

# NORTH TO THE FUTURE OF THE RIGHT TO BEAR ARMS: ANALYZING THE ALASKA FIREARMS FREEDOM ACT AND APPLYING FIREARM LOCALISM TO ALASKA

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## ABSTRACT

*The Second Amendment has gone from a rarely invoked constitutional provision to being one of the most hotly contested and politically charged protections of the Bill of Rights. Additionally, small government advocates have used local gun laws as a mechanism for challenging broad government regulation while conversely advocating for states' rights, with Alaska recently joining a series of states seeking to expand local gun rights by passing state laws that nullify federal gun laws. Given Supreme Court case law and as demonstrated by recent Ninth Circuit precedent, the nullification course is almost certainly ill fated. Apart from the big government/small government proxy war being waged through local gun laws, others see the local, traditional character of the right to bear arms in a particular place as the most appropriate manner for scrutinizing regulation, given Supreme Court precedent and historic tradition.*

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## INTRODUCTION

*"[The Second Amendment] had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?"*<sup>1</sup>

On May 27, 2010, Alaska House Bill No. 186, "An Act declaring that certain firearms and accessories are exempt from federal regulation,"<sup>2</sup> became law. Known otherwise as the Alaska Firearm Freedom Act (AFFA),<sup>3</sup> this legislation sought to nullify the federal government's ability to regulate personal firearms, firearm accessories, and ammunition that are manufactured entirely in Alaska and remain in Alaska.<sup>4</sup> In so doing, the AFFA initiated Alaska's attempted divorce from the federal gun control regime—a relationship that had begun with the United States government's purchase of Alaska in 1867,<sup>5</sup> and culminated in the Alaska Constitution's verbatim adoption of the Second Amendment nearly 100 years later.<sup>6</sup>

Alaska is not alone in its enactment of a federal gun control nullification statute.<sup>7</sup> Indeed, it was the eighth of nine states to successfully make such a measure law,<sup>8</sup> the first of which was Montana and the most recent being Kansas.<sup>9</sup> More significantly, the Montana and

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1. Question from Associate Justice Anthony Kennedy during oral argument in *District of Columbia v. Heller*. Oral Argument at 8:13, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf).

2. Alaska Firearms Freedom Act (AFFA), 2010 Alaska Sess. Laws ch. 23 (codified as amended at ALASKA STAT. § 44.99.500 (2013)).

3. ALASKA STAT. § 44.99.500 (2013).

4. *Id.*

5. *Purchase of Alaska*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/alaska-purchase> (last visited Jan. 31, 2016).

6. GORDON HARRISON, ALASKA LEGISLATIVE AFFAIRS AGENCY, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 37 (5th ed. 2012).

7. As of this writing, eight other states have enacted statutes exempting from federal regulation certain firearms manufactured in and remaining within state borders. *See generally* ARIZ. REV. STAT. ANN. § 13-3114 (2010); Idaho Firearms Freedom Act, IDAHO CODE ANN. § 18-3315A (2010); Second Amendment Protection Act, KAN. STAT. ANN. § 50-1204 (2013); Montana Firearms Freedom Act, MONT. CODE ANN. § 30-20-104 (2009); S.D. CODIFIED LAWS § 37-35-2 (2010); Tennessee Firearms Freedom Act, TENN. CODE ANN. § 4-54-104 (2010); Utah State-made Firearms Protection Act, UTAH CODE ANN. § 53-5b (LexisNexis 2010); Wyoming Firearms Freedom Act, WYO. STAT. ANN. § 6-8-401 (2010).

8. *See* AFFA, 2010 Alaska Sess. Laws ch. 23 (passing in the Second Session of 2010).

9. *See supra* note 8. Missouri has repeatedly fallen short enacting a

Kansas nullification statutes are the first and only laws to have their validity adjudicated in federal court.<sup>10</sup> While the Kansas challenge was dismissed for lack of standing,<sup>11</sup> the Ninth Circuit Court of Appeals upheld the dismissal of the Montana Shooting Sports Associations' request for declaratory judgment on the validity of the Montana law in *Montana Shooting Sports Association v. Holder*,<sup>12</sup> (hereinafter *Montana v. Holder*), finding that the action failed to state a claim because the Montana legislation was preempted by federal law and as such was invalid.<sup>13</sup>

This Note will briefly examine the history of the right to bear arms as contemplated by the Second Amendment against the federal government, the right to bear arms as it has been enforced in Alaska, and the theory of nullification.

It will also address the arguments that would likely be raised in defense of the AFFA, paying particular attention to those made and rejected by the District of Montana and Ninth Circuit in *Montana v. Holder*. Considering the Ninth Circuit decision, and its likely dispositive effect on claims raised in defense of the AFFA, it is all but a foregone conclusion that the AFFA is invalid.

First, this Note will analyze the assertion that the federal gun laws regulating intrastate gun manufacturing, sale, and possession—which the AFFA seeks to nullify—are outside of Congress' power to regulate interstate commerce because the activity in question is entirely local.

Second, it will consider the argument that even if the intrastate commerce is deemed to fall within the purview of the Commerce Clause, such a reading is directly in conflict with state sovereignty and the states' rights preserved under the Tenth Amendment. Both of these arguments were motivating rationales behind passage of the AFFA<sup>14</sup> and were also the plaintiffs' central arguments in *Montana v. Holder*.<sup>15</sup>

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nullification bill. Jordan Shapiro, *Missouri Lawmakers Fall Short on Gun Nullification*, ASSOCIATED PRESS (May 16, 2014), <http://bigstory.ap.org/article/missouri-lawmakers-fall-short-gun-nullification>.

10. Carey Gillam, *Gun Control Group Sues Kansas Governor Over Gun Rights Law*, CHICAGO TRIBUNE (July 9, 2014), [http://articles.chicagotribune.com/2014-07-09/news/sns-rt-us-usa-guns-kansas-lawsuit-20140709\\_1\\_kansas-bill-federal-law-kansas-law](http://articles.chicagotribune.com/2014-07-09/news/sns-rt-us-usa-guns-kansas-lawsuit-20140709_1_kansas-bill-federal-law-kansas-law).

11. *Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086, 1089 (D. Kan. 2015).

12. 727 F.3d 975, 978 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 955 (2014), and *cert. denied sub nom.* *Montana v. Holder*, 134 S. Ct. 1335 (2014).

13. *Id.* at 981–83.

14. See ALASKA STAT. § 44.99.500(a) (2013) (rationalizing that the Tenth Amendment and Commerce Clause exclude intrastate commerce from the regulatory purview of the federal government).

15. *Montana Shooting Sports Ass'n*, 727 F.3d at 979.

Given current Supreme Court jurisprudence and the decisions of the District of Montana and the Ninth Circuit in *Montana v. Holder*, this defense is also likely to fail in the case of the AFFA.

Finally, in Part II, this Note will consider an argument, unrelated to the AFFA, which would embrace the view that the right to bear arms, as it relates to Alaskans, might warrant treatment distinct from the right to bear arms as it relates to citizens of other localities. After the Supreme Court's decisions in *District of Columbia v. Heller*<sup>16</sup> and *McDonald v. City of Chicago*,<sup>17</sup> Alaskans, like all Americans, have a constitutional right to purchase, keep, and bear firearms for self-defense.<sup>18</sup>

An additional school of thought recognizes the potential for locally distinct protections under the right to bear arms.<sup>19</sup> This belief, drawing in part on recent comparisons between First and Second Amendment doctrines,<sup>20</sup> indicates the usefulness of analyzing the Second Amendment through the lens of First Amendment obscenity doctrine.<sup>21</sup> Such an analysis suggests that various firearms, on an as-applied basis, might demand different treatment by courts in various states, depending on a weapon's usefulness for self-defense purposes locally and the character of state regulations. Differing treatment would serve a signaling function for courts to determine which firearms might be locally useful. This analysis, if applied, for example, to the National Firearms Act on behalf of or by an Alaskan plaintiff, would likely determine that at least portions of federal regulations violate Alaskans' fundamental right to self-defense. Thus, while such a challenge would not save the AFFA from invalidity, it might better serve the needs of Alaskans concerned that the federal government is infringing their right to bear arms.

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16. 554 U.S. 570 (2008).

17. 561 U.S. 742 (2010).

18. *Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 791.

19. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 142-43 (2013) ("A localized Second Amendment would define the term based on local standards, allowing increased scope for regulation in places—cities, most prominently—where particular types of guns might be considered more uncommon, dangerous, or unusual.")

20. See generally David Kopel, *First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014) (analyzing Second Amendment doctrine using First Amendment principles).

21. See Jordan E. Pratt, *Uncommon Firearms As Obscenity*, 81 TENN. L. REV. 633, 640 (2014) (analyzing uncommon firearms as obscenity); Blocher, *supra* note 19.

## BACKGROUND

### A. The Federal Right to Bear Arms

#### 1. *By Enactment*

The Second Amendment to the U.S. Constitution reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>22</sup> In the days immediately following the establishment of the federal government, Congress enacted legislation relating to the militia.<sup>23</sup> However, the realm of gun control was governed largely by the states until the Twentieth Century.<sup>24</sup> The current federal gun control regime is almost entirely a creation of the past one hundred years.<sup>25</sup>

The first true federal gun regulation was passed in 1934, as a result of growing concerns about “gangland crimes.”<sup>26</sup> Collectively the National Firearms Acts of 1934 and 1938 (hereinafter NFA) taxed various weapons, including machine guns and sawed-off shotguns,<sup>27</sup> banned weapon sales to those “under indictment or . . . convicted of a crime of violence,”<sup>28</sup> and created a licensing regime mandating that all firearms dealers selling weapons in interstate commerce be federally licensed and record all of their transactions.<sup>29</sup> Importantly, Title II of the

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22. U.S. CONST. amend. II.

23. Calling Forth Act of 1792, ch. 28, 1 Stat. 264, 264 (repealed 1795); Militia Act of 1792, ch. 33, 1 Stat. 271, 271–74 (1792) (repealed 1903).

24. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 502–17 (2004) (describing numerous state laws, from the pre-Constitutional period through the Civil War, which were primarily responsible for regulating firearms).

25. See *History of Gun-Control Legislation*, WASH. POST (Dec. 22, 2012), [http://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278\\_story.html](http://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html) (describing the history of federal firearm regulations and identifying the National Firearms Act of 1934 as “the first federal gun-control law”).

26. *National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (ATF), <https://www.atf.gov/content/firearms/firearms-industry/national-firearms-act> (last visited Jan. 31, 2016).

27. *Id.*; 26 U.S.C. § 5845 (2012). At the time, the tax was considered to be substantially prohibitive as to effectively ban the affected firearms. See *id.* (“While the NFA was enacted by Congress as an exercise of its authority to tax, the NFA had an underlying purpose unrelated to revenue collection. As the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms.”).

28. Federal Firearms Act of 1938, Pub. L. No. 785, 52 Stat. 1250, 1250–51 (current version at 18 U.S.C. § 921 (2012)).

29. *Id.*

Gun Control Act of 1968 revised the NFA.<sup>30</sup> Currently, Title II firearms, including sawed-off shotguns, short-barreled rifles, silencers, machine guns, and those guns with an “any other weapon” designation, namely those “capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell,”<sup>31</sup> are effectively banned, absent a special permit from the federal government.<sup>32</sup> This legislation was groundbreaking at the time and laid much of the framework for contemporary federal gun laws.<sup>33</sup> The current criminal regime is enumerated in 18 U.S.C. § 921,<sup>34</sup> 18 U.S.C. § 922,<sup>35</sup> 18 U.S.C. § 923,<sup>36</sup> 18 U.S.C. § 924,<sup>37</sup> and in Title 26 of the US Code, Chapter 53, Subchapters A-D,<sup>38</sup> and was enacted largely by the Gun Control Act of 1968.<sup>39</sup> While section 922 includes a robust catalogue of prohibited activities, several notable regulations include: the prohibition on manufacturing or selling firearms unless licensed by the federal government;<sup>40</sup> a requirement that interstate transfers of firearms occur between federally licensed dealers;<sup>41</sup> the by-and-large criminalization of possession of sawed-off shotguns<sup>42</sup> and machine guns;<sup>43</sup> and a ban on possession of a firearm by felons<sup>44</sup> and those

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30. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (current version at 26 U.S.C. § 5801 *et seq.* (2012)).

31. 26 U.S.C. § 5845(e) (2012).

32. 26 U.S.C. § 5841 (2012).

33. The Safe Streets Act of 1968, passed shortly after the assassinations of John F. Kennedy, Jr., Robert F. Kennedy, and Martin Luther King, Jr., is in many ways an extension of the 1934 and 1938 Acts, especially its prohibition on possession by felons and its licensing regime. Safe Streets Act of 1968, Title IV, § 922, Pub. L. No. 90-351, 82 Stat. 197, 228 (current version at 18 U.S.C. § 922).

34. 18 U.S.C. § 921 (2012) (codifying thirty-five definitions related to the subsequent provisions of Title 18).

35. *Id.* § 922 (codifying unlawful acts related to firearms and their shipping or transportation in interstate commerce or foreign commerce, or firearm possession in or affecting interstate or foreign commerce).

36. *Id.* § 923 (codifying the licensing regime in place for businesses importing, manufacturing, or dealing in firearms, and businesses importing or manufacturing ammunition).

37. *Id.* § 924 (codifying the penalties for various firearm related crimes, including those in section 922, but with the addition of various aggravating factors). *See, e.g., id.* § 924(c)(1)(A) (showing the increased penalties for crimes of violence or drug trafficking committed by an individual who uses a firearm, carries a firearm, or possesses a firearm in furthering the offense).

38. 26 U.S.C. §§ 5801–5872 (2012).

39. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (current version at 26 U.S.C. § 5801 *et seq.* (2012)).

40. 18 U.S.C. § 922(a)(1) (2012).

41. *Id.* § 922(a)(2).

42. *Id.* § 922(a)(4); § 922(b)(4).

43. *Id.* § 922(o).

convicted of domestic violence.<sup>45</sup>

## 2. *By Court Decision*

In 1939, the Supreme Court heard the first major challenge to Congress' gun control regime in *United States v. Miller*.<sup>46</sup> The Court held that the NFA's effective ban on sawed-off shotguns did not violate the Second Amendment.<sup>47</sup> More recently, the Court's landmark decision in *District of Columbia v. Heller*<sup>48</sup> overturned the District of Columbia's ban on handgun possession and held that the Second Amendment protects an individual's right to (1) possess a firearm unconnected to service in a militia, and (2) use that arm for traditionally lawful purposes, particularly self-defense within the home.<sup>49</sup> Furthermore, in language oft-cited by federal courts<sup>50</sup> and described by scholars as "dicta of the strongest sort,"<sup>51</sup> the Court stated that bans on possession by felons, bans on possession by the mentally ill, and limits on certain weapons—like sawed-off shotguns and machine guns—are presumptively legal.<sup>52</sup>

Importantly, *Heller* makes clear that its holding does not call into question the *Miller* decision: the right to keep and carry arms extends only to those weapons that are "'in common use at the time' . . . [T]hat limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"<sup>53</sup> However, there is a tension inherent in the Court's interpretation of *Miller* and the holding that the Amendment's reference to "arms" enacts a specific protection of handguns. As the *Heller* Court acknowledges, *Miller* adopts a

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44. *Id.* § 922(g)(1).

45. *Id.* § 922(g)(9).

46. 307 U.S. 174 (1939).

47. *Id.* at 178-79.

48. 554 U.S. 570 (2008).

49. *Id.* at 635.

50. See, e.g., *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) ("Dicta in *Heller* states that the opinion should not 'be taken to cast doubt on long-standing prohibitions on possession of firearms by felons,' and we have reaffirmed our prior jurisprudence on this point since *Heller* was decided.") (internal citation omitted). Moreover, some appellate courts have gone so far as to treat that language as binding. See *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) ("Rozier argues that this language in *Heller* is merely dicta and we should not give it full weight of authority. First, to the extent that this portion of *Heller* limits the Court's opinion to possession of firearms by *law-abiding* and *qualified* individuals, it is not dicta. Second, to the extent that this statement is superfluous to the central holding of *Heller*, we shall still give it considerable weight.") (emphasis in original) (internal citations omitted).

51. Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. *Heller* and *Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009).

52. *Heller*, 554 U.S. at 626-27.

53. *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

consequentialist rather than historical approach, making no mention of history whatsoever.<sup>54</sup> *Heller* explicitly conducts a historical analysis insofar as it relates to the right to bear arms for self-defense purposes,<sup>55</sup> but its holding that the right to bear arms specifically protects hand gun possession is supported by a consequentialist analysis more evocative of *Miller*.<sup>56</sup> Thus, it is unclear doctrinally whether future analyses are properly conducted entirely through a historical analysis, a consequentialist analysis, or some hybrid. Additionally, while *Heller* explicitly disavows interest balancing in determining the validity of gun regulations, it does not announce a particular method of review or tier of scrutiny by which courts should conduct Second Amendment analysis.<sup>57</sup>

## B. The Right to Bear Arms in Alaska

### 1. By Enactment

The Alaska Constitution became operative on January 13, 1959 with the state's Formal Proclamation of Statehood.<sup>58</sup> Alaska adopted the right to keep and bear arms verbatim from the Second Amendment,<sup>59</sup> but amended its constitution in 1994 to include the following: "The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."<sup>60</sup> This amendment was passed before the Court's decisions in *Heller*<sup>61</sup> and *McDonald v. City of Chicago*,<sup>62</sup> and codified that the right in Alaska includes an individual citizen's explicit right to keep and bear arms.<sup>63</sup>

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54. *Id.* at 625.

55. *See id.* at 601-02 (describing the Court's historical analysis of state constitutional provisions for the right to bear arms, and their references to self-defense).

56. *See id.* at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

57. *Id.* at 634.

58. *The Constitution of the State of Alaska*, STATE OF ALASKA: OFFICE OF THE LIEUTENANT GOVERNOR BYRON MALLOTT, <http://ltgov.alaska.gov/treadwell/services/alaska-constitution.html> (last visited Jan. 31, 2016).

59. ALASKA CONST. art. I, § 19. "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." *Id.*

60. *Id.* (emphasis added).

61. *See supra* BACKGROUND Sec. A(2).

62. *See infra* BACKGROUND Sec. B(2).

63. *See* HARRISON, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE, *supra* note 6, at 29 ("The second sentence of this section was added by amendment in 1994. It makes explicit that the first sentence, which comes directly from Article II of the U.S. Bill of Rights, creates a personal right to possess a firearm unconnected with service in an official militia. U.S. Supreme Court decisions in 2008 and 2010

Alaska's statutory provisions limiting the right to bear arms are in many respects similar to those codified in Title 18 and the NFA. Comparable provisions include Alaska's ban on certain "prohibited weapons,"<sup>64</sup> the definition of which includes sawed-off shotguns, machine guns, and silencers.<sup>65</sup> That list of locally prohibited weapons, however, does not include smoothbore handguns capable of firing a shotgun shell, which are banned under the NFA's "any other weapon" prohibition.<sup>66</sup> Alaska's regulatory scheme varies from the federal regime in several other key ways. Notably, while Alaska does ban convicted felons from possessing a firearm, that ban does not reach all felons: 10 years after their conviction, felons can possess a firearm, so long as their original felony was not an offense committed against a person.<sup>67</sup> Additionally, Alaska has no law preventing gun possession by persons subject to a restraining order because of domestic violence,<sup>68</sup> and does not prohibit possession by the mentally ill or illegal aliens.<sup>69</sup>

Lastly, and importantly for the purpose of this Note, Alaska has enacted a nullification statute: the Alaska Firearms Freedom Act (AFFA). The AFFA was passed in 2010 and amended in 2013.<sup>70</sup> It states that any firearm, ammunition or firearm accessory that does not enter into interstate commerce is "not subject to federal law or federal

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accomplished the same purpose as the 1994 amendment to Alaska's constitution. Federal and state courts have ruled consistently that these constitutional guarantees do not prevent states from the reasonable regulation of firearms, such as requiring registration of handguns, prohibiting convicted felons from possessing firearms, and prohibiting concealed weapons."); Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205 (2006) (commenting on the Alaska amendment that "[a]n individual right is expressly secured, and the provision was enacted at a time (1994) when the supporters of an individual right treated the right as aimed at least in part at self-defense").

64. ALASKA STAT. § 11.61.200(a)(3) (2013).

65. *Id.* § 11.61.200(h)(1).

66. Compare *id.* (omitting from the ban smoothbore pistols, among other firearms categorized under the National Firearms Act as "any other weapon"), with 26 U.S.C. § 5845(e) (2012) (describing those weapons categorized as "any other weapon").

67. ALASKA STAT. §§ 11.61.200(a)(1), 11.61.200(b)(1)(C).

68. *Prohibited Purchasers Generally in Alaska*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/prohibited-purchasers-generally-in-alaska/> (last visited Jan. 31, 2016).

69. See ALASKA STAT. §§ 11.61.190, 11.61.195, 11.61.200, 11.61.210, 11.61.220 (failing to identify illegal aliens or the mentally ill as a class of individuals excluded from possessing a firearm); *Mental Health Reporting in Alaska*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/mental-health-reporting-in-alaska/> (last visited Jan. 11, 2015) ("Alaska has no law requiring the reporting of mental health information to NICS.").

70. AFFA, ALASKA STAT. § 44.99.500 (2013).

regulation, including registration.”<sup>71</sup> Additionally, it provides specifically that federal bans or restrictions on semiautomatic firearms or magazines, and any requirements that a firearm, magazine, or other firearm accessory be registered are “unenforceable.”<sup>72</sup>

## 2. *By Court Decision*

In *McDonald v. City of Chicago*, the Supreme Court held that the Second Amendment is incorporated against the states via the Fourteenth Amendment.<sup>73</sup> However, the impact of *McDonald* was perhaps felt less in Alaska than other states because Alaska’s state constitution already included a provision specifically providing individuals with the right to bear arms.<sup>74</sup>

In some ways, the Alaska courts were ahead of the Supreme Court. Indeed, because the aforementioned 1994 amendment to the state constitution already explicitly applied the right to bear arms to individual Alaskans, state courts, for example, had already determined, even before *Heller* and *McDonald*, that the individual right does not entitle those individuals proscribed from gun ownership—like felons<sup>75</sup>—to be able to possess a weapon.<sup>76</sup>

## C. The Theory of Nullification<sup>77</sup>

Nullification is grounded in the belief that a state has the power to determine whether action by the federal government is unconstitutional and, if so, to invalidate the enforcement of unconstitutional action within the state.<sup>78</sup> There have been various attempts at nullification throughout America’s history,<sup>79</sup> but the foundational event was James Madison and Thomas Jefferson’s respective Virginia<sup>80</sup> and Kentucky<sup>81</sup>

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71. *Id.* § 44.99.500(a).

72. *Id.* § 44.99.500(e).

73. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

74. *See supra* BACKGROUND Sec. B(1).

75. ALASKA STAT. § 11.61.200 (2013).

76. *See Gibson v. State*, 930 P.2d 1300, 1302–03 (Alaska Ct. App. 1997) (holding that the felon-in-possession statute did not violate the State Constitution).

77. This Note does not purport to undertake a thorough analysis of the history of nullification in the United States. For such an analysis, *see* James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 AM. POL. THOUGHT 263, 273 (2012) [hereinafter *Nullification Past and Present*].

78. *Id.*; O. Shane Balloun, *The Disarming Nature of the Wyoming Firearms Freedom Act: A Constitutional Analysis of Wyoming's Interposition Between Its Citizens and the Federal Government*, 11 WYO. L. REV. 201, 206–07 (2011).

79. Read & Allen, *Nullification Past and Present*, *supra* note 77, at 274.

80. Nancy Verell, *MONTICELLO, Kentucky and Virginia Resolutions*,

Resolutions, written in response to the passage of the Alien and Sedition Acts, the latter of which announced it within a state's right to declare a federal act to be "unauthoritative, void and of no force."<sup>82</sup> Even at the time, this notion was controversial: "The Kentucky and Virginia Resolutions garnered support from none of the other fourteen states. Four states made no response and ten states expressed outright disapproval. Some specifically maintained that the judiciary branch, not the state legislatures, was responsible for determining questions of constitutionality."<sup>83</sup> The Supreme Court would ultimately adopt the argument in favor of the judiciary as arbiter 150 years later in *Cooper v. Aaron*.<sup>84</sup>

Building on the ideas of Jefferson, the modern concept of nullification was crafted by John C. Calhoun in the 1830s—and opposed by Madison himself and on behalf of the then-deceased Jefferson<sup>85</sup>—and has been used repeatedly as a mechanism to combat various federal enactments, including the Tariff of 1832, the desegregation of schools, and beyond.<sup>86</sup>

However, while states have at times turned to nullification as a remedy for perceived unconstitutional infringements into their sovereignty, the Court made it clear in *Cooper* that it is not the states but rather the Court that is "supreme in the exposition of the law of the Constitution."<sup>87</sup> *Cooper* explicitly rejected the notion that the states could nullify school integration.<sup>88</sup> Today, even in spite of *Cooper*, some

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<https://www.monticello.org/site/research-and-collections/kentucky-and-virginia-resolutions> (last visited Mar. 18, 2016).

81. The Kentucky Resolution of November 10, 1798, in THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION 550 (Barbara B. Oberg & J. Jefferson Looney eds., 2008).

82. *Id.*

83. Verell, *supra* note 80.

84. 358 U.S. 1 (1958).

85. "It is remarkable how closely the nullifiers who make the name of Mr. Jefferson the pedestal for their colossal heresy, shut their eyes and lips, whenever his authority is ever so clearly and emphatically against them." James Madison to Nicholas P. Trist, December, 23 1832, *Transcription: The Writings of James Madison* (1900-1910), [https://memory.loc.gov/service/mss/mjm/23/23\\_1158\\_1160.pdf](https://memory.loc.gov/service/mss/mjm/23/23_1158_1160.pdf).

86. See Read & Allen, *Nullification Past and Present*, *supra* note 77, at 273-75 ("A set of common claims are made by Calhoun; by James J. Kilpatrick (1920-2010), editor of the *Richmond News Leader* during Southern states' campaign of 'massive resistance' to the Supreme Court's school desegregation decisions and author of *The Sovereign States* (1957); and by Thomas E. Woods, author of *Nullification* (2010) and a contemporary advocate of nullification affiliated with the Tenth Amendment Center.").

87. *Cooper*, 358 U.S. at 18.

88. *Id.* ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.").

continue to cling to the doctrine of nullification via the Ninth and Tenth Amendments<sup>89</sup> or by way of states' "sovereign power" to determine when the federal government has overstepped its constitutional bounds.<sup>90</sup>

#### D. The Montana Firearms Freedom Act

The Montana Firearms Freedom Act<sup>91</sup> (MFFA) took effect in October of 2009.<sup>92</sup> The operative section, Title 30, Chapter 20, § 104, exempts from federal jurisdiction any firearm, ammunition or firearm accessory that does not enter into interstate commerce.<sup>93</sup> Specifically, the MFFA provides that any weapon that is manufactured and remains in Montana need not be registered or licensed and is not otherwise regulable by Congress.<sup>94</sup> The Montana and Alaska statutes are virtually the same. The primary differences result from a 2013 amendment to the AFFA, which added an exemption for any weapon "possessed" in Alaska.<sup>95</sup> Any differences aside, the bills are motivated by a common purpose: to challenge Congress' authority under the Commerce Clause to regulate intrastate activity.<sup>96</sup>

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89. See Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled With?*, 67 ARK. L. REV. 17, 20 (2014) (discussing Texas Governor Rick Perry's response to a United States District Judge who invalidated Texas's refusal to recognize same-sex marriages) [hereinafter *Rediscovery of Nullification*]; AFFA, 2010 Alaska Sess. Laws ch. 23 (codified as amended at ALASKA STAT. § 44.99.500 (2013)) ("[T]he regulation of intrastate commerce is vested in the states under the Ninth and Tenth Amendments to the Constitution of the United States, particularly if not expressly preempted by federal law; the United States Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearm accessories, and ammunition.").

90. Levinson, *Rediscovery of Nullification*, *supra* note 89, at 21 (describing legislation passed by the Idaho House of Representatives nullifying the Affordable Care Act).

91. MONT. CODE ANN. § 30-20-101 (2013).

92. *Id.*

93. *Id.* § 30-20-104.

94. *Id.*

95. An Act Prohibiting State and Municipal Agencies From Using Assets to Implement or Aid in the Implementation of the Requirements of Certain Federal Statutes, 2013 Alaska Sess. Laws ch. 52, Sec. 3.

96. See Press Release, Will Vandergriff, *House Passes Updated Alaska Firearm Freedom Act* (Apr. 11, 2013), <http://www.housemajority.org/2013/04/11/house-passes-updated-alaska-firearm-freedom-act/> (invoking the intrusion of the federal government onto states' sovereignty for passage of the AFFA); MONT. CODE ANN. § 30-20-102 (2013) ("The regulation of intrastate commerce is vested in the states under the 9th and 10th amendments to the United States constitution [sic], particularly if not expressly preempted by federal law. Congress has not expressly preempted state regulation of intrastate commerce

## ANALYSIS

## PART I: THE VALIDITY OF THE AFFA

The Alaska Firearms Freedom Act (AFFA) is almost certainly invalid. This is all but a foregone conclusion since Gary Marbut<sup>97</sup> filed suit—which was ultimately dismissed—in the District of Montana, on behalf of himself and his co-plaintiffs, Montana Shooting Sports Association and the Second Amendment Foundation<sup>98</sup> (hereinafter Marbut), seeking a declaratory judgment on the validity of the MFFA. Specifically, Marbut argued that Montanans could legally produce, entirely in Montana, a .22 caliber Rifle, the Montana Buckaroo,<sup>99</sup> and market that rifle, entirely in Montana, without complying with federal licensing law because of the MFFA's protection.<sup>100</sup> This challenge, its ultimate dismissal, and the Ninth Circuit's upholding of the dismissal,<sup>101</sup> immediately implicated the AFFA; both laws consist of almost the same language<sup>102</sup> and both Alaska and Montana are located inside the jurisdiction of Ninth Circuit Court of Appeals. Thus, any judgment on the validity of the MFFA almost certainly binds the AFFA.

In the MFFA's case, the government moved to dismiss Marbut's action, alleging that the District Court lacked subject matter jurisdiction because the government had not waived its sovereign immunity,<sup>103</sup> and because the plaintiffs lacked standing,<sup>104</sup> and that the plaintiffs failed to state a cognizable claim because of Supreme Court Commerce Clause,<sup>105</sup>

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pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition.”).

97. Marbut is a community activist in Montana. See Jess Bravin, *A Gun Activist Takes Aim at U.S. Regulatory Power*, WALL ST. J. (July 14, 2011), <http://online.wsj.com/news/articles/SB10001424052702304584404576442440490097046>.

98. *Montana Shooting Sports Ass'n v. Holder*, No. CV-09-147-DWM-JCL, 2010 WL 3926029, at \*1, (D. Mont. Aug. 31, 2010), *report and recommendation adopted sub nom.* *Montana Shooting Sports Ass'n v. Holder*, No. CV-09-147-M-DWM-JCL, 2010 WL 3926029 (D. Mont. Sept. 29, 2010).

99. *Id.* at \*10.

100. *Id.* at \*1.

101. *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 978 (9th Cir. 2013).

102. See *supra* BACKGROUND Sec. D.

103. *Montana Shooting Sports Ass'n v. Holder*, No. CV-09-147-DWM-JCL, 2010 WL 3926029, at \*4-8, (D. Mont. Aug. 31, 2010). The district court ultimately found that this action fell within the exception to sovereign immunity when a plaintiff pursues “declaratory and/or injunctive relief suits against federal entities or officials seeking to enjoin the enforcement of an unconstitutional statute.” *Id.* at \*8.

104. *Id.* at \*9-14.

105. *Id.* at \*14-22.

Supremacy Clause, and Tenth Amendment precedents.<sup>106</sup> All of these arguments raised in opposition to Marbut's claim would likely be made against any individual attempting to uphold the AFFA.

The issue of standing, while an initial obstacle for the MFFA challenge,<sup>107</sup> ultimately was not dispositive in *Montana v. Holder*.<sup>108</sup> Likewise, a similar action seeking a declaratory judgment on the AFFA's status would be contingent on establishing standing, but such a hurdle would not exist if an Alaskan used the AFFA to justify her violation of federal gun law while being prosecuted.

Marbut's two constitutional arguments in defense of the MFFA would also likely be raised in defense of the AFFA, and thus the District of Montana and the Ninth Circuit's rulings on these questions are pivotal. Those two arguments are: (1) Congress' power to regulate interstate commerce does not extend to the regulation of goods manufactured and sold in an entirely intrastate market, and (2) because the Constitution is silent as to the issue of intrastate commerce, the right to regulate such commerce is reserved for the states by the Tenth Amendment.

#### A. An Attempt to Re-Litigate Commerce Clause Jurisprudence

A challenge to the AFFA<sup>109</sup> would likely argue, at least in part, that the regulation of intrastate gun activity, exempted from federal regulation by the AFFA, is not within Congress' powers under the Commerce Clause. This argument is one of the central "findings" listed in the legislation that enacted the AFFA, and is, along with a Tenth Amendment argument, the logical underpinning not just of the AFFA but most Firearms Freedom acts.<sup>110</sup> That argument hinges on whether intrastate gun manufacturing and sale fall into one of the three categories of commerce identified in *United States v. Lopez* as regulable

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106. *Id.* at \*22-23.

107. *See id.* at \*9-14 (dismissing case for lack of standing).

108. While the District of Montana found there was no standing, the Ninth Circuit reversed on the issue, finding that Marbut had alleged a sufficient economic injury under the assumption he would go through with his plan to manufacture the Montana Buckaroo without complying with applicable federal regulations. *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 980-81 (9th Cir. 2013).

109. ALASKA STAT. § 44.99.500 (2013).

110. *See The Firearms Freedom Act (FFA) is Sweeping the Nation*, FIREARMS FREEDOM ACT, <http://firearmsfreedomact.com/> (last visited Dec. 30, 2014) ("The FFA is primarily a Tenth Amendment challenge to the powers of Congress under the 'commerce clause,' with firearms as the object - it is a state's rights exercise.").

pursuant to Congress' Commerce Clause power.<sup>111</sup> In considering essentially the same argument relating to the MFFA in *Montana v. Holder*, the trial court determined that "whether Congress has the power to regulate the intrastate activity contemplated by the Act is properly analyzed under the third and final . . . [Lopez] category. To fall within Congress' Commerce Clause power on this basis, 'the regulated activity must substantially affect interstate commerce.'"<sup>112</sup>

Ultimately, both the District Court of Montana and Ninth Circuit agreed that the intrastate manufacturing and sale of the Montana Buckaroo would substantially affect interstate commerce.<sup>113</sup> The lower court noted that to exempt even intrastate gun activities would effectively leave a "gaping hole"<sup>114</sup> in the broader federal regulatory scheme controlling gun sales. Similarly, the appeals court was broadly unconvinced by Marbut's Commerce Clause arguments.<sup>115</sup>

Marbut, perhaps realizing the weakness of his case under current Supreme Court Commerce Clause doctrine, invited the District Court to "reverse the course of current Commerce Clause jurisprudence [and] . . . overrule the United States Supreme Court and Ninth Circuit."<sup>116</sup> Novel as it may be, both the trial court<sup>117</sup> and the appellate court rejected out-of-hand Marbut's argument that "the Supreme Court's Commerce Clause jurisprudence has improvidently altered the very form of American government, reading out dual sovereignty, and stripp[ed] from the States all independence of policy or action."<sup>118</sup>

In addition to trying to rewrite Commerce Clause case law, Marbut sought to distinguish the facts surrounding the MFFA from Supreme Court Commerce Clause precedent—in particular the Court's decision in *Gonzales v. Raich* that the intrastate production of Medical Marijuana

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111. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

112. *Montana Shooting Sports Ass'n*, 2010 WL 3926029, at \*15 (quoting *Lopez*, 514 U.S. at 558–59).

113. *Id.*; *Montana Shooting Sports Ass'n*, 727 F.3d at 982.

114. *Montana Shooting Sports Ass'n*, 2010 WL 3926029, at \*17 (quoting *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)).

115. *Montana Shooting Sports Ass'n*, 727 F.3d at 982.

116. *Montana Shooting Sports Ass'n*, 2010 WL 3926029, at \*18.

117. *See id.* ("[C]aselaw on point is the law, and binding authority must be followed unless and until overruled by a body competent to do so. This Court is thus bound by *Raich*, and must leave to the United States Supreme Court the prerogative of overruling its own decisions. This Court is likewise bound to follow existing Ninth Circuit precedent, and could disregard *Stewart* only if the decision was clearly irreconcilable with intervening higher authority.") (emphasis in original) (internal quotations omitted).

118. Brief for Appellants at \*9, *Montana Shooting Sports Ass'n*, No. 10-36094, 2011 WL 2353956 (9th Cir. 2011). *See also* *Montana Shooting Sports Ass'n*, 727 F.3d at 981 ("Whether or not Marbut is correct in his critique of that jurisprudence, we are not free to disregard it.").

was still regulable by the federal government under the Controlled Substances Act.<sup>119</sup> Marbut argued that the distinction lies in the MFFA's mandate that the guns regulated be specifically stamped, identifying them as entirely intrastate guns, while "the statute at issue in *Raich* did not similarly specify that it applied only to marijuana grown and used within the state of California, and did not provide a means for distinguishing locally cultivated marijuana from that cultivated elsewhere."<sup>120</sup> Again, the District Court was unconvinced that the "myopic" distinction was probative,<sup>121</sup> considering that the fungibility of the marijuana in *Raich* was only a portion of the Court's concern.<sup>122</sup> The District Court saw a clear parallel between the impact that nine entirely intrastate marijuana markets would have on the national drug market and the similar effects that the MFFA and other Firearms Freedoms Acts would have on the national gun trade, regardless of the presence of a "Made In" stamp.<sup>123</sup>

Additionally, the appellate court rejected Marbut's reading of *Raich*, agreeing with the lower court that "regulation of the Montana Buckaroo is within Congress' commerce power."<sup>124</sup> The Court of Appeals placed particular emphasis on its earlier holding in *United States v. Stewart*, and the analogue between the purportedly unique nature of the homemade machine guns concerned in *Stewart* and the "Made in Montana" stamped Buckaroo rifles at issue in Marbut's claim.<sup>125</sup> Neither firearm, according to the Court of Appeals, would necessarily remain outside the flow of interstate commerce, regardless of their distinct characteristics, and thus are regulable by Congress under *Raich*.<sup>126</sup>

The failure of this argument is again damning for the AFFA. First, while the MFFA requires any weapons under its exception to federal law be stamped "Made in Montana,"<sup>127</sup> there is no such requirement in the AFFA. Indeed, a 2013 amendment to the AFFA actually extends protections not only to guns manufactured in Alaska, but even any

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119. *Gonzales v. Raich*, 545 U.S. 1, 2-4 (2005).

120. *Montana Shooting Sports Ass'n*, 2010 WL 3926029, at \*18.

121. *Id.* at \*19.

122. *Id.*

123. *Id.* at \*20 ("Even more importantly, the *Raich* majority focused on the aggregate effect of medical marijuana use in the nine states with similar statutes and found that 'Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.'").

124. *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013).

125. *Id.*

126. *Id.*

127. MONT. CODE ANN. § 30-20-106 (2013).

weapon *possessed* exclusively in Alaska,<sup>128</sup> a distinction that makes the AFFA far more permissive than the MFFA. Given this distinction between the AFFA and MFFA, it seems even more likely that a court would have little trouble determining that the intrastate activity reached by the AFFA would substantially affect interstate commerce.

The same logic will apply to the intrastate activity exempted by the AFFA. Indeed, the AFFA actually exempts more local gun activity from federal regulation than does the MFFA by also protecting guns that are possessed entirely intrastate.<sup>129</sup> Thus, gun activity occurring entirely within Alaska would substantially affect interstate commerce. The “discrete local activity”<sup>130</sup>—gun manufacturing and sales—substantially affects the production and distribution of materials traded in “an established, lucrative interstate market”<sup>131</sup> for guns. Additionally, the Ninth Circuit in *Montana v. Holder* has already recognized the government’s permissible interest in the same comprehensive regulatory regime.<sup>132</sup>

Even before *Montana v. Holder*, the Ninth Circuit’s previous determination that any cutout for intrastate gun commerce would undercut federal regulation of the interstate market in guns in *United States v. Stewart*<sup>133</sup> provided a clear harbinger for the decisions in *Montana v. Holder* and any case concerning the AFFA. Now, given *Stewart*’s already binding precedent that intrastate gun activity does fall under Congress’ Commerce Clause power and *Montana v. Holder*’s extension of that precedent to the facts surrounding federal firearm nullification, there seems to be little chance of the AFFA successfully raising such a claim, barring a reverse or change in course from the *Raich/Lopez* framework by the Supreme Court.

It is also worth noting that the Supreme Court denied a petition for writ of certiorari in *Montana v. Holder*,<sup>134</sup> and while the Commerce Clause argument would certainly fail if raised on behalf of the AFFA in

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128. An Act Prohibiting State and Municipal Agencies From Using Assets to Implement or Aid in the Implementation of the Requirements of Certain Federal Statutes, 2013 Alaska Sess. Laws ch. 52, Sec. 3.

129. Compare ALASKA STAT. § 44.99.500(b) (2013) (exempting from federal law firearms possessed within the state) with MONT. CODE ANN. § 30-20-104 (2013) (exempting from federal law firearms manufactured within the state).

130. *Montana Shooting Sports Ass’n v. Holder*, No. CV-09-147, 2010 WL 3926029, at \*16.

131. *Gonzales v. Raich*, 545 U.S. 1, 26 (2005).

132. *Montana Shooting Sports Ass’n v. Holder*, 727 F.3d 975, 981–82 (9th Cir. 2013).

133. *Montana Shooting Sports Ass’n*, 2010 WL 3926029, at \*17 (quoting *Raich*, 545 U.S. at 22).

134. *Montana Shooting Sports Ass’n v. Holder*, *cert. denied*, 134 S. Ct. 955 (2014).

district court or at the Ninth Circuit, should a challenge to the AFFA reach the Supreme Court, there could theoretically be a minimal hope<sup>135</sup> that the Court, when faced with the questions posed by a gun nullification statute, could reverse nearly a century of Commerce Clause precedent. For example, the Court has, when considering gun regulations, taken notice of federalism concerns when paring down or invalidating another different federal gun control law.<sup>136</sup>

Additionally, in recent years the Court has signaled some hesitance towards an overly robust Commerce Clause power.<sup>137</sup> However, even in such cases, like the Court's recent decision in *N.F.I.B. v. Sebelius*,<sup>138</sup> the Court still reaffirmed Congress' power to regulate intrastate commerce that affects an interstate market.<sup>139</sup> While Justice Roberts found that the Congressional action in question—the individual mandate of the Affordable Care Act—was outside Congress' Commerce Clause power, the Court did so while still endorsing *Wickard v. Filburn*,<sup>140</sup> *Raich*, and broad notions that Congress has the power to “anticipate the effects on commerce of an economic activity.”<sup>141</sup> Because gun possession is essentially per se economic—even if a gun is manufactured at home, it would necessarily consist of parts purchased—it seems clear that *Sebelius*'s reaffirmation of *Wickard* and *Raich* is of great consequence to the AFFA—and its likely invalidity—if and when it is challenged in the

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135. For an insight into the likelihood of this, consider an exchange from the film *Dumb and Dumber*, in which the main character, Lloyd Christmas, asks a woman of interest what their chances are of ending up together. When she responds that the odds are “one out of a million,” his answer is, “so you're telling me there's a chance!” *DUMB AND DUMBER* (New Line Cinema 1994).

136. See *United States v. Lopez*, 514 U.S. 549, 577 (1995) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”); *Printz v. United States*, 521 U.S. 898, 928 (1997) (“It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is [not] compatible with this independence and autonomy that their officers be ‘dragooned’ . . . into administering federal law . . .”).

137. See *Lopez*, 514 U.S. at 552 (holding that a federal law banning possession of a firearm in a school zone is an invalid exercise of Congress' powers under the Commerce Clause); *United States v. Morrison*, 529 U.S. 598, 602 (2000) (holding that the federal provisions providing a civil remedy for the victims of gender-motivated violence was an unconstitutional exercise of Congressional Commerce Clause power); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct 2566, 2585 (2012) (holding, for a plurality, that the individual mandate of the Affordable Care Act violates the Commerce Clause by regulating prospective commercial activity as opposed to actual commercial activity).

138. *Sebelius*, 132 S. Ct at 2585.

139. *Id.* at 2585–86.

140. 317 U.S. 111 (1942).

141. *Sebelius*, 132 S. Ct at 2590 (emphasis added).

Ninth Circuit and before the Supreme Court.

## B. Pitting The Supremacy Clause Against The Tenth Amendment

Marbut's second argument for the validity of the MFFA received similar disapproval from the district and appellate courts and is likely unfavorable for the AFFA. Marbut argued that because the Tenth Amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people,"<sup>142</sup> Congress has overstepped its authority by regulating intrastate gun sales. Given the AFFA's explicit invocation of the Tenth Amendment in its "findings" section,<sup>143</sup> it seems likely that a similar argument would be made in defense of the AFFA if challenged. However, in *Montana v. Holder* the trial court quickly and summarily dismissed this as a misinterpretation of the amendment and ignorant of the Supremacy Clause.<sup>144</sup>

Although the Court of Appeals did not address these issues specifically, it still upheld the ruling of the District Court.<sup>145</sup> Given the lower court's *Montana v. Holder* holding and its affirmation by the Ninth Circuit,<sup>146</sup> it is unlikely that the AFFA will succeed if challenged in federal court on Tenth Amendment grounds.<sup>147</sup> The AFFA will face the same scrutiny from any court that, because it directly conflicts with a federal law deemed "within the powers granted to Congress under the Commerce Clause, it cannot constitute an exercise of power reserved to the states."<sup>148</sup>

Absent a challenge to the Supreme Court, re-litigating these issues

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142. *Montana Shooting Sports Ass'n v. Holder*, No. CV-09-147, 2010 WL 3926029, at \*23 (D. Mont. Aug. 31, 2010) (quoting U.S. CONST. amend. X).

143. AFFA, 2010 Alaska Sess. Laws ch. 23 (codified as amended at ALASKA STAT. § 44.99.500 (2013)).

144. See *Montana Shooting Sports Ass'n*, 2010 WL 3926029, at \*23 ("Because federal firearms laws are a valid exercise of Congress' power under the Commerce Clause as applied to the intrastate activities contemplated by the Act, there is no Tenth Amendment violation in this case."); *id.* at 22 (citing the Supremacy Clause for the notion that "federal laws prevail to the extent the [MFFA] conflicts with them").

145. *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 983 (9th Cir. 2013).

146. See *supra* ANALYSIS Sec. A.

147. See *Montana Shooting Sports Ass'n*, 727 F.3d at 981-83 (holding that its earlier precedent from *United States v. Stewart* and Supreme Court precedent from *Raich* are binding on the Commerce Clause issue); *Hart v. Massianari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("[C]aselaw on point is the law . . . . Binding authority must be followed unless and until overruled by a body competent to do so.") (emphasis in original).

148. *Montana Shooting Sports Ass'n*, 2010 WL 3926029, at \*23.

would likely prove fruitless considering the earlier decision's now-binding nature in the Ninth Circuit. Indeed, even before the Ninth Circuit ruled on the issue, Marbut himself acknowledged that litigating these issues at the district court level and before the court of appeals would likely end in defeat.<sup>149</sup> However, since the Supreme Court denied certiorari to the Ninth Circuit,<sup>150</sup> it seems likely that, even if in challenging the AFFA, Alaska re-litigated the aforementioned issues, the Court would similarly refuse to consider those arguments in the context of the AFFA. If the Court did grant certiorari, it would almost certainly follow its previous Supremacy Clause precedent on the issue of nullification.<sup>151</sup>

The Ninth Circuit's holdings in *Montana v. Holder* and *United States v. Stewart* make the AFFA virtually dead on arrival in any court within the Ninth Circuit. Moreover, despite recent Supreme Court precedent in *United States v. Lopez*,<sup>152</sup> *United States v. Morrison*,<sup>153</sup> and *N.F.I.B. v. Sebelius*,<sup>154</sup> signaling limits on Congress' Commerce Clause power, none of these cases have overturned or even called into question the well-established principle that intrastate commerce is regulable by the federal government.<sup>155</sup> Similarly, Supremacy Clause precedent clearly indicates that the Tenth Amendment arguments raised in defense of the MFFA, if raised on behalf of the AFFA, would likely fail in any court.

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149. See *Ninth Circuit Rules in Firearms Freedom Act Case*, FIREARMS FREEDOM ACT (Aug. 23, 2013), <http://firearmsfreedomact.com/2013/08/23/ninth-circuit-rules-in-firearms-freedom-act-case-82313/> ("We must get to the U.S. Supreme Court to accomplish our goal of overturning 70 years of flawed Supreme Court rulings on the interstate commerce clause. We knew that the Ninth Circuit couldn't help us with that. Only the Supreme Court can overturn Supreme Court precedent. However, now that the standing question is resolved in our favor, we have the green light to appeal to the Supreme Court.").

150. *Montana Shooting Sports Ass'n v. Holder*, cert. denied, 134 S. Ct. 955 (2014).

151. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that prior precedent required the Governor of Alaska and the state's legislature to enforce a judicially-approved integration plan).

152. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (holding that a federal law banning possession of a firearm in a school zone is an invalid exercise of Congress's powers under the Commerce Clause).

153. See *United States v. Morrison*, 529 U.S. 598, 602 (2000) (holding that the federal provisions providing a civil remedy for the victims of gender-motivated violence was an unconstitutional exercise of Congressional Commerce Clause power).

154. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585 (2012).

155. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

## PART II: AN ALTERNATIVE VIEW OF ALASKANS' SECOND AMENDMENT RIGHTS

After *Heller* and *McDonald*, it is unambiguous that individuals have the right to keep and bear arms, particularly handguns, for the purpose of self-defense.<sup>156</sup> However, the Court has not clarified, more specifically, how exactly to go about scrutinizing regulations that limit the right. Indeed, lower courts have struggled with the question and there has not been uniformity in adopting doctrinal approaches to measuring whether regulations infringe upon the Second Amendment.<sup>157</sup>

Thus far, this Note has focused its analysis on a piece of legislation aimed at nullifying federal gun control laws. But as stated above, the law in question is almost certainly unenforceable and as such serves little to no function in a practical sense. However, Alaskans serious about potentially challenging federal limitations on gun rights could make the argument, embraced by several scholars, that the Second Amendment—even as interpreted by the Court in *Heller* and *McDonald*—necessarily encompasses different rights for different citizens, dependent on the local character of self-defense needs and historical local regulations, and therefore requires additional protections for Alaskans who have unique self-defense needs.<sup>158</sup> As a normative matter, the keystone of this argument is that the right to bear arms, codified in the Second Amendment and interpreted through a historical lens in the Court's decisions in *Heller* and *McDonald*,<sup>159</sup> has a

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156. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (“[I]n *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense . . . . We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

157. Compare *Heller v. D.C.*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) (employing a two prong approach based on “whether a particular provision impinges upon a right protected by the Second Amendment [and] if it does, . . . whether the provision passes muster under the appropriate level of constitutional scrutiny”) with *United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (“The individual right to bear arms might well be a fundamental right, the restriction of which requires strict scrutiny.”). See generally Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, Issue Brief, AM. CONST. SOC'Y FOR L. AND POL'Y (Oct. 2010), [https://www.acslaw.org/sites/default/files/Mehr\\_and\\_Winkler\\_Standardless\\_Second\\_Amendment.pdf](https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf).

158. Blocher, *supra* note 19, at 87-88.

159. See *D.C. v. Heller*, 554 U.S. 570, 595 (2008) (basing its analysis on the Second Amendment's “text and history”); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (internal citations omitted) (basing its incorporation analysis on whether the right to bear arms is “deeply rooted in the nation's history and tradition”).

longstanding tradition of being regulated in varying ways in varying locales throughout American history and beginning even earlier: “This geographic variation, and specifically the urban/rural divide, predates the Second Amendment itself.”<sup>160</sup>

In making this Second Amendment argument, because it is untested in courts, it may be helpful to analogize to First Amendment obscenity doctrine and its emphasis on “community standards,” which provides a useful doctrinal analogue for how a court ought to analyze the notion that Alaskans’ right to bear arms as distinct from those of New Yorkers, Chicagoans, and even the residents of the lower 48 states at large.<sup>161</sup> Indeed, *Heller* itself recognizes the presence of such a nexus between limitations on First Amendment free speech and potential limitations on the Second Amendment.<sup>162</sup> While such a position could lead to an expansion of gun rights in some areas or some respects, it could potentially uphold stricter limitations on gun rights in others.

So-called “Firearm Localism”<sup>163</sup> offers the argument that courts “can and should incorporate the longstanding and sensible differences regarding guns and gun control in rural and urban areas, giving more protection to gun rights in rural areas and more leeway to gun regulation in cities.”<sup>164</sup> The doctrinal theory behind firearm localism invokes an important tradition-based framework based upon America’s history of differing treatment of firearms in urban and rural localities,<sup>165</sup> as well as providing a pragmatic mechanism to recognize the real and conscious divide between the nature of gun ownership in rural and urban communities.<sup>166</sup> An appeal to history is particularly crucial given *Heller* and *McDonald*’s doctrinal emphasis on a historical analysis in their

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160. *Id.* at 112–13.

161. *See, e.g.,* Pratt, *supra* note 21 (describing obscenity doctrine as useful for analysis of uncommon firearms); Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1291 (2009) (“While Justice Scalia did not specifically disclaim any scrutiny analysis, he strongly indicated that the Second Amendment, like the First, is an Amendment implemented in the first instance by categories.”); Blocher, *supra* note 19, at 125–26. *Cf.* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 54 (2012) (“[C]ritical normative, descriptive, and practical differences between the two Amendments and the rights they protect undermine those analogies.”).

162. *See Heller*, 554 U.S. at 635 (“The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets . . . . The Second Amendment is no different.”).

163. Blocher, *supra* note 19, at 85.

164. *Id.*

165. *Id.* at 112–13.

166. *Id.* at 121–24.

construction of the right to bear arms and the right to self-defense.<sup>167</sup> Firearm localism could be applied easily enough via the aforementioned comparison of the Second Amendment to the First Amendment with respect to the potentially local character of the rights in question.<sup>168</sup>

The parallels between obscenity and the Second Amendment are multiple. While the First Amendment broadly protects speech, that which is deemed obscene is not entitled to those protections.<sup>169</sup> Correspondingly, while the Second Amendment protects the right to bear arms for purposes of self-defense, it does not protect the use of dangerous and unusual firearms.<sup>170</sup> Furthermore, the normative concerns surrounding obscenity, and in particular sexually explicit material, are not unlike those surrounding uncommon weapons: a constant concern in obscenity doctrine, for example, is protection of children,<sup>171</sup> not inapposite to the Second Amendment's imperative on protecting the use of defense for protecting one's family.<sup>172</sup> While both amendments protect a core set of fundamental rights, the First Amendment does not reach material that is "utterly without redeeming social importance,"<sup>173</sup> and the Second Amendment does not protect socially useless weapons that serve only dangerous purposes rather than lawful ones.<sup>174</sup>

In addition to the standalone concept of firearm localism, there is a particularly compelling case, it has been argued, for treating uncommon firearms under the Second Amendment similarly to how obscenity is scrutinized under the First Amendment.<sup>175</sup> The definition of uncommon

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167. See *D.C. v. Heller*, 554 U.S. 570, 595 (2008) (basing its analysis on the Second Amendment's "text and history"); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (internal citations omitted) (basing its incorporation analysis on whether the right to bear arms is "deeply rooted in the nation's history and tradition").

168. Blocher, *supra* note 19, at 125–26; Pratt, *supra* note 21, at 644–47.

169. See *Roth v. United States*, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").

170. *Heller*, 554 U.S. at 627.

171. See *Miller v. California*, 413 U.S. 15, 20 (1973) ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 690 (1968) ("[W]e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.').

172. See *Heller*, 554 U.S. at 628 (problematizing the D.C. gun ban for its intrusion on an individual's ability to defend her "self, family and property").

173. *Roth*, 413 U.S. at 485.

174. *Heller*, 554 U.S. at 627.

175. Pratt, *supra* note 21, at 656.

firearms—which are currently regulated under federal law by the National Firearms Act (“NFA”)—could be of particular interest to Alaskans given the unique circumstances many Alaskans face on a day to day basis when compared with the rest of the country. Just as a phrase uttered in one part of the country might have a very different meaning somewhere else, a weapon that—if legal—might be commonly and safely used in rural Alaska might be just as uncommon and dangerous in urban Baltimore.

Given this parallel between commonality and necessity of use and community standards, particularly the questions of social utility that are implicit in the Court’s construction of both the First and Second Amendments, the clearly defined test for identifying obscenity is a logical starting point for developing a test to determine which weapons are dangerous and unusual. Obscenity doctrine weighs multiple factors to determine whether speech is obscene, with community standards playing a major role in making that determination.<sup>176</sup> In applying a three-pronged test to determine whether speech is obscene, the quintessential and first question is “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest.”<sup>177</sup> The second prong asks whether the work “depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,”<sup>178</sup> and the third, finally, “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>179</sup>

Reconfiguring these tests to conform to a Second Amendment inquiry would require only replacing consideration of the ‘work’ in question with the weapon in question, slightly modifying the social interests being considered, and changing deliberation on the interests at stake to a self-defense interest—which the Court has acknowledged as the central protection of the Second Amendment.<sup>180</sup> The resulting test would state that an otherwise prohibited “uncommon” gun is permitted if: (1) applying contemporary community standards, the firearm is necessary to protect an otherwise unsatisfied self-defense interest of

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176. See *Miller*, 413 U.S. at 32–33 (discussing the constitutionality of applying differing community standards to speech, concluding “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City”).

177. *Id.* at 26 (quoting *Roth*, 354 U.S. at 485).

178. *Id.*

179. *Id.*

180. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (“In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.”).

individuals in a certain locality; (2) the firearm does not function in such a way that is offensive to specific state law; *and* (3) the firearm has not served a historically antisocial function nor will it serve a presumptively antisocial future function.

The purpose of the first prong then, to consider the self-defense utility of a particular weapon through a localized community standards lens, is directly parallel to the obscenity doctrine's first prong<sup>181</sup> and a reflection of the self-defense concerns which are the constant undercurrent throughout *Heller*.<sup>182</sup> The second prong also serves important doctrinal functions: it allows courts, in determining the applicable community standards, to take a cue from the legislature as to what sort of weapons might per se fall outside of community norms. This analysis is more grounded in formalism than functionalism and takes into account *Heller's* emphasis on a historical analysis cognizant of longstanding traditions.<sup>183</sup> Consider, for example, Alaska's ban on

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181. See *id.* at 21 (discussing the social concerns relating to obscenity).

182. See *Heller*, 554 U.S. at 628 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”). In a concurrence to a per curiam decision striking the logic employed by the Massachusetts State Supreme Court to scrutinize Massachusetts’ ban on stun guns, Justice Alito, joined by Justice Thomas, casts doubt on the notion that the ability to replace one weapon with a different equally effective weapon, for the purposes of self-defense, might render the former weapon unprotected under the Second Amendment: “The [lower court] suggested that Caetano could have simply gotten a firearm to defend herself [instead of a stun gun]. But the right to bear other weapons is no answer to a ban on the possession of protected arms.” *Caetano v. Mass.*, 577 U.S. \_\_\_, at \*9 (2016) (per curiam) (Alito, J., concurring) (internal citations and quotations omitted). It is unclear whether Justice Alito’s rationale would be applicable beyond the comparison of a lethal weapon to a non-lethal weapon. Seemingly, the major distinction for Justice Alito is that an individual should have the option to use a non-lethal weapon rather than be forced to use a more deadly—but equally effective for the purposes of self-defense—handgun: “Courts should not be in the business of demanding that citizens use more force for self-defense than they are comfortable wielding.” *Id.* at \*9–10. Moreover, it is unclear whether Justice Alito’s position would even garner a majority of votes. Here, the per curiam opinion was much more limited in its rejection of the lower court’s Second Amendment holding than was Justice Alito. Rather than reaching the merits of the Second Amendment question, the Court simply rejected the logic employed by the lower court as a misreading of *Heller* by stating that (1) “the Second Amendment “extends to arms that were not in existence at the time of the founding,” (2) by equating unusual with in common use at the time of the Second Amendment’s enactment, the [lower] court’s second explanation is the same as the first; it is inconsistent with *Heller* for the same reason,” and (3) “*Heller* rejected the proposition that only those weapons useful in warfare are protected” by the Second Amendment. *Id.* at \*1–2 (per curiam).

183. See *id.* at 626–27 (discussing the presumptive legality of laws regulating gun possession by the mentally ill and regulating possession of guns deemed “not in common use”).

machine guns.<sup>184</sup> This state law would indicate that automatic weapons are traditionally outside the community standard and thus not protected. The third prong, finally, builds in *Heller* and *McDonald*'s concern for history and tradition<sup>185</sup> and would act as a fail-safe for the second prong, ensuring that states could not simply repeal bans on weapons that have a long history of illicit or undesirable use—for example, sawed-off shotguns—simply to create a loophole from federal law. The last portion, about presumptively illicit future functions, would require the government to make a rebuttable showing that the uncommon firearm in question serves no purpose other than an antisocial one.<sup>186</sup>

The three-pronged approach blends the doctrines from *Heller*, giving equal import to both the character and tradition of a weapon and accounting for *Heller*'s emphasis that there are consequentialist concerns in determining whether a weapon receives Second Amendment protection, as well as taking into account the importance of historical considerations in determining whether the right protects unusual weapons. Additionally, this framework might help to rectify a logical difficulty inherent in *Heller*'s pronouncement that “the sorts of weapons protected [a]re those ‘in common use at the time.’”<sup>187</sup> Given *Heller*'s lack of clarification of the definition of common use<sup>188</sup>—how long must a gun be in use to be deemed common, and by how many people—there is some uncertainty over how to apply this language<sup>189</sup> and there is the inherent catch-22 that guns that are banned can never be commonly used.<sup>190</sup> By adopting the community standards test, the question would

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184. ALASKA STAT. § 11.61.200(a)(3) (2010); ALASKA STAT. § 11.61.200(h)(1)(c) (2010).

185. See, e.g., *Heller*, 554 U.S. at 630 (discussing the practicality of using a handgun versus a long gun for self-defense).

186. This is a direct analog to the Court's logic in *Miller*, which is also forward looking in its consequentialist approach: “[I]t is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use *could* contribute to the common defense.” *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added).

187. *Id.* (quoting *Miller*, 307 U.S. at 179).

188. The Court has recently indicated that the Second Amendment's protection of uncommon firearms, at its bottom, must at least extend beyond those weapons available at the time of the Amendment's drafting. See *Caetano v. Mass.*, 577 U.S. \_\_\_, at \*2 (2016) (per curiam) (“[E]quating ‘unusual’ with ‘in common use at the time of the Second Amendment’s enactment’ . . . is inconsistent with *Heller* . . .”).

189. See Andrew R. Gould, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1563 (2009) (discussing the vagaries of *Heller*'s “common use” language).

190. The third prong of the proposed test—whether an otherwise uncommon weapon has served a historically antisocial purpose—is aimed at remedying this

no longer be common use, but whether a weapon satisfies the aforementioned three-prong approach.

Applying this framework to Second Amendment commonality and purpose would allow the judge, on an as-applied basis, to determine whether a particular weapon is contrary to the community's self-defense interest or whether a certain weapon is outside the class of weapons historically possessed by the locality for self-defense purposes.

The adoption of a community standards test for uncommon firearms would likely lead to challenges of various local and federal firearms bans. Consider, for example, a challenge brought by an Alaskan, to the NFA's ban on "any other weapon," particularly "a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell."<sup>191</sup> There is no Alaska law banning possession of handguns with a smooth bore barrel designed to fire a fixed shotgun shell.<sup>192</sup> Such a weapon, in the context of the Alaskan wilderness, would perhaps be a uniquely effective weapon for self-defense, serving a purpose that others cannot. While high-caliber rifles and shotguns can stop a bear,<sup>193</sup> both are cumbersome and could be difficult to accessibly carry while doing everyday chores outside the house that require using both hands. So although they might provide the necessary stopping power for a hunter, a smaller weapon would be much more conducive to self-defense for an Alaskan resident who simply wishes to do chores outside on her property and happens to live in an area populated by bears. Some handguns, like magnum revolvers, can "get the job done in a pinch,"<sup>194</sup> but they are difficult to aim accurately and are inferior to shotguns in stopping power and spread, essentially requiring that the shooter hit a vital organ to put down a

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circularity problem. By phrasing this portion of the test in the negative, focusing on an antisocial purpose rather than a socially positive purpose, new weapons not yet in common use could satisfy the third prong absent a strong showing of future dangerousness. However, because an uncommon weapon would have to satisfy *all three* prongs to be stricken, this does not mean any cognizable future weapon would be unregulable. The future provision of all three prongs collectively would still allow regulating future firearms broadly, so long as some other weapon would serve the self-defense function of the firearm in question, or the weapon fails scrutiny under some other non-NFA, designation.

191. 26 U.S.C. § 5845(e) (2012).

192. See ALASKA STAT. § 11.61.200(h) (2010) (omitting this weapon from the prohibited weapons list).

193. See *Bears and You*, ALASKA DEP'T OF NAT. RES., DIV. OF PARKS & OUTDOOR RECREATION, <http://dnr.alaska.gov/parks/safety/bears.htm> (last visited Jan. 11, 2015) (suggesting using at least a .300 mag rifle or 12-gauge shotgun to stop a bear); Chuck Hawks, *Firearms for Defense Against Bears*, [http://www.chuckhawks.com/firearms\\_defense\\_bears.htm/](http://www.chuckhawks.com/firearms_defense_bears.htm/) (last visited Jan. 11, 2015).

194. Hawks, *supra* note 193.

bear.<sup>195</sup> A smooth bored pistol firing shotgun shells could be worn in a holster, making it easy to carry around one's property without occupying her hands, and because it could fire shotgun shells, it would provide the necessary force to stop a charging animal,<sup>196</sup> be it a bear,<sup>197</sup> moose,<sup>198</sup> or wolf.<sup>199</sup> Moreover, because shotgun shells fire a spray pattern,<sup>200</sup> it would not have the same aiming issue associated with high-caliber handguns.<sup>201</sup>

Applying the above-developed three-pronged community standards test to this smooth bore, shotgun-shell firing handgun would likely result in finding that the NFA ban was, at least in Alaska, violating Alaskan's Second Amendment right to self-defense because: (1) this weapon is better suited to serve the self-defense needs of the community in question than any other legal weapon; (2) this weapon is not prohibited by Alaska state law; and (3) no such weapon has been in common use, and therefore is not attached to a historical stigma. Admittedly, the potential to analogize this weapon to a sawed-off shotgun, which is attached to historical stigma,<sup>202</sup> does exist. However, the very fact that the NFA itself distinguishes between the two would enable a challenge to the NFA to make the argument that the two ought to be analyzed as distinct since the law treats them as distinct.

The above hypothetical at first seems to pose a serious issue with the suggested doctrinal framework; it would allow a similar challenge to the NFA ban on sawed-off shotguns—as all of the characteristics listed in favor of the smooth bore pistol are virtually mirrored by sawed-off shotguns. If that were the case, the rule would conflict with *Heller's* clear indication that the NFA ban on sawed-off shotguns is proper.<sup>203</sup> However, it is important to note that a challenge to sawed-off shotguns in Alaska under the community standards framework would not

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195. See *id.* (“If you are not an experienced handgunner and/or are not willing to practice regularly with your bear gun, I suggest that you forego choosing a handgun.”).

196. *Id.*

197. Jethro Mullen, *Hunter Airlifted from Alaskan Island after Bear Attack*, CNN (Nov. 6, 2014) <http://www.cnn.com/2014/11/06/us/alaska-bears-attack-hunters/>.

198. Casey Grove, *Be Wary of Moose During Calving Season, Biologists Say*, ALASKA DISPATCH NEWS (May 29, 2012), <http://www.adn.com/article/20120529/be-wary-moose-during-calving-season-biologists-say>.

199. *Fatal Wolf Attack Unnerves Alaska Village*, NBC NEWS (Mar. 17, 2010), [http://www.nbcnews.com/id/35913715/ns/us\\_news-life/t/fatal-wolf-attack-unnerves-alaska-village/#.VKMkxGTF-5l](http://www.nbcnews.com/id/35913715/ns/us_news-life/t/fatal-wolf-attack-unnerves-alaska-village/#.VKMkxGTF-5l).

200. See Hawks, *supra* note 193.

201. *Id.*

202. See ALASKA STAT. § 11.61.200 (h)(1) (2010) (including a shotgun with a barrel length of less than 18 inches as a prohibited weapon).

203. *Dist. of Columbia v. Heller*, 554 U.S. 570, 622–26 (2008).

succeed because while sawed-off shotguns might appear to satisfy the unique self-defense demands of Alaskans, the weapon would fail the second prong. In Alaska, state law makes possession of a sawed-off shotgun illegal.<sup>204</sup> Indeed, even the repeal of such a law would not save sawed-off shotguns from violating the first and third prongs of the proposed test. Sawed-off shotguns certainly would not serve a more useful self-defense function than the aforementioned smooth-bored handgun, failing the first prong, and moreover have an infamous history alluded to in *Heller* that would similarly fail the third prong.<sup>205</sup>

Likewise, machine guns, which are banned under the NFA if they pre-date 1986<sup>206</sup> but are not specifically banned in some states,<sup>207</sup> would likely still be considered dangerous and unusual under this test. Even in states where local laws do not ban automatic weapons, leaving the second prong untriggered, the federal ban on machine guns would likely survive because a challenge would fail the first and third prongs of the aforementioned test. Such a challenge would be unable to demonstrate that machine guns are *necessary* (as opposed to sufficient) for self-defense purposes anywhere in the county,<sup>208</sup> nor could an argument in favor of machine guns refute that automatic weapons have historically been used for criminal purposes.<sup>209</sup> And while some states,

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204. See ALASKA STAT. § 11.61.200 (h)(1) (2010) (including a shotgun with a barrel length of less than eighteen inches as a prohibited weapon).

205. See *Heller*, 554 U.S. at 623-24 (describing sawed-off shotguns as “weapons which are commonly used by criminals”).

206. 26 U.S.C. § 5845(b) (2012).

207. See *State Machine Gun Laws*, LAW CENTER TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/category/state-machine-guns/> (last visited Jan. 11, 2015) (“Alabama law does not restrict the possession or transfer of machine guns.”).

208. See *Heller*, 554 U.S. at 629 (“[T]he American people have considered the handgun to be the quintessential self-defense weapon.”). While particular circumstances in one locale may require slightly more stopping power than a handgun, as discussed above regarding Alaskans’ need to defend themselves against wild animals, the marginal difference in rate of fire between an automatic weapon and semi-automatic weapon is not probative, as semi-automatic weapons can fire nearly a round per second sufficient to satisfy any cognizable self-defense need. See Luis Paulo A. Leme, *The Council Directive on Control of the Acquisition and Possession of Weapons and its Categorization of Firearms: A Rational Approach to Public Safety?*, 37 HARV. INT’L L.J. 568, 581 n.79 (1996) (“Tests have shown that semi-automatic fire from a light infantry rifle can approximate the rate of fire of the same weapon fired automatically and is substantially more accurate.”).

209. Adam Winker, *Franklin Roosevelt: The Father of Gun Control*, THE NEW REPUBLIC (Dec. 19, 2012), <https://newrepublic.com/article/111266/franklin-roosevelt-father-gun-control> (demonstrating that the NFA ban on machine guns was a result of the use of automatic weapons by “gangsters”). Since 1934, automatic weapons have been legal only within the very strict confines of the NFA.

like Wyoming, do not ban sawed-off shotguns,<sup>210</sup> leaving the second prong of the community standards test unmet, it is unlikely that a resident of any state other than Alaska could demonstrate the particular need for such a weapon in lieu of other weapons,<sup>211</sup> and would thus fail to satisfy prong one in challenging the NFA.<sup>212</sup> Indeed, this approach to firearm localism, while potentially expanding the Second Amendment rights of Alaskans, would likely lead to a corresponding narrowing of the rights of gun owners in urban areas, perhaps even Anchorage.<sup>213</sup> Localism could provide an avenue for more stringent local firearms regulations surviving strict scrutiny in urban areas, where, for example, possession of assault-style weapons would be less effectively rationalized as related to sporting and hunting.

A community standards prong would help to clarify Second Amendment doctrine post-*Heller* and would be a logical extension of the First Amendment test for obscenity that has clear normative parallels to Second Amendment uncommon weapon jurisprudence. Applying this test, on an as-applied basis, to federal gun laws as they affect various localities might lead to the finding that federal law, in particular the NFA ban on “any other weapon” under Title 26 U.S.C. § 5845, may violate Alaskans’ Second Amendment rights. Thus, adopting a community standards test to challenge the NFA might serve as a more fruitful mechanism for Alaskans to challenge federal firearms laws than will the Alaska Firearms Freedom Act.

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210. See Balloun, *supra* note 78, at 204 n.24 (describing the differences between the NFA and Wyoming gun laws, including the omission of short barrel shotguns from the latter).

211. For example, Alaska contains ninety-eight percent of the United States population of grizzly bears, making the need for a weapon to protect oneself from grizzly bears particular to Alaska. *Brown Bear*, THE ALASKA ZOO, available at <http://www.alaskazoo.org/brown-bear> (last visited Jan. 11, 2015). While this Note does not purport to analyze all potential local dangers for a Wyoming resident that might create a need to possess a sawed-off shotgun, the historical connotation of those weapons as used by criminals, under the test’s third prong, would likely defeat any challenge to the ban on sawed-off shotguns. See *Heller*, 554 U.S. at 623–24 (describing sawed-off shotguns as “weapons which are commonly used by criminals”).

212. Challenges to the ban on sawed-off shotguns would also likely fail for the same reasons as challenges to the ban on automatic weapons. See ALASKA STAT. § 11.61.200(h)(1) (2010).

213. See Blocher, *supra* note 19, at 135 (“Focusing energy on urban areas, where the costs of gun violence and support for gun control are highest, might give gun control advocates a shot at incremental policy victories that have proven elusive at the state and national levels.”).

## CONCLUSION

The Alaska Firearms Freedom Act (AFFA) is currently in a state of legal limbo. While untested in the courts, the Ninth Circuit's decision in *Montana v. Holder* not only dealt a major blow to federal gun control nullification statutes nationwide, but also put Alaska's law in particular jeopardy because Alaska, like Montana, is under the jurisdiction of the Ninth Circuit. While the findings section of the legislation raises multiple constitutional arguments that would likely be raised in defense of the AFFA, the idea that intrastate commerce is outside the purview of Congress' power under the Commerce Clause has been rejected by the Supreme Court, and now, after *Montana v. Holder*, specifically denounced by the Ninth Circuit in the context of a gun control nullification bill. Tenth Amendment states' sovereignty arguments have been dealt the same fate. Thus, it is unlikely that any attempt at defending the AFFA in federal court would succeed.

However, Alaskans who believe the federal government is infringing on their Second Amendment rights are not without recourse. Indeed, because the Supreme Court's watermark decision in *District of Columbia v. Heller* announced a Second Amendment fundamental right to use a handgun for self-defense, Alaskans may be able to assert their right to smooth bore pistols, capable of firing shotgun shells, via the notion that the Second Amendment is necessarily local in character. Applying this argument through an analogy to First Amendment obscenity doctrine and the consideration of community standards, this Note has created a test for whether a weapon has the commonality and purpose necessary to warrant Second Amendment protection. This test would be a useful clarification of currently ambiguous Supreme Court precedent.

Given the unique self-defense needs of rural Alaska, it is possible that a gun that might be uncommon and serve little self-defense purpose in some other state would be of substantial utility in Alaska. This inquiry would call into question the National Firearms Act, as it relates to Alaskan citizens, as that law may effectively preclude Alaskans from exercising their fundamental right to self-defense under the Second Amendment. At the same time, applying this approach would ensure that particularly dangerous weapons are effectively regulated in areas where they will do the most harm, like urban environments. So while the AFFA is likely invalid after *Montana v. Holder*, firearm localism, and doctrinal analogy to obscenity doctrine and the application of community standards to Second Amendment scrutiny, may provide a balanced approach to examining gun regulations and may even call into question existing federal laws as they relate to Alaskans.