Concealed Carry Interstate Reciprocity

POSITION PAPER

Ohioans for Concealed Carry

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1. Introduction

Ohioans for Concealed Carry supports federal legislation requiring interstate reciprocity for concealed carry licenses and permits. Below we offer several caveats and considerations for such legislation. Recognizing that a reciprocity bill must be tempered to withstand challenges both before and after it becomes law, we give special attention to constitutionality in sections four through six.

In our view, a concealed carry reciprocity law must satisfy at least four general requirements. Previous interstate reciprocity bills have formalized one or more of these items in legislative idiom with varying degrees of efficacy. We note that the Concealed Carry Reciprocity Act of 2017 (draft of Nov. 22, 2016) attempts to reflect all four components.

1. A concealed carry reciprocity statute must entitle an individual holding any state’s concealed carry license or permit to carry a concealed handgun in any other state that issues its own license or permit, or that allows concealed carry without a permit (e.g., Vermont). An individual who may lawfully carry a concealed handgun in their state without a permit must be entitled to carry a concealed handgun in any state that issues a license or permit, or that allows concealed carry without a permit. Washington, DC must be included in interstate reciprocity as if it was a state.

2. The statute must not establish national standards or prerequisites for concealed carry permits nor otherwise preempt states’ permit procedures or

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1. Ohioans for Concealed Carry (OFCC) is an IRS 501(c)4 tax-exempt, non-profit, non-partisan organization formed in 1999 to establish Ohio’s first concealed carry law. OFCC achieved that goal in 2004, and has since focused on a three-pronged mission: 1) advancing concealed carry rights for Ohioans through new legislation; 2) protecting concealed carry licensees by challenging illegal practices of Ohio municipalities (our cases have set precedent in Ohio Supreme Court); and 3) providing news and information to Ohio’s 500,000 concealed carry licensees.

firearm laws (except as noted in item 1). Neither must the statute establish any registration mechanism or database. In our view, these activities fail to comport with the Tenth Amendment. Accordingly, the statute’s title should not contain the word “national.”

3. To foreclose discrimination in states hostile to Second Amendment rights, a concealed carry reciprocity law must contain substantive legal safeguards for traveling permit holders, as well as meaningful penalties for states and their subdivisions that subtly or overtly disfavor lawful permit-holding guests.

4. The text of the interstate reciprocity statute must be strategically hardened against constitutional challenges. We will discuss these shortly.

3. The following challenge will likely be made: If national standards for permits offend the Tenth Amendment, then interstate reciprocity itself must be held equally disagreeable; both trespass on ground which heretofore has belonged to the states. Sections four through six of this paper will offer a constitutional basis for distinguishing between interstate reciprocity and national standards for permits. For the moment, consider which is less noxious to federalism: driver’s license reciprocity, or a congressional mandate establishing one age, training, and testing standard for all U.S. motorists.

2. The Need for Reciprocity

The number of states with “shall-issue” concealed carry programs has expanded from eight in 1986 to thirty-one in 2016. Another eleven states no longer require a permit for concealed carry (although gun purchases are still subject to standard FBI background checks and gun ownership is regulated by an array of state and federal laws). Thus, forty-two states now guarantee qualified citizens the right to carry a concealed handgun. The remaining eight states have concealed carry programs that require applicants to show “good cause” for carry, or impose other discretionary criteria designed to sharply limit the number of permits issued.

Concealed carry programs began to multiply as state legislatures recognized their remarkable safety record (see section three). After the U.S. Supreme Court reaffirmed Americans’ Second Amendment rights in 2008 and 2010, public interest in concealed carry further accelerated. Today more than 14.5 million Americans hold concealed carry permits, representing about six percent of the nation’s adult population. Women and minorities account for much of the recent growth in permits. Since 2007, the number of women holding permits has increased by 270 percent. In some parts of the country, “the number of black permit holders has grown more than twice as fast as the number for whites.”

As states create and revise reciprocity agreements, an unwieldy patchwork of regulations makes it difficult for travelers to be certain of their concealed carry rights.
outside their home state. Entire websites and books now are devoted to deciphering interstate reciprocity and state firearm laws.\textsuperscript{12} An Ohio resident seeking to travel with their concealed handgun would typically begin by reviewing reciprocity data from handgunlaw.us, which recently looked like this (some spelling, punctuation and grammar has been edited):

- Alaska, Arizona, Kansas, Maine, Mississippi, Vermont and West Virginia have permitless carry. Anyone who can legally possess a firearm may carry it concealed without any type of permit or license. You must be 21 years old (18 in Vermont) and carry your ID.
- Idaho: Idaho statewide permitless carry applies only to residents of Idaho who are 21 or older.
- South Dakota: SD issues Regular/Gold/Enhanced permits. DE, MN, NE, NV, SC and WI honor only the SD Enhanced permit (Gold permits not being issued until after 1/1/17).
- Idaho has Standard and Enhanced permits. The Enhanced permit requires more training. Alaska, Arizona, Delaware, Minnesota, Nevada, New Mexico, South Carolina and Washington honor only the Idaho Enhanced permit. SC honors only the Resident Enhanced Permit.
- Maine: Allows active military or honorably discharged vets 18 and older to carry on just their state-issued driver’s license/ID, but has restrictions that don’t apply to those with a permit that ME honors. ME doesn’t honor all other permits. See Maine page for restrictions on permitless carry and if they honor your state’s permit.
- Residents of Alaska, Arizona, Kansas, Maine, Mississippi, Vermont, West Virginia and Wyoming can carry in Oklahoma under their states’ permitless carry laws and do not need a permit or license to carry. They must carry their state-issued ID and be 21 years of age.
- Nevada/Mississippi: NV honors only the MS Enhanced permit.
- Texas/Ohio: Texas honors only Ohio permits issued or renewed on or after 3/23/15.
- Wisconsin/Ohio: Wisconsin honors only Ohio permits issued on or after 3/23/15.
- Pennsylvania honors only resident permits from the states of Arizona, Florida, Mississippi, Utah and Virginia. They will not honor a non-resident AZ, FL, MS, UT, or VA permit or license.
- Wisconsin/Missouri: Wisconsin will honor only a Missouri permit issued or renewed on or after 8/28/13.

- Nebraska/Iowa: NE will honor only the Iowa Non-Professional permit. Not their Professional permit.
- Colorado, Florida, Maine, Michigan, New Hampshire and South Carolina honor permits or licenses only from residents of the states they honor. They will not honor any non-resident permit or license.
- Wisconsin/Virginia: WI will honor only the VA non-resident permit and not their resident permit.
- Texas/Rhode Island: TX will honor only the Rhode Island permit or license issued by the Rhode Island attorney general’s office. Locally issued Rhode Island permits or licenses are not honored by Texas.
- North Dakota: ND issues two classes of licenses. If you hold a Class 2 License from ND, check carefully the states you wish to visit as there are a number of states that honor the North Dakota Class 1 license but not their Class 2 license.
- Wisconsin/West Virginia: WI will honor only the WV permit issued after 6/8/12.
- Wyoming’s permitless carry law applies only to residents of Wyoming.
- Wisconsin/Alaska: WI will honor only the AK permit issued after 1/14/13. AK changed their law concerning background checks. AK honors all other states’ permits or licenses.
- New Mexico/Oklahoma: New Mexico allows only for the carrying of one concealed firearm. Oklahoma does not allow the carry of a firearm larger than .45 caliber.
- Some states will not honor other states’ permits or licenses unless the holder of the permit or license is 21 years of age.13

An Ohio licensee might then attempt to generate a reciprocity map using a website like handgunlaw.us (hoping that it contains only current, accurate data). But this is just the beginning. It is frequently necessary to adjust an itinerary to avoid states that fail to recognize one’s home-state permit; this adds an additional layer of complexity and expense to automobile travel. Many licensees rule out air travel in fear of emergency stops in states that don’t recognize their right to possess a handgun.

Interstate travel for 14.5 million concealed carry licensees has thus become materially compromised. Not surprisingly, “Many horror stories exist in which the nonresident traveler is arrested on a firearm felony charge for a violation that wouldn’t

qualify as [even] a misdemeanor in the traveler’s home state.”

14. Two recent examples illustrate how easily law-abiding concealed carry licensees can run afoul of the maze of constantly changing interstate reciprocity laws. Meredith Graves, a medical student from Tennessee with a concealed carry permit from that state, was arrested when she attempted to turn in her pistol after noticing a “no guns allowed” sign at the 9/11 memorial in New York City. New York recognizes no other state’s concealed carry permit. Graves’ honest mistake and brave effort to correct it almost destroyed her medical career. Jonathan Ryan, a Florida landscaper with a concealed carry permit from his state, was jailed in New York City on similar charges. These are frequently recurring scenarios. Congress has recognized this dilemma since 2008 but has failed to pass a reciprocity bill. Lacking this relief, concealed carry licensees face an untoward burden when attempting to travel between states. Indeed, “Without a national reciprocity system in place, it would not be difficult for one to imagine scenarios such as the one encountered by Ms. Graves . . . occurring on a daily basis . . .”

Objections to concealed carry interstate reciprocity fall into two categories: complaints alleging public endangerment, and complaints claiming unconstitutionality. We will address both in the following sections.


3. Concealed Carry and Public Safety

Opponents of interstate reciprocity have labeled the concept “an utter disregard for public safety,”20 “absurd and dangerous,”21 and “a public health threat.”22 Nevertheless, the notion that concealed carry licensees present a danger to society is a bandwagon fallacy, a false claim advanced through the popularity and shrillness of its proponents. Peer-reviewed research by preeminent social scientists has long established the safety of licensed concealed carry23 and repudiated claims of public endangerment. After examining hundreds24 of peer-reviewed journal articles and government reports on gun control, the National Research Council, an affiliate of the National Academy of Sciences, concluded that concealed carry programs do not increase crime.25 In fact, concealed carry permit holders are six times less likely to be convicted of a crime than law enforcement officers themselves.26 A recent report from the Crime Prevention Research Center (a group led by John Lott, formerly a senior research scholar at the Yale Law School) noted that, “It is impossible to think of any other group in the U.S. that is anywhere near as law-abiding.”27 Nevertheless, opponents of interstate reciprocity repeat an ipse dixit that impedes reasoned discourse on the safety of concealed carry.


27. Ibid., 15.
4. Constitutionality under Article IV Privileges & Immunities

The constitutionality of interstate reciprocity for concealed carry permits is difficult to see under the Article IV Privileges and Immunities Clause (also known as the Comity Clause). While the clause is intended to prevent states from discriminating against citizens of other states, it does not compel states to grant visitors the identical freedoms they enjoy in their home states.

Nor, it is important to stress, has the Privileges and Immunities Clause been interpreted to require states to give visitors the same substantive rights that they enjoy in their home states, or the substantive rights that a federal court thinks all Americans should have. The Privileges and Immunities Clause created a rule of nondiscrimination, not a license for federal courts to impose on the nation some uniform judicially-created scheme of personal liberties.

Two U.S. Supreme Court cases supply the criteria for determining constitutionality under the Comity Clause. Baldwin v. Fish and Game Commission of Montana held that only laws which address “the vitality of the Nation as a single entity” and are “basic to the maintenance or well-being of the Union” can be sustained through the Comity clause. An example of such regulation might be interstate automobile travel under one’s home-state license. It is unclear whether interstate concealed carry can be understood as “basic to the maintenance or well-being of the Union,” although this may have become far more likely after District of Columbia v. Heller (which affirmed firearms ownership as an individual right under the Second


31. Ibid., 371.

32. Ibid., 371.

Amendment), *McDonald v. Chicago*[^34] (which incorporated the Second Amendment against the states), and *Moore v. Madigan*[^35] (which describes firearms carry outside the home as a constitutional right). Nevertheless, *Baldwin* doesn’t rush to recognize the constitutionality of interstate reciprocity for concealed carry:

> It was not intended by the provision [i.e., the Comity Clause] to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.[^36]

Another obstacle to constitutionality under the Comity Clause was introduced by *Toomer v. Witsell*,[^37] which held that states may discriminate against non-residents if there is a “substantial reason” to treat them differently from residents. For example, residents of Ohio may not vote for the governor of New York, and may be required to pay higher tuition than New York residents to attend their state-funded colleges. *Toomer* “has the advantage of enabling courts to make reasoned decisions about particular cases . . . without any need to determine which are ‘fundamental’ [as in *Baldwin*].”[^38] On the other hand, “The kind of judicial reasoning [*Toomer*] requires is relatively undisciplined. Deciding which forms of discrimination are reasonable, and which are not, entails a kind of balancing that invites courts to make essentially political decisions.”[^39] One can easily imagine how *Toomer* could be employed to advance or impede a case challenging the constitutionality of concealed carry interstate reciprocity.

[^34]: McDonald v. Chicago, 561 U.S. 742 (2010).
[^36]: Baldwin, at 392.
[^38]: Lund, 958.
[^39]: Ibid.
Courts now rely on both *Baldwin* and *Toomer* to evaluate constitutionality under the Comity Clause. This process is probably not as likely to favor interstate reciprocity as other tests, such as the current standards of review under Article I’s Commerce Clause.

40. Ibid., 960.
5. Constitutionality under the Commerce Clause

It is extremely likely that a concealed carry interstate reciprocity law, if written with sufficient precision, would pass constitutional muster under the Commerce Clause.41 Two U.S. Supreme Court decisions, United States v. Lopez42 and United States v. Morrison,43 established the modern standards of judicial review under the clause. These decisions “announced a new framework for analyzing Commerce Clause challenges.”44 Both decisions now offer constitutional pedigree to interstate reciprocity.

In United States v. Lopez, U.S. Supreme Court Chief Justice William Rehnquist opined that when an activity “substantially affects” interstate commerce, legislation regulating that activity must be sustained [as constitutional].45 Certainly the business and personal travel of America’s 14.5 million46 concealed carry permit holders “substantially affects” interstate commerce. Moreover, under interstate reciprocity, “Individuals with concealed carry permits would be encouraged to travel . . . This would have an aggregate effect of boosting interstate commerce.”47

To determine if an activity’s impact on interstate commerce is sufficient to regulate that activity under the Commerce Clause, both Lopez and Morrison lean on congressional findings. American Jurisprudence, the definitive anthology of U.S. law, offers a tidy summary of Congress’s decisive role in Commerce Clause review:

If Congress has determined that a transaction or practice is so related to interstate commerce as to warrant and necessitate regulation under its power under the Commerce Clause of the United States Constitution, a

court will not substitute its judgment for that of Congress unless the subject’s relation to interstate commerce and effect upon it clearly are nonexistent.\(^{48}\)

Congress thus has the remarkable opportunity to foreclose constitutional challenges through careful attention to a statute’s language.

When Congress attempted to pass an interstate reciprocity bill in 2011, the first version (Feb. 18, 2011) strategically included the following: “The Congress finds that preventing the lawful carrying of firearms by individuals who are traveling outside their home state . . . harms interstate commerce.”\(^ {49}\) For reasons unknown, this jurisdictional hook was dropped in the final version (Nov. 12, 2011). The Concealed Carry Reciprocity Act of 2017 returns to citing interstate commerce, although the language is brief and weak. To preclude constitutional challenges, the framers of this bill would be wise to invoke a decisive reference to the Commerce Clause.

Even if we pretend only a minor connection between interstate reciprocity and interstate commerce, \textit{Scarborough v. United States} takes reciprocity across the finish line. \textit{Scarborough} held that there need only be a “minimal nexus” between firearms and interstate commerce—such as guns having once been shipped across state lines from the factory—in order for the firearms to be regulated \textit{thereafter} under the Commerce clause.\(^ {50}\) David B. Kopel, a professor of constitutional law at Sturm College of Law, expounded this concept before the U.S. House of Representatives’ Subcommittee on Crime, Terrorism, and Homeland Security: “The theory that once a gun has been sold in interstate commerce it forever remains subject to congressional regulation under the

\(^{48}\) American Jurisprudence 2d 15A Commerce §10 (2013).


interstate commerce clause, is solidly established in the federal courts . . .” 51

Scarborough is thus the “nuclear option” in any contest over interstate reciprocity’s constitutionality under the Commerce Clause.

6. Other Constitutional Considerations

Though the word “travel” does not appear in the Constitution, the U.S. Supreme Court has 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.” 52 The stare decisis of free travel, particularly Sáenz v. Roe, 53 Shapiro v. Thompson, 54 and United States v. Guest, 55 strongly supports this principle. Today, in light of Heller, McDonald, and other cases reaffirming Second Amendment rights, there is considerable likelihood that regulations impeding the interstate travel of 14.5 million concealed carry permit holders would comprise the “unreasonable burdens and restrictions” noted in Sáenz above.

Moreover, the Equal Protection Clause of the Fourteenth Amendment provides a sturdy constitutional hook for concealed carry interstate reciprocity. In our post-Heller society, state laws barring the recognition of out-of-state concealed carry permits might be judged unconstitutional because, under Fourteenth Amendment jurisprudence, laws that impinge on a fundamental right must be narrowly tailored and serve a compelling state interest. 56 What compelling state interest is served when New York prohibits concealed carry by licensed visitors from Ohio? Certainly no case can be made on the grounds of salus populi. 57 What compelling interest remains? David Kopel has noted that the reason the Fourteenth Amendment was passed “was to adjust the state/federal

56. This is the standard of judicial review known as strict scrutiny. For its origin, see United States v. Carolene Products Co., 304 U.S. 144 (1938), Footnote 4.
57. “The safety of the people.”
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.”

We anticipate that Tenth Amendment objections will be easy to address. Aside from simple reciprocity, the proposed statute in no way preempts states’ permit procedures or firearms laws. It establishes no national standards or prerequisites for concealed carry permits. Nevertheless, a pamphlet produced by one gun control group calls concealed carry reciprocity “an extraordinary encroachment on state’s rights.”

While interstate reciprocity does prima facie compel states to accept each other’s permits, it is more accurately viewed as a federal directive to states to guarantee a fundamental constitutional right. This might have been a strenuous legal interpretation prior to *Heller*, *McDonald*, and *Moore*, but today an interstate reciprocity statute is far more akin to early federal initiatives barring racial discrimination than it is to a modern central-planner’s scheme that offends the Tenth Amendment. Eugene Volokh, a professor of law at the UCLA School of Law, has noted that while “the Constitution otherwise leaves each state with the authority to decide who is licensed to do what within that state . . . Congress may in many situations preempt such licensing with federal legislation. If the activity is constitutionally protected, a state by definition may not interfere with it through a discretionary licensing scheme.” The idea that concealed carry reciprocity is an “encroachment on state’s rights” is therefore a non sequitur.

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7. Conclusion

Ohioans for Concealed Carry supports, with certain caveats, federal legislation requiring interstate reciprocity for concealed carry licenses and permits. This position paper demonstrates that concealed carry programs are safe, and that their participants are among the most law-abiding citizens in American society (with fewer criminal convictions than even law enforcement officers themselves).

The current patchwork of ever-changing reciprocity laws unreasonably encumbers interstate travel for America’s 14.5 million concealed carry permit holders and trespasses on Second Amendment guarantees. Recognizing this problem, Congress has attempted to pass interstate reciprocity legislation at least four times. Since its first effort in 2008, the number of concealed carry permit holders in the United States has tripled.61 Therefore, the need for interstate reciprocity is now acute.

To foreclose a challenge of constitutionality, Congress must invoke precise language in a reciprocity bill, including decisive reference to Article I’s Commerce Clause. This effort is paramount because “whether a federal reciprocity law [can] withstand a constitutional challenge will depend on its final wording.”62 We have demonstrated why a carefully written bill must be held constitutional under the Commerce Clause, and how other sections of the Constitution lend substantive if not equal support.

We hope that our analysis forms a useful part of the national conversation on interstate reciprocity.