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Contumacious Responses to Firearms Legislation Balancing Federalism Concerns

by

Royce de R. Barondes*

Table of Contents

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ABSTRACT

The Law Enforcement Officers Safety Act ("LEOSA") is one of the handful of federal statutes that preempt state firearms regulation. It allows covered individuals (certain current and retired qualified law enforcement personnel) to possess firearms notwithstanding assorted state restrictions — to protect themselves and to supplement local law enforcement efforts.

The act reflects a careful legislative balancing of federalism concerns. Although it relies on states and localities to issue the authorizing credentials, it does not mandate states create a licensing regime out of whole cloth. The act ultimately presents issues requiring a nuanced assessment of the doctrine proscribing federal commandeering of the states. This Article probes the interpretation of LEOSA and the federalism issues raised by the act.

Some state responses to LEOSA seem contumacious. Many judicial approaches seem hostile to recognizing the rights sought to be created by the act.

In numerous ways, through patent violations and more debatable ones, states and their subdivisions have fettered the rights LEOSA appears to seek to grant. And there are federal administrative and local governmental interpretations coordinating the scope of LEOSA and the Gun-Free School Zones Act that are not required by customary principles of statutory interpretation and that significantly curtail LEOSA's efficacy.

The reluctance to recognize federally secured firearms rights is not limited to executive branch officials. Interpretation of the nuanced manner in which LEOSA endeavors to respect federalism principles has yielded miserly judicial interpretations, aberrant in the portfolio of authority construing civil rights.

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INTRODUCTION

Justice Alito has deprecated classification of Second Amendment rights as "second-class."[1] Yet, whether as to the primary right under the Second Amendment itself, or as to ancillary firearms rights arising by statute, the tack of some jurisdictions and localities seems surprisingly contumacious. This Article examines one federal statute securing certain rights to current and retired law enforcement officers, LEOSA.[2] As will be seen, one can encounter surprising disobedience to its commands. For example, Hawaii continues to post a policy directly contradicted by a 2010 amendment to the statute.[3]

Judicial reactions as well can be puzzling — flouting ordinary interpretative canons. For example, one court suggests LEOSA, which is designed to authorize firearms possession by active and retired law enforcement officers, cannot ever benefit retirees because it is possible at some time a retiree may become intoxicated.[4] That is, of course, contrary to the interpretative canons biasing in favor of an interpretation that gives effect to a provision[5] and against reaching absurd results.[6] But the assertion is even more outlandish, because

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[1] McDonald v. City of Chicago, Ill., 561 U.S. 742, 780 (2010) ("Municipal respondents, in effect, ask us to treat the right recognized in Heller as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.").

[2] Law Enforcement Officers Safety Act of 2004, Pub. L. No. 108–277, 118 Stat. 865 (2004) (codified as amended at 18 U.S.C. §§ 926B, 926C (Westlaw through Pub. L. No. 115–40)).

[3] *See infra* notes 84–87 and accompanying text.

[4] *In re* Wheeler, 81 A.3d 728, 764 n.24 (N.J. Super. Ct. App. Div. 2013) ("As a practical matter, it is unclear how a permit can be issued based upon LEOSA qualification. That is so because a retired officer's status under LEOSA depends, in part, upon whether the retired officer is or is not intoxicated while in possession of the firearm — a determination that cannot be made when a permit is issued.").

[5] *E.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 ("A textually permissible interpretation that favors rather than obstructs the document's purpose should be favored.").

[6] SCALIA & GARNER, *supra* note 5, at 234 ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.").

there simply is no statutory language in the directly cited section that can be so construed.[7]

As noted, LEOSA is designed to allow certain current and former law enforcement officers to possess firearms. The statute preempts state and local restrictions, subject to limited exceptions. More detail of the basic framework is provided in Part I.

There are a number of disputed issues concerning the scope of LEOSA, meaning the extent of state and local preemption. And one can encounter public statements that, to varying degrees of certainty, are contradicted by the language of LEOSA itself. Part II identifies the primary issues of scope. Those issues, and this Article's conclusions, include the following:

First, some would question whether LEOSA preempts local restrictions on features of firearms, e.g., restrictions on magazine capacities and on laser sighting systems. As explained in Part II.A, neither a tedious literal reading of the statute nor reference to its purposes would support the view that these limits are not preempted.

Second, one can encounter assertions that these arms may need to be registered, an assertion not supported by the statutory language.

Third, some would seek to limit the statute to persons who are or were full-time as law enforcement officers. As Part II.C. shows, that assertion is not supported by either the statutory language or its legislative history.

Fourth, there are assorted statements, by commentators as well as by federal and local agencies, asserting the act is ineffective to allow firearms possession within 1000 feet of a school (under the Gun-Free School Zones Act).[8] Part II.D shows that these plodding constructions are unwarranted, inconsistent with the approach to statutory interpretation taken in *King v. Burwell*[9] (involving interpretation of the phrase "established by the State under section 1311," as used in the Affordable Care Act). Among other things, the interpretative approach

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[7] The paragraph addressing issuing credentials does not reference intoxication. The statute references intoxication only as part of a defined term, 18 U.S.C. § 926C(c)(6) (Westlaw through Pub. L. No. 115–40); and that defined term is not used in the paragraph that addresses the process for, and the conditions on, the issuance of complying credentials. 18 U.S.C. § 926C(d).

[8] *See infra* notes 116–117 and accompanying text.

[9] King v. Burwell, 135 S. Ct. 2480, 2482 (2015).

this Article rejects would result in LEOSA generally being ineffective. Additionally, it would result in a separate statute that attempts to allow armored car personnel to work interstate while armed, which would be construed *in pari materia*, to be completely ineffective.[10]

With this background, we can then turn to federalism issues presented by LEOSA. The authorization provided by LEOSA relies on credentialing provided by states and local governments. There is not a general federal mechanism to issue credentials.[11] Some states do not facilitate the issuance of credentials. For example, a jurisdiction may refuse merely to confirm to another jurisdiction a retiree's former employment and status and thereby prevent accession to rights under LEOSA.

A question arises whether the prohibition on commandeering would not allow the federal government to require a state to participate in the credentialing. Although to benefit from LEOSA one has to be certified as passing firearms qualification, the scope of persons who can certify the training is sufficiently broad that a typical dispute likely will involve mere confirmation of former employment. Part III.A notes nuance in the commandeering jurisprudence, often elided, would indicate that it would be constitutional for LEOSA to mandate provision of information necessary for credentialing.

Part III.B continues our examination of private rights, examining authority that has addressed the existence of a private right of action for LEOSA beneficiaries. The steady authority restricting a private right of action has been countered by a recent opinion from the United States Court of Appeals[12] holding LEOSA creates a right enforceable under section 1983 of title 42. Much of the earlier authority addressed the issue of whether there is an implied right of action under LEOSA itself (i.e., without reference to section 1983), involving a higher threshold than would typically be applicable. Because those charged would be state actors, the more limited set of requirements for a finding of a right cognizable by section 1983 would be the initial inquiry. The

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[10] *See* Part II.D.5, *infra*.

[11] Retired federal law enforcement officers do qualify. 18 U.S.C. § 926C(e)(2) (Westlaw through Pub. L. No. 115–40). For them, credentialing would involve federal participation.

[12] DuBerry v. District of Columbia, 824 F.3d 1046 (D.C. Cir. 2016).

recent authority, as Part III.B shows, finding a right exists has the better of the argument. An opinion from the Southern District of New York, taking the opposite approach,[13] relies on appellate authority that is both inapposite and unsupported itself.

I. BASIC FRAMEWORK OF LEOSA

LEOSA provides in part:

> Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).[14]

Another provision extends similar benefits to retirees by substituting a reference to "retired law enforcement officer" for "law enforcement officer."[15] Each section requires the individual not be under the influence of intoxicants.[16] Each section excludes from its preemption (i) laws of any state that allow private persons to prohibit possession on their property and (ii) state prohibitions on possession on state or local government property.[17]

The drafting is somewhat unexpected in its reference to non-federal governmental property. In essence, a literal reading of the statute would provide that the authorization afforded by LEOSA does not extend to state or local property where ***state*** law prohibits possession, but it ***does*** authorize possession on local property if it is only a ***local*** regulation or an ordinance that bans possession on the local government property.[18]

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[13] Ramirez v. Port Auth. of N.Y. & N.J. (PANYNJ), No. 15cv3225 (DLC), 2015 WL 9463185, at *6 (S.D.N.Y. Dec. 28, 2015).

[14] 18 U.S.C. § 926B(a) (Westlaw through Pub. L. No. 115–40). *See also id.* § 926C(a).

[15] 18 U.S.C. § 926C(a) (Westlaw through Pub. L. No. 115–40). To qualify, the retiree must have served for an aggregate of at least 10 years or have separated due to a service-connected disability. *Id.* § 926C(c)(3).

[16] 18 U.S.C. §§ 926B(c)(5), 926C(c)(6).

[17] The term "State" is expressly defined as including the District of Columbia. 18 U.S.C. § 921(a)(2) (Westlaw through Pub. L. No. 115–40).

[18] The parsing of the language as to retirees is as follows:

This literal construction does not necessarily produce an absurd result — one that would in the ordinary case necessarily be rejected.[19] Requiring an out-of-state traveler to know the law of each municipality is orders of magnitude more burdensome than the burden, substantial in itself, to know the state law of each state in which one is traveling. Numerous states preempt local regulation of firearms possession[20] for this reason.[21] Thus, it is at least conceivable that the statute was crafted so as to make it more practicable for a person authorized under LEOSA to determine the prohibited areas.

For a current officer, the required credential is the employer-issued "photographic identification . . . that identifies the employee as a police officer or law enforcement officer of the agency."[22] For retired law enforcement officers, the required credentials constitute photographic identification from the former agency that "identifies the person as having been employed as a police officer or law enforcement officer"[23] together with certification, within the past year, from the former agency or the retiree's state of residence, that the retiree meets firearms qualification standards.[24] The act does not expressly require a state

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(i) paragraph (a) generally preempts firearms restrictions in a "provision of the law of any State or any political subdivision thereof." 18 U.S.C. § 926C(a) (Westlaw through Pub. L. No. 115–40).

(ii) Paragraph (b) provides an exception, under which the section does not "supersede or limit the laws of any State that . . . restrict the possession of firearms on any State or local government property, [etc.] . . . ." 18 U.S.C. § 926C(b) (Westlaw through Pub. L. No. 115–40).

Thus, the language explicitly distinguishes between prohibitions imposed by state law and those imposed by local law and, when it sets-forth those restrictions that are not preempted on government property, it only references "the laws of any State."

See generally C.D. MICHEL, CALIFORNIA GUN LAWS 264 (4th ed. 2016) ("Consequently, it appears that a person carrying pursuant to LEOSA is exempt from *local* restrictions.").

[19] *E.g.*, United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.").

[20] *E.g.* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 133 (2013).

[21] *Cf.* Blocher, *supra* note 20, at 136 ("Supporters of preemption emphasize the difficulty of complying with different local gun regulations . . . .").

[22] 18 U.S.C. § 926B(d).

[23] 18 U.S.C. § 926C(d)(1), (2)(A).

[24] 18 U.S.C. § 926C(d)(1), (2)(B).

issue all necessary credentials; were the statute to require credential issuance, it could be the subject to challenge (albeit one that should not be successful)[25] as commandeering invalidated under *Printz v. United States.*[26]

The preemption extends to "carry[ing] a concealed firearm,"[27] which often would exclude possession of rifles (at least where possessed for self-defense).[28] The act does not preempt restrictions on fully automatic weapons and silencers.[29] It was amended in 2010 to preempt prohibitions on possession of "ammunition not expressly prohibited by Federal law or subject to the provisions of the National Firearms Act."[30] Some states have restrictions on types of ammunition not prohibited under federal law, which has given rise to some tension in state accommodation to the requirements of federal law.[31]

One anomaly in the statute is that qualification for a retiree depends on his or her having been "separated from service in good standing from service with a public agency as a law enforcement officer." 18 U.S.C. § 926C(c)(1). However, the credential is not required to contain an affirmation that the individual was in "good standing." *Id.* §926C(d)(1). The phrase "good standing" only appears once in the section. *Id.* § 926C. A credentialing unit may endeavor nevertheless to assume some role in assuring good standing by imposing conditions on the issuance of the permit. *See generally, e.g., infra* note 103 and accompanying text (discussing New Jersey's discretionary issuance of credentials); Kittle v. D'Amico, No. 4763–14, 2015 WL 12805146 at *3–4 (N.Y. Sup. Ct. 2015) (discussed *infra* note 213 and accompanying text). *State v. Andros*, 958 A.2d 78, 84 (N.J. Super. Ct. App. Div. 2008) (citation omitted), reaches the following conclusion as to the ability to revoke a credential: "But a retired officer's conduct permits the licensing state to revoke the permit, as evidenced by the requirements for qualification and testing every year. In other words, the federal act expressly permits states to set 'standards for training and qualification' consistent with those of 'active law enforcement officers.' "

[25] *See infra* Part III.A.

[26] 521 U.S. 898 (1997).

[27] 18 U.S.C. §§ 926B(a), 926C(a).

[28] *But see infra* note 81 (discussing People v. Peterson, No. 08 CF 1169 (Ill. Cir. Ct. Oct. 1, 2010)).

[29] 18 U.S.C. §§ 926B(e), 926C(e).

[30] Law Enforcement Officers Safety Act Improvements Act of 2010, Pub. L. No. 111–272, 124 Stat. 2855 (codified as amended at 18 U.S.C. §§ 926B(e)(2), 926C(e)(1)(a)).

[31] *See infra* notes 86–87 and accompanying text.

The benefit generally is restricted to persons who have, or had, "statutory powers of arrest."[32] As discussed in Part II.C, *infra*, there is some disagreement whether the act benefits individuals having only limited powers of arrest. Somewhat curiously, a current officer must be "authorized by the agency to carry a firearm,"[33] although a retiree's qualification does not expressly depend on his or her having been so authorized during employment.[34]

In some ways, the statutory language does not work (at least as one might expect). It only protects the carrying of an arm, as opposed to all possession of an arm (the latter category being more extensive).[35] Assorted circumstances may result in one who seeks to benefit from LEOSA to need not to carry it. That can be because he or she is (or intends to become) intoxicated, or he will engage in activity that will not allow him or her to keep carrying the firearm, e.g., certain athletic activities or medical treatment. Engaging in those activities may make it impossible or impracticable to do something with the arm that is lawful. The arm may have features that will result in its possession being unlawful when possessed by anyone, other than under LEOSA.[36]

II. PRIMARY ISSUES OF SCOPE

Four issues concerning the scope of the protection afforded by LEOSA merit separate development:

(i) the extent to which LEOSA preempts state and local restrictions on types or features of arms;

(ii) whether LEOSA preempts state and local requirements to register arms;

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[32] 18 U.S.C. §§ 926B(c)(1), 926C(c)(2). Currently, persons having "statutory powers of . . . apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice) are also expressly included. 18 U.S.C. §§ 926B(c)(1), 926C(c)(2).

[33] 18 U.S.C. § 926B(c)(2).

[34] *See* 18 U.S.C. § 926C(c) (not including such a requirement); *see also infra* note 98 and accompanying text. Administrative convenience could account for this statutory construct.

[35] *See infra* notes 125–136 and accompanying text.

[36] The default recommendation to provide it to law enforcement may not be practicable or, if so, may nevertheless result in the arm not being returned.

(iii) whether LEOSA benefits persons who have or had curtailed powers of arrest; and

(iv) whether whether authorization under LEOSA is sufficient to exculpate one from the prohibitions in the federal Gun-Free School Zones Act, as amended.[37]

A. Types of Arms, Especially Magazine Limits.

Following *District of Columbia v. Heller*[38] and *McDonald v. City of Chicago*,[39] a complete ban on handgun possession within a jurisdiction would be unconstitutional. However, states have adopted a variety of restrictions on the types of firearms that may be possessed. Some states promulgate lists of authorized firearms, banning sales of those that are not listed.[40] In addition, state law may ban possession of firearms having certain features. There are local bans as well, e.g., Chicago bans possession of a handgun with laser sights, subject to certain exceptions.[41] Bans on magazines that may hold more than a specified number of cartridges are particularly relevant for our purposes, because millions of those restricted magazines are privately owned.[42] Those

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[37] 18 U.S.C. § 922(q) (Westlaw through Pub. L. No. 115–40).

[38] 554 U.S. 570 (2008).

[39] 561 U.S. 742 (2010).

[40] California provides a roster of firearms, prohibiting sale of firearms that are not on the roster. CAL. PENAL CODE § 32000 (Westlaw through urgency legislation through Ch. 9 of 2017 Reg. Sess.).

A private person cannot purchase a handgun outside his state of residence and import it into his state of residence. 18 U.S.C. § 922(a)(3) (Westlaw through Pub. L. No. 115–40). But, in California, for out-of-state residents, "It is legal to bring an 'off-Roster' handgun on your visit to California." C.D. MICHEL, CALIFORNIA GUN LAWS 181 (4th ed. 2016). Maryland prohibits sales of handguns not on their roster. MD. CODE ANN. PUB. SAFETY § 5–406(a)(2) (Westlaw through legislation effective June 1, 2017).

[41] CHICAGO, ILL., MUNICIPAL CODE § 8–20–60 http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il (prohibition on possession of a "laser sight accessory," subject to certain exceptions for persons acting in the scope of their duties) (visited July 21, 2017).

[42] *See infra* note 49 and accompanying text (addressing the quantity). In addition, there are concerns about functionality as to some alternative magazines. *See infra* note 53.

David Kopel provides the history of firearm magazines and prohibitions in David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV.

bans may merely restrict transactions in the weapons, and thus not prohibit possession where otherwise lawfully acquired, i.e., they would not prohibit possession by out-of-state persons exercising rights under LEOSA; or they may prohibit possession as well.[43]

Assorted litigation has challenged restrictions on types of firearms as violating the Second Amendment. Illustrative are challenges to

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849 (2015). New York's hurriedly-enacted legislation initially prohibited magazines acquired post-enactment that could accommodate more than seven rounds. 2013 Sess. Law News of N.Y. Ch. 1, § 38 (S. 2230) (McKinney's). Complying magazines are unavailable for many semi-automatic firearms. *See generally* Jessica Alaimo, *N.Y. Gun Law Mandates Magazines That Don't Exist*, USA Today (updated Mar. 1, 2013), https://www.usatoday.com/story/news/nation/2013/02/27/new-york-gun-law-seven-round-magazines-dont-exist/1950433/ ("This means that in less than two months gun dealers such as Paul Martin, owner of Pro-Gun Services in Victor, who deal mostly in full-size guns for sports enthusiasts, can only sell something that doesn't exist yet. Seven-round and smaller magazines do exist for a number of older and specialty models, including 1911 pistols. But firearms experts said seven-round magazines for the most popular models for sports enthusiasts are rare and hard to find."). This limit was subsequently increased to ten. 2013 Sess. Law News of N.Y. Ch. 57 (S. 2607–D) (McKinney's), Part FF, § 2.

[43] Included in jurisdictions banning are, *e.g.*, New York, N.Y. PENAL LAW § 265.00(23) (defining "large capacity ammuniting feeding devices") (Westlaw through L.2017 chs. 1 to 457), *id.* § 265.02(8) (generally criminalizing their possession); Connecticut; Colorado, COLO. REV. STAT. § 18–12–302 (Westlaw through First Extraordinary Sess. 71st General Assembly (2017)); and California. Effective July 1, 2017, California has criminalized mere possession of a magazine that can accept more than 10 cartridges. CAL. PENAL CODE §§ 16740, 32310(c) (Westlaw through urgency legislation through Ch. 9 of 2017 Reg. Sess.). There are exceptions for retired sworn peace officers and retired sworn federal law enforcement officers. CAL. PENAL CODE § 32406(a). The former appears generally not to include out-of-state peace officers. *See* CAL. PENAL CODE § 830.39 (including certain law enforcement officers from adjacent states as "a peace officer in this state").

Connecticut has complicated provisions regulating possession of magazines that may accept more than 10 cartridges. CONN. GEN. STAT. ANN. §§ 53–202w, 53–202x (Westlaw through June 20, 2017). There are certain provisions allowing registration of retired law enforcement officers, which, although ambiguous, appears to be limited to Connecticut officers, and, curiously, "[a] member of the military or naval forces of this state or of the United States." CONN. GEN. STAT. ANN. § 53–202w(d)(2), (3) (Westlaw through June 20, 2017). Authorized persons are permitted to possess the magazines following retirement only in limited circumstances. CONN. GEN. STAT. ANN. § 53–202x(a)(2), (f).

California's "roster;"[44] to restrictions on modern sporting rifles;[45] and to magazine limits.[46] They have generally been unsuccessful. Two notable exceptions are the invalidation of a New York requirement that one load no more than seven cartridges in a magazine[47] and a recent district court opinion, going against the trend, enjoining California's ban on possession of magazines that can accept more than ten cartridges.[48]

Whether LEOSA preempts state magazine restrictions is rather important in practice. Pistols with magazines having capacities of 15 or 17 rounds are common. An employee of the National Shooting Sports Foundation has estimated there are over 100 million magazines possessed by consumers that have capacities exceeding 10 rounds of ammunition, approximately half of all the magazines possessed by consumers.[49] An officer or retiree from a state not having such a limit may not own diminished-capacity magazines.

A variety of reasons can result in individuals having firearms for self-defense wishing to have magazines exceeding ten rounds. One can encounter numerous circumstances where more than ten rounds are used for defensive purposes. The well-known trainer Massad Ayoob

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[44] *See generally* Pena v. Lindley, No. 2:09–CV–01185–KJM, 2015 WL 854684 (E.D. Cal. Feb. 26, 2015) (granting summary judgment against a challenger to the roster requirements); *supra* note 40 (discussing California's roster).

[45] Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) ("[T]he banned assault weapons and large-capacity magazines are not protected by the Second Amendment."); New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 263 (2d Cir. 2015) (upholding restrictions on certain sporting rifles), *cert. denied sub nom.* Shew v. Malloy, 136 S. Ct. 2486 (2016); Heller v. D.C. (*Heller II*), 670 F.3d 1244, 1249, 1264 (D.C. Cir. 2011) (express ban on AR–15s).

[46] Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) ("[T]he banned assault weapons and large-capacity magazines are not protected by the Second Amendment."); New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 247 (2d Cir. 2015), *cert. denied sub nom.* Shew v. Malloy, 136 S. Ct. 2486 (2016) ("We hold that the core provisions of the New York and Connecticut laws prohibiting possession of semiautomatic assault weapons and large-capacity magazines do not violate the Second Amendment, and that the challenged individual provisions are not void for vagueness."); Heller v. D.C. (*Heller II*), 670 F.3d 1244, 1249, 1264 (D.C. Cir. 2011) (discussing ban on magazines holding more than ten rounds).

[47] New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 264 (2d Cir. 2015), *cert. denied sub nom.* Shew v. Malloy, 136 S. Ct. 2486 (2016).

[48] Duncan v. Becerra, No. 17–cv–1017–BEN–JLB at 66 (S.D. Cal. June 29, 2017).

[49] Declaration of James Curcuruto in Support of Plaintiffs' Motion for Preliminary Injunction, at 3, Duncan v. Becerra, No. 17–cv–1017–BEN–JLB (S.D. Cal. May 5, 2017).

provides details of five illustrative private defensive firearms uses involving more than fifteen rounds, including one person who used forty-five cartridges in assisting a law enforcement officer who was attacked by persons the officer had detained.[50]

Ayoob notes that in many circumstances, such as a person who is awakened in the night, the clothing one is wearing may make it impracticable to carry additional magazines.[51] He concludes, "Any suggestion that private citizens simply carry more guns or more ammunition feeding devices would, for the reasons stated above, be impractical. . . . Criminals bent on causing harm, on the other hand, even assuming they were impeded from obtaining over ten-round magazines by [state law], could simply arm themselves with multiple weapons, and often do."[52]

Additionally, one can see anecdotal references to down-sized magazines not functioning properly in firearms.[53]

There is some uncertainty concerning whether LEOSA preempts these magazine restrictions. For example, a text on California law, written by an eminent practitioner in the firearms law area, asserts, "[R]estrictions on magazines would apply unless the officer meets an exemption to those restrictions pursuant to that state's laws."[54]

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[50] Declaration of Massad Ayoob in Support of Plaintiffs' Motion for Preliminary Injunction; Exhibits A–C, at 5–7, Duncan v. Becerra, No. 17–cv–1017–BEN–JLB (S.D. Cal. May 5, 2017). They include: sixteen rounds in response to three attackers; thirty rounds in response to three attackers; forty-five rounds by a private person assisting a police officer attacked by an occupant of a detained vehicle, where the private person "prevented the assailants from 'finishing off' the officer;" fifteen rounds discharged by an attacked pizza delivery man; and approximately nineteen shots by a watch shop owner.

[51] Ayoob, *supra* note 50, at 8.

[52] Ayoob, *supra* note 50, at 8.

[53] For example, a search of www.pistol-forum.com (visited July 21, 2017) reveals dissatisfaction expressed by someone identified as "staff" and "S.M.E." (subject-matter expert) DocGKR, who in a July 11, 2013, post references having encountered difficulties with reduced-capacity magazines for a particular, common firearm. This author is not expressing any opinion as to whether those statements are accurate as to that particular firearm and magazine combination. He is rather indicating that some have a preference, whether well-founded or otherwise, for the originally-designed OEM magazines.

[54] C.D. MICHEL, CALIFORNIA GUN LAWS 264 (4th ed. 2016). *See also, e.g.,* Jeremy Nikolow & Anthony Galante, *Retired Police as Force Multipliers: The LEOSA Effect,* IN

Although that may be a prudent position to take in advising a client as to how to proceed, the better reading of the statute is that it preempts state and local magazine limits.

Let us first turn to the language of LEOSA. It provides in pertinent part that, as to a covered person:

> Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual . . . may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).[55]

The term "firearm" is defined as follows:

> As used in this section, the term "firearm" —
>
> (1) except as provided in this subsection, has the same meaning as in section 921 of this title;
>
> (2) includes ammunition not expressly prohibited by Federal law or subject to the provisions of the National Firearms Act; and
>
> (3) does not include —
>
> (A) any machinegun (as defined in section 5845 of the National Firearms Act);
>
> (B) any firearm silencer (as defined in section 921 of this title); and
>
> (C) any destructive device (as defined in section 921 of this title).[56]

The underlying referenced definition of "firearm" is:

PUBLIC SAFETY (Jan. 13, 2016), https://inpublicsafety.com/2016/01/retired-police-as-force-multipliers-the-leosa-effect-2/ (article by adjunct and part-time university faculty members stating, "High-capacity magazines are not allowed, per the Bureau of Alcohol, Tobacco, Firearms and Explosives . . . ."); Richard Fairburn, *Blue Hawaii: Some States Make CCW under LEOSA Tough for Cops*, POLICEONE.COM (July 6, 2015) ("The LEOSA statute does not exempt you from the magazine limitations . . . ."); Law Enforcement Officers Security Unions, LEOSA Law Enforcement Officers' Safety Act, http://www.leosu.org/leosa-law-enforcement-officers-safety-a (visited July 12, 2017) ("The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has ruled that State and local laws and regulations applying to magazines do apply and the exemption provided by LEOSA applies only to firearms and ammunition.").

[55] 18 U.S.C. § 926B(a) (Westlaw through Pub. L. No. 115–40) (addressing current officers; comparable terms for retired officers at 18 U.S.C. § 926C(a) (Westlaw through Pub. L. No. 115–40)).

[56] 18 U.S.C. § 926B(e).

> (3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.[57]

This author's ultimate conclusion is that there is little support for concluding that LEOSA does not preempt magazine limits. To conclude it does not preempt magazine limits, one would need, by referencing extrinsic language or circumstances, to find ambiguous the facially unambiguous statutory language. One would need to avoid application of the "cardinal" principle of construction that rejects an interpretation that makes language surplusage.[58] And one would need to distinguish construction of similar language in another section of the Gun Control Act of 1968, which should be construed *in pari materia* and which has been construed as preempting restrictions on firearm features.[59] To conclude that authority is incorrect would substantially eviscerate the efficacy of that other section. Lastly, even were to take that approach to legislative interpretation, the legislative history would reject that position.

Perhaps a first step in applying these statutory provisions is to note that a magazine is an integral part of a semi-automatic pistol.[60] Some semi-automatic pistols will not function if a magazine is not installed.[61] That is sometimes referenced as a "safety feature," which decreases the likelihood there will be an unintended discharge when the pistol is being cleaned.[62] Although many semi-automatic pistols will discharge a round when a magazine is missing, that configuration — with a

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[57] 18 U.S.C. § 921(a)(3) (Westlaw through Pub. L. No. 115–40).

[58] *See infra* notes 65–73 and accompanying text.

[59] *See infra* notes 74–77 and accompanying text.

[60] Duncan v. Becerra, No. 3:17–cv–1017–BEN, at 16 (S.D. Cal. June 29, 2017) (order granting preliminary injunction) (stating magazines "are necessary and integral to the designed operation of these arms").

[61] Duncan v. Becerra, No. 3:17–cv–1017–BEN, at 17 (S.D. Cal. June 29, 2017) (order granting preliminary injunction).

[62] E.g., Rick Hacker, *Magazine Disconnect*, AMERICAN RIFLEMAN (Sept. 11, 2015), https://www.americanrifleman.org/articles/2015/9/11/magazine-disconnect/.

magazine removed — is not the one in which they are designed to be possessed for self-defense.

With that background, then, one can easily ascertain that, by literal application of the definitions, a semi-automatic pistol having a magazine is a firearm — it is a "weapon . . . which . . . is designed to . . . expel a projectile by the action of an explosive," and it is not designed to do anything else. The capacity of the magazine simply is not relevant to deciding whether the item qualifies as a firearm, but the magazine (of whatever capacity it is) is necessary for the item, if possessed, to function as a firearm in the ordinary, intended way.

To state the obvious, a literal interpretation of a statute requires one reference what is in the statute. One does not begin a literal interpretation of a statute by ascertaining whether it does or does not contain a particular word. Rather, one reads the words actually present. If a person is possessing an ordinary handgun with its original equipment magazine, e.g., capable of containing 17 rounds, one is possessing a firearm, as that term is used in LEOSA (provided it is not a machinegun and does not have a suppressor attached to it). As to that possession by a qualifying person, LEOSA states the item may be carried concealed "[n]otwithstanding any other provision of the law of any State . . . ." So, this literal interpretation is easy. A state prohibition based on a feature of what is being carried is included in "any other provision." So, the state prohibition is preempted.

To put it another way, only by rewriting "any," substituting "some" or some such, can one have statutory language that would literally subject this possession to state laws (other than on state or local property, or private property restricted by a controlling person). Because "any" does not generally mean "some" in this construct, it requires a peculiar non-literal interpretation to state that magazine limits are not preempted.

That is of course relevant, because starting with a review of the language of a statute involves assessing the language as it was adopted.

One occasionally encounters novelty pistols such as ones that also have blades mounted on them.[63] Because the addition of a blade

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[63] *E.g.*, Chris Eger, 5 Knife-Equipped Handguns: Pistols with a Point, GUNS.COM (Mar. 12, 2013), http://www.guns.com/2013/03/12/5-knife-equipped-handguns-pistols-

contemplates a use other than expelling a projectile, one might quibble whether such an item is within the protection of the statute, preempting any state law restricting bayonet mounts and the like.[64] But, the magazine capacity is not subject to such an objection.

There are fully automatic pistols,[65] and those pistols (referenced as "machineguns" in the statute[66]) can be possessed by private persons who comply with Title II of the Gun Control Act of 1968, as amended,[67]

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with-a-point/ (visited July 21, 2017) ("In the early 2000s, the well-respected Czech arms giant CZ-Brno offered a $100 bayonet attachment for their CZ-SP01 model handgun.").

[64] The corresponding issue has been addressed as to whether "knuckles" become lawful where attached to a blade. The Court of Appeals of Alaska recently concluded not:

> Thrift[, the defendant,] argues that the statute requires the weapon to consist exclusively of finger rings or guards and cannot include finger rings or guards with a knife blade attached. He has a related argument that the statute "indicates [that] the finger rings or guards cannot serve another primary purpose, such as protecting the fingers or reducing the chance the bearer would unintentionally drop an item." But the statute does not contain the words "exclusively" or "primary purpose," and we do not agree that these restrictive readings can be taken from the statute. Under Thrift's interpretation of the statute, the addition of a knife blade to an illegal weapon — a change that makes the illegal weapon even more dangerous — would render the formerly illegal weapon into a legal one. This is illogical. For example, a prohibited short-barreled shotgun would not become legal or cease to be a shotgun simply because a bayonet was attached.

Thrift v. State, No. A–11888, 2017 WL 2709732, at *2 (Alaska Ct. App. June 21, 2017) (approving jury instructions stating, "Attaching a knife to metal knuckles, as defined above, does not cause the metal knuckles to become legal," and parenthetically summarizing *Thompson v. United States*, 59 A.3d 961, 962–64 (D.C. 2013), to the following effect: "[T]the addition of a blade to metal knuckles simply made the weapon more versatile and more lethal; exempting it from the statute 'would have the perverse effect of prohibiting possession of only the least dangerous versions of knuckles'").

[65] *See, e.g.*, ATF, Firearms – Guides - Importation & Verification of Firearms – National Firearms Act Definitions – Machinegun, https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-national-firearms-act-definitions-0 (visited July 21, 2017) (depicting an Ingram MAC-10, a firearm not having a stock and not having a second, forward grip, in a collection of machineguns).

[66] 26 U.S.C. § 5845(b) (Westlaw through Pub. L. No. 115–40) (referencing "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger").

[67] 26 U.S.C. ch. 53 (Westlaw through Pub. L. No. 115–40) (the successor to, and sometimes referenced as, the National Firearms Act).

and any applicable state or local law. The same applies to sound suppressors.[68] Both types of items also can be possessed by state and local law enforcement officials (possession by those officials is subject to decreased regulation).[69]

Some states do ban private possession of fully automatic weapons and firearm sound suppressors.[70] However, LEOSA expressly excludes from its protection the carrying of fully automatic weapons[71] and sound suppressors.[72] State laws restricting carrying them are not preempted. This exception indicates, under the cardinal interpretative principle proscribing construction of language as surplusage,[73] that LEOSA preempts restrictions on magazine capacity of arms otherwise carried in compliance with LEOSA. If the remainder of the language allowed a state to ban firearms having particular features, the express exception for machineguns and "silencers" would not be necessary.

The holding in with *Arnold v. City of Cleveland*,[74] interpreting a different section of the Gun Control Act of 1968, confirms that conclusion. Section 926A of title 18 provides a person who may lawfully possess a firearm:

> shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being

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[68] *Id.*

[69] 26 U.S.C. § 5853(a), (c).

[70] *See, e.g.*, Hollis v. Lynch, 827 F.3d 436, 450 (5th Cir. 2016) (tabulating assorted state restrictions on machineguns); N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 250 (2d Cir. 2015) (discussing a prohibition on a barrel that can accept a sound suppressor), *cert. denied sub nom.* Shew v. Malloy, 136 S. Ct. 2486 (2016).

[71] 18 U.S.C. § 926B(e)(3)(A).

[72] 18 U.S.C. § 926B(e)(3)(B).

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

[74] No. 59260, 1991 WL 228628, at *10 (Ohio Ct. App. Oct. 31, 1991), *aff'd on other grounds sub nom.* Arnold v. Cleveland, 616 N.E.2d 163 (Ohio 1993). The ordinance was amended to comply with 18 U.S.C. § 926A following the decision of the Ohio Court of Appeals and the relevant part of that court's opinion was not addressed by the Ohio Supreme Court. *Arnold*, 161 N.E.2d at 165 n.2.

> transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle . . . .[75]

These provisions should be interpreted *in pari materia*.[76] If the statutory language in LEOSA, which provides a person "may carry a concealed firearm" does not preempt state and local restrictions on components having particular features, then the comparable language stating a person "shall be entitled to transport a firearm" also would not preempt state and local restrictions on component features. However, *Arnold* holds section 926A does preempt local bans on firearms having specified magazine capacities.[77]

The legislative history of LEOSA confirms that it does preempt state and local magazine limits. The dissenting views of Reps. Conyers, Berman, Scott, Watt, Waters & Delahunt state: "In other words, once an officer qualifies to carry a service weapon, he will have the right under this bill to carry *any* gun, on-duty or off-duty . . . ."[78] Moreover, the House committee rejected a proposed amendment that would have added to the arms excluded from the preemption a "semiautomatic

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[75] 18 U.S.C. § 926A (Westlaw through Pub. L. No. 115–40).

[76] *Cf.* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 117 (1983) (stating the Gun Control Act of 1968, codified as amended at 18 U.S.C. § 921–931, and 18 U.S.C. App. § 1202(a)(1) (repealed 1986), "a gun control statute similar to and partially overlapping §§ 922(g) and (h)" have been treated *in pari materia*), *superceded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99–308, 100 Stat. 449 (1986), *amended by* Pub. L. No. 99–360, 100 Stat. 766 (1986), *as recognized in* Logan v. United States, 552 U.S. 23, 27–28 (2007); United States v. Spillane, 913 F.2d 1079, 1084 (4th Cir. 1990) (referencing construction *in pari materia* in interpreting 18 U.S.C. § 921(a) and 18 U.S.C. § 1073); United States v. Wickstrom, 893 F.2d 30, 32 (3d Cir. 1989) (stating 18 U.S.C. §§ 5861, 5845 and 921 should be construed in pari materia because "[a]ll three sections . . . were passed as part of the Gun Control Act of 1968, Pub.L. 90–618, 82 Stat. 1230 (1968)."). *See generally* United States v. Ressam, 553 U.S. 272, 275–77 (rejecting the Ninth Circuit's interpretation that a section of the Gun Control Act of 1968 and a section of a separate act, regulating explosives, should be construed *in pari materia*, *United States v. Ressam*, 474 F.3d 597, 602 (9th Cir. 2007), *rev'd*, 553 U.S. 272 (2008), where one had been amended by Congress and the other had not).

[77] 1991 WL 228628 at *1, 10.

[78] H.R. Rep. No. 108–560, at 81, 85 (2004). *But see generally* State v. Andros, 958 A.2d 78, 85 (N.J. Super. Ct. App. Div. 2008) ("[W]hen seeking to determine legislative intent, the United States Supreme Court has stated that '[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" (quoting Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 19, 29 (quoting cases)).

assault weapon."[79] If state bans on arms firearm features other than those listed (being fully automatic or having a silencer) were not preempted under the language that was approved, the proposed amendment would not have been necessary.

There is only limited litigation addressing interpretation of this aspect of LEOSA. LEOSA's scope was addressed in an amicus brief filed for the United States, as Amicus Curiae, in *District of Columbia v. Barbusin*.[80] There the federal government's briefing rejects the argument that LEOSA does not protect possession of an AR–15, a semi-automatic sporting rifle. It notes the *Barbusin* defendant's reference to the defeat of the proposed amendment to exclude "any semiautomatic assault weapon" from LEOSA, continuing:

> Although each of defendant's points is valid, more importantly, in 2010, Congress made clear that the term "firearm" "has the same meaning" as in 18 U.S.C. § 921(a) (3) and also "includes ammunition not expressly prohibited by Federal law." In pertinent part, § 921(c) (3) (A) defines a "firearm" as "any weapon . . . which will . . . expel a projectile by the action of an explosive." Defendant's AR–15 and its accompanying ammunition satisfies this broad definition.[81]

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[79] H.R. Rep. No. 108–560, at 64, 67 (2004). Although a pistol could have constituted such "semiautomatic assault weapon," magazine capacity would not have been relevant to the determination. *See* 18 U.S.C. § 921(a)(30)(C) (Westlaw United States Code Annotated–2004).

[80] Crim. No. 2012–CDC–913 (June 29, 2012).

[81] Brief for the United States as Amicus Curiae at 5, District of Columbia v. Barbusin, Crim. No. 2012–CDC–913 (June 29, 2012) (quoting 18 U.S.C. § 926B(e) (n.d.)). The charges were ultimately dismissed on the basis of a discovery violation. Peter Hermann, *Gun Charges Against D.C. Officer Dismissed*, WASH. POST (July 29, 2013), https://www.washingtonpost.com/local/gun-charges-against-dc-officer-dismissed/2013/07/29/674898de-f84c-11e2-afc1-c850c6ee5af8_story.html?utm_term=.581fd4e33289.

One Illinois trial court opinion, reversed on other grounds, declines to decide as a matter of law whether LEOSA preempts state restrictions on particular types of firearms. People v. Peterson, No. 08 CF 1169 (Ill. Cir. Ct. Oct. 1, 2010) (Schoenstedt, J.), reprinted at http://www.policelawblog.com/blog/2010/10/leosa-ruling-in-the-context-of-officer-felony-weapons-charge.html, *vacated on other grounds*, People v. Peterson, 923 N.E.2d 890, 897–98 (Ill. App. Ct. 2010) (dismissing for lack of jurisdiction defendant's claim on appeal that the prosecution was preempted by LEOSA). The claim there

Lastly, one taking the position that LEOSA does not unambiguously preempt magazine limits, and who barely managed to convince a court that the statute is ambiguous, would fail by virtue of the rule of lenity: "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[82] The Supreme Court has stated, as to the rule of lenity:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.[83]

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involved allegations the rifle violated state law for having a barrel less than 16 inches. *Peterson*, 923 N.E.2d at 892.

[82] Rewis v. United States, 401 U.S. 808, 812 (1971).

[83] United States v. Santos, 553 U.S. 507, 514 (2008).

Application of principles of lenity are potentially more complex than is typically the case. Here we are construing separate exceptions to criminal liability, as opposed to simply construing a statute that criminalizes certain conduct. One can see the principle of lenity as arising from notions one should have notice of what is criminalized, and that courts should not usurp the role of selecting what conduct is criminal. *E.g.*, United States v. Santos, 553 U.S. 507, 514 (2008) (stating, as to the rule of lenity, "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."). On these bases, that one is construing a preemption from criminalization, as opposed to the act affirmatively criminalizing conduct, would not seem to matter.

It bears mention that this intersection of lenity and federalism is perhaps the opposite of the ordinary case. In addition to the typical justification of lenity as implicating Due Process and the need for fair notice of illegality, one justification sometimes involves limiting the scope of federal crimes to exclude federal intrusion into matters typically regulated by the states. Here we would have application of lenity that would implicate Due Process concerns but in a fashion that operated to enhance federal intrusion into state regulation of an area traditionally regulated by states. *But see generally* Fowler v. United States, 563 U.S. 668, 684–85 (2011) (Scalia, J., concurring) (identifying a federalism interest supporting lenity in rejecting an interpretation that would federally criminalize local criminal conduct).

Treating state and local magazine restrictions as not preempted by LEOSA fosters the harms the Court indicates the rule of lenity seeks to avoid: to subject a person to criminal liability where the statutory framework is not certain in doing so, and places on the courts the responsibility for proscribing conduct criminally when the Congress itself declined to do so. The latter is particularly informative, where Congress did express itself as to possession of firearms with some features, explicitly allowing criminalization of some and explicitly rejecting allowing criminalization of others.

B. Requirement to Register Arms; Flouting Provisions re. Ammunition.

Some jurisdictions require registration of firearms. Hawaii guidelines published by its Department of the Attorney General state that a person taking a firearm to the state under the authority of LEOSA is required to comply with registration requirements.[84] LEOSA's preemption of state law has no exception for state registration requirements, and the document fails to provide any theory under which the state requirement is not preempted.

Occasionally one encounters responses to LEOSA that might be classified as contumacious. Hawaii's response to LEOSA may well be an illustration. A document from its Attorney General states that a person exercising rights under LEOSA is required to comply with Hawaii law restricting permissible ammunition: "The ammunition loaded in your concealed firearm CANNOT be Teflon coated or designed to explode or segment upon impact."[85] LEOSA was amended in 2010 to preempt state and local restrictions on types of ammunition (other than ammunition

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[84] The document states:

> If you bring a firearm to Hawaii and remain longer than five (5) days, you must register the firearm with the chief of police in the county in which you are staying. Every person arriving in the State who brings, or by any manner causes to be brought into the State, a firearm SHALL register the firearm with the chief of police of the county within five (5) days after arrival of the firearm or the person, whichever arrives later. See H.R.S. § 134–3.

Dep't of the Attorney General, State of Hawaii, Guideline for Carrying a Concealed Firearm in the State of Hawaii by a "Qualified Law Enforcement Officer" Pursuant to 18 United States Code § 926B (Apr. 21, 2015), https://ag.hawaii.gov/cjd/files/2013/01/LEOSA-guideline-for-QLEO-926B.pdf

[85] *Id.* at 3.

"expressly prohibited by Federal law or subject to the provisions of the National Firearms Act"[86]). Segmenting ammunition is, however, commercially available to members of the public.[87] This Hawaii policy manifestly is in violation of federal law.

C. Limited Powers of Arrest and Part-Time Officers.

Of course, it is entirely common for law enforcement officers to have territorial restrictions on assorted law enforcement activities.[88] There has been some litigation involving classification for LEOSA purposes of persons holding positions other than those that immediately come to mind when one thinks of a law enforcement officer.[89] *Thorne v. United*

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[86] Law Enforcement Officers Safety Act Improvements Act of 2010, Pub. L. No. 111–272, 124 Stat. 2855 (2010) "Sections 922(a)(7) and (8) [of title 18] prohibit, with exceptions, the manufacture or importation of armor piercing ammunition, and the sale of such ammunition by a manufacturer or importer." STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 2:31 (Westlaw through Oct. 2016). Exploding ammunition may constitute a destructive device regulated by Title II. *See* United States v. Thomas, 111 F.3d 426, 428 (6th Cir. 1997) (exploding shotgun shells).

[87] The Cabela's chain sells G2 Research R.I.P. Handgun Ammunition, which is described as follows:

> Feed your handgun with G2 Research's R.I.P. Handgun Ammunition for deep penetration and explosive fragmentation. Unique 100% copper-plated trocar design gives R.I.P. (Radically Invasive Projectile) bullets the ability to penetrate while the petals break from the base, creating additional, individual wound channels while the base continues on course. This penetration and separation combines to deliver maximum shock wave and wound path.

http://www.cabelas.com/product/G-RESEARCH-R-I-P-HANDGUN-AMMO/2262015.uts (visited June 25, 2017).

[88] *E.g.*, N.J. STAT. ANN. § 40A:14–152 (Westlaw through L.2017, c. 100 and J.R. No. 7) ("The members and officers of a police department and force, within the territorial limits of the municipality, shall have all the powers of peace officers and upon view may apprehend and arrest any disorderly person or any person committing a breach of the peace."); State v. Cohen, 375 A.2d 259, 264 (N.J. 1977) (concluding stating the authority of police officers of the Port Authority of New York "to arrest on view and without warrant a violator of any order, rule or regulation of the Authority for the regulation and control of traffic on bridge, tunnel, plaza or approach extend . . . to all other facilities now operated by the Authority" and to "the whole territorial area of the Port District itself," and stating, "Consequently police officers can normally exercise the powers inhering in their office only within the confines of the jurisdiction which employs them.").

[89] For example, the benefits of LEOSA are limited to persons who have or had "statutory powers of arrest or apprehension under [10 U.S.C. 807(b)]." 18 U.S.C.

States[90] holds that a person holding Virginia court appointments as a "special conservator of the peace" is not a law enforcement officer for purposes of LEOSA, where his employer is a private party, the Alexandria Security Patrol Corporation.[91] *Foley v. Godinez*[92] upholds a determination that parole agents, who allegedly "engaged in or supervised the prevention of crimes and the incarceration of people for violating state criminal laws and had statutory powers of arrest," are not officers benefitting from LEOSA,[93] affirming denial of the required

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§§ 926B(c)(1), 926C(c)(2). In re *Casaleggio*, 18 A.3d 1082, 1086 (N.J. Super. Ct. App. Div. 2011) (footnote omitted) holds, "[T]he reference to LEOSA in N.J.S.A. 2C:39–6(*l*) does not encompass retired assistant prosecutors or deputy attorneys general. Rather, it is intended to accommodate retired law enforcement officers from out of state who have relocated to New Jersey." However, prosecutors may have "statutory powers of arrest." State v. Winne, 96 A.2d 63, 71 (N.J. 1953) (stating a county prosecutor is not "required personally to detect, arrest, indict and convict, though he may and often does do so"); N.J. STAT. ANN. § 2A:158–5 (Westlaw through L.2017, c. 100 and J.R. No. 7) ("Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws."). *See generally* 94 C.J.S. *Weapons* § 51 (Westlaw through June 2017). Prior to a 2013 amendment, National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–239, § 1089, 126 Stat. 1632, 1970–71 (2013), "[m]ilitary police officers did not qualify for protection under LEOSA because they possess[ed] statutory powers of apprehension, not arrest, as required by the statute." State v. Pompey, No. A–3985–15T2, 2017 WL 655515, at *1 (N.J. Super. Ct. App. Div. Feb. 17, 2017). There is an analogous issue under state law. *See, e.g.*, Orange Cty. Employees Assn., Inc. v. Cty. of Orange, 14 Cal. App. 4th 575, 577, 582 (1993) (holding deputy coroners and court service officers are entitled to carry concealed firearms without a permit under state law); Stumpff v. State, 998 So. 2d 1186, 1187–88 (Fla. Dist. Ct. App. 2009) (holding an inactive volunteer/reserve/auxiliary officer with the Florida Fish and Wildlife Commission was exempt from state licensing requirements). *See generally infra* notes 105, 109 (providing legislative history addressing the broad scope).

[90] 55 A.3d 873 (D.C. 2012).

[91] 55 A.3d at 882. There are a number of reported cases involving these positions. Ord v. D.C., 587 F.3d 1136, 1138 (D.C. Cir. 2009) (holding plaintiff could assert preenforcement challenge), *remanded to* Ord v. D.C., 810 F. Supp. 2d 261 (D.D.C. 2011), *aff'd*, No. 11–7134, 2012 WL 1155808 (D.C. Cir. Mar. 1, 2012).

[92] 62 N.E.3d 286 (Ill. App. Ct. 2016).

[93] 62 N.E.3d at 290.

credentials because the determination was discretionary and thus not subject to *mandamus* review.[94]

It seems that treatment of corrections officers is particularly likely to give rise to disputes.[95] The court in *DuBerry v. District of Columbia*[96] suggests that corrections officers do benefit from LEOSA, noting, "Congress defined 'qualified law enforcement officers' broadly, to include individuals who engage in or supervise incarceration," although leaving the ultimate determination unsettled, because it raises factual issues.[97] The court continues, "Further, contrary to the District of Columbia's suggestion at oral argument, the LEOSA does not require that, prior to retiring, a law enforcement officer's job required carrying a firearm in order to be a "qualified retired law enforcement officer[ ]."[98]

New Jersey, like Hawaii, seems to take a contumacious attitude toward LEOSA. A 2005 memorandum from the state's Attorney General, a document that remains available through the state's web site twelve years later, states in part:

> The passage of the Federal Law Enforcement Officers Safety Act does not alter the obligation of retired New Jersey law enforcement officers to comply with the provisions of N.J.S.A.

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[94] *Godinez*, 62 N.E.3d at 295 ("[E]ven if the Director erred in finding that plaintiffs were not qualified retired law enforcement officers, mandamus cannot be used to reach a different decision."). *See generally* Memorandum of Law in Support of Motion for Summary Judgment at 10–11, Moore v. Trent, No. 09 C 1712, 2010 WL 5232727 (N.D. Ill. Dec. 16, 2010) (stating, "correctional or parole officer's arrest powers are not plenary, but are limited to the narrow categories enumerated," and arguing, "The Training and Standards Board can legitimately take the position that only fully trained law enforcement officers, that is police officers, are eligible for the LEOSA identification card. This determination is fully consistent with LEOSA, which leaves it to the States to have a concealed carry certification program and to establish eligibility criteria for the wide range of job classifications that come under the generic category of law enforcement officers.").

[95] For example, *Sonoma County Law Enforcement Association v. County of Sonoma*, 379 F. App'x 658 (9th Cir. 2010), involves "correctional deputies who work in the county jails" issued credentials that state "while correctional deputies are authorized to carry concealed firearms off-duty within California, they are not 'qualified law enforcement officers' within the meaning of 18 U.S.C. § 926B . . . ." Brief of Appellees at 4, Sonoma Cty. Law Enf't Ass'n v. Cty. of Sonoma, 379 F. App'x 658 (9th Cir. 2010) (No. 09–16277), 2009 WL 6809634, at *4.

[96] 824 F.3d 1046 (2016).

[97] *Id.* at 1053.

[98] *Id.* (citation omitted).

> 2C:39–6*l* in order to carry a firearm in this state. Absent statutory changes to our retired officer permitting procedures, it remains in full effect and officers must comply with its requirements.[99]

That statute exempts certain retirees from the New Jersey prohibition on "unlawful possession of weapons."[100] The New Jersey statute was amended in 2007 to add to the excluded persons those who are qualified retired law enforcement officers domiciled in New Jersey,[101] and again amended in 2017 to add miscellaneous full-time officers.[102] The statute the New Jersey Attorney General indicates must be complied-with requires annual applications be made to the New Jersey Superintendent of State Police. The statute does not require issuance of the permit (i.e., it is discretionary), and contemplates hearings being available for those aggrieved by a denial.[103]

Under LEOSA, a person who has retired as a potentially qualifying New Jersey police officer and become a domiciliary of another state, as long as he or she has the photographic identification attesting to his or her having been employed as a law enforcement officer, can get the remainder of his or her credentials from his or her state of residence.[104] LEOSA does not vest in the state from which an officer retired the exclusive control over licensure following retirement. This is relevant insofar as New Jersey seeks to exercise discretion in deciding whom to permit. Thus, insofar as the New Jersey policy purports to require its retirees to qualify under its statute (which is apparently the literal reading of that policy), the policy is unlawful.

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99 Peter C. Harvey, Attorney General, Guidance Regarding the Law Enforcement Officers Safety Act of 2004 [PL 108–277 (HR 218)] (June 7, 2005), at http://www.nj.gov/lps/dcj/agguide/pdfs/hr-218.pdf (visited June 26, 2017).

100 N.J. STAT. ANN. § 2C:39–5 (Westlaw through L.2017, c. 100 and J.R. No. 7).

101 The relevant paragraph of the statute was amended in 2007 to increase the age to 75 and to add an express exclusion for "; or is a qualified retired law enforcement officer, as used in the federal 'Law Enforcement Officers Safety Act of 2004,' Pub.L.108–277, domiciled in this State," in addition to other adjustments. 2007 N.J. Sess. Law Serv. Ch. 313, § 1 (Assembly 2158) (Westlaw). Modest changes were made in 2007 N.J. Sess. Law Serv. Ch. 314, § 1 (Assembly 2224) (Westlaw). The statutory change was not well-written; it does not parse.

102 2017 N.J. Sess. Law. Serv. Ch. 110 (Assembly 2690) (Westlaw).

103 N.J. STAT. § 2C:39–6l(4), (5) (Westlaw through L.2017, c. 91 and J.R. No. 7.).

104 18 U.S.C. § 926C(d)(2)(B).

This is also relevant to retirees who worked part-time. It appears New Jersey takes the position that it need not recognize under LEOSA persons whose law enforcement activities were or are not full-time.[105] The statutory language does not support this limitation. Although the statute, as initially enacted, limited retiree benefits to a person who "before such retirement, *was regularly employed* as a law enforcement

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[105] The memorandum of the New Jersey Attorney General, *see* Harvey, *supra* note 99, states LEOSA "allows full-time active duty and retired law enforcement officers . . . to carry concealed firearms . . . without having first obtained permits to carry from a foreign state." This provision, of course, does not literally state persons who are not full-time do not benefit from LEOSA, though that is the better reading of the document — the inclusion of reference to "full-time" officers would be redundant without it.

A part-time New Jersey sheriff, allegedly otherwise qualifying under LEOSA, who was denied a permit was one of the unsuccessful plaintiffs in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013). *See* Declaration of Finley Fenton at 1, Piszczatoski v. Filko, 840 F. Supp. 2d 813 (D.N.J. 2012) (Civ. No. 10–06110 (WHW)), 2010 WL 10378297, *aff'd sub nom.* Drake v. Filko, 724 F.3d 426 (3d Cir. 2013). The initial complaint recites that New Jersey takes the view that part-time officers do not benefit from LEOSA:

> 75. Mr. Fenton is a "qualified law enforcement officer" within the meaning of the Law Enforcement Officers Safety Act of 2008 ("LEOSA"), and as such, federal law authorizes him to "carry a concealed firearm that has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 926B(a).
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> 76. However, the State of New Jersey, in a policy directive issued by Defendant Paula T. Dow on June 7, 2005, maintains that LEOSA protects only "full time" police officers. [See http://www.nj.gov/lps/dcj/agguide/pdfs/hr-218.pdf.] Mr. Fenton is afraid that he will be arrested and charged if he carries a handgun to protect himself while off-duty.

Complaint for Deprivation of Civil Rights under Color of Law at 75–76, Piszczatoski v. Filko, 840 F. Supp. 2d 813 (D.N.J. 2012) (Civ. No. 10–06110 (WHW)), 2010 WL 10378297, *aff'd sub nom.* Drake v. Filko, 724 F.3d 426 (3d Cir. 2013). The trial court disposed-of the complaint without the defendants having filed a responsive answer.

Part of the discussion captured in the House Report on the legislation shows the breadth of individuals who would be entitled to benefit from LEOSA:

> Ms. LOFGREN. Reclaiming my time, in California, as the other Members from California will know, you become a law enforcement officer when you are accepted for peace officer standards and training training [sic], if you are POST certified. That includes weights and measure inspectors, it includes zoning administrators. It is very, very broad, and only some of those people actually get training. I mean, real cops obviously do, but there are a lot of people with POST training who are legally police officers, who are qualified under law, but who don't ever use a gun — museum guards.

H.R. Rep. No. 108–560, at 60 (2004) (statement of Rep. Lofgren).

officer for an aggregate of 15 years or more"[106] (there was no corresponding limitation applicable to current officers), that requirement was amended in 2010.[107]

LEOSA provides its benefits extend to persons involved in the detection, investigation or prosecution of "any violation of law, and has [or had] statutory powers of arrest."[108] Legislators' discussion of the scope referenced authorization of game and fisheries officers.[109] The structure of the act is thus not amenable to a limiting construction under which it benefits only individuals who can be expected frequently to need to deploy firearms. It was clearly contemplated that it would not be so limited.

Additionally, under LEOSA, a New Jersey domiciliary who has retired from a position in another state can, under LEOSA, obtain the required credentials and certification from the out-of-state agency. No action of New Jersey is required. Requiring the New Jersey domiciliary to obtain a permit from the New Jersey Superintendent of State Police is unauthorized by LEOSA.

In some circumstances, courts restrictively construe federal statutes that impinge on the ordinary boundaries between federal and state regulation of activity. *Bond v. United States* references the following "well-established" *interpretative* principle:

> " '[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' " the

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106 Law Enforcement Officers Safety Act of 2004, Pub. L. No. 108–277, 118 Stat. 865 (2004) (adding 18 U.S.C. § 926C(c)(3)(A)).

107 Law Enforcement Officers Safety Act Improvements Act of 2010, Pub. L. No. 111–272, § 2(c)(1)(C)(ii), 124 Stat. 2855 (2010) (substituting "served" for "was regularly employed").

108 18 U.S.C. § 926B(c)(1); *id.* § 926C(c)(2) (substituting "had" for "has").

109 H.R. Rep. No. 108–560, at 55 (2004) (statement of Rep. Scott). *See also id.* at 54, 62 ("Thinking back to my many years in local government, there are many peace officers that you would not think of as peace officers. We have park police, we have transit police, for example, we have all the correctional officers in Santa Clara County, where I served. There is a huge issue.") (statement of Rep. Lofgren concerning a rejected amendment providing the act "shall not be construed to supersede or limit the rules, regulations, policies, or practices of any State or local law enforcement"); 150 Cong. Rec. 13,671 (2004) (statement of Rep. Delahunt) ("Under this proposal, a retired Customs inspector from Alabama can come into Massachusetts carrying a concealed weapon, and my local sheriff or my local police chief can do nothing about it.").

> "usual constitutional balance of federal and state powers." To quote Frankfurter again, if the Federal Government would " 'radically readjust[ ] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit' " about it.[110]

This approach is sometimes termed a *clear statement principle*[111] or the *plain statement rule*[112] of statutory construction.[113] Justice Breyer, in dissent, has asserted, "Private gun regulation is the quintessential exercise of a State's 'police power' . . . ."[114]

But it would be difficult to construe LEOSA restrictively so as to allow New Jersey to interpose this type of veto on retirees from New Jersey who were part-time and moved out-of-state, or on New Jersey retirees who moved out of state following retirement and whom, for whatever reason, the state decided not to license. Preemption of state and local regulation (subject to the express statutory limits) is patent and at the core of the act.[115] Thus, insofar as New Jersey would purport to restrict reliance on LEOSA by its retirees who no longer need the state's assistance in obtaining required credentials, that view is simply unsupported. A more difficult question, addressed in Part III, arises where some further act is required of New Jersey (or another state that wishes to restrict the types of persons who may be qualified under LEOSA).

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[110] 134 S. Ct. 2077, 2089 (2014) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40 (1947) (first and second alterations in original)). *See generally* Royce de R. Barondes, *Federalism Implications of Non-Recognition of Licensure Reciprocity under the Gun-Free School Zones Act*, __ J.L. & POL. __, __ (2017) (discussing the principle in the context of the Gun-Free School Zones Act, 18 U.S.C. § 922(q) (Westlaw through Pub. L. No. 115–40)).

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

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

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

[114] McDonald v. City of Chicago, 561 U.S. 742, 922 (2010) (Breyer, J., dissenting).

[115] *See* 18 U.S.C. § 926B(a), (b).

D. Gun-Free School Zones Act.

A variety of sources, both commentators[116] and government entities,[117] have asserted that LEOSA does not authorize possession of a firearm within 1,000 feet of an elementary secondary school — possession that generally is restricted by the Gun-Free School Zones Act.[118] The Gun-Free School Zones Act has seven exceptions to the criminalization of firearms possession within 1,000 feet of an elementary or secondary school, including the following:

> (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political

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[116] *E.g.*, James M. Baranowski, Law Enforcement Officer Safety Act: Off-limit Areas?, http://le.nra.org/leosa/off-limit-areas.aspx ("[I]ndividuals carrying under LEOSA do not qualify for the same exemptions some state permit holders benefit from in terms of . . . Gun Free School Zones (GFSZ).") (visited July 24, 2017); The New York State Fraternal Order of Police, The Badge Newsletter at 13 (May/June 2015) ("No good in GUN FREE SCHOOL ZONES (Note: you cannot be anywhere in the Borough of Manhattan and not be within 1000' of a school zone)"), http://www.fop997.org/pdf/TheBadgeNewsletter-Issue1.pdf.

[117] *E.g.*, Secretary of the Navy, SECNAV Instruction 5580.3, at 3–4 (Jan. 19, 2017) ("This instruction does not . . . [c]ircumvent the provisions of § 922(q) of reference (h), which prohibits the possession of a firearm at a place the individual knows, or has reason to believe, is a school zone, unless the individual is officially on law enforcement duties."), https://doni.documentservices.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-500%20Security%20Services/5580.3.pdf; East Haven Police Department, Policies & Procedures No. 312.1 (May 28, 2015) ("LEOSA by its terms does not permit or authorize an individual to . . . [c]arry a firearm in violation of the Gun Free School Zone Act (18 U.S. Code 922(q)) or similar State law. . . . Federal laws governing the carrying of concealed firearms are not superseded by LEOSA."), www.easthavenpolice.com/files/6714/3291/0686/312.1_-_Retired_Officers_Firearms_LEOSAEffective_07-01-2015.pdf.

On the other hand, a document posted on the FBI's web site notes prohibitions on possession on state and local property are not preempted, but fails to mention the Gun-Free School Zones Act. https://leb.fbi.gov/2011/january/off-duty-officers-and-firearms (visited July 24, 2017). Because that document references retirees, its failure to reference the Gun-Free School Zones Act prohibitions would be a surprising omission were there a conscious decision by the FBI that the Gun-Free School Zones Act prohibits retiree possession.

[118] 18 U.S.C. § 922(q) (Westlaw through Pub. L. No. 115–40).

> subdivision verify that the individual is qualified under law to receive the license; . . .
>
> (iv) by a law enforcement officer acting in his or her official capacity . . . .[119]

Clause (iv) does not exempt off-duty law enforcement officials and does not exempt retirees. So, the benefits of LEOSA would not extend to those persons whose travels take them within 1,000 feet of a school, unless either LEOSA implicitly repeals part of the Gun-Free School Zones Act or the exception in clause (ii) is broadly interpreted. As literal matter, clause (ii) involves licensure "by" the State where the school zone is located and thus may not, under a tediously literal interpretation, extend to federal licensure or licensure by another state. Nevertheless, because that hyper-literal interpretation would substantially eviscerate the core objective of LEOSA, and applying that interpretative approach to a separate provision exempting certain security personnel from state licensure would eviscerate it,[120] a thoughtful court would reject it.

1. Geographic Scope of Prohibition if LEOSA Licensure Does not Satisfy GFSZA. Before turning to applying the principles of statutory interpretation, it is helpful to provide the context by describing the impact of this hyper-literal interpretation. Representative Coble, who supported the bill,[121] stated as to LEOSA, "The legislation is fairly broad in some areas. It allows current and retired State and local law enforcement officers to carry a concealed weapon anywhere in the country."[122] Chairman Sensenbrenner, who opposed the legislation, noted it "would override States' right-to-carry laws and mandate that retired and active police officers could carry a concealed weapon anywhere within the United States."[123]

But vast swaths of non-rural parts of the country are within 1,000 feet of a school zone.[124] It can easily be the case that one cannot go about one's business in a non-rural area without passing through a

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[119] 18 U.S.C. § 922(q)(2)(B) (Westlaw through Pub. L. No. 115–40).

[120] *See infra* notes 166–168 and accompanying text.

[121] H.R. Rep. No. 108–560, at 75 (2004) (vote of Rep. Coble).

[122] H.R. Rep. No. 108–560, at 22 (2004) (statement of Rep. Coble).

[123] H.R. Rep. No. 108–560, at 22 (2004) (statement of Rep. Sensenbrenner) (noting as well, "It is no secret that I am opposed to this legislation.").

[124] *See generally* Barondes, *supra* note 110, at __.

school zone. These locations are too ubiquitous to assert they are *de minimis* and that legislators could simultaneously assert LEOSA allows firearms possession "anywhere" in the United States and elide reference to an exception for school zones were such an exception intended.

2. Implications for LEOSA's Limitation to Carrying a Firearm; Prohibit Anticipated Availability for Defensive Use. The United States asserted in an amicus brief in *District of Columbia v. Barbusin* that LEOSA preemption is restricted to persons who "carry a concealed firearm" — the term "carry" being more restrictive than (defining a subset of) mere possession.[125] What precisely constitutes carrying a firearm for purposes of LEOSA is not clear. The Supreme Court has stated that to "carr[y] a fiream," as used in another section of the Gun Control Act of 1968, as amended, includes one who is transporting it in a vehicle even if not immediately accessible, as in a locked glove compartment.[126] Model jury instructions define carry as follows:

> "Carrying" a firearm includes carrying it on or about one's person. ["Carrying" also includes knowingly possessing and conveying a firearm in a vehicle which the person accompanies including in the glove compartment or trunk.][127]

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[125] Brief for the United States as Amicus Curiae at 7, District of Columbia v. Barbusin, Crim. No. 2012–CDC–913 (June 29, 2012) ("However, LEOSA's plain language is limited to the narrow act of carrying a concealed firearm, and does not include the broader act of possessing a concealed firearm without having ready access to it.").

[126] Muscarello v. United States, 524 U.S. 125, 138 (1998).

[127] Sixth Circuit Committee on Pattern Criminal Jury Instructions, Pattern Criminal Jury Instructions: Sixth Circuit 12.02 (Westlaw through 2013) (italics removed). *See also* 2A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS: CRIMINAL § 39:20, at 41 (Supp. 2016) (providing the following as a Seventh Circuit jury instruction: "A person 'carries' a firearm when he knowingly transports it on his person [or in a vehicle or container]. [A person may 'carry' a firearm even when it is not immediately accessible because it is in a case or compartment [such as a glove compartment or trunk of a car], even if locked.]").

There is some varying authority. *E.g.* 2A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS: CRIMINAL § 39:20, at 123 (2009) (providing Third Circuit jury instruction stating, "'Carry' means that the defendant (had the firearm on (his)(her) person) (possessed the firearm). (emphasis removed)).

It bears mention that authority construing carrying in other statutory provisions may involve a nexus between the carrying and some other criminal act, *e.g.*, United

On the other hand, one may be considered as possessing a firearm in circumstances where one is not carrying it.[128] The mere presence of a firearm in the bedroom of a location where a person was found has been held inadequate to prove the person carried the firearm.[129] Thus, if authorization under LEOSA does not extend to locations within 1,000 of a school zone, a person may not be able even to leave the firearm outside school zones while he or she is engaged in activity within, or passes through, a school zone.

For example, if the plodding interpretation is correct, it would appear that a person relying on LEOSA in California would not be able to leave a firearm containing a normal capacity magazine in some location outside a school zone. California would ban possession of the magazine,[130] and that could result in its being possessed when it was not carried.[131]

One cannot elide this issue by taking the position that these restrictions on features are not preempted by LEOSA.[132] This problem

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States v. Wilson, 884 F.2d 174, 177 (5th Cir. 1989); United States v. Phelps, 877 F.2d 28, 30 (9th Cir. 1989), and thus incorporate additional components.

[128] *See, e.g.,* United States v. Hill, 799 F.3d 1318, 1320–21 (11th Cir. 2015) ("In order to be convicted under § 922(g)(1), a defendant must be a convicted felon that knowingly possesses a firearm that is 'in or affecting interstate commerce.' 'Possession of a firearm may be either actual or constructive.' A defendant is in constructive possession of a firearm when the defendant does not actually possess the firearm 'but instead knowingly has the power or right, and intention to exercise dominion and control over the firearm.' Jury instructions that imply knowledge or an awareness of the object possessed when defining constructive possession, substantially cover the requirement that a defendant knowingly possess a firearm — the use of such an instruction does not constitute reversible error." (citations and paragraph break omitted) (quoting United States v. Perez, 661 F.3d 568, 576 (11th Cir. 2011))).

[129] United States v. Sheppard, 149 F.3d 458, 463 (6th Cir. 1998) (stating, "'Carry,' in the ordinary sense of the word, means to move or transport.").

[130] CAL. PENAL CODE §§ 16740, 32310(c) (Westlaw through urgency legislation through Ch. 9 of 2017 Reg. Sess.).

[131] *See* C.D. MICHEL, *supra* note 18, at 50 (" 'Constructive possession" means that you knowingly have control of, or have *the right to* control the object, either directly or through another person."); Judicial Council of California Advisory Committee on Criminal Jury Instructions, Judicial Council Of California Criminal Jury 2500 (Westlaw through May 2017) (sample jury instruction stating, "A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.").

[132] *See generally* Part II.A, *supra*.

is not limited to possession of items as to which there is a disagreement as to whether LEOSA preempts the relevant state restriction.

For example, New Jersey makes it a crime if one "knowingly has in his possession" "hollow nose" ammunition, subject to limited exceptions for private persons.[133] In the 9 milimeter caliber, this type of ammunition, not prohibited by federal law, is commonly used to limit the possibility of over-penetration, i.e., for safety purposes.[134] New Jersey authority indicates that one would be treated as "having in his possession" hollow point ammunition if it is left in a location over which one has exclusive access.[135] Thus, if LEOSA licensure by another state (or the federal government) does not satisfy the Gun-Free School Zones Act, an individual relying on LEOSA in these kinds of circumstances might, while in a school zone, need to keep the arm unloaded in a locked container he was carrying (that would be within another Gun-Free School Zones Act exception). Simply leaving it at his temporary dwelling might be criminal.

Of course, carrying a firearm in this manner is not suitable for use in self-defense. But allowing one to carry a firearm in a condition suitable for use in self-defense is a primary purpose of the act:

> While a police officer may not remember the name and face of every criminal he or she has locked behind bars, criminals often have long and exacting memories. A law enforcement officer is a target in uniform and out; active or retired; on duty or off.

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[133] N.J. STAT. § 2C:39–3.f, .g (Westlaw through L.2017, c. 91 and J.R. No. 7). There are assorted exceptions in New Jersey, which are not applicable to restrictions on possession of hollow point ammunition, for possession of some other arms. N.J. STAT. § 2C:39–6.e, .f (Westlaw through L.2017, c. 91 and J.R. No. 7).

[134] *E.g.*, State v. Tyriq T., No. 2803777, 2012 WL 6582550, at *2 n.9 (Conn. Super. Ct. Nov. 15, 2012) (quoting Wikipedia.com); *In re* Hessney, 16 N.Y.S.3d 918, 921 (N.Y. County Ct. 2015) (referencing testimony of part-time sheriff deputy); Michael S. Obermeier, Comment, *Scoping Out the Limits of "Arms" Under the Second Amendment*, 60 U. KAN. L. REV. 681, 699 n.136 (2012) *Cf.* People v. Baillie, No. E050832, 2011 WL 675974, at *1 (Cal. Ct. App. Feb. 25, 2011) ("If a hollow point projectile 'mushroom[ed] out,' it might slow down enough to stop inside a person.").

[135] State v. Aitken, No. A–0467–10T4, 2012 WL 1057954, at *16 (N.J. Super. Ct. App. Div. Mar. 30, 2012) (affirming a conviction where the ammunition was found in the defendant's car while at his dwelling, rejecting the argument that an exception for transport between dwellings should be supplied by the court; reversing conviction for possession of larger capacity magazine because a witness "was not qualified to testify that the magazines were capable of feeding ammunition").

> The Law Enforcement Officers Safety Act of 2003, S. 253, is designed to protect officers and their families from vindictive criminals . . . .[136]

Moreover, loading and unloading the firearm in a public location would create alarm.[137] In sum, this plodding interpretation would anomalously frustrate firearms possession of the type the act was designed to allow.

3. Purpose to Allow Carrying Anywhere in the United States. The five sentence Purpose and Summary of LEOSA, provided in the House report, states: "H.R. 218, the 'Law Enforcement Officers Safety Act of 2003,' would override State laws and mandate that retired and active police officers could carry a concealed weapon anywhere within the United States."[138] There are numerous other references in the report to the act authorizing possession "anywhere in the United States," by both supporters and opponents of the act.[139]

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[136] S. Rep. No. 108–29, at 4 (2003). The report continues, noting an additional purpose to allow "certified law enforcement officers . . . to carry concealed firearms in situations where they can respond immediately to a crime across state and other jurisdictional lines." *Id.*

[137] Users also might not be inclined to do so for fear it would adversely affect the functionality of the ammunition. *E.g.*, Richard, Ammunition Failure Warning, Blue Sheepdog (reporting a Gwinnett County Sheriff's Department training bulletin as stating "[T]he cause of the misfire was determined to be from the primer mix being knocked out of the primer when the round was cycled through the firearm multiple times."), http://www.bluesheepdog.com/2012/03/08/ammunition-failure-warning/ (visited July 24, 2017).

[138] H.R. Rep. No. 108–560, at 3 (2004).

[139] H.R. Rep. No. 108–560, at 22 (2004) (stating LEOSA would "mandate that retired and active police officers carry a concealed weapon anywhere within the United States") (statement of Rep. Coble); *id.* ("The legislation is fairly broad in some areas. It allows current and retired State and local law enforcement officers to carry a concealed weapon anywhere in the country.") (statement of Rep. Coble); *id.* ("H.R. 218 would override States' right-to-carry laws and mandate that retired and active police officers could carry a concealed weapon anywhere within the United States.") (statement of Rep. Sensenbrenner); *id.* at 79 ("H.R. 218 would override State 'right to carry' laws and mandate that retired and active police officers could carry a concealed weapon anywhere within the United States.") (Dissenting Views of Reps. Sensenbrenner and Flake); *id.* at 80 ("These officers, while performing an admirable service, will not necessarily have the experience of the beat police officer, yet, this legislation insists we allow them the same authority to carry concealed weapons anywhere in the country.") (Dissenting Views of Reps. Sensenbrenner and Flake).

Legislative history from the Senate is less clear in this regard. The body text of the summarized purposes, reproduced in full in the margin,[140] states the act "does not seek to supersede Federal law," without explicit reference to the Gun-Free School Zones Act, and notes state firearms law was previously preempted in part by the Armored Car Industry Reciprocity Act of 1993.[141] That report does not, however, indicate that the unaffected federal law extends beyond those provisions in federal law the statute explicitly references (ammunition prohibited by federal law and federal regulation of fully automatic weapons, silencers and destructive devices).[142]

The character string "school" appears four times in that report; all are in part of the dissenting views of Senator Kennedy. In three locations, the report makes reference to extant state restrictions on firearms possession in schools; and in the fourth, it makes reference to a rejected amendment that would have preserved state restrictions in schools and other locations.[143] No mention is made of subjecting persons

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[140] The report states:

> The purpose of S. 253, the "Law Enforcement Officers Safety Act of 2003," is to amend title 18, United States Code, to authorize qualified off-duty law enforcement officers and qualified retired law enforcement officers carrying photographic identification issued by a governmental agency for which the individual is, or was, employed as a law enforcement officer, notwithstanding State or local laws, to carry a concealed firearm that has been shipped or transported in interstate or foreign commerce. This Act, however, does not seek to supersede Federal law or limit the laws of any State that permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or prohibits or restricts the possession of firearms on any State or local government property, installation, building, base, or park.

S. Rep. No. 108–29, at 3 (2003).

[141] *Id.* (referencing the Armored Car Industry Reciprocity Act of 1993, Pub. L. No. 103–55, 107 Stat. 276 (1993) (codified as amended at 15 U.S.C. §§ 5901–5904 (Westlaw through Pub. L. No. 115–40))).

[142] 18 U.S.C. §§ 926B(e), 926C(e) (Westlaw through Pub. L. No. 115–40).

[143] The four statements are all on the same page, S. Rep. No. 108–29, at 13 (2003):

> (i) "They have offered no explanation why Congress is better suited than states, cities, and towns to decide how to best protect police officers, schoolchildren, church-goers, and other members of their communities."
>
> (ii) "I also offered an amendment to preserve state and local laws that prohibit concealed weapons in churches, schools, bars and other places where alcohol is served, sports arenas, government offices, and hospitals. In many

qualified under LEOSA to federal prohibitions in the Gun-Free School Zones Act.

Of course, a need to preserve state restrictions on firearms in private schools would have been moot if LEOSA does not authorize possession within 1000 feet of a school. That Senate report, then, cannot fairly be understood as reflecting a conscious determination not to allow persons qualified under LEOSA to possess firearms in areas regulated by the Gun-Free School Zones Act. In fact, the discussion of the referenced rejected amendment indicates the converse — that the act, by virtue of not having been so amended, would allow firearms possession by persons under LEOSA in school zones (although not on public school property itself) without the authorization of the corresponding state.

4. Ambiguity in Gun-Free School Zones Act Concerning Entity Issuing Licensure. The question then becomes whether the Gun-Free School Zones Act is sufficiently unambiguous so as to prevent its interpretation to give effect to these purposes — to allow general carrying of a firearm for self-defense by law enforcement officers and retireees. For those who emphasize textualism, a starting point would be, one supposes, the definition of "by," because the Gun-Free School Zones Act references one "licensed to do so by the State in which the school zone is located."[144] One can find numerous definitions of "by" that are not limited to a meaning of "through the agency of," such as "in the general region of," "in the matter of" and "with respect to."[145]

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states, cities, and towns, these places are singled out as deserving special protection from the threat of gun violence."

(iii) "Michigan has a law that prohibits concealed firearms in schools, sports arenas, bars, churches, and hospitals."

(iv) "Kentucky prohibits carrying concealed firearms in bars and schools. South Carolina prohibits concealed firearms in churches and hospitals."

[144] *See supra* note 119 and accompanying text.

[145] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 307 (2002), includes the following in its definition of "by":

> **1** . . . **b** : in the general region of <they commonly commanded both ~ sea and land — John & William Langhorne> **2** . . . **b** . . . (2) : at or into (as another's house) on passing <he came ~ the house for a few minutes yesterday> . . . **7** . . . **b** : on the basis of (as a distinction or classification) : in the matter of : with respect to <a Kansan ~ birth> <a lawyer ~ profession> **8 a** : in or to the amount or extent of — used in expressions involving comparison to indicate an amount or degree of excess or increase or of deficiency or decrease esp. in space, time, quantity, or

One might assert that "through the agency of" is the best literal reading of "by," in the phrase "licensed to do so by the State," when one focuses solely on those seven words. The litigation in *King v. Burwell*,[146] involving interpretation of the phrase "established by the State under section 1311," as used in the Affordable Care Act, provides helpful insight. Professors Eskridge, Ferejohn, Fried, Manheim and Strauss wrote in an amicus brief in *King v. Burwell* concerning construction of the phrase "established by the State under section 1311":

> The broader problem, however, is not that Petitioners' responses to those provisions are unpersuasive; it's that they ignore the "cardinal rule that a statute is to be read as a whole." Petitioners start — and end — by looking to Section 36B's seven words, and conclude that those seven words, read in isolation, unambiguously forbid the IRS from providing tax credits to customers who purchase plans on the HHS-created exchanges. To the extent that they look to the other provisions of the ACA at all, they do so only to ask whether those provisions would be rendered "patently absurd" under their theory.
>
> But the whole-text canon doesn't authorize courts to interpret seven words in isolation and then ask whether that interpretation renders other statutory provisions absurd. Rather, courts must interpret a provision *in the first instance* in light [sic] its context and place in the statutory scheme. Statutory construction, after all, is a "holistic endeavor." So the question here isn't just whether Petitioners' reading of Section 36B renders absurd the various provisions discussed above. Rather, the question is this: What does the ACA, read as a whole, say about tax credits when you take into account all its provisions?[147]

In that litigation, the United States rejected the argument that "established by" refers to action through the agency of the named locale. The Government argued the phrase "serves to identify the Exchange in

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weight <won the race ~ two yards> <missed the train ~ five minutes> <carried his ward ~ 80 votes> <lighter ~ six pounds> <better ~ far> . . . .

[146] King v. Burwell, 135 S. Ct. 2480, 2482 (2015).

[147] Brief of William N. Eskridge et al. in Support of Respondents at 2, 18–19, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14–114), 2015 WL 428994 at *2, 18–19) (quoting King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991); United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)) (citation omitted).

a particular State. Its presence or absence in the Act's provisions reflects style and grammar — not a substantive limitation on the type of Exchange at issue."[148] By analogy, one might assert that the reference in the Gun-Free School Zones Act to one being licensed "by" a jurisdiction involves mere identification the location where one can possess a firearm (akin to the first-reproduced definition of "by"[149] as meaning "in the general region of", as in the phrase "they commonly commanded both by sea and land;" or as in "in the matter of" or "with respect to," as in "a lawyer by profession"[150]).

Assorted authority supports the view that interpretation focused on a disembodied literal reading of a specific phrase is improper.[151] For

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[148] Brief for the Respondents at 33, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14–114), 2015 WL 349885 at *33.

[149] *See supra* note 145.

[150] *See supra* note 145.

[151] For example, *Deal v. United States*, 508 U.S. 129, 132 (1993), states, "Petitioner's contention overlooks, we think, this fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005), states, "Statutory language has meaning only in context . . . ."

Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 2442 (2014), states:

> "[R]easonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole" does not merit deference.

Id. (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988); University of Tex. Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 2529 (2013)).

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000), states in part:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole," Similarly, the

example, the Supreme Court has reached the following statutory interpretations:

- the term "employee" includes a former employee;[152]
- the term "person" includes only natural persons, thereby excluding entities from those who may proceed *in forma pauperis*, notwithstanding a definition in the Dictionary Act[153] that the word "person" includes assorted entities;[154]
- the term "original sentence," when used in connection with resentencing someone who violated probation, references instead the maximum sentence in a range provided by sentencing guidelines;[155]
- the term "tangible object" excludes fish (in the context, it is limited to items "used to record or preserve information");[156] and
- a statute prohibiting the "deport[ation] or return" of an alien does not prohibit the return of persons intercepted outside U.S. territorial waters.[157]

> meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

Id. (quoting Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989); Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995); FTC v. Mandel Brothers, Inc., 359 U.S. 385, 389 (1959)) (citations omitted).

Davis v. Michigan Department of Treasury, 489 U.S. 803, 809 (1989) states:

> Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

[152] Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

[153] 1 U.S.C. § 1 (1958), *amended by* 21st Century Language Act of 2012, Pub. L. No. 112–231, 126 Stat. 1619 (2012) (amending other definitions).

[154] Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 196, 199 (1993).

[155] United States v. Granderson, 511 U.S. 39, 54, 56–57 (1994).

[156] Yates v. United States, 135 S. Ct. 1074, 1079 (2015) (announcing the judgment of the court, in an opinion joined by three other justices).

[157] Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 170–71, 173 (1993); *id.* at 188–89 (Blackmun, J., dissenting) ("Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word 'return' does not mean return, because the opposite of 'within the United States' is not outside

So, although it might well be the best literal interpretation of "licensed to do so by [a particular] State" as a detached sentence fragment to limit that to persons having received authorization directly through the agency of that particular state, that it not the relevant inquiry.

Thoughtfulness in avoiding literal interpretation of individual sentence fragments in light of the entire statutory context is of increased importance where one is considering the interaction of multiple statutes, particularly statutory language enacted at different times. Although interpretative doctrine provides that repeals by implication are disfavored, even a textualist can state as to that principle: "This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily

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the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration." (citations omitted)).

A discussion by Popkin would urge inclusion of *United States v. Hutcheson*, 312 U.S. 219 (1941), in this list. He states, "Finally, in *United States v. Hutcheson*, Justice Frankfurter engaged in what the dissent called 'a process of construction never . . . heretofore indulged by this Court,' by interpreting a later statute denying a labor injunction to be an implicit repeal of a prior criminal statute." William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1152 (1992) (footnote omitted) (quoting *Hutcheson*, 312 U.S. at 245 (Roberts, J., dissenting)). *Hutcheson* may well not be a good candidate. The main opinion notes statutory language, not referenced in the dissent, that makes the case more supportable by noting the latter statute: "also relieved such practices of all illegal taint by the catch-all provision, 'nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.'" *Hutcheson*, 312 U.S. at 230 (majority opinion).

Church of the Holy Trinity v. United States, 143 U.S. 457, 458 (1892), is the fashionable reference to interpretation rejecting textualism. There, the court holds that a statute prohibiting contractual assistance of migrations of aliens "to perform labor or service of any kind in the United States," subject to specific exceptions including "professional actors, artists, lecturers, singers, and domestic servants," *id.* at 458–59, does not prohibit a contract for an alien to serve as a rector and pastor. *Id.* at 457–58. In reaching the conclusion, the court notes, "So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act." *Id.* at 464.

Providing a counterpoint for that case, "[A]s the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress, not the courts." Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827 (1978) (quoting United States v. Sisson, 399 U.S. 267, 297 (1970)).

assumes that the implications of a statute may be altered by the implications of a later statute."[158] Even if the understanding of one definition of "by" in the Gun-Free School Zones Act would have been most reasonable when the act was adopted, the relevant question for our purposes is whether that choice is so required that, to enact rights contemplated by LEOSA, it was necessary to re-write that existing statutory language not otherwise amended by LEOSA (in addition to adding new language of LEOSA itself).

An interesting illustration is provided by *Holland v. Commonwealth*.[159] A Kentucky law limiting parole eligibility of violent offenders has an exception for "a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim."[160] The cited section of the Kentucky Revised Statutes allows eligibility for probation or conditional release to a person convicted of certain crimes where "the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged" where he or she "establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse."[161]

In sum, the literal terms of these statutes restrict the benefits of parole eligibility to a domestic violence victim who had used a firearm or similar device. Nevertheless, the court holds that a domestic violence victim who did not use a firearm, but rather burned an abuser with gasoline she ignited, could benefit from the exception.[162] The court notes, "It is elementary that each section of a legislative act should be read in light of the act as a whole; with a view to making it harmonize, if possible, with the entire act, and with each section and provision thereof, as well as with the expressed legislative intent and policy."[163]

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158 United States v. Fausto, 484 U.S. 439, 453 (citations omitted) (Scalia, J.).

159 192 S.W.3d 433 (Ky. Ct. App. 2005). *See generally* WILLIAM D. POPKIN, THE JUDICIAL ROLE: STATUTORY INTERPRETATION & THE PRAGMATIC JUDICIAL PARTNER 129 n.91 (discussing *Holland*).

160 KY. REV. STAT. ANN. § 439.3401 (Westlaw through 2017 Reg. Sess.).

161 KY. REV. STAT. ANN. § 533.060(1) (Westlaw through 2017 Reg. Sess.).

162 192 S.W.3d at 435, 437.

163 192 S.W.3d at 437.

5. Application of These Interpretative Principles; Interpretation* in pari materia *with Armored Car Industry Reciprocity Act of 1993. The purposes of LEOSA are to allow active and retired law enforcement officials to protect themselves from retaliation (and to facilitate these persons' acts insofar as they would wish assist in law enforcement while not on-duty). That these purposes are objectives is patent from the structure of the act, and is confirmed by the legislative history.[164] Realization of those goals is eviscerated if LEOSA does not authorize possession in wide swaths of the country; that would substantially impede the ability to exercise the rights LEOSA creates.

Moreover, as noted above,[165] the Senate report on LEOSA makes explicit reference to the Armored Car Industry Reciprocity Act of 1993.[166] That act, like LEOSA, does not mention the Gun-Free School Zones Act. It states qualified personnel having a license "in the State in which such member is primarily employed," subject to additional terms, "shall be entitled to lawfully carry any weapon to which such license relates and function as an armored car crew member in any State while such member is acting in the service of such company."[167] It has an express preemption provision, which states in full, "This chapter shall supersede any provision of State law (or the law of any political subdivision of a State) that is inconsistent with this chapter."[168] It makes no reference to restricting application of *federal* law.

In terms of whether the federal authorization is sufficient to authorize a firearm in a school zone, it is difficult to distinguish between the statutory language in LEOSA and the Armored Car Industry Reciprocity Act.[169] If the language in LEOSA is insufficient to authorize firearms possession in school zones, as restricted by the Gun-Free School Zones Act, the Armored Car Industry Reciprocity Act is likely also insufficient. And that would necessarily produce absurd results. As so construed, the Armored Car Industry Reciprocity Act

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164 *See supra* notes 136–143 and *infra* note 242 and accompanying text.

165 *See supra* note 141 and accompanying text.

166 Pub. L. No. 103–55, 107 Stat. 276 (1993) (codified as amended at 15 U.S.C. §§ 5901–5904 (Westlaw through Pub. L. No. 115–40)).

167 15 U.S.C. § 5902.

168 15 U.S.C. § 5903.

169 *See generally supra note* 76 (discussing authority construing statutes *in pari materia*).

would be ineffective in allowing armored car personnel's possession of loaded weapons when visiting a customer within 1,000 feet of a school, and it would require repeated loading and unloading of weapons throughout the day if it was to be effective in locations outside a school zone.

E. Conclusion.

This Part II collects some of the ways in which rights sought to be preserved by LEOSA have been or may be fettered. We have encountered rather patent violations — a clearly preempted prohibition on carrying particular ammunition — and we have seen authority stating that local restrictions on firearm features are not preempted, though, for a variety of reasons, that is an unsustainable interpretation of LEOSA. We have encountered attempts to limit the type of officer who may benefit from LEOSA. And we have seen governmental interpretations that would render ineffectual the rights LEOSA endeavors to create, through unsupported conclusions one possessing a firearm under LEOSA remains subject to the Gun-Free School Zones Act.

Part III turns to the extent to which these rights may be affirmatively vindicated. This is of significant importance if the rights are to be used as intended. If contumacious disregard of the federal law cannot be remedied prospectively, there is a significant likelihood the exercise will be chilled.

III. PRIVATE RIGHTS

Litigation concerning the scope of LEOSA can arise in a number of contexts. An individual charged with violating state or local law prohibiting firearms possession may assert rights under the act as a defense. Alternatively, a private person may rely on the act in seeking affirmative relief, whether monetary damages for a violation or prospective relief for assistance in acquisition of the necessary credentials, to prohibit a state or local government official's taking acts inconsistent with LEOSA or to require training of state or local officials concerning LEOSA compliance.

LEOSA is not express concerning whether, or the extent to which, a private person has a right to seek this type of affirmative relief.

Whether there is such a right implicates a number of theories: (i) the possible implication of a private right of action under *Cort v. Ash*;[170] (ii) creation of a "right" enforceable under section 1983 of title 42; and (iii) claims seeking a declaratory judgment under the Declaratory Judgment Act[171] or a state statute.

We shall cabin our discussion to the following theories of relief: (a) state principles addressing a property right to a credential; (b) implied rights of action under LEOSA; and (c) section 1983. This choice reflects, simply, the primary theories that have been litigated. As we shall see, where a federal statute's language focuses on providing rights to an identified group (as opposed to commanding governmental action), a right recognized under section 1983 is often found to exist,[172] which gives rise to a rebuttable presumption that a remedy is available under section 1983.[173] But, with the exception of a recent District of Columbia circuit opinion,[174] courts typically have been reluctant to allow claims for relief under section 1983.

A. Commandeering.

It is convenient to examine the extent to which federalism concerns may operate to restrict rights under LEOSA before examining the existence of an ability to seek affirmative relief. *Printz v. United States*[175] involves a statute requiring that, for handgun sales by dealers in a state not having a background check, local law enforcement "make a reasonable effort to ascertain within 5 business days whether receipt

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170 422 U.S. 66 (1975).

171 28 U.S.C. §§ 2201–2202 (Westlaw through Pub. L. No. 115–40). The issue might also ultimately be presented by virtue of the inherent equitable power of a court. *See generally* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. Thus, the Supremacy Clause need not be (and in light of our textual analysis above, cannot be) the explanation. What our cases demonstrate is that, 'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.'" (citations omitted) (quoting Carroll v. Safford, 3 How. 441, 463, 11 L.Ed. 671 (1845)).

172 *See infra* notes 223–225 and accompanying text.

173 *See infra* note 228 and accompanying text.

174 DuBerry v. District of Columbia, 824 F.3d 1046 (D.C. Cir. 2016).

175 521 U.S. 898 (1997).

or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."[176] In concluding the statute is infirm, the Supreme Court notes that the Constitution obligates the President to execute Federal law.[177] It continues:

> The Brady Act effectively transfers this responsibility to thousands of CLEOs[, chief law enforcement officers,] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive — to ensure both vigor and accountability — is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[178]

The Court concludes it does not make a difference whether the federal statute directs the states themselves or their officers.[179] And it concludes balancing of burdens on the state, compared to the benefits of the act, is improper where the object of the federal statute is to "direct

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[176] 521 U.S. at 903. The statute excluded officers in states that developed an instant background check system or that issued handgun permits after a statutorily-described background check. 521 U.S. at 903.

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

[178] 521 U.S. at 922–23 (citations omitted). Gerken describes the commandeering principles as follows: "The prohibition on commandeering may be fuzzy at the edges, but it's a workable rule that corresponds to a basic intuition: Congress can't take over states' governing apparatuses and force them to do its bidding." Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 101 (2014).

[179] 521 U.S. at 930 ("The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in *New York* because the former is addressed to individuals — namely, CLEOs — while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one.").

the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty," as opposed to merely imposing an incidental burden on it.[180]

The restrictions on commandeering announced in *Printz* may appear to prohibit all affirmative relief seeking assistance with obtaining the required credentials from state or local governments (excluding, potentially, the District of Columbia).[181] In fact, a few cases considering challenges to failure to provide credentials have relied on this principle in concluding a remedy was not available. However, a more thorough understanding of the Supreme Court authority eliminates much of the concern.

Zarrelli v. Rabner[182] involves a complainant who had passed the state's firearms requalification program, but to whom New Jersey declined to issue a certification.[183] At that time, LEOSA required retiree firearms testing and its certification "by the State" or the agency from which he or she retired.[184] The statute was amended a few years later to allow testing and certification "by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State" as an alternative.[185] The state already had in effect a licensing program for retirees, though the complainant evidently did not qualify for that because, *inter alia*, he retired from an out-of-state position.[186] As noted, what the complainant required in

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[180] 521 U.S. at 931–32.

[181] *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016), summarily rejects application of *Printz* to commandeering of the District of Columbia. *Id.* at 1057 ("[The District of Columbia's] reliance on the anti-commandeering doctrine appears to be misplaced; at least it cites no authority that the doctrine is applicable to it." (citation omitted)).

[182] No. A–5511–05T2, 2007 WL 1284947 (N.J. Super. Ct. App. Div. May 3, 2007).

[183] *Id.* at *1.

[184] Law Enforcement Officers Safety Act of 2004, § 3, Pub. L. No. 108–277, 118 Stat. 865 (2004) (prior to 2010 and 2013).

[185] *See* Law Enforcement Officers Safety Act Improvements Act of 2010, § 2(c)(2)(B)(ii), Pub. L. No. 111–272, 124 Stat. 2855 (codified as amended at 18 U.S.C. §§ 926B(e)(2), 926C(e)(1)(a)).

[186] The applicant had been a New York court officer. *Zarrelli*, 2007 WL 1284947 at *1. It appears the relevant statutory language restricted issuance of credentials to a retiree:

> who was regularly employed as a full–time member of the State Police; a full–time member of an interstate police force; a full–time member of a county or

Zarrelli was merely communication of information, not compulsion of the state's testing him.

The *Zarrelli* court summarily asserts the federal government cannot commandeer the states and quotes a fragment from *Printz* out of context. The court states, "It is immaterial, however, that a federal enactment 'places a minimal and only temporary burden upon state officers.'"[187] *Printz*, however, restricts the conclusion that the extent of the burden is immaterial to circumstances where "it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty," only stating that in that case, "such a 'balancing' analysis is inappropriate."[188]

The precise meaning of this limitation in *Printz* is not self-evident from the sentence itself. But some clarification may be provided by focusing on the rather peculiar nature of the duties imposed by the act

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> municipal police department in this State; a full–time member of a State law enforcement agency; a full–time sheriff, undersheriff or sheriff's officer of a county of this State; a full–time State or county corrections officer; a full–time county park police officer; a full–time county prosecutor's detective or investigator; or a full–time federal law enforcement officer . . . .

Prevention—Cruelty—Animals, 2005 N.J. Sess. Law Serv. Ch. 372 § 14 (Assembly 3186) (Westlaw).

[187] 2007 WL 1284947, at *3 (quoting *Printz*, 521 U.S. at 932). The court's analysis, in full, is as follows:

> It is settled that Congress cannot compel officers of one State to implement federal programs. *Printz v. United States* is illustrative. In *Printz,* the Supreme Court struck down certain portions of the Brady Act which required local law enforcement officials to investigate prospective handgun purchasers. The Court ruled that Congress could not "force[ ] participation of the States' executive in the actual administration of a federal program."
>
> Plaintiff argues that in light of the fact that New Jersey already has its own certification program for retired law enforcement officers under *N.J.S.A.* 2C:39-6, it would not be at all burdensome for New Jersey to create a certification program under the Act. It is immaterial, however, that a federal enactment "places a minimal and only temporary burden upon state officers." Rather, "[i]t is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." That New Jersey may have the authority under the Act to issue such a certification does not mean that it has the obligation to do so.

Zarrelli, 2007 WL 1284947, at *2–3 (citations omitted) (quoting *Printz*, 521 U.S. at 918, 932).

[188] *Printz*, 521 U.S. at 932.

addressed in *Printz*. The statute at issue did not require the local chief law enforcement officer to communicate information to anyone. So, *Printz* does not address a federal obligation to disclose information, as the opinion itself expressly notes.[189] (And some lower courts have concluded that the proscription on commandeering does not extend to the provision of information.[190]) Rather, the statute required officials in

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[189] *Printz*, 521 U.S. at 918 (stating regulations "which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case."). *See also id.* at 935 (O'Connor, J., concurring) ("In addition, the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid. See, *e.g.*, 42 U.S.C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice). The provisions invalidated here, however, which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme.").

[190] Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 214 (4th Cir. 2002) (stating, in validating a federal statute requiring information to be forwarded to the federal government, "[H]ealth care providers are required to collect and report information to the State Board of Medical Examiners. The State Board of Medical Examiners then forwards that information to a federal data bank. But more is required than the expenditure of time and effort on the part of state officials in order to offend the Tenth Amendment."); *see also* Freilich v. Bd. of Directors of Upper Chesapeake Health, Inc., 142 F. Supp. 2d 679, 695 (D. Md. 2001), *aff'd sub nom.* Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205 (4th Cir. 2002) (stating the act "established a national reporting system which, among other things, requires hospitals to provide information about adverse professional review actions …."); Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F. Supp. 2d 1260, 1295 (M.D. Fla. 2009) (agreeing with the Fourth Circuit's analysis in *Freilich's* of application of the Tenth Amendment), *aff'd*, 451 F. App'x 862 (11th Cir. 2012); United States v. Brown, No. 07 CR 485 (HB), 2007 WL 4372829, at *5–6 (S.D.N.Y. Dec. 12, 2007), *aff'd*, 328 F. App'x 57 (2d Cir. 2009) (stating, as to a federal act that "merely requires state officials to provide information regarding sexual offenders-information that the state officials will typically already have through their own state registries-to the federal government," "In sum, because the individuals subject to the Act are already required to register pursuant to state registration laws, and because the Act only requires states to provide information rather than administer or enforce a federal program, the Act does not violate the Tenth Amendment."). *See generally* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government*, 161 U. PA. L. REV. 103, 139 (2012) (discussing *Freilich* and *Brown* and stating, "Taking cues from the *Printz* dicta, several lower courts have dismissed the

states not having an existing background check to make a reasonable effort to determine whether the transaction "would be in violation of the law," without imposing any obligation to do anything if so.[191]

In sum, the act required local law enforcement officers to investigate (monitor) the potential illegality of a pending transaction. One objective apparently implicit in that forced monitoring is to influence law enforcement activities — to enforce prohibitions against persons these searches identify.

LEOSA cannot be categorized as having its "whole object" influencing state enforcement of existing criminal proscriptions, as in requiring local officials inform themselves concerning the details of a particular set of ongoing activities by private persons. Rather, LEOSA's objectives include prohibiting states and localities from criminalizing certain interstate conduct (and, as part of that, allowing individuals to have confirmation of factual information, in the possession of states, that evidences the legality of their freedom from state and local prosecution). So, the proscription announced in *Printz* on imposing minimal burdens on states is inapplicable to claims of right under LEOSA.

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notion that providing information in any way constitutes assisting the enforcement of a federal regulatory program.").

[191] The Court summarizes as follows the act's requirements for states that did not have a background check process:

> When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." § 922(s)(2). The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would-be purchaser with a written statement of the reasons for that determination. § 922(s)(6)(C). Moreover, if the CLEO does not discover any basis for objecting to the sale, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form.

Printz, 521 U.S. at 903–04. Moreover, where no prohibiting circumstances were found, the act required destruction of records relating to the transfer. *Id.*

Johnson v. New York State Department of Correctional Services[192] also relies on *Printz*,[193] and similarly elides these important distinctions. Although *Printz* indicates otherwise *de minimis* burdens on states are not validated where the "whole object" of the federal act is to direct the functioning of the state executive,[194] in applying the standard the *Johnson* court (i) drops the qualifier "whole" and (ii) does not attempt to address the meaning of "to direct the functioning of the state executive."[195] *Johnson's* analysis without explanation extends the proscription on commandeering.

Reno v. Condon[196] identifies a second relevant restriction on the scope of commandeering prohibited by *Printz*. *Reno* limits the prohibition on commandeering to federal regulation that "require[s] the States in their sovereign capacity to regulate their own citizens," otherwise referenced as "requir[ing] state officials to assist in the enforcement of federal statutes regulating private individuals."[197]

Reno involves a federal statute that "restricts the States' ability to disclose a driver's personal information without the driver's consent"[198] and that "*requires disclosure of personal information* 'for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, [etc.] . . . ."[199] The Court, focusing on the restrictions on disclosure of information, finds that the federal act is *not* invalid commandeering. The opinion for a unanimous court states:

> It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent

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192 709 F. Supp. 2d 178 (N.D.N.Y. 2010).

193 *Id.* at 187.

194 *See supra* note 188 and accompanying text.

195 *See Johnson*, 709 F. Supp. 2d at 187 (stating, in a conclusory fashion, "Even if plaintiffs were able to demonstrate that LEOSA established a federal mandate for state officers to issue the identification described in subsection (d), the extent of the burden placed upon the state officers would make no difference because the object of the law would then be to 'direct the functioning of the state executive.'").

196 Reno v. Condon, 528 U.S. 141 (2000).

197 *Id.* at 151.

198 *Id.* at 144.

199 *Id.* at 145 (emphasis added).

with the constitutional principles enunciated in *New York* and *Printz.*[200]

LEOSA may be similarly characterized as not concerning the "regulat[ion of] private individuals" but, rather, restricting the actions of states in regulating interstate commerce, namely restricting the extent to which states and localities may regulate private persons carrying firearms interstate. LEOSA is ultimately about preempting state and local regulation. Insofar as a challenge involves the information-providing portions of LEOSA credentialing, a claim that requiring the disclosure would violate federalism norms is inconsistent with two separate limits to the commandeering doctrine. The proscription on commandeering (i) does not extend to the minor, ancillary, ministerial act of providing information and (ii) does not extend beyond attempts to *regulate private individuals*.

Whether LEOSA could be construed as lawfully requiring states to do firearms testing of individuals is less certain. One supposes the issue of diminished importance as a result of changes made to LEOSA in 2010. Initially, the act required the firearms testing, and certification of the testing, for a retiree be either by the agency from which he or she retired or his or her state of residence.[201] As of 2010, the testing and certification can be from one who is "a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State."[202]

But, if there is a challenge from a retiree who asserts he has a right to compel testing, the statute as so construed[203] would, one supposes, not violate federalism norms on the limited basis that it did not involve compelling the "regulat[ion of] private individuals." Most analogous would be *South Carolina v. Baker*,[204] where the Supreme Court upholds a federal prohibition on state issuance of securities in bearer form — a

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[200] *Id.* at 151 (referencing New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997)).

[201] 18 U.S.C. § 926C(d)(1), (2)(B) (Westlaw through Pub. L. No. 115–40).

[202] Law Enforcement Officers Safety Act Improvements Act of 2010, § 2(c)(2)(B)(ii), Pub. L. No. 111–272, 124 Stat. 2855 (codified as amended at 18 U.S.C. §§ 926B(e)(2), 926C(e)(1)(a)).

[203] This likelihood seems sufficiently remote not to warrant discussion of whether such a construction is proper.

[204] 485 U.S. 505 (1988).

prohibition that necessarily imposes on the states an obligation to perform the administrative tasks associated with maintaining registered ownership of bonds. That would include maintaining, or requiring someone else maintain, a register of ownership and processing transfers of registration,[205] which although apparently perfunctory can nevertheless be troublesome to execute[206] and burdensome.[207] The Court indicates this kind of regulation of state activity is not prohibited:

> Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.[208]

Reno v. Condon harmonizes the Court's authority concerning commandeering by noting the statute at issue in *South Carolina v. Baker* " 'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'"[209] Thus, that creation of an affirmative right to a remedy for denial of a LEOSA credential might involve administrative action that would not otherwise be taken, then, does not compel the conclusion that it involves unconstitutional commandeering. LEOSA regulates — restricts — *state* activities; it does not affirmatively control or direct the manner in which states regulate private persons. And the federal

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[205] *See generally* WILLIAM CAMPBELL RIES, REGULATION OF INVESTMENT MANAGEMENT AND FIDUCIARY SERVICES § 12:20 (Westlaw through July 2016).

[206] *E.g.*, *SEC Obtains Million Dollar Penalty and Cease and Desist Order Against the Chase Manhattan Bank*, SEC News Digest 2001–184, 2001 WL 1113149, at *1 (Sept. 24, 2001) (referencing $1 million fine arising from initial inaccuracies of $46.8 billion as transfer agent for corporate and municipal bond issues identified in 1998, which were not reconciled until June 2000, resulting in reserves of $45.8 million, with about $28.8 million resulting from payment errors).

[207] Exceptions to the Report of the Special Master and Brief in Support, South Carolina v. Dole, 485 U.S. 505 (1988) (No. 94, Orig.), 1987 U.S. S. Ct. Briefs LEXIS 1315, at *66 (citing evidence that, for issuances of $10 million or less, which are identified as representing "most" bond issuances, "registration raises ongoing administrative costs significantly over the life of those issues").

[208] 485 U.S. 505, 514–15 (1988).

[209] *Reno*, 528 U.S. at 150 (quoting *Baker*, 485 U.S. at 514–15).

command approved by the Supreme Court in *Baker* necessarily involves individuals be delivered information (a physical certificate representing ownership or other confirmation of ownership upon transfer). So, *Baker* rejects the position that it is unlawful commandeering for a federal act to mandate, as an ancillary component, the ministerial state act of delivering information.

B. Private Right of Action.

LEOSA necessarily affords a defense to a qualifying, credentialed person charged with violation of state or local law restricting firearms possession that is preempted by LEOSA. But there are broader potential uses of LEOSA. A person may seek to assert a claim for failure to assist in the acquisition of credentials necessary to benefit. A qualifying, credentialed person might seek to enjoin acts made unlawful by LEOSA (e.g., may seek to enjoin enforcement of a contumacious policy banning ammunition clearly protected by LEOSA), or seek to require training for LEOSA compliance, so that holders of required credentials would not be subject to arrest in the first instance. Or a person aggrieved by actions in violation of LEOSA might seek damages.

Whether there is a cause of action that would allow these types of remedies to be available is somewhat complex. They could be available under either state or federal law. We can first turn to state-law theories. As we shall see, state-law theories have generally focused on credentialing. In general, those claims have failed, with a notable exception as to a person who was denied new credentials to replace previously issued ones that had been physically broken.

After briefly discussing the state theories, we shall turn to the federal theories of recovery that typically have been litigated. We shall examine principles of implied rights of action (which have been unsuccessful) and section 1983 of title 42, which provides for a remedy for violation of federal rights by persons acting under color of state law. A 2016 opinion from the U.S. Court of Appeals for the District of Columbia holds LEOSA does create a right remediable under section 1983, conflicting with, *inter alia*, earlier authority from the U.S. District Court for the Southern District of New York. The better answer would appear to be that LEOSA does give rise to a right enforceable under section 1983.

However, even if there is such a right, certain details of the judicial gloss applied to section 1983 can operate to prevent vindication of rights. Although the focus of this Article is not provision of a comprehensive sketch of these aspects of section 1983, we shall briefly detail the implications of qualified immunity and the necessity that certain challenged acts be by policy or custom.

1. Causes of Action under State Law. It is impracticable to provide a fifty-state survey of the potential theories under state law that might provide a remedy. As to claims seeking credentials, a comprehensive survey would depend on municipal law as well, as it may be a local agency that would potentially issue the relevant credential,[210] and any right to a credential could implicate the much more numerous provisions of municipal law.

Restricting our focus to litigated disputes asserting state causes of action, we can encounter assorted cases addressing credentials. The authority has typically found some reason why there is not an entitlement to a credential. Some authority denies a right to a credential because the procedures for issuing credentials are informal and do not give rise to a protectable right,[211] even if it allegedly has been an unofficial policy and uniform practice to issue a credential.[212]

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[210] *See generally In re* Wheeler, 81 A.3d 728, 764 (N.J. Super. Ct. App. Div. 2013) (stating credentials issued to a person retired from an "Arson Investigation Unit" by the Newark Police Department, identifying him as a retired "police captain" and an "arson captain," are inadequate for purposes of LEOSA, because Arson Investigation Units "are established within a City's fire department").

[211] Mpras v. District of Columbia, 74 F. Supp. 3d 265, 271 (D.D.C. 2014) (inadequate allegations of entitlement for due process purposes). *See generally* Morello v. D.C., 621 F. App'x 1, 2 (D.C. Cir. 2015) (finding the complainant failed to allege constitutional inadequacies in the process available through the District of Columbia Superior Court and, therefore, the complainant was not deprived of property without due process). *Cf.* Bernard v. Metro. Gov't of Nashville/Davidson Cty., No. M200900812COAR3CV, 2010 WL 3033798, at *4–5 (Tenn. Ct. App. Aug. 3, 2010) (holding municipal ordinance that "directs the police department to 'make a gift of a gun and a badge to all retiring officers who have at least twenty-five years of service upon their retirement and also to police officers who, regardless of years of service, receive a disability pension from the metropolitan government,' " is a "gift" and not a "retirement benefit," for purposes of principles of construction).

[212] Rousseau v. Windsor Locks Police Comm'n, No. 3:10CV1312 MRK, 2012 WL 3113134, at *3 (D. Conn. July 31, 2012) (finding an applicant does not have a property interest in the credential, because the defendants had unfettered discretion in deciding;

Another case has denied recovery because the permit denial was not arbitrary and capricious.[213] The frequency with which the claims, whether under state or federal law, fail for peculiar pleading deficiencies seems somewhat striking,[214] although no effort is made here to endeavor to compare relative frequencies. There is, however, authority prohibiting denial of a replacement credential, sought when an originally issued credential had been damaged.[215]

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stating the applicant "has not pointed to any law or regulation that could have constrained 'the opportunity of the [Commission] to deny issuance' of his retirement credentials").

[213] Kittle v. D'Amico, No. 4763–14, 2015 WL 12805146 at *3–4 (N.Y. Sup. Ct. 2015) (applicant retired while under investigation for "failing to conduct a DWI test investigation on a motorist after observing two bottles of vodka in the center console").

[214] *E.g.*, Tesler v. Cacace, 607 F. App'x 87, 88 (2d Cir. 2015) (holding not ripe for judicial consideration a request for declaratory judgment where the applicant had not taken the necessary training), *cert. denied*, 136 S. Ct. 823 (2016), *reh'g denied*, 136 S. Ct. 1402 (2016); Morello v. D.C., 621 F. App'x 1, 2 (D.C. Cir. 2015) (finding the complainant failed to allege constitutional inadequacies in the process available through the District of Columbia Superior Court and, therefore, the complainant was not deprived of property without due process); Sonoma Cty. Law Enf't Ass'n v. Cty. of Sonoma, 379 F. App'x 658, 660 (9th Cir. 2010) (finding a claim not ripe because the claimants did not adequately allege "a concrete plan to carry a concealed firearm outside California"); Pizzo v. City & Cty. of San Francisco, No. C 09–4493 CW, 2012 WL 6044837, at *16 n.8 (N.D. Cal. Dec. 5, 2012) (dismissal of Equal Protection challenge to LEOSA for plaintiff's failure to identify a proper defendant), *appeal dismissed*, No. 13–15012, 9th Cir. (Mar. 8, 2013); Koren v. Noonan, No. CIV. A. No. 12–1586, 2013 WL 5508688, at *2–3 (E.D. Pa. Oct. 3, 2013), *aff'd on other grounds*, 586 F. App'x 885 (3d Cir. 2014) (holding claim alleging a property interest in an honorable discharge, arising from federal and state rights of retirees to possess firearms, was time barred); Foley v. Godinez, 62 N.E.3d 286, 294–95 (Ill. App. Ct. 2016) (holding writ of mandamus not available where the determination is discretionary, and entitlement to the credential depends on the discretionary determination whether an applicant is a qualified law enforcement officer; denying applicant's request to add a declaratory judgment count); Bernard v. Metro. Gov't of Nashville/Davidson Cty., No. M200900812COAR3CV, 2010 WL 3033798, at *9 (Tenn. Ct. App. Aug. 3, 2010) (delayed filing of an amended complaint precluded litigation of Equal Protection claim arising from credential denial).

[215] Frawley v. Police Comm'r of Cambridge, 46 N.E.3d 504, 507, 518 (Mass. 2016) (concluding the applicant being under investigation for a citizen complaint at the time he retired was not a basis to deny a 2011 application for issuance of a replacement, although "[h]ad the commissioner been evaluating [the] application in March, 2004, he would have acted well within his discretion in refusing to issue an ID card given the ongoing investigation concerning the citizen complaint.").

2. Implied Right of Action vs. Rights Remediable under Section 1983. A court in 2014 could state, "Every court to have considered the question has held that no private right of action exists under LEOSA because Congress explicitly intended for states to establish and enforce their own concealed firearm certification standards."[216] Although some courts have addressed the availability of a remedy for failure to provide a credential under principles governing whether there is an implied right of action under LEOSA,[217] the more direct analysis involves

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[216] Friedman v. Las Vegas Metro. Police Dep't, No. 2:14–CV–0821–GMN–GWF, 2014 WL 5472604, at *4 (D. Nev. Oct. 24, 2014).

[217] For example, *Moore v. Trent*, No. 09 C 1712, 2010 WL 5232727 (N.D. Ill. Dec. 16, 2010), focuses on the existence of a remedy under LEOSA for failure to issue the credential, eliding discussion of the availability of a remedy under section 1983 if there merely is found to be a right under LEOSA:

> Plaintiffs argue that LEOSA unquestionably creates the *right* to carry a concealed firearm for qualified retired law enforcement officers. Plaintiffs' argument is predicated on the assertion that once an applicant satisfies the criteria of a "qualified retired law enforcement officer" as enumerated in § 926C(c), he is, as of right, automatically entitled to the identification card. Defendants contend that the statute confers a right solely to the holders of the identification card….
>
> The court's duty at this stage is to determine whether Congress implied a private remedy. After examining the plain language of the Act and its legislative history, the court concludes that LEOSA does not reflect Congress' intent to create a federal private remedy.

Id. at *3. The plaintiffs in *Moore* make the incomprehensible assertion that the denial of the permits violates 18 U.S.C. § 962, which prohibits the fitting-out of vessels to be employed against foreign states at peace with the United States. Class Action Complaint at 5, Moore v. Trent, No. 09 C 1712, 2010 WL 5232727 (N.D. Ill. Dec. 16, 2010) ("Defendants, acting in conjunction with each other and pursuant to a unified policy and practice, refuse to issue conceal carry permits to Plaintiffs and the class they purport to represent. This policy and practice violates 18 U.S.C. 962.").

Friedman v. Las Vegas Metropolitan Police Department, No. 2:14–CV–0821–GMN–GWF, 2014 WL 5472604, at *4 (D. Nev. Oct. 24, 2014), a case removed from state court, merely asserts the absence of a private right of action, in analysis that omits reference to section 1983 (as did the complaint) (stating, "Every court to have considered the question has held that no private right of action exists under LEOSA because Congress explicitly intended for states to establish and enforce their own concealed firearm certification standards."); *see also* Complaint, Friedman v. Las Vegas Metro. Police Dep't, No. 2:14–CV–0821–GMN–GWF, 2014 WL 5472604, at *4 (D. Nev. Oct. 24, 2014).

Johnson v. New York State Department of Correctional Services, 709 F. Supp. 2d 178, 183–184 (N.D.N.Y. 2010) (footnote omitted), focuses on the existence of an implied cause of action under *Cort v. Ash*, without discussing the possible existence of a remedy

whether LEOSA creates a right remediable under section 1983. The trend denying a remedy was interrupted by the 2016 decision in *DuBerry v. District of Columbia*,[218] where the court allows a cause of action to proceed under section 1983.

We shall first sketch the framework developed by the Supreme Court. Then we shall summarize conflicting implementations — one holding a claim could proced under section 1983 and another not.

The Supreme Court's framework. The Supreme Court has contrasted two theories for seeking a remedy (an implied right of action and a cause of action under section 1983) in the following way:

> In implied right of action cases, we employ the four-factor *Cort [v. Ash*] test to determine "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of express congressional authorization of private suits," these separation-of-powers concerns are not present in a § 1983 case.[219]

Two paragraphs in the Supreme Court's opinion in *Gonzaga University v. Doe*[220] detail a number of pertinent principles:

> (i) Both (x) finding whether an implied right of action exists and (y) determining whether an action is remediable under

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under section 1983: "Nothing in the text or structure of the statute bestows either an explicit right to obtain the identification required under § 926C(d) or a federal remedy for a state agency's failure to issue such identification. Therefore, Congress did not expressly intend to create a private cause of action under LEOSA."

A court, of course, may be constrained to address the theory presented by the complainant.

[218] 824 F.3d 1046 (D.C. Cir. 2016).

[219] Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509, 110 S. Ct. 2510, 2517 (1990) (quoting Middlesex County Sewerage Authority v. National Sea Clammers Ass'n., 453 U.S. 1, 19 (1981)) (citing Cort v. Ash, 422 U.S. 66 (1975)) (citations omitted). *Ziglar v. Abbasi*, No. 15–1358, 2017 WL 2621317, at *10 (U.S. June 19, 2017), suggests a retrenchment in the availability of a private right of action has developed subsequent to *Cort*.

[220] 536 U.S. 273 (2002).

section 1983, involve a determination of whether "Congress intended to create a federal right."[221]

(ii) Those two inquiries — whether Congress intended to create a federal right in these two contexts — are comparable ("no different," in the Court's language).[222]

(iii) For a federal right to be found to have been intended, the statute's "text must be 'phrased in terms of the persons benefited,'"[223] suggesting the statutory language must literally have "an unmistakable focus on the benefited class."[224] The court cites authority distinguishing statutory language that "focuses . . . on the agencies that will do the regulating."[225] So, there is an idiosyncratic focus on the style of the language used for this particular interpretative purpose.

(iv) Although a person alleging a federal statute creates a private right of action "must show that the statute manifests an intent 'to create not just a private right but also a private remedy,'"[226] a person asserting a remedy under section 1983 need not, because "because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes."[227]

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[221] 536 U.S. at 283 (emphasis removed).

[222] 536 U.S. at 285 ("[T]he initial inquiry — determining whether a statute confers any right at all — is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute 'confer[s] rights on a particular class of persons.'" (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

[223] 536 U.S. at 284 (quoting Cannon v. University of Chicago, 441 U.S. 677, 692, n. 13 (1979)).

[224] 536 U.S. at 284 (stating such statutory language creates individual rights and quoting Cannon v. University of Chicago, 441 U.S. 677, 691 (1979)).

[225] 536 U.S. at 284 n.3 (parenthetically citing, *inter alia*, Alexander v. Sandoval, 532 U.S. 275, 288 (2001), for the proposition that "existence or absence of rights-creating language is critical to the Court's inquiry"); *see also Alexander*, 532 U.S. at 289 (finding no right where the statutory language "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating").

[226] 536 U.S. at 284 (quoting *Sandoval*, 532 U.S. at 286).

[227] 536 U.S. at 284.

> (v) "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."[228]

Because the inquiry at hand involves deprivations by state actors,[229] we can begin our analysis with whether LEOSA creates a right remediable under section 1983, as opposed to whether LEOSA creates an implied right of action.

Blessing v. Freestone[230] identifies three factors traditionally referenced in determining whether a federal statute creates a right enforceable under section 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.[231]

After a plaintiff shows there is an enforceable right, a rebuttable presumption arises that the right is enforceable under section 1983.[232] "The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. Our cases have explained that evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.' 'The crucial consideration is what Congress intended.'"[233]

Following this approach, *Gonzaga University v. Doe* finds no such rights created in a statute whose language was focused on directing the activities of a government official, contrasting that conclusion with

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[228] 536 U.S. at 284.

[229] Section 1983 is limited to claims against persons acting "under color of" state law. 42 U.S.C. § 1983 (Westlaw through Pub. L. No. 115–40).

[230] 520 U.S. 329 (1997).

[231] *Blessing*, 520 U.S. at 340–41 (citations omitted).

[232] City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 120 (2005).

[233] *City of Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing*, 520 U.S. at 341; Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

prior authority finding rights where the statutory language focuses on the alleged beneficiaries ("No person . . . shall . . . be subjected to discrimination . . . .").[234]

The Court has recognized a statute as creating a right remediable under section 1983 where implementing the right is not perfunctory or routine. In *Wilder v. Virginia Hospital Association*,[235] the Supreme Court recognized a right to a remedy under section 1983 for a state's failure to adopt reasonable medical reimbursement rates.[236] So, one may conclude the following: that implementing the right is not

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[234] *Gonzaga*, 536 U.S. at 287 (stating, "FERPA's provisions speak only to the Secretary of Education, directing that '[n]o funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.' " (citing 20 U.S.C. § 1232g(b)(1))). *See also* Delancey v. City of Austin, 570 F.3d 590, 594 (5th Cir. 2009) (finding no right arising from language directing certain activities be taken by specified agencies).

Courts are retrenching in concluding spending legislation gives rise to rights enforceable under section 1983. *Gonzaga*, 536 U.S. at 281 ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes."); *compare* Long v. D.C. Hous. Auth., 166 F. Supp. 3d 16, 29–31 (D.D.C. 2016) (collecting cases with differing outcomes as to whether a right is created by the United States Housing Act of 1937, Pub. L. No. 75–412, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.) *with* California Ass'n of Rural Health Clinics v. Douglas, 738 F.3d 1007, 1013 (9th Cir. 2013) (holding "Medicaid providers have a private right of action to bring a § 1983 claim to enforce 42 U.S.C. § 1396a(bb)") *and* Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204, 212 (4th Cir. 2007) (same).

[235] 496 U.S. 498 (1990).

[236] The Court states in *Wilder*:

> Such an inquiry turns on whether "the provision in question was intend[ed] to benefit the putative plaintiff." If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is " 'too vague and amorphous' " such that it is " 'beyond the competence of the judiciary to enforce.' " Under this test, we conclude that the Act creates a right enforceable by health care providers under § 1983 to the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility that provides care to Medicaid patients. The right is not merely a procedural one that rates be accompanied by findings and assurances (however perfunctory) of reasonableness and adequacy; rather the Act provides a substantive right to reasonable and adequate rates as well.

Wilder, 496 U.S. at 509–10 (quoting Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989); *id.* at 106) (citation omitted).

perfunctory does not prevent the right's being enforceable under section 1983.

Allowing a section 1983 claim to proceed: *DuBerry v. District of Columbia.* *DuBerry v. District of Columbia*,[237] a 2016 opinion, holds LEOSA creates a right to carry a concealed firearm that is due protection under section 1983.[238] In the case, the court addresses a challenge to the District's failure to affirm the claimants had statutory powers of arrest (which those providing the firearms certification required).[239]

The language of LEOSA directly focuses on the alleged beneficiaries of a right, stating "an individual who is a qualified law enforcement officer . . . may carry a concealed firearm,"[240] and "an individual who is a qualified retired law enforcement officer . . . may carry a concealed firearm."[241] A focus on the first *Blessing* factor, concerning an intent to benefit qualified personnel, would not seem productive for one inclined to deny the existence of a right under section 1983.

In its analysis, the *DuBerry* court introduces a recitation of certain aspects of the legislative history by noting, "The legislative history demonstrates that Congress's purpose was to afford certain retired law enforcement officers, in view of the nature of their past law enforcement responsibilities, the present means of self-protection and protection for the officer's family and, as an added benefit, to provide additional safety for the communities where the officers live and visit."[242]

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[237] 824 F.3d 1046 (D.C. Cir. 2016).

[238] 824 F.3d at 1052, 1054.

[239] *Id.* at 1048, 1050.

The court rejects the assertion the claim that the right does not arise until a person obtains the requisite firearms certification:

> Consequently, the firearms certification requirement does not define the right itself but is rather a precondition to the exercise of that right. Understood as an individual right defined by federal law, the LEOSA concealed-carry right that appellants allege Congress intended for them to have is remediable under Section 1983. Their further allegation that they have been deprived of their ability to obtain and exercise that right because of the District of Columbia's unlawful action is sufficient to state a claim.

824 F.3d at 1050, 1055.

[240] 18 U.S.C. § 926B(a).

[241] 18 U.S.C. § 926C(a).

[242] 824 F.3d at 1054.

As to the second *Blessing* factor, *DuBerry* concludes the act is not too vague to prevent the existence of a right to a remedy. It describes LEOSA generally as "set[ting] specific requirements . . . in historical and objective terms."[243] As to the "existence and nature of [the applicant's] [] statutory power of arrest," the court does not suggest that determination is too "vague and amorphous" to strain judicial competence — one supposes it is a non-starter to suggest that it is beyond judicial competence to determine whether a person had statutory powers of arrest. The court merely references it as involving a factual question. In light of *Wilder v. Virginia Hospital Association*,[244] this application of this factor seems well within Supreme Court precedent.

As to the third factor (concerning creation of a binding obligation on the states), the court focuses on the "categorical preemption of state and local law" and "the nature of the ministerial inquiries" required of states and localities, as imposing mandatory duties.[245] The court does note the existence of retained discretion concerning a determination as to physical or mental incapacity, but summarily discards that as a basis for not finding the third factor as met, because the court states incapacity is not claimed and is thus not before the court.[246]

No enforceable right under section 1983: *Ramirez v. Port Authority of New York & New Jersey (PANYNJ).* On the other hand, *Ramirez v. Port Authority of New York & New Jersey (PANYNJ)*[247] holds LEOSA does not create a right enforceable under section 1983.[248] The relevant

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[243] 824 F.3d at 1053.

[244] 496 U.S. 498 (1990). *See generally supra* notes 235–236 and accompanying text for the circumstances of *Wilder.*

[245] 824 F.3d at 1053.

[246] 824 F.2d at 1054.

[247] No. 15cv3225 (DLC), 2015 WL 9463185 (S.D.N.Y. Dec. 28, 2015).

[248] A claim for false arrest was separately found wanting as follows:

> Finally, even if LEOSA protected Ramirez from arrest for carrying a concealed weapon and the DA's office should have known of its provisions, Ramirez was not charged with only that violation of the law. There was probable cause to prosecute Ramirez on the child endangerment charge because the loaded gun was found in the same area of the car as his two-year-old daughter's car seat. Ramirez does not dispute any of the material facts related to probable cause.

Ramirez, 2015 WL 9463185, at *5. The circumstances under which a mistake of law can be a basis for probable cause for arrest are in some flux and are beyond our scope. *See*

analysis in *Ramirez* comprises four paragraphs. The first mostly summarizes the *Blessing* factors and provides a one-sentence quotation from *Gonzaga University*. The second paragraph mostly attempts to compare the circumstances to the lower court opinion in *Duberry* (which the appellate court subsequently reversed, in an analysis summarized above). The third paragraph summarizes the application of the *Blessing* factors in *Torraco v. Port Authority of New York & New Jersey*,[249] which addresses whether a different federal firearms statute gives rise to a right enforceable under section 1983. The fourth paragraph concludes *Torraco* controls the result, stating in full:

> LEOSA shares these features, indicating that Congress did not intend to make its violation actionable under § 1983. This is true even assuming that LEOSA creates an individual right for law enforcement officers to carry concealed weapons under certain conditions. Like § 926A, enforcement of LEOSA is "vague and amorphous," indicating that Congress did not intend for it to create a right whose violation would be actionable under § 1983. The warning in *Torraco* that allowing actions for damages based on violations of LEOSA could cause law enforcement to hesitate before enforcing gun control laws further indicates that Congress did not intend to create a federal right. Because LEOSA does not create an individual right actionable under § 1983, Ramirez's § 1983 claims based on violations of LEOSA are dismissed.[250]

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generally, e.g., State v. Stoll, 370 P.3d 1130, 1135 (Ariz. Ct. App. 2016) ("We agree with the Seventh Circuit's reasoning that '*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an unambiguous statute." (quoting United States v. Stanbridge, 813 F.3d 1032, 1037 (7th Cir. 2016) (citing Heien v. North Carolina, 135 S. Ct. 530 (2014)); Flint v. City of Milwaukee, 91 F. Supp. 3d 1032, 1057–58 (E.D. Wis. 2015) (stating, as to a city's defense that an alleged mistake of law undermining probable cause for arrest, "[T]the Court has qualms about even applying *Heien* here, given that this is not a reasonable suspicion case. *But see J Mack LLC v. Leonard*, No. 13–CV–808, 2015 WL 519412, at *9, 2015 U.S. Dist. LEXIS 15259, at *22 (S.D.Ohio Feb. 9, 2015) (stating that the court 'has no reservation in extending *Heien's* rational to the probable cause analysis, especially given that the Supreme Court's decision is based in part on nineteenth century precedent that it characterized as establishing the proposition that a mistake of law can support a finding of probable cause')."").

249 615 F.3d 129 (2d Cir. 2010).

250 Ramirez, 2015 WL 9463185, at *6 (citation and footnote omitted).

Judge Cote's *Ramirez* opinion is an embarrassment, illustrative of the dismissive treatment of firearm rights by some federal courts. As an inferior court, it was bound to apply *Torraco* if it controlled the disposition. But *Torraco* did not control the decision, and *Torraco's* own reasoning is unsupported and thus cannot provide a basis for extension.

As to why *Torraco* did not control the decision in *Ramirez: Torraco* involves a different statute — the Firearms Owners' Protection Act.[251] That act allows interstate transport of firearms where the possession is lawful in both the origin and the destination, if other requirements are met.[252] The *Torraco* court concludes difficulties police officers would have in ascertaining the legality of conduct in multiple other jurisdictions, on which the federal preemption depends, fails the second *Blessing* factor.[253] The *Torraco* opinion asserts assuring compliance is impracticable, because an officer cannot be expected to be able to know whether the firearms possession will be lawful in both origin and destination locations.[254]

The issue before the court in *Ramirez* is not comparable. The legality of the possession involved in *Ramirez* does not require knowledge of the law governing firearms possession in multiple other states. The officer merely needs to know the federal law, and confirm the existence of valid credentials.

A difficulty in ascertaining whether credentials are valid was identified and resolved during debate on LEOSA. The International

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[251] Pub. L. No. 99–308, 100 Stat. 449 (1986) (codified at 18 U.S.C. § 926A and other scattered sections of 18 U.S.C.) *amended by* Pub. L. No. 99–360, 100 Stat. 766 (1986).

[252] The firearm has to be unloaded and not readily accessible. 18 U.S.C. § 926A. In addition, courts have held that the poorly-written language requires the firearm be in the course of being transported in a vehicle, so that the statute does not protect transport of a firearm from a vehicle to an airline counter for check-in. Ass'n of New Jersey Rifle & Pistol Clubs Inc. v. Port Auth. of New York & New Jersey, 730 F.3d 252, 255 (3d Cir. 2013). ("It is plain . . . that the statute protects only transportation of a firearm in a vehicle . . . .").

[253] 615 F.3d at 136–39.

[254] *Torraco*, 615 F.3d at 138 ("Thus, in Weasner's case, a police officer's liability could turn on the correctness of his on-the-spot determination about whether Weasner's hotel in New Jersey constituted a residence, and whether his trip to Ohio constituted a move. In Torraco's case, a police officer would be obligated to speculate whether Torraco's brief stop in New York prior to proceeding to the airport was 'reasonably necessary under the circumstances.' ").

Association of Chiefs of Police, who opposed the legislation, "expressed concern that because of difficulty in verifying the identity and eligibility of out-of-State law enforcement officers, passage of the bill could lead to a tragic situation where officers from other jurisdictions are wounded or killed by local police."[255] Among a laundry list of objections expressed by Representative Waters, who also opposed the legislation,[256] was difficulty in verification of the credentials.[257]

The House Committee focused on the extent to which the credentials should allow a law enforcement official to ascertain whether a person asserting rights under LEOSA was qualified. Rep. Sensenbrenner described an approved amendment he offered as "help[ing] officers clarify the good standing of individuals they may encounter."[258]

In sum, the House considered the extent to which the contemplated credentials ought to be adequate from the perspective of law enforcement officials encountering persons asserting rights under LEOSA, and amended the bill in light of one such specific concern. It did so after broader concerns with verification of credentials were raised. The legislative history does not support the view that the

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[255] H.R. Rep. No. 108–560, at 4 (2004).

[256] *Id.* at 87 (dissenting Views of Rep. Conyers et al.).

[257] *Id.* at 57 (statement of Rep. Waters) ("I am not impressed with the fact that someone representing themselves as a law enforcement officer has a picture and even a badge. How do we know if they really are law enforcement officers, and how does the jurisdiction in which this officer attempts to enter know and how are they able to verify, do they have the means by which to do that, to ensure that this really is a law enforcement officer?").

[258] *Id.* at 27 (statement of Rep. Sensenbrenner) ("To help officers clarify the good standing of individuals they may encounter during a traffic stop or other similar situations, I have included in my amendment that the identification must show that the officer has received training in the last 12 months or the officer must carry a separate certification proving that he is current in his training. I believe that this amendment is an improvement to the legislation, and I ask my colleagues to support it. You know, I would note that the identification in the originally introduced legislation does not require that the identification include that the officer or retired officer is current in training because the provisions of the legislation are limited to those who are current in training. There ought to be something that the officer carries, that he or she indeed qualifies under the legislation. My amendment fixes it up, and I would urge support for the amendment."); *id.* at 31 (statement of Rep. Sensenbrenner) (announcing the amendment was agreed-to).

statute was designed to allow the right LEOSA crafts to be fettered by law enforcement officers who quibble over the credentials.

Moreover, any court should be cautious in extending *Torraco*, because its analysis is suspect. The relevant *Blessing* factor involves difficulties for the *judiciary* if a right is recognized,[259] whereas the difficulty *Torraco* references is one of a different governmental branch. *Torraco* manufactures a *sui generis* concern arising from absence of evidence of an intend that police officers could be personally liable.[260]

It is legitimate to question whether some obscure legal principle obviates the legality of what otherwise would appear to be lawful police officer conduct and thereby subjects a government employee to crippling personal liability. The problem with the *Torraco/Ramriez* approach is that it attempts to integrate the concern in the wrong component of the analysis. Rather, this concern is part of assessing the existence of qualified immunity that, if applicable, would eliminate personal liability.[261] By treating the issue as a factor to the existence of a right at all improperly eliminates, for example, the ability of a person deprived of the right to compel training in a lawsuit seeking injunctive relief against a municipality. Concerns with personal liability of individual officers need not and should not pretermit such a claim.

3. Limits of Section 1983 Remedial Provisions. Even if a court holds that LEOSA creates a right enforceable under section 1983, the detailed principles governing immunities under section 1983 might operate to prevent a claim in a particular case. The intricacy of the immunity principles prevents a comprehensive assessment of their application in the myriad circumstances where a claim of right under LEOSA could be asserted. However, there are a few specific issues that merit identification and some brief commentary:

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259 *See supra* note 231 and accompanying text.

260 *E.g.*, 615 F.3d at 137 ("We find no evidence either in the text or structure of Section 926A that would indicate that Congress intended that police officers tasked with enforcing state gun laws should be liable for damages when they fail to correctly apply Section 926A.").

261 *See infra* notes 273–276 and accompanying text.

(i) individual liability of an officer who deprives a person of rights under LEOSA may depend on whether this fits within the "extraordinary circumstances" exception;[262]

(ii) municipal liability depends on the activity being by virtue of a custom or policy; and

(iii) municipal liability for wrongful denial of a credential may depend on somewhat complex issues of whether the actor is treated as one who can, by virtue of his office, make "policy."

We will sketch the basic landscape and illuminate some of the relevant applications.

The scope of the limits depends on whether the claims are against a state and its officials or municipalities and their officials. A state cannot be sued under section 1983.[263] State officials cannot be sued under section 1983 in their official capacities for damages,[264] although they can be so sued for damages in their individual capacities.[265] And they can be sued for injunctive relief in their official capacities[266] (but not in their personal capacities[267]) although in such a lawsuit, "the entity's

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[262] *See, e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 9A.05 (4th ed. Westlaw through 2018-1 Supp.); 15 Am. Jur. 2d *Civil Rights* § 116 (Westlaw through Nov. 2017).

263 Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989) ("[A] State is not a person within the meaning of § 1983."); *cf.* 42 U.S.C. § 1983 (stating "[e]very *person* … shall be liable ….") (Westlaw through Pub. L. No. 115–40) (emphasis added).

[264] Hafer v. Melo, 502 U.S. 21, 26 (1991).

[265] *Hafer*, 502 U.S. at 23.

[266] Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'").

[267] Barrish v. Cappy, No. CIV.A. 06–837, 2006 WL 999974, at *4 (E.D. Pa. Apr. 17, 2006) (concerning Pennsylvania Supreme Court Justice). The same holds true for an attempt to seek injunctive relief against a municipal official acting in his or her personal capacity. Evans v. Bayer, 684 F. Supp. 2d 1365, 1369 (S.D. Fla. 2010) (stating, as to a remedy sought against a school principal, "An issue remains, however, concerning whether injunctive relief can be sought against a defendant in his individual capacity if the act must be in his official capacity to have official consequences. The Court finds the answer to be no.").

'policy or custom' must have played a part in the violation of federal law."[268]

On the other hand, "*Monell v. Department of Social Services* held that local governmental bodies are persons under § 1983 and, hence, directly suable for compensatory damages and declaratory and injunctive relief. . . . The Court also concluded in *Monell* that local governmental officials may be sued in their official capacity for damages and retrospective declaratory and injunctive relief even though the local governmental body itself pays."[269] Persons suing a municipality, whether for damages or prospective relief ("such as an injunction or a declaratory judgment")[270] under section 1983 "must show that their injury was caused by a municipal policy or custom."[271] This requirement for a "municipal policy or custom" has been applied by lower courts to claims for injunctive relief against municipal officials sued in their official capacities.[272]

Extraordinary circumstances. Under what are sometimes referenced as "extraordinary circumstances,"[273] an employee can nevertheless avoid personal liability for infringement of a right secured by section 1983. For example:

> [O]fficers can still prevail if they claim "extraordinary circumstances and can prove that [they] neither knew nor should have known of the relevant legal standard. But . . . the defense would turn primarily on objective factors."[274]

An older statement of the principle is:

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[268] Moreno v. Ryan, No. CV1508312PCTSRBJZB, 2017 WL 2214703, at *4–5 (D. Ariz. May 19, 2017); Aleto v. State of California, No. EDCV150842RGKJEM, 2015 WL 9305626, at *4 (C.D. Cal. Dec. 21, 2015) (same).

[269] SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 6:5 (Westlaw through September 2016) (footnotes omitted) (citing Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978)).

[270] Los Angeles Cty., Cal. v. Humphries, 562 U.S. 29, 31 (2010).

[271] Los Angeles Cty., Cal. v. Humphries, 562 U.S. at 30–31.

[272] Jewell v. Miller Cty., Ark., 489 F. App'x 993, 994 (8th Cir. 2012); Cain v. City of New Orleans, No. CV 15–4479, 2017 WL 467685, at *15 (E.D. La. Feb. 3, 2017).

[273] *See supra* note 262 and accompanying text.

[274] Wesby v. District of Columbia, 841 F. Supp. 2d 20, 38 (D.D.C. 2012), *aff'd*, 765 F.3d 13 (D.C. Cir. 2014); *reh'g den'd*, 816 F.3d 96 (D.C. Cir. 2016); *cert. granted*, 137 S. Ct. 826 (2017) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (citation omitted).

> Ordinarily, a qualified immunity defense will fail if, as here, the law was clearly established at the time the action occurred, "since a reasonably competent public official should know the law governing his conduct." However, if the official claims that extraordinary circumstances existed and can prove, based on objective factors, that he neither knew nor should have known the relevant legal standard, the defense should be applied. "[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and * * * in such cases those officials * * * should not be held personally liable."[275]

This principle allows for recognition of the type of flexibility in curtailing individual liability — of the type of concern in *Ramirez v. Port Authority of New York & New Jersey (PANYNJ)*[276] — and nevertheless allow for vindication of rights where non-monetary relief is sought or where the concerns for limiting liability are less compelling, as would be the case where a municipality contumaciously adopts a policy flouting LEOSA.

"Policy or custom" requirement. The "policy or custom" requirement may materially curtail the availability of a remedy against a municipality. Although a unilateral action by an inferior employee would not be included, a single decision can constitute a "policy" for these purposes,[277] where made by one "whose acts or edicts may fairly be said to represent official policy."[278] For example, a court has noted as to a sheriff's decisions not to maintain records required under state law of prisoner work:

> We note that even "a single decision may create municipal liability *if* that decision were made by a final policymaker responsible for that activity." Sheriffs in Mississippi are final policymakers with respect to all law enforcement decisions made within their counties. Sheriff Howell admitted on the record that the department kept none of the required records detailing the

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[275] E-Z Mart Stores, Inc. v. Kirksey, 885 F.2d 476, 478 (8th Cir. 1989) (quoting *Harlow*, 457 U.S. at 818–19; and Anderson, Anderson v. Creighton, 483 U.S. 635, 641 (1987)) (citation omitted).

[276] No. 15cv3225 (DLC), 2015 WL 9463185 (S.D.N.Y. Dec. 28, 2015).

[277] Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

[278] *Id.*

> locations and number of days prisoners worked. The jury could infer from this statement that the county had a policy of not keeping such records.[279]

Because the classification as to who has final policymaking authority is a question of state law,[280] the unilateral acts of a sheriff or police chief might or might not constitute a "policy." Even in the absence of a "policy," an action allegedly inconsistent with LEOSA might be treated as custom, sufficient to give rise to a remedy:

> Proof of random acts or isolated events is insufficient to establish custom. But a plaintiff may prove "the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal officials were not discharged or reprimanded." Once such a showing is made, a municipality may be liable for its custom "irrespective of whether official policy-makers had actual knowledge of the practice at issue."[281]

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[279] Brooks v. George Cty., Miss., 84 F.3d 157, 165 (5th Cir. 1996) (quoting Brown v. Bryan County, Oklahoma, 67 F.3d 1174, 1183 (5th Cir.1995) (emphasis in *Brown*)) (citations omitted).

[280] *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989) (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion)) ("[W]hether a particular official has 'final policymaking authority' is a question of state law."). *See generally, e.g.*, Kelley v. LaForce, 288 F.3d 1, 10 (1st Cir. 2002) (granting summary judgment on basis that complaint asserts the town administrator ordered an individual's ejection of a pub manager, negating the claim the police chief had final policy-making authority); Gros v. City of Grand Prairie, Tex., 181 F.3d 613, 617 (5th Cir. 1999) (remanding for determination whether city chief of police had final policymaking authority in connection with claims for abusive traffic stop); Bennett v. Pippin, 74 F.3d 578, 586 (5th Cir. 1996) (quoting Turner v. Upton Cty., Tex., 915 F.2d 133, 136 (5th Cir. 1990)) (stating, as to claims arising from an alleged rape by a sheriff in the course of an investigation, "In this circuit, '[i]t has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of the delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected.'").

[281] Navarro v. Block, 72 F.3d 712, 714–15 (9th Cir. 1995), *as amended on denial of reh'g* (Jan. 12, 1996) (quoting Gillette v. Delmore, 979 F.2d 1342, 1348 (9th Cir.1992); Thompson v. City of Los Angeles, 885 F.2d 1439, 1444 (9th Cir. 1989)). Another statement is provided in *Mitchell v. City & County of Denver*, 112 F. App'x 662 (10th Cir. 2004):

> A custom is a "persistent and widespread" practice which "constitutes the standard operating procedure of the local governmental entity." It may also be a

The clearly established right requirement; illustrations. State and local officials benefit from qualified immunity in damages actions,[282] but not in claims for injunctive relief or declaratory judgments.[283] The Supreme Court has recently noted the following concerning qualified immunity:

> series of decisions by a subordinate official of which the supervisor must have been aware. Liability attaches in such a case, because "the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official." "But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority."

Id. at 672 (quoting Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112, 130 (1988) (plurality); *id.* (footnote and citation omitted). George M. Weaver, *Ratification As an Exception to the S 1983 Causation Requirement: Plaintiff's Opportunity or Illusion?*, 89 NEB. L. REV. 358, 373–77 (2010) (collecting cases addressing the number of incidents sufficient or insufficient to find a custom).

A review of model jury instructions reveals the following vague standard as to what might be a custom:

> A "policy or custom" includes a … practice or course of conduct that is so widespread that it has acquired the force of law — even if the practice has not been formally approved. You may find that a "policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that [name of city]'s policymaker[s] either knew of it, or should have known of it.

3B KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 168:180 (6th ed. Westlaw through Aug. 2016). Another illustration: "Official [policy/custom]" means: [*insert one of the following*:] … [A custom that is a permanent, widespread, or well-settled practice of the [city/county] …." Judicial Council of California Advisory Committee on Civil Jury Instructions, Judicial Council of California Civil Jury Instruction 3002, Judicial Council of California Civil Jury Instruction 3002 (Westlaw through July 2017). *See generally* Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and A Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 593–94 (2014) (discussing use of statistical evidence to prove a custom).

[282] *E.g.*, Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (addressing state police officers); SHELDON H. NAHMOD CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:98 (Westlaw through Sept. 2016) ("The decisions of the Supreme Court and the circuits demonstrate that the qualified immunity test covers all state and local government officials at all levels of responsibility, with the exception of those who have absolute immunity.").

[283] DAVID W. LEE, HANDBOOK OF SECTION 1983 LITIGATION § 9.03 (2017) ("Qualified immunity does not apply to § 1983 suits for injunctive or declaratory relief.").

> A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. A right is clearly established only if its contours are sufficiently clear that "a reasonable official would understand that what he is doing violates that right." In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." This doctrine "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.' "[284]

These limits on rights to recover under section 1983 create an intricate mosaic that may operate to prevent vindication of rights under LEOSA in a particular context. A few ways in which that may play-out can be sketched.

As noted, a person seeking injunctive relief must demonstrate a violation of a policy or custom.[285] The credential might be sought, for example, from a sheriff or chief of police, whose acts might not constitute a "policy."[286] And there might not be enough denials to evidence a persistent and widespread practice,[287] as "random acts or isolated incidents" are normally insufficient.[288] (Of course, arrests in

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[284] Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (addressing state police officers) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987); Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); *id.* at 743; *id.* (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)) (citation omitted). Justice Thomas has recently criticized the landscape of the current jurisprudence, stating, "Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act." Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

[285] *See supra* notes 268–271 and accompanying text.

[286] *See supra* note 279–280 and accompanying text.

[287] *See supra* note 281 and accompanying text.

[288] Daniel v. Hancock Cty. Sch. Dist., 626 F. App'x 825, 832 (11th Cir. 2015).

It bears mention that this context may be somewhat different than the norm, in ways not typically captured in the litigation but that a court could well find important. If a private person is denied prospective relief as to a credential, that is inherently an ongoing denial. The need for repeated occurrences is sometimes referenced in the context of assuring the decision-maker is aware of the actions. *E.g.*, *Hancock Cty. Sch. Dist.*, 626 F. at 832 ("Indeed, the practice must be extensive enough to allow actual or

violation of LEOSA are particularly likely not to be pursuant to a policy and subject to the normal limits on frequency so as not to constitute a custom.)

Thus, a claim for injunctive relief under section 1983 as to failure to assist with obtaining credentials may fail because there is not a state or municipal "policy" or adequately widespread custom[289] that is inconsistent with LEOSA, and the persons involved in the denial were not final policymakers under state law.

In such a case, a claim against the person who failed to issue the credential in his or her individual capacity might fail because the right to a credential is not "clearly established" (giving the individual qualified immunity), unless the denial was treated as non-discretionary, ministerial act (litigated in a court recognizing that exception).[290] Under current doctrine,[291] a court determining there is not a clearly established right need not in that case (and often does not) in that opinion address whether the right exists.[292] So, the availability

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constructive knowledge of such customs or policies to be attributed to the governing body of the municipality.") A court could take the position that denials of firearms permits that result in requests for prospective relief are necessarily going to involve decision-makers becoming aware of the circumstances and, therefore, the denial is necessarily a product of a policy.

[289] An illustration of adequate allegations of a custom is provided by *Perros v. County of Nassau*, No. CV 15–5598, 2017 WL 728711, at *5 (E.D.N.Y. Feb. 24, 2017) (finding adequate allegations of a custom in equal protection challenge to denial of documentation (so-called "good-guy letters") allegedly on the basis of retirement on the basis of disability). *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. Pro. 12(b), at 33, *Perros*, 2017 WL 728711 (six named plaintiffs and statement denial on account of retirement for disability); First Amended Complaint at 8, *Perros*, 2017 WL 728711 (alleging "Defendant['s] . . . sole reason for his denial was the fact that Plaintiffs were injured and/or was disabled for medical reasons at the time of their application for retirement.").

[290] *See supra* note 293 and accompanying text.

[291] In 2009, the Supreme Court held, "The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson v. Callahan, 555 U.S. 223, 236 (2009). This reversed the approach the Court dictated only a few years before in *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (addressing constitutional rights).

[292] *E.g.*, Chesney v. City of Jackson, 171 F. Supp. 3d 605, 609, 619–22 (E.D. Mich. 2016) (finding, as to one who carried a firearm in a government building and also defended on First Amendment grounds, the right under the Second Amendment to

of a remedy might require a sufficient passage of time so that there are sufficient denials to constitute a custom. If the credentialing entity is local, that might not happen quickly. And even if a state entity does the credentialing, that might not happen quickly if denials are inconsistent.

However, some authority holds that qualified immunity does not apply to non-discretionary, ministerial acts.[293]

CONCLUSION

The purposes supporting adoption of LEOSA are to allow the covered individuals, certain current and retired qualified law enforcement personnel, to protect themselves, in light of circumstances that may have arisen from their work in that capacity; and to allow these persons potentially to supplement local law enforcement efforts.[294] The act is one of a number that preempt state firearms regulation, including the

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carry a firearm outside the home was not clearly established, eliding a determination of whether such a right exists). To provide another illustration, *Schaefer v. Whitted*, 121 F. Supp. 3d 701, 707 (W.D. Tex. 2015), involves allegations that, immediately upon a person's exiting his house with a holstered firearm, "Without identifying himself, and without warning, [an officer, one Whitted,] immediately grabbed [the occupant's] left arm in an attempt to physically remove the gun from its holster," quickly leading to the homeowner being shot to death. The court concludes, "[T]here is no clearly established rules putting Officer Whitted on notice his actions *even implicated* the Second Amendment." *Id.* at 711 (emphasis added). The case elides addressing the scope of the right, although it does nevertheless allow to proceed claims seeking increased training for use of deadly force, interaction with persons legally armed and the Second Amendment. *Id.* at 719. Certain claims asserting Fourth Amendment violations were allowed to proceed. *Id.* at 715.

293 Groten v. California, 251 F.3d 844, 851 (9th Cir. 2001) (stating as to an alleged failure to provide the complainant with proper application materials for reciprocal real estate licensure, "These ministerial acts are unshielded by qualified immunity, which protects 'only actions taken pursuant to discretionary functions.'") (quoting F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1314 (9th Cir. 1989)); Brooks v. George County, 84 F.3d 157, 165 (5th Cir. 1996) (addressing failure to maintain records of a trusty's work, "Mississippi law, as quoted above, imposes on Sheriff Howell a non-discretionary duty to keep records of work performed by pretrial detainees and to transmit those records to the board of supervisors so that pretrial detainees can be paid. Sheriff Howell thus is not entitled to qualified immunity from individual liability on this due process claim.").

294 See supra note 242 and accompanying text.

Armored Car Industry Reciprocity Act of 1993,[295] and the Firearms Owners' Protection Act.[296] Some of the state responses to LEOSA seem contumacious. For example, we have a state that publicly purports to prohibit certain ammunition be carried by qualifying personnel,[297] when that position is directly contradicted by LEOSA's text. Such a response is, of course, manifestly unsatisfactory.

Although LEOSA was initially adopted in 2004,[298] there remain basic questions concerning its scope. A primary issue not yet answered by the courts is whether the act preempts state and local restrictions on possession of firearms having particular features (other than bans on fully automatic firearms and sound suppressors). This is an important question for those who would wish to rely on LEOSA. In the view of some, state restrictions that ban magazines, owned by private persons in the tens of millions or more, would remain applicable.[299] It would allow to subsist application to qualifying personnel of other obscure local restrictions, such as those in Chicago prohibiting laser sights on handguns.

There is a substantial impediment to realization of the act's goals — allowing qualifying personnel to travel nation-wide and be able to protect themselves, and potentially assist local law enforcement — if the preemption is incomplete, requiring the qualifying persons ascertain whether the particular firearms features are banned in every locality they transit. Although it is clear why a jurisdiction that did not wish to have its laws preempted would wish for a maze of local regulations to make use of the right impracticable, the question for students of the law is whether the statute admits of this interpretation that would frustrate its evident purposes.

The argument that these restrictions on firearms features are not preempted is rather laughable. It involves what purports to be a literal

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[295] *Id.* (referencing the Armored Car Industry Reciprocity Act of 1993, Pub. L. No. 103–55, 107 Stat. 276 (1993) (codified as amended at 15 U.S.C. §§ 5901–5904 (Westlaw through Pub. L. No. 115–40))).

[296] Pub. L. No. 99–308, 100 Stat. 449 (1986) (codified at 18 U.S.C. § 926A and other scattered sections of 18 U.S.C.), *amended by* Pub. L. No. 99–360, 100 Stat. 766 (1986).

[297] *See supra* note 85 and accompanying text.

[298] Law Enforcement Officers Safety Act of 2004, Pub. L. No. 108–277, 118 Stat. 865 (2004).

[299] *See supra* note 54 and accompanying text.

interpretation of the statutory language but, ironically, does not actually reflect an understanding of what is meant by a literal interpretation.[300]

The absurd view that one might encounter is that the statute does not make express reference to "magazines" and, thus, a literal interpretation compels the conclusion that the statute does not preempt restrictions on magazine limits. To assert a literal interpretation requires a particular conclusion, one necessarily must apply the actual statutory language. The statute states, "Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual . . . may carry a concealed firearm . . . ."[301] It then defines "firearm." An ordinary semi-automatic pistol having inserted in it, for example, an original equipment manufacturer's 17-round magazine, for example, is literally within that definition of firearm.[302] So, the statute literally states that, as to this firearm having this particular component, a qualifying person can carry it in a state, notwithstanding "any other provision of" state law.

A focused state or local ban, e.g., one referencing magazine size, is literally included in "any other provision of" state law. Thus, the statute literally provides the illustrative firearm can be carried notwithstanding such a ban. This rather foolish interpretative approach is not literal at all. It requires that "any" does not mean "any;" that statutory reference to "notwithstanding any other provision of the law of any State" does not mean what it says but, rather, "notwithstanding *some* other provision[s] of the law of any state." Because "any" does not mean "only some," an assertion that restrictions on firearm features, such as the capacity of its integral component, a magazine, is not a literal reading of the statute.

To conclude LEOSA does not preempt state and local restrictions on firearms features:

> (i) One would need to find the facially unambiguous statutory language is ambiguous.[303]

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300 *See supra* notes 62–64 and accompanying text.

301 18 U.S.C. §§ 926B(a) (Westlaw through Pub. L. No. 115–40); *see also id.* § 926C(a).

302 *See supra* note 56 and accompanying text.

303 *See supra* notes 60–64 and accompanying text.

(ii) One would need to avoid application of the "cardinal" principle of construction that rejects an interpretation that makes language surplusage.[304]

(iii) One would need to distinguish construction of similar language in another section of the Gun Control Act of 1968, FOPA, which should be construed *in pari materia*, which has been construed as preempting state or local restrictions on firearm features.[305] To conclude that authority is incorrect would substantially eviscerate the efficacy of that other section and be inconsistent with its prior judicial construction.

(iv) One would need to ignore the legislative history, which indicates LEOSA was intended to allow qualified persons to possess "*any* gun," other than those whose features by express provision are not subject to preemption.[306]

(v) One would need to reject a position expressly taken by the United States in litigation, that LEOSA preempts restrictions on firearms because the arms have particular features (there, a semi-automatic sporting rifle).[307]

(vi) One would need to reject application of the rule of lenity.[308]

There is nothing in the statute or its context that would support those conclusions, so as to make the carrying of a firearm authorized by LEOSA impracticable for qualifying persons.

The argument that one encounters that LEOSA does not allow qualifying persons to possess firearms within 1000 feet of an elementary or secondary school[309] is almost as absurd. It suasion is confined to those who misunderstand the principle of statutory construction as involving assembly of the parsing of sentence fragments and stopping there — those eliding judicial conclusions that, for example, (i) principles of statutory construction may cause a category comprising "tangible object" not to include, as inconsistent

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304 *See supra* notes 65–73 and accompanying text.

305 *See supra* notes 74–77 and accompanying text.

306 *See supra* note 78 and accompanying text.

307 *See supra* notes 80–81 and accompanying text.

308 *See supra* notes 82–83 and accompanying text.

309 *See supra* notes 116–118 and accompanying text.

with statutory objectives, fish;[310] and (ii) from the context, statutory reference to something "established by the state" might, under some principles of construction, involve something the state in fact declined to establish. Finding that persons benefitting from LEOSA are not prohibited to carry firearms within 1000 feet of a school is a much more straight-forward process than those conclusions that the Supreme Court has reached.

A conclusion that licensure under LEOSA does not satisfy the licensure requirements under the Gun-Free School Zones Act would necessitate a conclusion, by construing sections *in pari materia*, that persons authorized to carry firearms out-of-state under the Armored Car Industry Reciprocity Act of 1993[311] cannot do so within 1000 feet of a school. That, of course, would effectively disarm these personnel out-of-state and is a result that can be rejected as inherently absurd.

The legislative history is clear that the act was intended to allow qualifying personnel to carry concealed firearms "anywhere within the United States," subject to the express limitations in the statute as to private property and state and local property. The five-sentence summary of the House report states that. Assorted Representatives stated that. All the references in the legislative history to "schools" indicate the act was understood as not resulting in qualifying personnel being effectively prohibited from carrying a firearm within 1000 feet of a school.[312] Were that to have been understood, there would not have been a proposal to amend the statute so as to not preempt state restrictions of firearms on schools — but there was such an amendment (albeit one that was rejected).[313]

After *King v. Burwell*,[314] the conclusion that the Gun-Free School Zones Act does not apply to persons carrying firearms under LEOSA follows *a fortiori*.

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[310] *See supra* notes 153–157 and accompanying text.

[311] See supra note 165–169 and accompanying text (referencing the Armored Car Industry Reciprocity Act of 1993, Pub. L. No. 103–55, 107 Stat. 276 (1993) (codified as amended at 15 U.S.C. §§ 5901–5904 (Westlaw through Pub. L. No. 115–40))).

[312] *See supra* notes 138–143 and accompanying text.

[313] *See supra* note 143 and accompanying text.

[314] King v. Burwell, 135 S. Ct. 2480, 2482 (2015).

The better view is that LEOSA creates a right enforceable under section 1983. The contrary view, expressed in *Ramirez v. Port Authority of New York & New Jersey (PANYNJ)*,[315] is poorly reasoned. *Ramirez* inexplicably takes the position that some *other statute* is too burdensome to subject local law enforcement officials to financial liability for non-compliance, so LEOSA should not give rise to a right under section 1983.[316] To state the analysis is to reject it. Moreover, the authority on which *Ramirez* relies, *Torraco v. Port Authority of New York & New Jersey*,[317] is doctrinally defective.[318] It in fact admittedly fails to apply the terms of a Supreme Court analysis that it recites as applicable.[319]

Objections that LEOSA would give rise to a right that would be invalid under principles prohibiting commandeering reflect a misunderstanding of Supreme Court precedent. The Court has, in fact, validated federal regulation that requires a state to engage in activity that it finds burdensome, and that actually requires a state to provide information (evidence of ownership, in that case) to the public. [320] An argument that the federal government cannot force a state to provide information (in the case at hand, confirmation of a person's prior employment) is inconsistent with Supreme Court precedent. One error of courts that have found a commandeering problem is their failure to recognize, as the cases make patent, that the proscription on commandeering is limited to federal impositions "requir[ing] state officials to assist in the enforcement of federal statutes *regulating private individuals*."[321] LEOSA does not do this. Rather, it involves federal impositions arising from preventing states and localities from criminalizing particular conduct.

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[315] No. 15cv3225 (DLC), 2015 WL 9463185 (S.D.N.Y. Dec. 28, 2015); *see supra* note 247 and accompanying text.

[316] *See supra* notes 250 and accompanying text.

[317] 615 F.3d 129 (2d Cir. 2010).

[318] *See supra* notes 259–260 and accompanying text.

[319] *See* Torraco v. Port Auth. of New York & New Jersey, 615 F.3d 129, 137 (2d Cir. 2010) ("Appellants are correct that the language of the second factor focuses on whether the rights conferred would be difficult for the *judiciary*, as opposed to law enforcement officials, to identify and enforce.").

[320] *See supra* note 204–208 and accompanying text.

[321] Reno v. Condon, 528 U.S. 141, 151 (2000) (emphasis added).

The remedial limits that have been developed for claims under section 1983, as Justice Thomas has recently noted, are not actually tethered to "the common-law backdrop against which Congress enacted the 1871 Act."[322] Insofar as a court finds a need not to allow a damages remedy to the careless but not contumacious police officer who fails to recognize the scope of LEOSA and arrests a person for acts protected by LEOSA, the Supreme Court can either amplify extant exceptional circumstances exceptions or create another *sui generis* component to this *sui generis* remedial scheme. It need not simply conclude that the *sui generis* remedial scheme is now so frozen that no right whatsoever can be recognized to have been created under LEOSA, even for injunctive relief.

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[322] Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment).