–68, 472–73. The court, in doing so, rejects the following FTC claim that *Gregory v. Ashcroft*, 501 U.S. 452 (1991), should be distinguished: “According to the Commission, the present regulation, ‘by contrast . . . regulates the conduct of private entities or individuals; there is no regulation of States or state officials.’” 430 F.3d at 472. The court continues, “This response does not pass muster.” *Id.* at 472.

²⁸⁵ See *supra* note 284.

²⁸⁶ *BFP*, 511 U.S. at 542–44.

²⁸⁷ *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 163, 165, 174 (2001) (noting land use is “a function traditionally performed by local governments” and, to avoid adjusting the federal-state balance, holding “an abandoned sand and gravel pit” that is “used as habitat by migratory bird [sic] which cross state lines” is not “waters of the United States”).

²⁸⁸ *Am. Bar Ass’n v. FTC*, 430 F.3d at 465–67 (does not include the practice of law).

²⁸⁹ See *supra* notes 254–257, 260–266 and accompanying text.

²⁹⁰ 541 U.S. 125 (2004).

²⁹¹ See *id.* at 132 (stating, “Nor is coverage of public entities reliably signaled by speaking of ‘any’ entity; ‘any’ can and does mean different things depending upon the setting.”); see also *supra* notes 267–269 and accompanying text.

²⁹² *E.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) (distinguishing the interpretive approach for “any” in *Nixon*); *New York v. EPA*, 443 F.3d 880, 885–86 (D.C. Cir. 2006) (same); *Firearms Imp./Exp. Roundtable Trade Grp. v. Jones*, 854 F. Supp. 2d 1, 16 n.19 (D.D.C. 2012)

Lastly, the principle has been applied to reject ordinary canons of construction. It has been applied to reject application of the cardinal principle²⁹³ that would avoid a construction resulting in some language being surplusage. *Edwards v. State*²⁹⁴ construes the following sentence concerning application for federal funds: “The Governor of a State desiring to receive an allocation under section 14001 shall submit an application at such time, in such manner, and containing such information as the Secretary may reasonably require.”²⁹⁵ It interprets the sentence so as to allow a state to make a submission even if the Governor does not,²⁹⁶ which makes surplusage the first three words (“[t]he Governor of”).

The court in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*,²⁹⁷ applies the interpretive principle in contravention of what is called the “*Russello* presumption.”²⁹⁸ Under that presumption, “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”²⁹⁹ *City of Columbus* interprets a statutory exception granted to “the safety regulatory authority of a State” as extending to municipalities, even though the statute elsewhere makes reference to “provisions by ‘a State [or] political subdivision of a State . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property,’ ” i.e., elsewhere makes express, separate reference to subdivisions following a reference to a state.³⁰⁰

(same), *aff’d sub nom.* Firearms Imp./Exp. Roundtable Trade Grp. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 498 F. App’x 50 (D.C. Cir. 2013); *In re Cendant Corp. Sec. Litig.*, 569 F. Supp. 2d 440, 444 (D.N.J. 2008) (same). *But see* Small v. United States, 544 U.S. 385, 388, 394 (2005) (citing *Nixon* and holding “any court” excludes foreign courts).

²⁹³ See *supra* notes 106–107 and accompanying text.

²⁹⁴ 678 S.E.2d 412 (S.C. 2009).

²⁹⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 14005, 123 Stat. 115, 282–83 (2009) (codified as amended at 20 U.S.C.A. § 10005 (Westlaw through Pub. L. No. 114–327)).

²⁹⁶ The court states, “We accordingly construe the participial phrase ‘desiring to receive an allocation [or seeking a grant]’ in § 14005 as modifying the word immediately preceding it ‘State’ — to avoid any conflict between our State constitutional allocation of power and the ARRA.” 678 S.E.2d at 419.

²⁹⁷ 536 U.S. 424 (2002).

²⁹⁸ *Id.* at 434–35 (using the term “*Russello* presumption” and discussing *Russello v. United States*, 464 U.S. 16 (1983)); *id.* at 444 (Scalia, J., dissenting) (citing *Russello* and identifying additional textual provisions supporting application of the presumption).

²⁹⁹ *Russello*, 464 U.S. at 23 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

³⁰⁰ 536 U.S. at 428.

C. Summary of the Import of Constitutional Avoidance

Part III provides a number of illustrations where the phrase “licensed by,” preceding the reference to some instrumentality, is used in the law in a fashion that contemplates licensure without any licensee-specific action by the licensing body. Thus, the relevant language of the Gun-Free School Zones Act, as amended, does not unambiguously prohibit delegation of any decision-making. It is at least ambiguous in this regard, and one might argue it in fact is unambiguous in not prohibiting licensure through delegation.

Understanding that is the case, a wealth of authority compels the conclusion that the ATF’s position is incorrect. The ATF’s interpretation would result in the federal government mandating how a state determines to allocate decision-making authority. Federalism concerns, arising from intrusion into a state’s choice to allocate authority, have been identified in authority that involves, *inter alia*:

(i) whether a federal statute that prohibits state restrictions on the provision telecommunication services by “any entity” extends to state prohibitions on municipalities, holding that the federalism implications result in the federal statute not extending to state regulation of municipalities;³⁰¹ and

(ii) whether a federal statute inhibits a state’s delegation of legal work to outside counsel.³⁰²

Moreover, the ATF’s interpretation would alter that normal balance of authority and would do so in a context not generally regulated by the federal government — the permitting of persons to possess firearms. Authority demonstrates that circumstance also heightens federalism concerns.

And lastly, the ATF’s interpretation necessarily involves a “sensitive” decision.³⁰³ It would result in criminalizing exercise of what is, under some state constitutions, an enumerated right,³⁰⁴ which exercise some states, through delegated authority, sought to have be lawful. And it would involve restricting private conduct that would be “sensitive” as the exercise of an enumerated right under the Federal Constitution if that provision is not limited to private possession in one’s home.

The language of the GFSZA simply is not remotely close to “unmistakably clear,” as required under, e.g., *Gregory v. Ashcroft*,³⁰⁵ to

³⁰¹ See *supra* notes 267–269 and accompanying text.

³⁰² See *supra* notes 284–285 and accompanying text.

³⁰³ See *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (discussed *supra* note 283).

³⁰⁴ E.g., LA. CONST. art. I, § 11 (“The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.”); MO. CONST. art. I, § 23.

³⁰⁵ 501 U.S. 452, 460–61 (1991).

prohibit recognition of firearms licenses through reciprocity. For all these reasons, the clear statement principle applies to the relevant portion of the Gun-Free School Zones Act, as amended. The ATF's interpretation, which is inconsistent with that principle, is not correct.

CONCLUSION

The ATF asserts the Gun-Free School Zones Act prohibits a state's licensure of private firearms possession within 1000 feet of a school through reciprocity. The ATF asserts this conclusion is compelled by a literal interpretation of the language.

The ATF's proffered interpretation of the term "licensed . . . by the State" in the Gun-Free School Zones Act relies on an assumption that the term "licensed by," when followed by "the state" or reference to some other governmental unit, requires some licensee-specific affirmative act of the state or governmental unit. However, the use of the term "licensed by the state," and correlative terms, is not so restricted. Giving evident effect to similar statutory language in a number of contexts requires that one authorized by a governmental entity simply by statute making it so for numerous people is sufficient for one to be "licensed by" the entity.

One can put that analysis in context by referencing the holding in *King v. Burwell*.³⁰⁶ There, the Court holds the term "established by the State" is not limited to items that are established by a state.³⁰⁷ In light of the outcome in *Burwell*, the hyper-literalism reflected in the ATF's interpretation of the GFSZA can be rejected *a fortiori*.

As an interpretation of a criminal statute, the ATF's interpretation is not entitled to deference. Understanding the ATF's interpretation is not compelled by a literal reading of the statute, one would turn to the statute's purposes to ascertain the statute's application to licensure through reciprocity. The purposes, expressly articulated in the statute,³⁰⁸ do not reveal any objective furthered by burdening a state's licensure processes by prohibiting licensure through reciprocity.

Nor do those purposes reveal any desire for consistency within a state. Permits issued by local officials, under standards applied very differently among localities, can authorize possession in covered areas statewide.³⁰⁹

³⁰⁶ 135 S. Ct. 2480 (2015).

³⁰⁷ *Id.* See *supra* notes 102–108 and accompanying text.

³⁰⁸ See *supra* note 127 and accompanying text.

³⁰⁹ See *supra* notes 139–140 and accompanying text.

The federal government could not commandeer states in the licensure of firearms possession in school zones. However, the GFSZA is not simple commandeering of the manner in which states license firearms possession in covered areas. Rather, it leaves states with a second choice — having private firearms possession banned in the covered areas.

A federal regulation is infirm where a state is relegated to a set of choices, none of which the federal government can command. There is a substantial question whether the federal government could impose the choice not involving commandeering — whether it could ban private firearms possession for self-defense in covered areas. And mandating that a state not effect any licensure of a nonresident through reliance on his or her state of residence is a peculiar intrusion into the manner by which a state delegates its authority. A wealth of authority identifies a bias in interpreting statutes in such cases, under which courts avoid these problems by construing statutes so as not to raise federalism concerns. The principle has been applied to support an unnatural interpretation of language that is oft-distinguished in subsequent authority.³¹⁰ And the principle has been applied as part of rejecting application of common canons of construction.³¹¹ In light of these interpretive principles, the ATF's interpretation of the GFSZA, to the effect that licensure through reciprocity does not authorize possession in covered areas, is unsound.

³¹⁰ See *supra* note 292 and accompanying text.

³¹¹ See *supra* notes 293–300 and accompanying text (discussing the cardinal principle concerning surplusage and the *Russello* presumption concerning internal variation in language).