Firearm Preemption Laws and What They Mean for Cities

By Joseph Tartakovsky

The Rapidly Changing Scene of Second Amendment Jurisprudence

The Second Amendment, once a leading candidate for Sleepiest Area of Constitutional Law, has burst into the offices of every city attorney. In 2008, in *District of Columbia v. Heller*, the Supreme Court with fanfare declared that the Second Amendment secured an individual right to keep arms, especially in the home to defend family and property.[1] In *McDonald v. City of Chicago* (2010), the Court extended that holding to the states.[2] Before that watershed duo the last major opinion to interpret the amendment was in *United States v. Miller*, a thin unimpressive exhibition in 1939 in which the appellees didn't even bother to show up.[3] The NRA had actually *lobbied* for the National Firearms Act of 1934 that was challenged in that case.[4]

What has happened since? Curiously, almost nothing on the federal level and a great deal among the states. *Heller* struck down a D.C. municipal law—and this appears to be the only federal law to have met with invalidation. The statutory crux of federal firearm law is the Gun Control Act of 1968—incidentally, also NRA-supported, though more tepidly than the 1934 act[5]—which illegalizes gun possession by certain classes of people, among them felons, the mentally ill, drug addicts, and illegal aliens.[6] Since *Heller*, these provisions have been challenged relentlessly and altogether in vain.[7] The real action has been in the states, with 50 bodies of more comprehensive law and less political deadlock.[8] That litigation should erupt after *Heller* and *McDonald* is not surprising, but the direction state legislation has taken is.

Most of it has firmed up the individual right. That's a safe summary—or, depending on your policy preferences, an unsafe one. Blue states like California, Connecticut, Massachusetts, and New York imposed new restrictions. The rest have deregulated gun possession, with the Second Amendment a rallying call to arms (so to speak) for assertions of state sovereignty. Some laws are quite specific. For instance, in Arkansas, the 2013 Church Protection Act lifted the state's old ban on carrying concealed handguns into houses of worship.[9] In March, South Dakota became the first state to authorize K-12 schools to "supervise the arming of school employees"[10] and perhaps also the first to allow packing heat on snowmobiles.[11]

But the real trend is not captured simply by tallying laws. Colorado, the site of some of the worst gun atrocities—Columbine, the Nathan Dunlap quadruple homicide, the Holmes theater shooting—enacted measures that restrict the size of magazines, intensify background checks for buyers, and impose fees for such checks. Yet the law provoked an immediate backlash.[12] The bill was enacted without Republican votes and two supporting Democrats face recall elections.[13] The states that moved to extend gun rights have not seen such counter-reaction. Arkansas's Church Protection Act passed 85-8 in its House of Representatives, a body evenly split between the parties, and was signed by Democratic Governor Mike Beebe.[14]

More far-reaching yet are Montana's "Firearm Freedom Act"[15] (emulated in Alaska,[16] Wyoming,[17] and Tennessee,[18] among others) or Kansas's "Second Amendment Protection Act."[19] These laws take their starting point from the fact that federal firearm regulation is premised on the Commerce Clause: guns (or subparts) flit between states, affecting national commerce, therefore Congress has power over them. Prof. David Engdahl called this the "herpes theory" of interstate commerce; once an object crosses a state line it remains forever touched (or, if you will, infected) by federal power.[20] Even "if a gun were manufactured in Massachusetts in 1922," wrote David Kopel, "and sold in Utah in 1923, and never left Utah thereafter, its possession within Utah in 1999 could still be prohibited under the congressional power to regulate interstate commerce."[21] Kansas now provides that if a gun is "owned or manufactured commercially or privately in Kansas," it is "not subject to any federal law."[22] Montana's law and its analogues are identical in this respect.[23] The fate of these laws is, as we say, TBD. Certainly assistant

U.S. attorneys know how to make an argument about "substantial effects."[24]

Gun Preemption Laws

But one less flashy trend in state firearm law has flown under the radar—though not yours, perhaps—because it seems either too innocuous or complex (at least to journalists). These are newly strengthened or expanded state firearm *preemption* laws. They generally bar a city or county from enacting firearm-related regulations. Preemption laws historically have had a simple purpose: to resolve, in advance, conflicts between the laws of two jurisdictions by having the one with superior authority declare that in a particular area of law, its laws should be understood to displace the inferior jurisdiction's enactments on the same subject matter.

In June I made a study of every state statute (and one constitutional provision) that contains a firearm-preemption provision. They vary impressively and are rife with exceptions and dizzying cross-references. But I was able to draw some conclusions and make some categorizations that I invented for the purpose. (The full list with citations is in Appendix A.)

- 45 states have a preemption statute (or a constitutional provision, in NM's case) that restricts what their cities can and cannot do with regard to regulating guns.

- 12 states have what amount to absolute preemption provisions ("high"). This means that on the face of the law no municipal regulation is allowed and no exceptions are made. These are AR, IN, IA, KY, MI, NM, OR, PA, RI, SD, VT, UT.
- 29 states are in the middle and allow local jurisdictions to regulate some aspects of guns ("medium"). This means that the state preempts local regulation but makes one or more exceptions. These are AL, AK, AZ, FL, GA, DE, ID, KS, LA, ME, MD, MN, MS, MO, MT, NB, NV, NC, ND, OH, OK, SC, TN, TX, WA, VA, WV, WI, WY.

- Many states limit exceptions to firearm discharge within city limits and zoning ordinances. Other states make numerous exceptions. Alaska, a high-medium state, has most of the common exceptions: a city can regulate discharge of guns "when there is a reasonable likelihood that people, domestic animals, or property will be jeopardized"; it can apply zoning restrictions to gun dealers; it can prohibit guns in the "restricted access area of municipal government buildings"; and it can levy taxes on gun sales.[25]
- Four states have partial pre-emption ("low"). This means that preemption exists but its scope is limited, say, to handguns only. These are AL, CA, CO, and IL.[26]
- One state expressly permits local regulation of firearms. This is NJ.
- Four states appear to have no firearm preemption statute. These are HI, NJ, MA, NY. HI and MA have extensive licensing requirements that presume local cooperation.
- No statute mentions local "discretion." There are only exceptions to the pre-emption provisions. For example, five states specifically exempt the city's regulation of *employees* from the general preemption law. These are AZ, FL, GA, NC, and VA.
- Seven states provide for civil penalties or create causes of action against local officials who violate the preemption law. These are AR (recovery of firearms), FL (civil fines and damages capped at $100,000), KY (civil suit without immunity and criminal misdemeanor penalties), ME (civil suit but only in very limited circumstances), OH (prevailing plaintiffs gets costs and attorneys' fees), OK (civil cause of action against individual or city for rights violated "pursuant to the protection of the preemption provisions"), VA (prevailing plaintiffs get attorneys' fees, expenses, and costs).

- FL and KY's new statutes (2011 and 2012) impose the toughest penalties on officials.

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The Consequences of Preemption Laws

Why do we care about firearm preemption laws? Because in a nation of 80 million gun owners,[27] any particular gun law is liable either to offend some as too restrictive or frighten others as too permissive. To say that a town can't pass laws "relating to" firearms (as so many municipal ordinances do, directly or incidentally) is to affect a staggeringly broad sweep of regulation. Preemption laws seem mostly to have had their legislative target in a big city's heavy restrictions and registration requirements—the classic fights include San Francisco vs. Sacramento, Philadelphia v. Harrisburg, and Louisville v. Frankfort—but a preemption law can actually work both ways. Georgia's preemption law might well preclude the "Family Protection Ordinance" of Nelson, Georgia, which would require "every head of household to maintain a firearm."[28] The 913-resident town is

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blissfully free of serious crime and said it won't enforce the "symbolic" ordinance.[29] But a lawsuit filed against it by the Brady Center to Prevent Gun Violence is quite non-symbolic—nor are the costs the city will incur to defend against it.[30]

This spring, as Louisville, Kentucky, celebrated its third NCAA basketball championship, its devoted city attorneys were thinking hard about how to interpret Kentucky Revised Statute (KRS) § 65.870, enacted in July 2012, a law with the distinction of being the only firearm preemption law to *criminalize* preemption violations by local officials. (By the way, the representative who introduced it is a "conservative Democrat.") Did this mean the city couldn't bar guns from schools, libraries, or courthouses? Must city zoning rules yield to home-made shooting ranges? Did the state really mean to prohibit the police from regulating its own gun usage and training? Can Louisville impose fines for improper disposal of live ammunition?

Gun rights frequently collide with other rights, especially those bearing on public safety. In fact, preemption laws are *designed* for these inevitable conflicts. Yet many of the 44 firearm preemption statutes make no exceptions (even for local law enforcement), even though any sensible legislator would concede that these exceptions exist. They would probably agree that a city jail can ban people from entering with weapons or that a board of supervisors can forbid the recreational discharge of guns at 3 a.m. in residential neighborhoods. No law can cover every contingency. In the meantime, hundreds~ even thousands, of local officials—aldermen, city attorneys, police chiefs—must deal with the law while trying to keep citizens safe. Some have thrown up their hands. As Stuart, Florida, faced the Sunshine State's tough new preemption law,

> City Manager Paul Nicoletti said there is too much risk as fines for violating the new law can reach $5,000 per official. Officials also face the potential of being removed from office. "Because the sanctions are so severe we're just pulling them out," Nicoletti said of the language addressing firearms in city ordinances. "That way we don't have to deal with the issue...."[31]

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The Louisville Experience

The challenge facing Louisville—which I've worked for on a pro bono basis—is of particular significance because of the harshness of its provisions. I do not hesitate to call them that: they lay down career-threatening criminal penalties that appear to threaten even city officials who act in good faith to comply with the law. (The statute goes so far as to penalize violations of its "spirit," a jurisprudential novelty.) As the Firearm Freedom Acts demonstrate, gun laws across the nation are modeled on one another and enacted, *seriatim*, quickly. Kentucky's law is a fearsome new template from the perspective of a municipal attorney. For that reason I outline two promising avenues of challenge. Their appeal is that instead of challenging the state's regulatory power or gun policy, a city can argue that a law like Kentucky's, when so incautiously drafted, poses serious problems under the U.S. Constitution's Speech and Due Process Clauses.

Free Speech: In a fraught area like firearm policy, hunters, parents of victims of shooting violence, school-board presidents—everyone else has the right to speak out. (However much you may regret the fact, even city council reps have speech rights.) Yet Kentucky declared that "any" official "action" or "policy" may (1) constitute the criminal offense of "official misconduct" or (2) expose offending officials to a new civil cause of action without official immunity.[32] In Louisville, a metropolitan area of three-quarters of a million people, it seems inevitable that some speech, if not a great deal of it, will trigger this law. All that needs to happen is that someone must assert that the official's speech, whether an offhand remark or anti-gun commentary, rose to the level of an official "policy." This will mean self-censorship, and in this way KRS § 65.870 may effectively prohibit "public discussion of an entire topic."[33] Even when a law "may not appear to be about freedom of expression at all"—since the "statute on its face does not punish the use of communications"—a closer look can reveal otherwise.[34]

Hypotheticals are easily devised. KRS § 65.870's sweeping application to "policy," "executive or legislative action," and violations of its "spirit"[35] could discourage a police chief from advising cadets about pistol storage. Policemen at Louisville International Airport could be sued for keeping loaded rifles away from indoor passenger pick-up areas in obedience to airport policy. Nurses in city hospitals may be obligated to ignore hospital regulations against visitors wearing holstered guns in sickrooms. Or, as happened a few years ago, three Louisville police officers were sued for detaining a man after a concerned citizen saw him carrying a sidearm in downtown Louisville.[36] In fact the man lawfully possessed the gun, but the court ruled that the officers had qualified immunity against his false-arrest claim since they made the decision to stop him in good faith.[37] Under § 65.870 it is unclear that the officers could have avoided liability.[38]

Whether gun-themed speech will amount to a "policy" is not even the main problem. It's that the speaker has to undergo a possibly bankrupting civil suit or humiliating prosecution to find out. For policymakers, the statute may

criminalize not only formal acts like issuing an ordinance, but also communications in town-hall meetings or newsletters—so long as a litigious citizen or aggressive prosecutor construes the speech as violating the statute's "spirit." A city could argue that a law so clearly burdening policy discussion is facially content-based[39] and presumptively invalid.[40] If a court agrees that KRS § 65.870 is content-based, the state would have to show, with hard evidence, narrow tailoring and compelling interests.[41] It would have to show that its interest in enforcing state law in local jurisdictions or in preventing a patchwork of conflicting local regulations justifies the chill imposed by the law's penalty provisions, not least because other states seem able to accomplish these ends without such measures.[42] The United States Courts of Appeal have held that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."[43]

A Kentucky city attorney might ask: Does anything in § 65.870's legislative history suggest that Kentucky had been unable to enforce its firearm law? Is there a record of defiance or evasion by Louisville or other local governments? Is there some defect in standard remedies like injunctive or declaratory relief, formal complaints, or opinions from the attorney general? It happens that in 1999 Kentucky's Attorney General stated that a particular Louisville gun ordinance was invalid.[44] If the ordinance is no longer on Louisville's books, does that suggest compliance? Does the state preempt municipalities on other subjects without civil or criminal penalties? Are exceptions made for regulations against guns near schools, playgrounds, mental-health facilities, jails, stadiums, police stations, or power plants? Are there exemptions for gun use by law enforcement, or in educational seminars, or in museums? Any emergency exception?

KRS § 65.870, as drafted, may punish local officials for objectively reasonable interpretations of law that turn out, after litigation, to be incorrect. This is the essence of preemption disputes: did a city, despite its best efforts, cross into preempted territory? It's usually a close question that only a laboring judge can resolve. For instance, in 2002, a challenge was brought under a prior, milder version of the Kentucky preemption law against the cities of Dayton and Bellevue for ordinances that limited where gun stores could operate.[45] An appeals court held that the city ordinances did not violate the statute because they did not serve as restrictions on firearms but rather as "zoning regulations."[46] But if officials in those cities, by enacting those ordinances, exposed themselves to civil suit or even jail time, would they have been able to discover that their public-minded enactments were in fact perfectly lawful?

The U.S. Supreme Court in *Garcetti v. Ceballos* (2006) made clear that public employees are not insulated from employer oversight simply because they work for the state.[47] But *Garcetti* cases invariably concern employee discipline like termination, reassignment, or other adverse workplace actions. § 65.870 law imposes major civil penalties and criminal sanctions, meaning that the state here acts as a sovereign, not as an employer.[48] It is also not clear to me that a state's power over state-level employees is the same as its power over home-rule *city* employees.

Due Process: KRS § 65.870—to me, self-evidently—lacks the clarity required of criminal laws by the Fourteenth Amendment's Due Process Clause. A statute creating an offense must "inform those who are subject to it what conduct on their part will render them liable to its penalties."[49] The U.S. Supreme Court has said that laws that both infringe on speech *and* impose criminal penalties earn even more distrustful scrutiny for vagueness.[50] Such laws invite civil complaints and criminal investigations, whether or not the officials reasonably believed their speech was obligated by their duties—very effective chillers of lawful speech.

The vagueness is manifest. The line at which a suggestion becomes a "policy" is left for officials to wonder at. The head of Louisville's ambulance service, for instance, might put himself at risk for suggesting to EMTs that being armed on the job is a perilous habit. The statute also applies to "*any…form* of executive or legislative *action*."[51] How do we know that this doesn't include a disapproving remark about the law by a public-sector worker—a fire chief, parks-and-rec manager, or hospital director—in an email? The distinction that the law makes (if any) between an official's "action" and his speech—at least until a court rules—is "wholly at the mercy of the varied understanding of his hearers."[52] Louisville's public servants are left in anxiety even as they undertake the daily task of ensuring the safety of their residents.

Appendix A: State Firearm Preemption Laws, Classified

High or medium preemption: Alaska Stat. 29.35.145; Ariz. Rev. Stat. 13–3108; Ark. Code Ann. 14–16–504; 9 Del. Code 330(c); Fla. Stat. 790.33; Ga. Code Ann. 16–11–173(b)(1); Idaho Cd. § 18-3302J; Ind. Code Ann. 35-47-11.1-2; Iowa Code 724.28; Kan. Stat. Ann. 12–16,124; Ky. Rev. Stat. 65.870; La. Rev. Stat. Ann. 40:1796; 25 Me. Rev. Stat. Ann. 2011; Md. Code Ann. Crim. Law 4–209; Mich. Comp. Laws 123.1102; Minn. Stat. 471.633; Miss. Code Ann. 45–9–51; Mo. Rev. Stat. 21.750; Mont. Code Ann. 45–8–351; Nev. Rev. Stat. Ann. 268.418; N.H. Rev. Stat. Ann. 159:26; N.M. Constitution, Sec. 6, Art. II; N.C. Gen. Stat. 14–409.40; N.D. Cent. Code 62.1–01–03; Ohio Rev. Code Ann. § 9.68; Okla. Stat. 1289.24; Or. Rev. Stat. 166.170; 18 Pa. Cons. Stat. 6120; R.I. Gen. Laws 11–47–58; S.C. Code Ann. 23–31–510; S.D. Codified Laws 7–18A–36, 8–5–13, and 9–19–20; Tenn. Code Ann. 39–17–1314; Tex. Local Govt. Code Ann. 229.001; Utah Code Ann. 76–10–500; 24 Vt. Stat. Ann. 2295; Va. Code Ann. 15.2–915; Wash. Rev. Code Ann. 9.41.290; W. Va. Code 8–12–5a; Wis. Stat. 66.0409(2); and Wyo. Stat. Ann. 6–8–401.

Alabama, California, Colorado, and Illinois have partial or "low" preemption statutes. *See* Ala. Code 11–45–1.1 (preempting the field of possession and ownership of only handguns); Colo. Rev. Stat. 18–12–105.6(b) (preempting the field of transport of weapons in a private vehicle for a lawful purpose); Cal. Govt. Code § 53071 (preempting the field of firearm manufacture and licensing); § 53071.5 (preempting the field of imitation

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firearms). Until July 2013, Illinois allowed local firearm ordinances but now preempts cities on handguns and assault weapons. *See* 430 Ill. Comp. Stat. Ann. 65/13.1(b) [handguns] & (c) [assault weapons].

New Jersey alone expressly permits local legislation on firearms, *see* N.J. Stat. 40:48–1. Nebraska appears to preempt the field of "purchase, lease, rental, and transfer of handguns" but grandfathers in existing municipal regulation. *See* Neb. Rev. Stat. 69–2401 and 69–2425.

The laws of the remaining four, non-preempting states are Conn. Gen. Stat. 29–27 et seq. and 53a–216 et seq.; Haw. Rev. Stat. 134–1 et seq.; 140 Mass. Gen. Laws 121 et seq. and 269 Mass. Gen. Laws 10 et seq.; N.Y. Penal Law 265.00 et seq. and 400.00 et seq.

Notes

1. Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008).
2. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (Second Amendment is incorporated through the 14th Amendment against the states). But as Professor Adam Winkler points out in his excellent GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (W.W. Norton & Co., 2011), at x, the right to bear arms "has never rested primarily on the U.S. Constitution. The vast majority of states—forty-three as of this printing—protect the right of individuals to bear arms in their own state constitutions, meaning most Americans would enjoy the right regardless of the Second Amendment." *See also id.* at 257, noting that some of these provisions were ratified in the 1980s and 1990s.
3. United States v. Miller, 307 U.S. 174, 175 (1939) (rejecting constitutional challenge to the National Firearms Act); *see Heller*, 554 U.S. at 638 (Stevens, J., concurring) ("Since our decision in Miller, hundreds of judges have relied on the view of the Amendment we endorsed there").
4. *Winkler*, *supra*, at 64-65.
5. *Winkler*, *supra,* at 253-54.
6. 18 U.S.C. § 922(g). For an interesting challenge to the felon-in-possession provision, in § 922(g)(1), see the cert. petition filed by Alan Gura, the victorious advocate in *Heller* and *McDonald*, appealing the decision in Schrader v. Holder, 704 F.3d 980, 982 (D.C. Cir. 2013).
7. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (10th Cir. 2012) ("No Second Amendment challenge since *Heller* to any of these provisions has succeeded.").
8. For a good round-up, see the Law Center to Prevent Gun Violence's "Post-*Heller* Litigation Summary," updated September 1, 2012, *available at* http://smartgunlaws.org/post-heller-litigation-summary/.
9. Ark. Code Ann. § 5-73-306(16)(B), enacting Church Protection Act, State of Arkansas, 89th General Assembly, Regular Session, 2013, *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillInformation.aspx?measureno=sb71.
10. S.D. Codified Laws § 13-64-1, enacting H.B. No. 1087, S.D. Leg. Assem., Eighty-Eight Session, 2013, *available at* http://legis.state.sd.us/sessions/2013/Bill.aspx?File=HB1087ENR.htm. *See also* John Eligon, "A State Back Guns in Class for Teachers," N.Y. TIMES, March 8, 2013, *available at* http://www.nytimes.com/2013/03/09/us/south-dakota-gun-law-classrooms.html?pagewanted=all&_r=0. *See also* 2013 Arkansas Laws Act 226 (H.B. 1243) (allowing certain individuals to possess concealed handguns on public university and college grounds).
11. S.D. Codified Laws § 32-20A-11, enacting S.B. No. 227, S.D. Leg. Assem., Eighty-Eight Session, 2013, *available at* http://legis.state.sd.us/sessions/2013/Bill.aspx?File=SB227P.htm.
12. *See* Stephanie Condon, "Colorado gun laws go into effect facing immediate backlash," CBS News, July 1, 2013, *available at* http://www.cbsnews.com/8301-250_162-57591800/colorado-gun-laws-go-into-effect-facing-immediate-backlash/.
13. Jack Healy, "Facing a Recall After Supporting Stronger Gun Laws in Colorado," N.Y. TIMES, July 29, 2013, A9, *available at* http://www.nytimes.com/2013/07/29/us/facing-a-recall-after-supporting-stronger-gun-laws-in-colorado.html?pagewanted=all&_r=0.
14. Institute for Legislation Action, NRA, "Arkansas: Church Protection Act Passes House by an Overwhelming Majority," *available at* http://www.nraila.org/legislation/state-legislation/2013/2/arkansas-church-protection-act-passes-house-by-an-overwhelming-majority.aspx?s=&st=10468&ps=.
15. Mont. Code Ann. § 30-20-104, *available at* http://leg.mt.gov/bills/mca_toc/30_20_1.htm. For background see Jess Bravin, "A Gun Activist Takes Aim at U.S. Regulatory Power," WALL ST. J., July 14, 2011, *available at* http://online.wsj.com/article/SB10001424052702304584404576442440490097046.html.
16. Alaska Stat. Ann. § 44.99.500 (West).
17. Wyo. Stat. Ann. § 6-8-404 (West).
18. Tenn. Code Ann. § 4-54-104 (West).
19. H.B. No. 2199, as yet uncodified, Kansas Legislative Session of 2013, *available at* http://www.kslegislature.org/li/b2013_14/measures/documents/hb2199_00_0000.pdf.
20. *See* Randy Barnett, RESTORING THE LOST CONSTITUTION (Princeton 2004), 316.
21. David B. Kopel, "The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless error," 86 DENV. U. L. REV. 938, *available at* http://www.law.du.edu/documents/denver-university-law-review/v86-3/Kopel.pdf.
22. H.B. 2199, at Sec. 4(a).
23. Mont. Code. Ann. 30-20-104, *available at* http://leg.mt.gov/bills/mca/30/20/30-20-104.htm ("A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.").
24. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (introducing "substantial affects" test, by which even items that do not leave your farm or enter into commerce can nonetheless be subject to the commerce power; Gonzalez v. Raich, 545 U.S. 1 (2005) (intrastate marijuana cultivation has national affects).
25. Alaska Stat. 29.35.145(a) & (b)(2), (3), (4) & (c).
26. In July, Illinois's firearm-preemption law expanded while city and state gun laws sustained heavy attack in federal court. *See* Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (preliminary injunction against city ordinance mandating firing-range training as prerequisite to lawful gun ownership); Moore

v. Madigan, 702 F.3d 933 (7th Cir. 2012) (Illinois statutes that generally prohibit the carrying of guns in public violate Second Amendment).
27. Winkler, *supra*, at 20.
28. "Family Protection Ordinance," Ch. 38, Art. I, Sec. 38-6, City of Nelson, Georgia, *available at* http://www.nelsongeorgia.com/family-protection-ordinance.

The ordinance was ridiculed by one law professor as "flagrantly unconstitutional and certifiably moronic" (quoted in the *Washington Post* article below). But the best antidote to hysteria, said Mortimer Adler, is a good dose of history. The professor may forget that the founders "implemented laws that required all free men between the ages of eighteen and forty-five to outfit themselves with a musket, rifle, or other firearm suitable for military service." Winkler, *supra*, at 113. This is what a "muster" was—a gathering for official gun inspections and recording in state rolls. It was a matter of national survival: in an age before a standing army, every man—and his gun—was necessary to defend the nascent union. For more, see Robert H. Churchill, "Gun Ownership in Early America: A Survey of Manuscript Militia Returns," Wm & Mary Quarterly, 3d ser., 60 (2003); Saul Cornell & Nathan DeDino, "A Well Regulated Militia: The Early American Origins of Gun Control," 73 Fordham L. Rev. 508-10 (2004).
29. Caitlin Dewey, "Georgia town's mandatory gun ownership law is just 'symbolic,'" Wash. Post, April 2, 2013, *available at* http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/02/georgia-towns-mandatory-gun-ownership-law-is-just-symbolic/. Spring City, Utah, also contemplated requiring gun ownership as well as mandatory firearm training. *See* Ben Winslow, "Spring City debates ordinance that puts a gun in every home," Fox 13 News, Salt Lake City, Feb. 7, 2013, *available at* http://fox13now.com/2013/02/07/spring-city-debates-ordinance-that-puts-a-gun-in-every-home/.
30. The Brady Center's complaint against the Nelson ordinance, filed May 16, 2013, is available at https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnx3ZWxjb21ldG9uZWxzb25nYXxneDo0MDcwOGE2NDRiY2MwODI4.
31. Jim Turner, "Stuart erases firearms from city ordinances," *Treasure Coast Palm*, June 14, 2011, *available at* http://blogs.tcpalm.com/martin-county-politics/2011/06/stuart-erases-firearms-from-city-ordinances.html.
32. Ky. Rev. Stat. § 65.870(2), (4) & (6). The prospect appears of a jury deciding a pure question of law.
33. Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 537 (1980); Hill v. Colorado, 530 U.S. 703, 723 (2000) ("content-based" regulations are those that operate to restrict certain subject matter that might be discussed by a speaker).
34. Boddie v. Am. Broad. Companies, Inc., 881 F.2d 267, 270 (6th Cir. 1989).
35. *See* KRS § 65.870(2), (3), (4) & (5).
36. Louisville-Jefferson County Metro Gov't v. Stoke, 2007-CA-000296-MR, 2008 WL 2468757 (Ky. Ct. App. June 20, 2008).
37. Some federal courts may not have been so forgiving of the police. *See, e.g., United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) ("where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention.").
38. At times the danger of civil suit is even more fearsome that criminal sanctions, both because of high damages and the lower threshold of proof. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).
39. Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion).
40. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
41. United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012) (under strict scrutiny the "First Amendment requires that the [state's] chosen restriction on the speech at issue be actually necessary to achieve its interest"); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818-19 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (in the sensitive area of speech, "[t]he existence of adequate content-neutral alternatives...undercuts significantly any defense of such a statute."); Carey v. Wolnitzek, 614 F.3d 189, 200 (6th Cir. 2010) (citation omitted).
42. In nearly every state, state law simply *displaces* contrary local law without need for enforcement mechanisms like those enacted here. *See, e.g.,* Or. Rev. Stat. Ann. § 166.170; S.D. Codified Laws § 7-18A-36; Va. Code Ann. § 15.2-915. *See also* United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (in First Amendment context, plaintiff may mount facial attack by showing that statute is substantially overbroad, i.e., "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep").
43. *See, e.g.,* Miller v. City of Cincinnati, 622 F.3d 524, 540 (6th Cir. 2010).
44. Kentucky Attorney General, OAG 99-10 (Dec. 17, 1999).
45. Peter Garrett Gunsmith, Inc. v. City of Dayton, 98 S.W.3d 517, 518 (Ky. Ct. App. 2002).
46. *Id.* at 520.
47. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).
48. *See, e.g.,* Phelan v. Laramie County Cmty. Coll. Bd. of Trustees, 235 F.3d 1243, 1247 (10th Cir. 2000) (discussing the sovereign versus employer distinction).
49. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).
50. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72 (1997).
51. Ky. Rev. Stat. § 65.870(2), (4) & (5) (emphasis added).
52. *See* Thomas v. Collins, 323 U.S. 516, 535 (1945). ML

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analysis between uniform environmental protections and measures that either specifically target railroads or would interfere with their "constructing, acquiring, operating, abandoning, or discontinuing a line." In *Humboldt Baykeeper v. Union Pacific Railroad Company,*[28] the application of the Clean Water Act was upheld against operating railroads. But in *Ass'n of American Railroads v. South Coast Air Quality Mgmt Dist.,*[29] the Ninth Circuit voided a local air pollution regulatory district's rule specifically directed at the idling of railroad locomotives.

Another case exploring the scope of permissible local regulation was *Rushing v. Kansas City Southern Railway Co.,*[30] in which a federal court, acting in a case removed from state court that featured complaints of noise, vibrations and water runoff from a rail facility, dismissed the causes of action relating to the noise

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