

Representative Brian M. Greene proposes the following substitute bill:

SECOND AMENDMENT PRESERVATION ACT

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian M. Greene

Senate Sponsor: Margaret Dayton

6	Cosponsors:	Keith Grover	Michael E. Noel
7	Jacob L. Anderegg	Ken Ivory	Curtis Oda
8	Jerry B. Anderson	Michael S. Kennedy	Jeremy A. Peterson
9	Kay J. Christofferson	David E. Lifferth	Paul Ray
10	Rich Cunningham	John G. Mathis	Marc K. Roberts
11	Gage Froerer	Daniel McCay	John R. Westwood
12	Francis D. Gibson	Mike K. McKell	Ryan D. Wilcox
13	Richard A. Greenwood	Ronda Rudd Menlove	

LONG TITLE

General Description:

This bill affirms that the regulation of intrastate firearm activity is subject to the exclusive jurisdiction of the state.

Highlighted Provisions:

This bill:

- affirms that it is the exclusive authority of the state Legislature to adopt and enact any and all laws, orders, rules, or regulations regarding the manufacture, transfer, possession, ownership, and use of firearms exclusively within this state;
- provides that state officials and employees may not enforce, or be compelled to



25 enforce, federal regulations related to firearms; and

26 ▶ provides that federal officials may not enforce contrary federal regulations related to
27 intrastate firearm activity

28 **Money Appropriated in this Bill:**

29 None

30 **Other Special Clauses:**

31 This bill provides an immediate effective date.

32 **Utah Code Sections Affected:**

33 AMENDS:

34 **63C-4-102**, as last amended by Laws of Utah 2012, Chapters 324 and 377

35 ENACTS:

36 **53-5c-101**, Utah Code Annotated 1953

37 **53-5c-102**, Utah Code Annotated 1953

38 **53-5c-103**, Utah Code Annotated 1953



40 *Be it enacted by the Legislature of the state of Utah:*

41 Section 1. Section **53-5c-101** is enacted to read:

42 **CHAPTER 5c. SECOND AMENDMENT PRESERVATION ACT**

43 **53-5c-101. Title.**

44 This chapter is known as the "Second Amendment Preservation Act."

45 Section 2. Section **53-5c-102** is enacted to read:

46 **53-5c-102. Legislative authority.**

47 In addition to the provisions of Sections 53-5a-102 and 76-10-500, and with respect to
48 wholly intrastate activity, the Legislature:

49 (1) affirms that all statutes, orders, rules, and regulations pertaining to the regulation of
50 firearms, firearm accessories, ammunition, or ammunition components enacted or authorized
51 by the Legislature shall enjoy legal primacy within this state over any and all conflicting federal
52 statutes, orders, rules, and regulations; and

53 (2) finds that a federal statute, regulation, rule, or order that has the purpose, intent, or
54 effect of confiscating or banning any firearm, firearm accessory, limiting the capacity of a
55 firearm magazine, imposing any limitation on ammunition or an ammunition component, or

56 requiring the registration of any firearm or ammunition infringes on the right of citizens of
57 Utah to keep and bear arms as protected by the Second Amendment to the United States
58 Constitution and Article I, Section 6 of the Utah Constitution.

59 Section 3. Section **53-5c-103** is enacted to read:

60 **53-5c-103. Prohibition of certain actions by state and federal officers and**
61 **employees.**

62 (1) An officer or employee of this state, or of any political subdivision, may not
63 enforce, attempt to enforce, or be compelled to enforce any federal statute, order, rule, or
64 regulation relating to the intrastate ownership, possession, sale, or transfer of a personal
65 firearm, a firearm accessory, ammunition, or ammunition component.

66 (2) An officer or employee of the federal government may not enforce or attempt to
67 enforce any federal statute, order, rule, or regulation relating to the intrastate ownership,
68 possession, sale, or transfer of a personal firearm, a firearm accessory, ammunition, or
69 ammunition component.

70 Section 4. Section **63C-4-102** is amended to read:

71 **63C-4-102. Duties.**

72 (1) The Constitutional Defense Council is a council to assist the governor and the
73 Legislature on the following types of issues:

74 (a) the constitutionality of federal mandates;

75 (b) when making recommendations to challenge the federal mandates and regulations
76 described in Subsections (1)(f)(i) through (v), the rationale for and effectiveness of those
77 federal mandates or regulations;

78 (c) legal and policy issues surrounding state and local government rights under R.S.
79 2477;

80 (d) legal issues relating to the rights of the School and Institutional Trust Lands
81 Administration and its beneficiaries;

82 (e) a disagreement with another state regarding the use or ownership of water; and

83 (f) the advisability, feasibility, estimated cost, and likelihood of success of challenging:

84 (i) federal court rulings that:

85 (A) hinder the management of the state's prison system and place undue financial
86 hardship on the state's taxpayers;

87 (B) impact a power or a right reserved to the state or its citizens by the United States
88 Constitution, Amendment IX or X; or

89 (C) expand or grant a power to the United States government beyond the limited,
90 enumerated powers granted by the United States Constitution;

91 (ii) federal laws [~~or~~], regulations, or policies that:

92 (A) reduce or negate water rights or the rights of owners of private property, or the
93 rights and interest of state and local governments, including sovereignty interests and the power
94 to provide for the health, safety, and welfare, and promote the prosperity of their inhabitants;
95 and

96 (B) infringe upon the fundamental rights of Utah's citizens protected under the
97 Constitution of the United States or the Constitution of Utah;

98 (iii) conflicting federal regulations or policies in land management on federal land;

99 (iv) federal intervention that would damage the state's mining, timber, and ranching
100 industries;

101 (v) the authority of the Environmental Protection Agency and Congress to mandate
102 local air quality standards and penalties; and

103 (vi) other issues that are relevant to this Subsection (1).

104 (2) The council shall:

105 (a) provide advice to the governor, state planning coordinator, and the public lands
106 policy coordinator concerning coordination of:

107 (i) state and local government rights under R.S. 2477; and

108 (ii) other public lands issues;

109 (b) approve a plan for R.S. 2477 rights developed in accordance with Section
110 63C-4-104; and

111 (c) review, at least quarterly:

112 (i) financial statements concerning implementation of the plan for R.S. 2477 rights;
113 and

114 (ii) financial and other reports from the Public Lands Policy Coordinating Office
115 concerning its activities.

116 (3) The council chair may require the attorney general or a designee to provide
117 testimony on potential legal actions that would enhance the state's sovereignty or authority on

118 issues affecting Utah and the well-being of its citizens.

119 (4) The council chair may direct the attorney general to initiate and prosecute any
120 action that the council determines will further its purposes, including an action described in
121 Section 67-5-29.

122 (5) (a) Subject to the provisions of this section, the council may select and employ
123 attorneys to implement the purposes and duties of the council.

124 (b) The council chair may, in consultation with the council, direct any council attorney
125 in any manner considered appropriate by the attorney general to best serve the purposes of the
126 council.

127 (c) The attorney general shall negotiate a contract for services with any attorney
128 selected and approved for employment under this section.

129 (6) The council chair may, only with the concurrence of the council, review and
130 approve all claims for payments for:

131 (a) legal services that are submitted to the council;

132 (b) an action filed in accordance with Section 67-5-29; and

133 (c) costs related to a constitutional defense plan approved in accordance with Section
134 63C-4-104 that are submitted by:

135 (i) the Public Lands Policy Coordinating Office;

136 (ii) the School and Institutional Trust Lands Administration; or

137 (iii) the Office of the Attorney General.

138 (7) Within five business days' notice, the council chair may, with the concurrence of
139 the council, order the attorney general or an attorney employed by the council to cease work to
140 be charged to the fund.

141 (8) (a) At least 20 calendar days before the state submits comments on the draft
142 environmental impact statement or environmental assessment for a proposed land management
143 plan of any federal land management agency, the governor shall make those documents
144 available to:

145 (i) members of the council; and

146 (ii) any county executive, county council member, or county commissioner of a county
147 that is covered by the management plan and that has established formal cooperating agency
148 status with the relevant federal land management agency regarding the proposed plan.

149 (b) (i) Council members or local government officials receiving the documents may
150 make recommendations to the governor or the governor's designee concerning changes to the
151 documents before they are submitted to the federal land management agency.

152 (ii) Council members or local government officials shall submit recommendations to
153 the governor or the governor's designee no later than 10 calendar days after receiving the
154 documents under Subsection (8)(a).

155 (c) Documents transmitted or received under this Subsection (8) are drafts and are
156 protected records pursuant to Subsection 63G-2-305(21).

157 (9) The council shall submit a report on December 1 of each year by electronic mail
158 that summarizes the council's activities to each legislator.

159 **Section 5. Effective date.**

160 If approved by two-thirds of all the members elected to each house, this bill takes effect
161 upon approval by the governor, or the day following the constitutional time limit of Utah
162 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
163 the date of veto override.

Legislative Review Note

as of 2-27-13 8:05 AM

As required by legislative rule and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This bill provides that: (1) the regulation of firearms, including their manufacture, transfer,

possession, sale, and use exclusively within this state is not subject to federal regulation; (2) an officer, employee, or agent of the federal government may not enforce any federal statute, rule, or regulation on a Utah firearm that is manufactured and remains within the state of Utah; (3) the federal government may not compel local law enforcement officers to enforce federal firearms laws; and (4) any federal statute, order, rule, or regulation that has the purpose, intent, or effect of confiscating or banning any firearm, magazine, accessory, ammunition or ammunition component infringes on the right of citizens of Utah to keep and bear arms.

As drafted, these provisions raise issues relating to the Supremacy Clause, contained in Article VI, Section 2 of the United States Constitution which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Under existing standards of jurisprudence, and, particularly the United States Supreme Court case of *Marbury v. Madison*, 5 U.S. 137 (U.S. 1803) , the United States Supreme Court has the final say on the meaning and interpretation of provisions of the United States Constitution. Consequently, the determinations of the United States Supreme Court, and direct extrapolations from those opinions, provide the only objective basis for evaluating the constitutionality of legislation. This note, therefore, relies on United States Supreme Court opinions in analyzing the constitutionality of this legislation.

The United States Supreme Court has "long recognized that state laws that conflict with federal law are 'without effect,'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008), quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and has further held that an individual cannot be guilty of a state crime if the individual was acting necessarily and properly under the authority of the laws of the United States. *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890).

Federal firearms laws currently impose restrictions on firearms including: sale and transfer (18

U.S.C. §922(b)); possession (18 U.S.C. § 922(g) and (n)); and that every manufacturer have a federal license (18 U.S.C. § 923(a)). Additionally, the federal laws include a provision declaring the federal law as controlling if a state law "direct[ly] and positive[ly]" conflicts with the federal law. (18 U.S.C. § 927). These provisions, coupled with the United States Constitution's Supremacy Clause, suggest that there is a high probability that this legislation would be held unconstitutional.

While this legislation limits itself to wholly intrastate conduct, it is not beyond the reach of Congress's power under the Commerce Clause of the United States Constitution. Judicial interpretation of federal firearms laws has held that Congress has the power to regulate wholly intrastate conduct. See, e.g. *United States v. Lebman*, 464 F.2d 68, 71 (5th Cir. 1972) (stating that "Congress intended to and had the authority, under its commerce power, to regulate the intrastate transactions at issue here."). This interpretation of federal firearms laws is consistent with the United States Supreme Court's rationale for allowing regulation of other wholly intrastate conduct. See, e.g. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (holding that Congress may regulate wholly intrastate conduct if the failure to regulate that conduct would "have a substantial effect in defeating and obstructing" Congress's purpose in regulation of other, interstate conduct.). This long standing interpretation of the Commerce Clause has been sustained by the United States Supreme Court in *Gonzales v. Raich*, 545 U.S. 1 (2005). A federal circuit court directly applied this interpretation to firearms, stating: "The Congressional purpose, set forth in the legislative history, is to assist the states effectively to regulate firearms traffic within their borders. Illegal intrastate transfer of firearms is part of a pattern which affects the national traffic and Congress can validly enact a comprehensive program regulating all transfers of firearms." *United States v. Petrucci*, 486 F.2d 329 (9th Cir. 1973), *cert. denied* 416 U.S. 937, 94 S. Ct. 1937, 40 L. Ed. 2d 287 (1974).

Congress has provided a comprehensive system for regulating firearms, including broad licensing requirements. Congress has also provided that contrary state laws are invalid. Existing judicial interpretations of Congress's power to regulate intrastate conduct allow the manufacture, possession, and sale of firearms to be restricted by federal law, while allowing

some room for state laws but only if they are not directly contrary to federal law.

The provision prohibiting the enforcement of federal firearms laws would likely be held to have a chilling effect on federal officers' authority. The Supreme Court, in *Tennessee v. Davis*, 100 U.S. 257 (U.S. 1880), addressed this issue briefly in its review of whether a federal agent being prosecuted by a state for carrying out his federal duties can require removal of the case to a federal court. In the midst of a 40-plus page opinion, the Court noted:

[The general government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State. . . the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government.... We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. *Id.* at 262-263

From this rationale, there is a high probability that a court, if faced with a federal officer charged with violating a provision of this legislation, would reaffirm the supremacy of federal law and declare that portion of the law unenforceable.

The issue of deputizing state officers for federal purposes has not been directly addressed in an

arena where criminal laws are being enforced. However, in *City of New York v. United States*, 179 F.3d 29 (2d Cir. N.Y. 1999), on the question of the enforcement of civil provisions of federal immigration law vis-a-vis the Tenth Amendment, the court stated "[a] system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. . . .The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes. We therefore hold that states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs." *Id.* at 35 (citations omitted).

In conclusion, this legislation purports to limit the reach of the federal law and is inconsistent with existing federal firearms provisions. Based on the federal statutes and case law described above, there is a high probability that a court will find that this bill violates the Supremacy and Commerce Clauses to the extent that it conflicts with current federal regulation of firearms.

Office of Legislative Research and General Counsel