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before the

United States House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security,

Of the Committee on the Judiciary

Regarding interstate recognition of handgun carry permits

H.R. 822

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Summary of key points:

Congress has the legitimate constitutional authority to enact H.R. 822.

First, the bill would protect the right of interstate travel, which is one of the "privileges or immunities of citizens of the United States," which the 14th Amendment gives Congress the explicit authority to protect.

Second, the Second Amendment right to keep and bear arms is also protected by section 1 of the 14th Amendment, and therefore Congress has the power under section 5 of the 14th Amendment to protect the right to bear arms from state infringements.

The Supreme Court's *Heller* and *McDonald* decisions recognize that the right to carry arms for lawful self-defense in public places in part of the Second Amendment right. Even if the Supreme Court had been silent on the right to carry, or left the issue in a gray zone, Congress can still act to protect the right to carry; under the rule of *City of Boerne v. Flores*, only an explicit Supreme Court decision holding that there is no right to carry would bar Congress from legislating to protect the right to carry.

Additionally, H.R. 822 is supported by a very long line of Supreme Court precedent (but perhaps not original meaning) that the congressional power to protect interstate commerce from state interference can be used to protect the right to travel.

The denial of the exercise of constitutional rights is, in itself, sufficient reason for Congress to act to end that denial.

H.R. 822 would also very likely be upheld by courts because it uses the same jurisdictional hook as many other federal gun laws: namely that the gun in question must have at some point moved in interstate commerce. This is the same jurisdictional basis as is used for the federal statutes barring various categories of persons from possessing firearms (Gun Control Act of 1968; 18 U.S.C. § 922(g)); the version of the Gun-free School Zones Act which Congress enacted in 1995, after an earlier version of the GFZSA was ruled unconstitutional by the Supreme Court in *United States v. Lopez* (18 U.S.C. 922(q)); and the Law Enforcement Officers Safety Act, allowing interstate carry of firearms by active and retired law enforcement officers (18 U.S.C. § 926B&C).

The theory that once a gun has been sold in interstate commerce it forever remains subject to congressional regulation under the interstate commerce clause, is solidly established in the federal courts, even though it is contrary to the original meaning of the Constitution. However, use of Congressional power under section 5 of the 14th Amendment to protect the right to arms and the right to travel is entirely consistent with original meaning.

H.R. 822 is consistent with the letter and the spirit of the 10th Amendment, and of principles of federalism. The very reason that the 14th Amendment was added to the Constitution by the People was to adjust the state/federal balance, granting Congress the direct power to act against state infringements of important federal rights, such as the right to bear arms and the right to travel.

Empirical evidence and social science show that H.R. 822 would not be harmful to public safety. Social scientists differ on whether the licensed carry laws that now exists in most states lead to a statistically significant reduction in crime. Social scientists *agree* that there is no evidence that licensed carry leads to a statistically significant increase in crime.

Records from states around the nation show that persons who hold licensed carry permits are far more law-abiding than the general population, that permit revocations are very rare, and that virtually none of the permitees ever perpetrate violent crimes with a gun.

Some gun prohibition groups have claimed that many permitees commit crimes. These claims are based on misrepresentation of the facts, for example categorizing lawful self-defense—as determined by law enforcement and the courts—as if it were a crime.

I. Congressional enforcement of the right to travel

A. A well-established line of Supreme Court precedents recognizes the constitutional right to travel.

The constitutional right to travel is supported by many Supreme Court precedents.[1] The Supreme Court's most recent major decision on the right to travel is *Sáenz v.*

[1] *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (a "fundamental personal right"); Griffin v. Breckenridge, 403 U.S. 88, 105-07 (1971) (affirming congressional power to enact a statute to thwart private criminal conduct interfering with the right to travel; "That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation."); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."); United States v. Guest, 383 U.S. 745, 758 (1966) (Congress can enact legislation against state or private interference with the right to travel, which is "A right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union."); id. at 763 (Harlan, J., concurring) ("past cases do indeed establish that there is a constitutional 'right to travel' between States free from unreasonable governmental interference."); Edwards v. California, 314 U.S. 160, 181 (1941) (Douglas, J., concurring) ("The conclusion that the right of free movement is a right of national citizenship stands on firm historical ground."); United States v. Wheeler, 254 U.S. 281 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 78 (1920); Twining v. New Jersey, 211 U.S. 78, 97 (1908) ("among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state"); Williams v. Fears, 179 U.S. 270, 274 (1900) ("the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution"); Blake v. McClung, 172 U.S. 239 (1898) ("The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise")(quoting Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230, a leading case decided by Justice Bushrod Washington while circuit-riding); Slaughter-House Cases, 83 U.S. 36, 51 (1872) (Bradley, J., dissenting)(same quote from Corfield); Paul v. Virginia, 75 U.S. 168, 180 (1868) (Regarding ArticleIV's privileges and immunities clause: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."); Crandall v. Nevada, 73 U.S. 35, 49 (1867) ("We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."); Passenger Cases, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting (same language quoted and adopted by the Crandall majority, above).

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

Roe, 526 U.S. 489 (1999). Writing for a seven-Justice majority,[2] Justice Stevens explained:

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

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

In other words, an "unreasonable" burden on interstate travel is a violation of the Constitution.

The *Sáenz* Court explained that there are three components to the right to travel. Two of them (the right to cross state borders, and the right to become a citizen of a different state) are not addressed by H.R. 822. The component that is addressed is the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Id.* at 500.

As for the right of visitors to be treated equally, it is

> expressly protected by the text of the Constitution. The first sentence of Article IV, §2, provides:

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[2] In dissent, Chief Justice Rehnquist and Justice Thomas argued that that there was no violation of the right to travel in the particular case at bar: California's rule that new arrivals to the state would for their first year in California receive welfare benefits at the levels of their previous state, rather than the higher payments provided in California. The dissenters agreed, however, that "The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free interstate passage of citizens." Further, "Nonresident visitors of other States should not be subject to discrimination solely because they live out of State." *Sáenz* at 511-12, 512 (Rehnquist, C.J., dissenting). The dissenters' main argument was that the majority was conflating the right to travel with the separate right to become a citizen of another state. That criticism, whether or not it is correct, does not bear on H.R. 822, because H.R. 822 only involves pure travel, not immigration to another state. A second dissent, written by Justice Thomas and joined by Justice Rehnquist, pointed out that the majority's welfare rights decision was out of step with Supreme Court precedent which had interpreted the 14th Amendment Privileges or Immunities clause narrowly, but that dissent also expressed openness to re-examining the original meaning of that clause in an appropriate case, as Justice Thomas eventually did in *McDonald v. Chicago.*

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."
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> Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." Paul v. Virginia, 8 Wall. 168, 180 (1869) ("[W]ithout some provision . . . removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"). It provides important protections for nonresidents who enter a State whether to obtain employment, Hicklin v. Orbeck, 437 U. S. 518 (1978), to procure medical services, Doe v. Bolton , 410 U. S. 179, 200 (1973), or even to engage in commercial shrimp fishing, Toomer v. Witsell, 334 U. S. 385 (1948). Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." Id., at 396.

*Sáenz a*t 501-02.

B. The 14th Amendment was intended to give Congress the power to protect the right to travel—with special concern for travelers who might be threatened by violence.

Section 5 of the 14th Amendment grants a new power to Congress: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One of the purposes of section 5 was to give Congress the affirmative power to enforce the rights protected in Article IV, § 2, which Congress believed to be among those rights which were protected by section 1 of the 14th Amendment. Randy Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* 3 JOURNAL OF LEGAL ANALYSIS 165 (2011).[3]

Notably, congressional debate on the 14th Amendment's Privilege or Immunities clause indicated specific intent to protect the right to travel—not just the right to

[3] Some supporters of the 14th Amendment argued that Congress had always had the implicit power to enforce Article IV, § 2 "Privileges and Immunities." They pointed out that the Supreme Court had found that Congress had implicit power to enforce another provision of Article IV, § 2, namely the requirement that charged criminals who fled a state before trial, or fugitive slaves, or fugitive indentured servants who had not completed their term of labor, must be returned to the original state. Prigg v. Pennsylvania, 41 U.S. 539 (1842). To remove any doubt, the drafters of the 14th Amendment made sure to put "Privileges or Immunities of citizens of the United States" in section 1 of the 14th amendment, and a congressional enforcement power in section 5. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEORGETOWN LAW JOURNAL 329 (2011).

become a citizen of a new state. Congress discussed South Carolina's notorious 1844 persecution of Samuel Hoar, an attorney from Massachusetts. Hoar had traveled to South Carolina to mount a legal challenge to the state law which authorized the capture and enslavement of any free black sailor who in a South Carolina port stepped off his ship and onto the land.[4] Incited by the South Carolina legislature and governor, mobs threatened violence against the attorney, and he was forced to leave the state. *See* Massachusetts General Court, Joint special committee on the treatment of Samuel Hoar by the state of South Carolina, *Resolve and declaration* (1845).

For example, Senator John Sherman (R-Ohio)[5] explained the need for the Amendment, pointing out that Article IV of the Constitution had always meant that "a man who was recognized as a citizen of one state had the right to go anywhere within the United States and exercise the immunity of a citizen of the United States; but the trouble was in enforcing this constitutional provision. In the celebrated case of Mr. Hoar…This constitutional provision was in effect a dead letter as to him." Cong. Globe, 39th Cong., 1st Sess. 41 (Dec. 13, 1865).

Illinois Senator Lyman Trumbull had authored the 13th Amendment, abolishing slavery. He cited the Hoar case, and Mississippi's prohibition on gun ownership by freedmen, as examples of the needs for a congressional power to enforce national citizenship rights. Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866). *See also* Cong. Globe, 39th Cong., 1st Sess. 1066 (Feb. 27, 1866) (Rep. Hiram Price, of Iowa, regarding the proposed privileges or immunities clause of the 14th Amendment: "I want to have a Constitution that will protect my children and my children's children who may have occasion to travel in any part of the United States.").

Ohio Republican Columbus Delano[6] explained the 14th Amendment to the public by reminding them of the Hoar atrocity, and stating that the 14th Amendment would protect the right of travel. Cincinnati Commercial, Aug. 31, 1866, p. 2 (report of speech at Coshocton, Ohio, Aug. 28).

C. Congress's power to regulate interstate commerce includes the power to thwart impediments to the right to travel.

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

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

[5] He later served as Secretary of the Treasury, and Secretary of State, and is best known today as the sponsor of the Sherman Antitrust Act.

[6] He had been a U.S. Representative and a State Representative, and would later serve as Commissioner of Internal Revenue and as Secretary of the Interior.

The motel was clearly involved in catering to interstate travel:

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

Id. at 242. The unanimous Supreme Court found that Congress clearly possessed the power to prohibit the motel from refusing Black guests, because such refusal was a barrier to interstate travel.

The Court summarized congressional testimony and fact-finding that discrimination had "a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community." *Id.* at 252-53.

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

The opinion concluded:

> It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed - what means are to be employed - is within the sound and exclusive discretion of the Congress. It is subject only to one caveat - that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Id. at 261-62.

Significantly, *Heart of Atlanta* is not a case which upheld congressional use of the interstate commerce power as a pretext for regulating something else. The original intended purpose of the grant of the power "to regulate Commerce. . .among the several States" was to enable to Congress to act against impediments to interstate commerce. There was ample evidence that racial discrimination by hotels and

motels which catered to interstate travelers was a "qualitative" and "quantitative" barrier to interstate travel.[7] That being established, Congress could choose the means with which to address the problem.

D. Application to H.R. 822

Forty-eight states have provisions for licensing the carrying of handguns in public places for lawful self-defense. Vermont does not issue licenses, but simply allows concealed carry by persons who can legally possess handguns. Illinois also has no licensing provision, and allows carry in a much more limited set of places.

The large majority of states have reciprocity agreements with other states, so that a carry permit issued to residents of state A may be used by those residents when they visit state B, and vice versa. These states are not the primary problem that H.R. 822 addresses. A few states—including California, New York, and New Jersey—refuse to enter into reciprocity agreements with any of their sister states, *and* they have no provision allowing a non-resident to apply for a permit.

These states impose "qualitative" impediments on interstate travel. They discriminate against travelers based on "the mere fact that they are citizens of other States." They deny the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State."

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

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

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

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[7] As the *Heart of Atlanta* Court pointed out, there was substantial support in Supreme Court precedent for viewing as within the scope of "interstate commerce" interstate travel even if that travel were not for commerce, and even if that travel were not by means of a common carrier. Whether that broad view of the relationship between the commerce clause and right of interstate travel was consistent with the original meaning of the word "commerce" in the interstate commerce clause is questionable. *See* Robert G. Natelson & David B. Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICHIGAN LAW REVIEW FIRST IMPRESSIONS 55 (2010), http://www.michiganlawreview.org/articles/commerce-in-the-commerce-clause-a-response-to-jack-balkin. Strict originalists who are leery of any interpretative expansion of the commerce clause would probably be more comfortable relying on the original meaning of section 5 of the 14th Amendment, rather than the *Heart of Atlanta* line of cases, as justification for H.R. 822.

ended up in a part of some town which was significantly more menacing that he had expected.

Further, tourists and similar visitors are particularly targeted by criminals. Their style of dress or mannerisms may indicate that they are not familiar with local mores. Because they are not local residents, they are known to be less likely or able to make another trip to testify in court against the criminal, so the criminal has a greater sense of impunity in attacking a tourist.[8]

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

As in the *Heart of Atlanta* case, or almost every law enacted under section 5 of the 14th Amendment, H.R. 822 is not the only possible step that Congress could take to solve the problem. Congress could deploy tens of thousands of new federal law enforcement officers all over America, dedicated solely to the protection of interstate travelers. Congress has already enacted criminal laws against persons who attempt to interfere with a person's right to interstate travel,[9] and Congress could enact additional such statutes. Congress could under section 5 of the 14th Amendment create a civil cause of action on behalf of any interstate traveler who was injured because state action deprived her of the practical means of self-defense.

Congress can instead choose to enact H.R. 822, which is significantly less intrusive than the other alternatives. H.R. 822 puts no new federal officials into the states, does not force any state officials to do anything, and imposes no new federal criminal penalties on anyone. H.R. 822 simply requires that state and local officials not interfere with the lawful defensive carrying of handguns by interstate visitors, *provided that in carrying, the visitors follow precisely the same laws about the manner and places of carrying that are applicable to residents of the host state.*

Congress need not accumulate data about precisely how many people are criminally victimized because their constitutional rights are denied by some states. The denial of constitutional rights is in itself a tremendous harm. There is no more important purpose for congressional action than the protection of the national rights of citizenship guaranteed by the Constitution of the United States of America.

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

[9] The modern application of this Reconstruction era civil rights statute is discussed in *United States v. Guest*, which is cited in footnote 1 of this testimony.

II. Congressional enforcement of the Right to Bear Arms

Even without the right to travel, H.R. 822 is constitutionally sound based on Congress's power under section 5 of the 14th Amendment to enforce the rest of that Amendment.

A. *Heller* and the Right to Bear Arms

The Second Amendment guarantees the pre-existing "right to keep and bear Arms." *District of Columbia v. Heller*, 554 U.S. 570 (2008). The full scope of the Second Amendment is protected from state or local government infringement by section 1 of the 14th Amendment. Section 1 declares, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law…." Four Justices thought that the work of applying the Second Amendment to the states was done by the second clause (the "liberty" clause), while Justice Thomas thought that the work was done by the first clause ("privileges or immunities"). *McDonald v. Chicago*, 130 S.Ct. 3020 (2010). For purposes of H.R. 822, the relevant legal fact is that the Second Amendment is made fully applicable to the states by section 1.

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

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

Notably, the *Boerne* Court itself reaffirmed that Congress's powers under section 5 are not limited to practices which the Supreme Court has explicitly declared unconstitutional. For example, although the Supreme Court had ruled that literacy tests for voters, if fairly administered, are not unconstitutional,[10] Congress outlawed literacy tests in the Voting Rights Act of 1965. The Court upheld the ban.[11] *Boerne* cited the literacy test cases with approval, and stated that

[10] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[11] South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970). As the *Boerne* Court pointed out, the Voting Rights Act was based mainly on Congress's enforcement power in section 2 of the 15th Amendment, and the doctrinal analysis for the 14th Amendment's enforcement power in section 5 is identical. (The two sections have only minor, non-substantive differences in wording.)

"Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne* at 517-18.

H.R. 822 fits solidly within the zone of permissible section 5 legislation, and does not come close to violating *City of Boerne*.

What might constitute a violation of *City of Boerne*, in the context of H.R. 822? Let's imagine that the Supreme Court had handed down a decision which said that the Second Amendment right to "keep" arms is an absolute right for everyone to have guns at home for any purpose. And also imagine that in this hypothetical opinion, the Court also said that the right to use arms outside the home was solely for the militia. Then H.R. 822 would not be appropriate under section 5, because it protects arms use outside the home by all licensed citizens, not just the militia.

There indeed has been such a case, *Aymette v. Tennessee*, 2 Humphreys 154, decided in 1840 by the Tennessee Supreme Court. The Tennessee court was interpreting the right to arms clause in the Tennessee Constitution, and also said that the same interpretation applied to the federal Second Amendment.

Did *Heller* adopt the *Aymette* reading? No. First all, *Heller* was careful to remind that reader than the opinion does not attempt to delineate "the full scope of the Second Amendment." *Heller* at 626. Regarding *Aymette* in particular, the *Heller* Court wrote that "This odd reading of the right is, to be sure, not the one we adopt . . ." *Id.* at 613.

What *Heller* and *McDonald* both do is clearly indicate that the right to carry firearms for lawful self-defense in public is part of the Second Amendment right. Even if *Heller* and *McDonald* had been silent on the right to carry, H.R. 822 would be legitimate under section 5, because Congress would then be protecting rights in a gray zone left unclear by the Court.

While *Heller* and *McDonald* both involved handgun bans that even applied in the home, the Court, apparently aware of its duty to provide guidance to lower courts, explicated the Second Amendment to show that it includes the right of public carry.

The right to "bear Arms," explained the Court includes the right to "carry weapons in case of confrontation" for the "core lawful purpose of self-defense." *Heller*, at 592, 630.

The *Heller* opinion made it clear that not all gun controls are unconstitutional, and then listed some "presumptively lawful regulatory measures." According to the Supreme Court: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools

and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27.

These are the exceptions that prove the rules. Under *Heller*, ordinary citizens (but not felons and the mentally ill) have Second Amendment rights to possess guns. The Second Amendment right includes the right to carry guns, but not to carry in "sensitive places."

Having rejected *Aymette*'s rule that the right in public places was constrained by the Second Amendment's preface extolling the militia, the *Heller* Court further explicated the right to bear arms by approvingly citing and discussing state cases involving the right. Each of these cases came to the same conclusion: a state could ban concealed carry of handguns, if and only if the state also allowed the *open* carry of handguns. Thus, a legislature could regulate the *mode* of carry as long law-abiding citizens could actually exercise the right to carry.

For example, *State v. Reid*, 1 Ala. 612, 616-17 (1840), upheld a ban on carrying a weapon concealed, but added: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." This sentence is quoted in *Heller* as an accurate expression of the right to bear arms. *Heller*, at 629.

Likewise cited by the Supreme Court as an accurate reading of the Second Amendment was *Nunn v. State*, 1 Ga. 243 (1846), cited in *Heller* at 612-13. That case, relying on the Second Amendment struck down a general ban on carrying handguns for protection. *Nunn* upheld a ban on concealed carry, because open carry was allowed.

Heller also relied on *State v. Chandler*, 5 La. Ann. 489 (1850). As *Heller* put it: "the Louisiana Supreme Court held that citizens had a right to carry arms openly: 'This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.'" *Heller*, at 613.

To the exact same effect is *Andrews v. State*, 50 Tenn. 165 (1871), where the Tennessee Supreme Court equated the state constitutional provision to the Second Amendment, and struck down a law against carrying handguns "publicly or privately, without regard to time or place, or circumstances." *Heller*, at 629.

The *Heller* Court also approvingly cited several other legal authorities which stated that the right to arms included the right to carry defensive arms.[12]

[12] William Hawkins, *A Treatise of the Pleas of the Crown* 72 (1716) (there is "no Reason why a Person, who without Provocation, is assaulted by another *in any Place whatsoever*, in such a Manner

The states which have caused the problem addressed by H.R. 822 have done exactly what *Reid*, *Chandler*, *Nunn*, and *Andrews*—and *Heller*'s adoption of all of them forbid: with regard to visitors, they have completely disabled them from being able to carry a functional handgun (or any other firearm) for lawful protection.

B. *McDonald* and the Right to Bear Arms

Right at the beginning of the discussion of the constitutional violations that the Fourteenth Amendment was designed to remedy, Justice Alito's opinion in *McDonald* pointed out that the Fourteenth Amendment was aimed at laws such as the Mississippi statute providing that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . . ." *McDonald v. Chicago*, 130 S.Ct. 3020, 3038 (2010). *McDonald* then stated, "see also Regulations for Freedmen in Louisiana, in id.,[13] at 279-280." That disfavored law said: "No negro who is not in the military service shall be allowed to carry firearms, or any kind of weapons, within the parish, without the written special permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol."

McDonald described a convention of black citizens in South Carolina who sent a petition to Congress stating that the Constitution "explicitly declares that the right to keep and bear arms shall not be infringed" and urging that "the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution." 130 S.Ct. at 3038 n.18, quoting STEPHEN. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 9 (1998). Rep. George Washington Julian (R-Ind.) described that South Carolina law and another in urging adoption of the Fourteenth Amendment:

> Although the civil rights bill[14] is now the law, . . . [it] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is

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as plainly shews an Intent to murder him, . . .may not justify killing such an Assailant") (emphasis added), cited in *Heller*, at 582.

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

[13] 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 289 (W. Fleming ed.1950).

[14] The Civil Rights Act of 1866.

> whipped. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.

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

"The most explicit evidence of Congress' aim" regarding the Fourteenth Amendment, *McDonald* continued, appeared in the recognition in the Freedmen's Bureau Act of 1866 of "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms . . . ." 130 S.Ct. at 3040.

Justice Thomas's concurrence referred to states that "enacted legislation prohibiting blacks from carrying firearms without a license," *Id*. at 3082, and quoted Frederick Douglass as stating that "the black man has never had the right either to keep or bear arms," a problem which would be remedied by adoption of the Fourteenth Amendment. *Id*. at 3083.

C. Concealed handguns

As accurately noted by *Heller*, many state courts have upheld bans on *concealed* carry.[15] H.R. 822 applies only to concealed carry. If H.R. 822 were applied to a state which banned visitors from carrying concealed, *and* if that state allowed open carrying by visitors, then there might be a serious question about whether H.R. 822 could be applied to such a state.[16]

However, there is no such state. The states such as New York and New Jersey which are obliterating the constitutional rights of visitors are not one iota more tolerant of open carry by visitors than they are of concealed carry.[17] For all practical purposes, all defensive carry is completely prohibited. Accordingly, Congress may in its discretion enact national reciprocity for concealed carry rather than for open carry. Like any legislature, Congress may make a choice between preferring one mode of carry over another. Further, Congress may, in enacting system based on interstate reciprocity of *licenses*, may take into account the fact that almost every

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[15] "[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller* at 629.

[16] In other words, there would be a question under the *Tennessee v. Lane* line of cases about whether the congressional remedy was "congruent and proportional."

[17] California does allow unlicensed open carry, but only for *unloaded* guns. The gun may only be loaded under the same type of circumstances under which it would be appropriate to call 911. This system is, at best, a shadow of the Second Amendment right to carry functional firearms for self-defense. *See* Amicus brief for the International Law Enforcement Educators and Trainers Association, and the Independence Institute, in *Peruta v. San Diego* (9th Cir., 2011), http://davekopel.org/Briefs/Peruta/Intl-Law-Enforcement-Educators-and-Trainers.pdf. Several cases involving the California system are currently before the 9th Circuit Court of Appeals.

state issues licenses to residents for concealed carry, but only a few issue licenses for open carry.[18]

III. Constitutionality based on the gun's having been shipped or transported in interstate commerce.

H.R. 822 is well justified by the text and original meaning of the Constitution, as applications of the congressional power to enforce the 14th Amendment right to keep and bear arms and the right to travel.

H.R. 822 also invokes another theory: the bill only applies to a gun which has previously shipped or transported in interstate commerce. The gun having once moved been an object of interstate commerce, it forever remains, supposedly, subject to Congress's interstate commerce power.[19]

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[18] Most states have statues that explicitly require the issuance of concealed carry licenses to law-abiding citizens based on objective standards. *See* Ark. Code Ann. § 5-73-309(a); Colo. Rev. Stat. Ann. § 18-12-203(1); Fla. Stat. Ann. § 790.06(2); Ga. Code Ann. § 16-11-129; Idaho Code Ann. § 18-3302(1); Ind. Code Ann. § 35-47-2-3(e), Iowa Code Ann. § 724.7; Kansas Stat. Ann. § 75-7c03; Ky. Rev. Stat. Ann. § 237.110(2); La. Rev. Stat. Ann. § 40:1379(A)(1); Me. Rev. Stat. Ann. tit. 25, § 2003; Mich. Comp. Laws Ann. § 28.422(2)(3); Minn. Stat. § 624.714, subdiv. 2(b); Miss. Code Ann. § 45-9-101(2); Mo. Ann. Stat. § 571.090(1); Mont. Code Ann. § 45-8-321(1); Neb. Rev. Stat. § 28-1202; Nev. Rev. Stat. Ann. § 202.3657(2); N.H. Rev. Stat. Ann. § 159.6; N.M. Stat. Ann. § 29-19-4 ; N.C. Gen. Stat. § 14-415.11(b); N.D. Cent. Code § 62.1-04-03; Ohio Rev. Code Ann. §2923.125(D)(1); Okla. Stat. Ann. tit. 21, § 1290.12(12); Or. Rev. Stat. Ann. § 166.291; 18 Pa. Cons. Stat. Ann. § 6109(e); S.C. Code Ann. § 23-31-215(A); S.D. Codified Laws § 23-7-7; Tenn. Code Ann. § 39-17- 1351(b); Tex. Gov't Code Ann. § 411.177(a); Utah Code Ann. § 53-5-704(1)(a); Va. Code Ann. § 18.2-308(D); Wash. Rev. Code Ann. § 9.41.070(1); W. Va. Code Ann. § 61-7-4(f). Wisconsin's similar law will take effect in November. The Alabama and Connecticut statutes nominally have more discretion, but in practice are applied so that all law-abiding adults can obtain permits. Alaska, Arizona, and Wyoming do not require concealed carry licenses, but will issue them to applicants based on objective criteria, so that the licensees can participate in interstate reciprocity. Vermont does not require permits, and does not issue them. Illinois has no procedure for issuing permits, but allows carrying one's own property, and in some other circumstances. The remaining 8 states have statutes giving arbitrary power to the licensing agent. In these capricious issue states, the possibility of obtaining a permit may vary widely from county to county (e.g., New York, California) or may usually be denied (e.g., New Jersey, Maryland).

[19] For some of the many criticisms of this theory, see United States v. Cortner, 834 F. Supp. 242, 243 (M.D. Tenn. 1993), rev'd sub nom. United States v. Osteen, 30 F.3d 135 (6th Cir. 1994) ("To say . . . that because something once traveled interstate it remains in interstate commerce after coming to rest in a given state, is sheer sophistry. This Court, at one time, owned a 1932 Ford which was manufactured in Detroit in the year 1931 and transported to the state of Tennessee. It remained in Tennessee thereafter. Now if this car were hijacked today, some sixty years later, is it still in interstate commerce?"); David E. Engdahl, *Casebooks And Constitutional Competency*, 21 SEATTLE UNIVERSITY LAW REVIEW 741, 783-85 (1998); David E. Engdahl , *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARVARD JOURNAL OF LAW & PUBLIC POLICY 107, 120 (1998) ("theory that some lingering federal power infects whatever has passed through the federal dominion--a premise that is simply ridiculous."); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial*

I have previously criticized this theory, which is plainly contrary to the original meaning of the interstate commerce clause, and to common sense.[20] The U.S. Supreme Court has interpreted statutes which rely on the theory,[21] but has never ruled on the constitutionality of the theory itself. The lower federal courts have upheld many federal gun control laws using the theory.

It should be noted that many other federal gun control laws contain the same jurisdictional element. These include:

- The statute barring various categories of persons from possessing firearms. Gun Control Act of 1968; 18 U.S.C. § 922(g). Notably, this law applies to persons whose own current possession of the gun—unlike gun possession by an interstate traveler—has not the slightest practical connection to interstate commerce.

- The version of the Gun-free School Zones Act which Congress enacted in 1995, after an earlier version of the GFZSA was ruled unconstitutional by the Supreme Court in *United States v. Lopez*. 18 U.S.C. 922(q). This law applies to gun carrying within a state regardless of whether the carrying really has anything to do with interstate commerce. As revised, the GFSZA and its theory have been upheld some courts.[22] Like H.R. 822, the GFSZA controls the conditions for carrying handguns in public places. Unlike H.R. 822, the GFSZA applies to everyone, not just interstate travelers.

- Law Enforcement Officers Safety Act. 18 U.S.C. § 926B&C. This law allows gun carrying by qualified active and retired law enforcement personnel. It at least has the virtue of applying almost entirely to gun carrying by interstate travelers (since all states already allowed gun carrying by resident active law enforcement, and for resident retired law enforcement, the states either issue permits, or do not require permits).

In short, as a practical matter, the limitation of H.R. 822 to guns that once moved in interstate commerce provides a further reason why federal courts are likely to uphold H.R. 822. But unlike some other federal gun laws, H.R. 822 has a solid basis in the use of congressional enforcement power for the 14th Amendment.

Regulations but Preserve State Control over Social Issues, 85 IOWA LAW REVIEW 1, 84, n. 391 (1999); Steven K. Balman, *Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause*, 41 TULSA L. REV. 125, 164 (2005).

[20] David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENVER UNIVERSITY LAW REVIEW 901, 938 (2009); David B. Kopel & Glenn Harlan Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban*, 30 CONNECTICUT LAW REVIEW 59 (1997).

[21] *E.g.*, Scarborough v. United States, 431 U.S. 563 (1977).

[22] United States v. Dorsey, 418 F.3d 1038 (9th Cir., 2005); United States v. Danks, 221 F.3d 1037 (8th Cir.1999).

IV. Public Safety

A. Social Science studies

In 1998, the first extensive and sophisticated study of the effect of objective, "shall issue" handgun carry licensing laws was published. Professor John Lott's research found statistically significant reductions in the rates of homicide, rape, robbery, and assault. JOHN LOTT, MORE GUNS, LESS CRIME (1st ed. 1998). Early efforts to discredit Lott's findings were tendentious and unpersuasive.

More serious re-examination of Lott's findings were conducted by Stanford professor John Donohue, a fervent anti-gun advocate, but also a sophisticated econometrician. Donohue and his Ian Ayres corrected some errors in Lotts' coding, collected additional data, and reported that there were no statistically significant effects in any direction. Ian Ayres & John J. Donohue, III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STANFORD LAW REVIEW 1193 (2003).

The National Research Council, a private research organization affiliated with the National Academy of Sciences, conducted a meta-study of all research on gun control.[23] The majority agreed that there was no persuasive research showing that shall issue laws resulted in a statistically significant increase or decrease in crime. NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005). One of the seven panelists, UCLA's Prof. James Q. Wilson, partially dissented, arguing that the research did show a statistically significant decrease in homicide.

Professor Donahue, who was not on the panel, agreed with the NRC majority that the current state of the social science evidence did not support a finding that there were statistically significant effects.[24]

Several years after the NRC concluded its work, a new study reviewed the entire literature on the subject of concealed carry, and with additional years and variables added to the 2003 Ayers-Donohue analysis. That study found that the only statistically significant long-term effect is a reduction in assault. Carlisle E. Moody

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[23] The NRC reviewed approximately "253 journal articles, 99 books, 43 government publications, and some original empirical research." Don Kates and Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARVARD JOURNAL OF LAW & PUBLIC POLICY 649, 654 (2007).

[24] A recent Donohue article concludes: "Finally, despite our belief that the NRC's [National Research Center's] analysis was imperfect in certain ways, we agree with the committee's cautious final judgment on the effects of RTC [Right to Carry] laws: —with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." Abhay Aneja, John J. Donohue, III, & Alex Zhang, "The Impact of Right-to-Carry Laws and the NRC Report: Lessons for the Empirical Evaluation of Law and Policy," paper presented at 5th Annual Conference on Empirical Legal Studies, Johns Hopkins University, June 29, 2010, http://ssrn.com/abstract=1632599 (parentheticals added).

& Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON JOURNAL WATCH 269 (2008).

Although gun prohibition advocates sometimes claim that forcible resistance by victims is dangerous, the evidence does not support such claims. Studies based on data from the National Crime Victimization Survey and other sources show that "There is no sound empirical evidence that resistance does provoke fatal attacks."[25] Nor does resistance with a firearm increase the chance of victim injury.[26] Instead, "The use of a gun by the victim significantly reduces her chance of being injured...."[27]

The FBI reports that there an estimated 1,318,398 violent crimes in the United States in 2009.[28] A law which reduced the number of such crime by several hundred or several thousand might not be statistically significant. But it would be of the highest possible significance to the families of the people who were not murdered, to the women who were not raped, to the travelers who were not robbed, assaulted, and maimed.

Congress is not constitutionally required to exercise its powers only when social science unanimously indicates in advance that a proposed law will have statistically significant benefits. In the *Heart of Atlanta* case, Congress did not have any social science studies proving that prohibition of racial discrimination by businesses catering to interstate travelers would lead to a statistically significant increase in interstate travel by Blacks. When enacting the Civil Rights Acts during Reconstruction, Congress had no econometric studies about the potential net benefits of stopping state interference with the right of interstate travel and the right to bear arms. Protecting the national rights of citizenship is *constitutionally* significant, and there it is the most important duty of Congress.

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[25] Gary Kleck & Jongyeon Tark, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*. 42 CRIMINOL. 861, 903 (2005).

[26] Kleck, 35 SOC. PROBS. at 7-9; Gary Kleck & Miriam DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 JOURNAL OF QUANTITATIVE CRIMINOLOGY 55, 73-77 (1993)(study of all NCVS robbery data from 1979-85; the most effective form of resistance, both for thwarting the crime, and for reducing the chance of victim injury, is resistance with a gun); Gary Kleck & Marc Gertz, 86 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 150, 174-75 (1995); William Wells, *The Nature and Circumstances of Defense Gun Use: A Content Analysis of Interpersonal Conflict Situations Involving Criminal Offenders,* 19 JUSTICE QUARTERLY 127, 152 (2002).

[27] Lawrence Southwick, *Self-Defense with Guns: The Consequence*s, 28 JOURNAL OF CRIMINAL JUSTICE 351, 362, 367 (2000)(NCVS robbery data, pertaining to situations where the robber has a non-gun weapon; if the robber has a gun, or has no weapon, victim gun possession did not seem to affect injury rates. If 10% more victims had guns, serious victim injury would fall 3-5%).

[28] FBI Uniform Crime Reports 2009, "Violent Crime," http://www2.fbi.gov/ucr/cius2009/offenses/violent_crime/index.html.

B. Empirical evidence about permitees

Besides social science, another source of information about the public utility of laws allowing people, after proper licensing, to carry handguns for lawful self-defense is the behavior of people who have such licenses.

Not all states publish detailed reports on their handgun carry licensees. In a 2009 law review article, I collected all the data I could find from states which did publish such reports on the Internet. While the details of how the data are reported vary among the states, the reports unanimously show that almost all permitees are highly law-abiding. In particular:

- Minnesota. One handgun crime (broadly defined, such as driving while under the influence if a handgun is in the car) per 1,423 permitees.

- Michigan. 161 charges of misdeeds involving handguns (including duplicate charges for one event, and charges which did not result in a conviction) in 2007 and 2008 out of an approximate Michigan population of 190,000 permitees.

- Ohio. 142,732 permanent licenses issued since 2004, and 637 revocations for any reason, including moving out of state.

- Louisiana: Permitee gun misuse rate of less than 1 in 1,000.

- Texas: Concealed handgun licensees are 79% less likely to be convicted of crimes than the non-licensee population. Only 2/10 of 1% of licensees ever convicted of a violent crime or firearms regulation crime.

- Florida: The data show a rate of 27 firearms crimes per 100,000 licensed Florida residents.

David B. Kopel, *Pretend "Gun-free" School Zones: A Deadly Legal Fiction*, 42 CONNECTICUT LAW REVIEW 515, 564-69 (2009).

C. Claims about permitees by anti-gun groups

Florida's 1988 concealed handgun licensing law started a national trend, so that by 1995 the majority of the U.S. population lived in a state with such a law, and by 2011, only 9 states have laws which broadly infringe the rights of residents of carry handguns for lawful protection. If there were good evidence that laws allowing the exercise of the right to bear arms are harmful, it would have been found by now.

Some anti-gun advocates argue against lawful carry by pointing to the article Mark Duggan, *More Guns More Crime*, 109 JOURNAL OF POLITICAL ECONOMY 1086 (2001), whose title reveals its thesis. Yet the article proves nothing at all. Rather than

studying concealed handgun laws, the article studied the circulation of *Guns & Ammo* magazine. The article said that it found higher circulation for the magazine (which was used a proxy for gun ownership rates) to be associated with higher crime rates. However, the study failed to consider the circulation policy of *Guns & Ammo* during the study period. At the time, the magazine was attempting to meet certain circulation numbers, which it had guaranteed to advertisers, by giving away 5 to 20 percent of its circulation to doctors and dentists offices. The publisher deliberately concentrated its free magazine program in counties which were believed to have increasing crime rates, since they might be more interested in learning more about defensive guns. *See* Florenz Plassmann & John Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes*, Social Science Research Network (July 2, 2002), http://ssrn.com/abstract=320107.

The Brady Campaign and the Violence Policy Center publish reports on their websites which claim that many crimes are committed by concealed handgun licensees. These reports are collections of supposed incidents which the organizations found by reading newspaper articles on the Internet. Yet when one reads the newspaper stories themselves, it become clear that the anti-gun advocates have engaged in considerable exaggeration.

For example, according to a 2007 report by the Brady Center, "thousands of people with CCW licenses have committed atrocious acts of gun violence."[29] Yet the only cited support for this claim was a *Los Angeles Times* article which reported on four individuals in Texas who had committed crimes, plus another Brady Center report on carry licensees in Florida.[30] The cross-cited Brady report on Florida listed the criminal offenses behind 105 Florida permit revocations in 1987–97.[31] Most of these listings provided no indication that the person whose permit was revoked had committed any crime with a gun, let alone an "atrocious act of gun violence."[32] To the contrary, only 13 out of the 105 listed offenses included use of a firearm as an element, such as "adjudication withheld on felony assault with a deadly weapon," "adjudication withheld on felony aggravated assault with a firearm," or "convicted of felony possession with intent to distribute cocaine, possession of a firearm during drug trafficking offense." Indeed, for the vast majority of the offenses—such as assault or drug sales—the absence of a firearms count would seem to indicate that a firearm was *not* used. Likewise, there was no indication that a firearm was used in the many offenses of simple possession of marijuana, passing fraudulent checks, or other non-violent crimes.

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[29] BRADY CENTER TO PREVENT GUN VIOLENCE, NO GUN LEFT BEHIND: THE GUN LOBBY'S CAMPAIGN TO PUSH GUNS INTO COLLEGES AND SCHOOLS, at iv (2007).
[30] *Id.* at 34–35.
[31] *See* CENTER TO PREVENT HANDGUN VIOLENCE (the previous name of the Brady Center), GUNS & BUSINESS DON'T MIX: A GUIDE TO KEEPING YOUR BUSINESS GUN-FREE, 1C–4C (1997).
[32] BRADY CENTER, NO GUN, at IV.

The 2007 Brady report asserted that a carry permit "can often be a license to kill."[33] An Appendix provided a litany of 29 incidents from around the country, presumably the most "atrocious acts of gun violence" it could find.[34]

Now, if every one of these involved a criminal homicide, these twenty-nine cases (out of a national CCW licensee population of several million), would mean that CCW licensees have a criminal homicide rate far below that of the general population. But most of the 29 most "atrocious" CCW stories that the Brady Center could find did not even involve conduct with a gun that was carried pursuant to a CCW permit.[35] Of those that did, not all of them are exactly the stuff of "a license to kill." For example, United States Representative John Hostettler forgot to take his licensed handgun out of his bag when going through airport security; he pleaded guilty to a misdemeanor.[36] A former judge made the same mistake and also pleaded guilty to a misdemeanor charge.[37]

In Virginia, a schoolteacher left a handgun locked in a car while the car was parked on school property; he was charged with violating the Virginia law against firearms on school property.[38] In Pennsylvania, the transportation director for a school district was suspended for several months for, among other things, what the district described as "unintentionally bringing a loaded firearm onto school property" when he left a handgun in a motorcycle saddlebag.[39]

The Brady Center listed some cases in which a person was arrested after a shooting, but almost never reported dispositions. The Brady Center thus treated a case that was not prosecuted, because an investigation established that the defendant acted in lawful self-defense, as equivalent to a case of criminal homicide. For example, the *Austin Examiner* quoted on Brady Center story:

> Fort Lauderdale, Florida, January 1, 2006. Rogelio Monero [sic], 49, allegedly shot and killed Victor Manuel Villanueva, 17, during a New Year's altercation as Moreno tried to stop a fight between Villanueva and a third party. Moreno was charged with manslaughter.[40]

Then the *Austin Examiner* telephoned the Fort Lauderdale Police Department, and

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[33] BRADY CENTER, NO GUN, at 22.
[34] *Id.* at 22–26.
[35] *Id.*
[36] *See id.* at 24 (citing Jason Riley, *Congressman Guilty in Gun Case*, LOUISVILLE COURIER-J., Aug. 11, 2004, at 1B).
[37] *Id.* at 25.
[38] *See id.* at 24 (citing Maria Glod, *Va. Teacher Accused of Taking Gun to School; Loaded Weapon Found in Locked Car*, WASHINGTON POST, Apr. 27, 2005, at B01).
[39] *Id.* at 25.
[40] Howard Nemerov, *Brady Campaign: Biased, Inaccurate Research*, AUSTIN EXAMINER, Apr. 12, 2009, http://www.examiner.com/x-2879-Austin-Gun-Rights-Examiner~y2009m4d12-Brady-Campaign-Biased-inaccurate-research (quoting BRADY CENTER, NO GUN).

found that the shooting had been determined to be a justifiable homicide.[41]

Another Brady Center story:

> Vancouver, WA, October 3, 2006. Jon W. Loveless, unemployed for ten years, daily marijuana smoker, and father of two children— said that he shot "until my gun was empty" at Kenneth Eichorn [sic, Eichhorn], because Eichorn [sic] had "a weird look" on his face. Loveless also claimed that Eichorn [sic] held a handgun, but the Eichorn [sic] family disputes the claim. Loveless was charged with one count of second-degree murder.

Missing from the Brady account was the conclusion to the story, which was reported October 5, 2006, in the same newspaper that the Brady Center had cited:

> Jon W. Loveless was exonerated Thursday on charges of second-degree murder and was to be released from the Clark County Jail. . . .
>
> On Wednesday, [Senior Deputy Prosecutor] Fairgrieve indicated he had yet to see evidence that would support a second-degree murder charge. He said the standards police use to arrest a suspect are lower than what prosecutors use to file charges, and by law charges against a person in custody must be filed within 72 hours of the suspect's first court appearance.[42]

Of the 29 incidents reported by the Brady Center, there are four cases of gun accidents, two of them fatal. As for criminal homicides by people who actually had concealed carry permits (not people whose permits had earlier been revoked, although the Brady Center lists these), there was only one that was committed in a public place (where the permit would even be relevant), and one more that was committed at home. There were three other cases of misusing a gun against another person (making an improper threat, carrying a gun while impersonating a police officer, and a robbery perpetrated by a police officer's wife).

In short, the Brady Center's claims about the dangerousness of licensees were grossly exaggerated, and some of exaggeration involved people who were determined by law enforcement to have acted in lawful self-defense.

Is every single handgun licensee perfect? No, but the overwhelming majority are highly law-abiding, and even very the few who are not almost never commit violent gun crimes.

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[41] *Id.*; Press Release, City of Fort Lauderdale Police Department, Shooting At New Year's Eve Party Leaves One Dead (Jan. 1, 2006), http://ci.ftlaud.fl.us/police/pdf/2006/january/06-01%20New%20Year%20shooting.pdf.

[42] *Loveless Exonerated in CB Shooting,* CLARK COUNTY COLUMBIAN, Oct. 5, 2006, http://www.accessmylibrary.com/article-1G1-152392929/loveless-exonerated-cb-shooting.html.

In sum, the social science evidence and the government data provide good reason for Congress to believe that the effect of H.R. 822 will be to save lives, thwart violent crimes, and deter criminals.

Conclusion

Samuel Hoar escaped before the criminals could injure or kill him. Many interstate travelers are not so lucky. Congress has the clear constitutional authority, and the responsibility, to protect national citizenship rights from infringements by state or local governments. H.R. 822 safeguards the constitutional right to travel and the constitutional right to bear arms, and enhances public safety.