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Gun Control:

State Versus Federal Regulation of Firearms

By William S. Harwood



This article addresses the complex question of whether gun control should be regulated by the federal or state government, or by some combination of both. In a thorough look at the history of federal and Maine state gun control—and at the various ways the issue of gun violence can be framed—Harwood concludes that neither level of government has a clear mandate to regulate exclusively. Rather, Harwood argues for a more cooperative federal-state approach that allows the federal government to apply uniform regulations when appropriate and the states to experiment with further regulations if so desired. 🐉

INTRODUCTION

For almost one hundred years, our nation has struggled with the issue of gun control. Despite extensive and often heated debate, a consensus on how to best regulate firearms remains as elusive as ever. The National Rifle Association (NRA) refers to government officials responsible for regulating firearms as “jack-booted government thugs,” while 750,000 moms march in Washington on Mother’s Day demanding stricter regulation of firearms.¹

In Maine, the issue may not be as hotly debated as in other parts of the country, but it periodically polarizes the more rural gun owners who wish to preserve gun ownership and the tradition of recreational hunting from the more urban and suburban families who fear that gun violence may spread to their neighborhoods. It has been estimated that there are approximately 1.3 million guns in Maine (900,000 rifles and shot guns and 400,000 handguns), or enough guns for every man, woman, and child in the state. Each year those guns kill approximately one hundred Maine citizens and injure several hundred more. Despite the perception that Maine is a relatively safe place, Maine loses approximately the same percentage of citizens to gun violence each year as the nation as a whole. Of the one hundred fatalities in Maine, approximately 75% are suicides and 25% are homicides. Of the homicides, approximately one-half involve domestic or family violence.

These statistics create the potential for periodic flare-ups over the need for stricter gun laws to reduce the level of gun violence. In 1987, the gun owners mounted a successful referendum to amend the Maine Constitution to assure that the state constitutional right to bear arms is an individual right rather than just a collective right of the people to act in their common defense. However, their victory was hollow as the Maine Supreme Judicial Court, in the first case under the new amendment, interpreted it to have almost no practical significance.²

Similarly in 1990 the state watched with great interest a criminal trial in Bangor in which Donald Rogerson, a deer hunter, was acquitted of manslaughter for shooting Karen Wood, a thirty-seven-year-old

mother of twin one-year-old girls. Ms. Wood was shot in the chest while she stood in her wooded backyard in a suburb of Bangor wearing white mittens, which the hunter mistook for the underside of a deer’s tail. The case gained national attention and triggered a bitter public debate over the rights of hunters and non-hunters.

Despite these periodic flare-ups, the gun debate has not been center stage very often in Maine. But as the Rogerson acquittal demonstrates, all the seeds are in place for a heated and full-blown debate if, and when, a particularly sensational or controversial shooting takes place.

There is little doubt that a firearm in the wrong hands presents a potentially deadly risk to innocent by-standers. It is this risk, or the “externalities” associated with the private ownership of firearms, that justifies government regulation. In economic terms, the cost to an individual of purchasing a gun is less than the full cost to society of that individual’s decision to purchase the gun. The challenge for policymakers is to design a regulatory policy that imposes on the gun owner the additional cost to society of the externalities, so the full cost of gun ownership will be borne by the responsible party.

Throughout the long and complex history of the debate over how to reduce gun violence, the primary issue has been how much regulation of guns is appropriate to account for the externalities of private ownership of guns. However, there has been a secondary, and almost as important, issue of whether this regulation should be at the state or federal level. Regardless of how much government regulation of firearms is justified, there is still the question of whether that regulation should be imposed by the federal government or



by the various state governments. As one commentator put it: “The question of how state powers and regulations relate to national governmental powers and regulations (a practical definition of federalism) undergirds any analysis of national gun policy.”³ Another commentator stated it more bluntly: “Although it would appear that the issues of American gun control and modern federalism are unrelated, they are, in fact, tightly bound together.”

When the government regulates activities of its citizens, the question frequently arises—who should do the regulating: the states or the federal government?

The modern era of gun control began in New York in 1911 with the Sullivan Law, aimed primarily at youth groups and organized crime.⁴ Since that time, the battleground for the debate has shifted between the state and federal governments. Depending on the circumstances, the debate has intermittently flared up either in the halls of Congress or the legislative chambers of one or more state houses. In 1968, after the assassinations of Robert Kennedy and Martin Luther King, Jr., the debate was centered in Washington, D.C. and eventually led to the enactment of the Crime Control Act of 1968. In response to recent school shootings, the debate has heated up in numerous state capitals.

This paper will explore the pros and cons of federal versus state regulation. It will focus on the benefits of one national set of rules for the purchase, ownership, storage and discharge of firearms, rather than the fifty-one potentially different sets of rules for each of the fifty states and the District of Columbia.

Before doing so, it is important to identify what will not be addressed in this paper. First, the constitutional limits of any government regulation of firearms is beyond the scope of this analysis. Clearly, a part of the gun policy debate is the extent to which the Second Amendment protects the private ownership

and use of firearms from any government regulation. This paper assumes that reasonable regulation is constitutionally permissible and focuses on whether it is preferable to regulate it at the state or federal level.

In addition, this paper will not advocate whether stricter gun laws are needed to reduce gun violence. The NRA has argued that new gun laws are not needed, but rather better enforcement of existing laws is the answer to gun violence. Supporters of stricter gun laws counter that until the loopholes in our existing gun laws are closed, enforcement alone is not sufficient. Much has been written about this debate and undoubtedly much more will be written in the future. This paper will attempt to remain neutral on this issue and focus solely on the issue of whether firearms should be regulated by the state or federal government, or some combination of both.

FEDERAL PREEMPTION AND STATES' RIGHTS

When the government regulates activities of its citizens, the question frequently arises—who should do the regulating: the states or the federal government?

In some cases, the judicial doctrine of federal preemption decides this question. The doctrine is based upon the basic constitutional principle that in those areas where the founding fathers gave Congress the constitutional authority to regulate, Congress has the right to insist on one uniform set of national regulations. Once Congress exercises this right by enacting a comprehensive set of federal regulations, the states are constitutionally prohibited from adopting any regulations that are inconsistent with the federal regulations. Essentially, when Congress exercises its constitutional authority “to regulate commerce...among the several states,” it may decide to “occupy the field” and thereby preempt states from regulating inconsistently.⁵ Well-recognized examples of federal preemption include the federal regulation of nuclear power by the Nuclear Regulatory Commission and the federal regulation of the sale of corporate securities by the Securities and Exchange Commission.

But federal preemption is elective. Congress can decide to occupy the field or not, as it sees fit. In many cases Congress has decided not to restrict a state's right to regulate. For example, the federal government has, for the most part, left to the states the regulation of insurance. As a result, each state has a department or bureau of insurance or similar regulatory agency, which has primary regulatory authority over the activities of the insurance industry within that state.⁶

Finally, Congress can elect to regulate certain industries or activities, but also make it clear that by doing so, it is not intending to exercise its constitutional right to preempt the states also from regulating. In essence, Congress may decline to adopt an "either/or" approach and develop federal regulations but allow states to develop their own regulations. This has been the strategy adopted by Congress for the regulation of firearms. Congress has neither "occupied the field" exclusively nor completely abdicated its authority to the states. Rather, it has elected to pursue a strategy whereby states are free to regulate firearms simultaneously with the federal government. Under this approach, there are two independent regulatory schemes—one at the federal level and one at the state level. Accordingly, anyone who is involved in the purchase or ownership of firearms must comply with both sets of regulations. Where there is inconsistency, the individual must comply with whichever law is stricter. For example, under federal law, it is unlawful for a federally licensed gun dealer to sell handguns to those under the age of twenty-one, but under Maine law it is only unlawful to sell handguns to those under the age of sixteen.⁷ Despite the lower state standard, gun dealers in Maine must comply with the stricter federal law. But if the Maine Legislature raised the minimum age under Maine law to twenty-five, gun dealers in Maine would be required to comply with the stricter state law.

The flip side of the doctrine of federal preemption is the doctrine of states' rights, where each state has the right to regulate certain activities free from federal interference. Throughout our nation's history there have been numerous political causes that were wrapped in the flag of states' rights. Perhaps the best known example was the southern governors efforts during the

1960s to use states' rights to resist the federally supported civil rights movement. The doctrine of states' rights has roots in the United States Constitution. Although surprising to many in this era of a big federal government, the Constitution provides that the federal government is a government of limited powers. Unless the Constitution gives the federal government authority to act, the power to do so resides exclusively with the people and their respective state governments. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."⁸

Prior to the Roosevelt New Deal of the 1930s this constitutional doctrine was frequently invoked by the courts to strike down federal legislation attempting to protect consumers and employees. However, after the Supreme Court gave the so-called "Commerce Clause" of the United States Constitution a broad interpretation in its famous 1934 decision of *Nebbia v. NY*, the constitutional doctrine of states' rights fell into disfavor and was generally thought to be little more than an interesting but outdated footnote in our constitutional history.

However, in recent years with a more conservative Supreme Court, states' rights has reemerged as a viable doctrine. For example, the Supreme Court recently struck down a federal law barring age discrimination in employment and a federal law allowing rape victims to sue their attackers in federal court. In each case, the Court ruled that Congress had crossed the line into areas reserved exclusively for state regulation.

In the context of states' rights, it is worth noting that the Second Amendment has often been viewed as limiting the federal government's ability to control the *state militia*, the predecessor to the modern National Guard. In the late eighteenth century, there was great distrust among the states of professional armies organized by the federal government. The drafters of the Bill of Rights feared that a strong federal army would engage in the same abuses as the British Army. As a result, it has been argued that the Second Amendment was adopted to preserve and protect the local militia, which had fought so well in the Revolutionary War. However, not long after the Second Amendment was

adopted, local militia were badly outclassed in the War of 1812 and the pendulum swung heavily toward a professional army under the control of the federal government. Thus, despite the NRA's campaign to portray the Second Amendment as protecting an individual's right to own guns free from government regulation, the Second Amendment has a distinctly "states' rights" flavor.⁹

Of more recent relevance to the subject of firearm regulation, is the Supreme Court's 1995 decision to strike down the federal Gun-Free School Zones Act of 1990 that made it a federal crime to possess a firearm within a school zone.¹⁰ In a 5-4 decision entitled *United States v. Lopez*, the Court ruled that the Act impermissibly intrudes on the rights of states because it does not fall within the federal government's constitutional power "to regulate commerce... among the several states." However, shortly after the ruling Congress reenacted the law after making several "findings" that the flow of firearms in interstate commerce and the importance of education to interstate commerce gave the federal government the authority to act. To date the reenacted version has not been challenged.

In addition, in 1997 the United States Supreme Court ruled in *Printz v. United States* that the 1994 Brady Act, requiring a waiting period for the purchase of handguns while a background check was being performed, was unconstitutional.¹¹ In the view of the Court, the Act impermissibly required *state* law enforcement officials to participate in the background check of each purchaser and thereby force them to help carry out a *federal* mandate. As in the case of the Gun-Free School Zones Act of 1990, the ruling was more symbolic than substantive. Despite the decision, many state law enforcement agencies continue to participate in federal background checks because they believe it is good public policy or they are already required to do so by state law.¹²

At this point it is doubtful that states' rights will emerge as a significant limitation on the federal government's authority to regulate firearms. As demonstrated by congressional reaction to *Lopez*, if Congress wishes to regulate firearms, it is able to make the necessary findings that particular regulations are reasonably related to interstate commerce and therefore within the

constitutional authority of Congress. Similarly, although theoretically possible, there is no immediate prospect that the federal government will attempt to invoke federal preemption to limit the state government's authority to regulate firearms. Accordingly, constitutional provisions favoring either state or federal regulation are not likely to dictate whether firearms should be regulated by the state or federal government. At this point, as a matter of constitutional law, the field of firearm regulation appears wide open to both levels of government.

HISTORY OF FIREARMS REGULATION

A brief history of the last one hundred years of legislative efforts to regulate firearms provides some helpful insight into the question of state versus federal regulation. Unfortunately, most of what has been written in recent years about firearm regulation has focused primarily on the efforts of the federal government, leaving the history of state regulation much less well known.¹³

Federal Regulation

In 1927 Congress passed the first federal regulation—a prohibition on the sale of handguns to private individuals through the U.S. mail. Significantly, this proposal passed after others had failed, because it was promoted as a measure that supported state regulation. By banning the shipment of handguns through the mail, the federal government was attempting to stop the flow of handguns from states with weak laws governing the sale of guns into states with stricter laws. In essence, Congress was attempting to support state regulation more than impose federal regulation.

In the 1930s Congress was forced to respond to Depression-era gangsters and the crime wave associated with such groups. The National Firearms Act of 1934 was aimed primarily at limiting access to machine guns, submachine guns and sawed-off shotguns—weapons of choice for gangsters. Handguns were removed from the bill prior to final passage at the urging of the NRA. Soon after, the Federal Firearms Act of 1938 was enacted, giving the Treasury Department control over the licensing of gun dealers, importers and manufac-

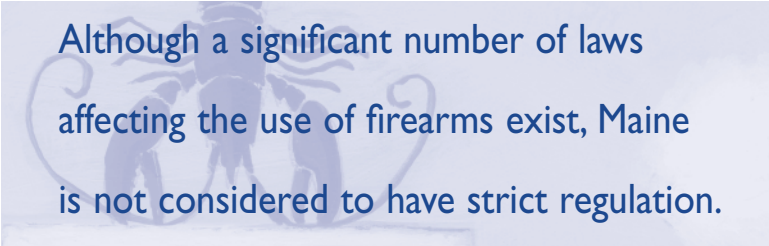
turers. However, at the urging of the NRA the bill was weakened prior to enactment by the addition of language that prevented the prosecution of dealers who sold guns to criminals unless the government could meet an almost impossible standard of proving that the dealer knew the purchaser was a criminal. In neither the 1934 Act or the 1938 Act did Congress attempt to become the exclusive regulator of firearms and thereby reduce the states' role.

The issue of gun control remained relatively quiet from the 1930s until the assassinations in the 1960s of the Kennedy brothers and Martin Luther King, Jr. First, the Omnibus Gun Control and Safe Streets Act of 1968 was enacted, banning all shipment of handguns across state lines to individuals and also limiting the purchase of handguns to the state where the purchaser resided. Once again protection of state regulation was the primary motivation of the new federal law. A second law, the Gun Control Act of 1968, banned the interstate shipment of long guns (rifles and shotguns) as well as ammunition, and also prohibited the sale of guns to minors, drug addicts, mental incompetents and convicted felons.

In the 1980s the pendulum swung back in favor of gun owners with the presidential election of Ronald Reagan. In 1986, opponents of gun control succeeded in passing the Firearms Owners Protection Act of 1986. The 1986 Act, among other things, authorized interstate sales of rifles and shotguns so long as the sale was legal in the states of both the seller and the buyer. Although weakening the earlier attempts to restrict interstate sales, the 1986 Act reaffirmed the federal policy begun in 1927 of respecting states' rights by requiring the interstate sale to be legal in both the buyer's and seller's home state.

In the 1990s the pendulum once again swung back in favor of gun control with first the 1993 Brady Act and then the Assault Weapons Ban of 1994. During the debate over the proposed "waiting period" or cooling-off period in the Brady Act, the question of federal versus state regulation arose. At a critical point in the Senate debate, the NRA proposed that the existing waiting periods and background checks under the laws of more than twenty states be preempted by the proposed federal five-day waiting

period. In essence, the proposal would have used the Commerce Clause and the constitutional doctrine of federal preemption to bar states from imposing longer waiting periods or stricter background checks than that contained in the Brady bill. The NRA proposal was defeated by gun control supporters because many states had waiting periods longer than five days and these would have been effectively repealed by the NRA-backed amendment. Once again states' rights were respected.



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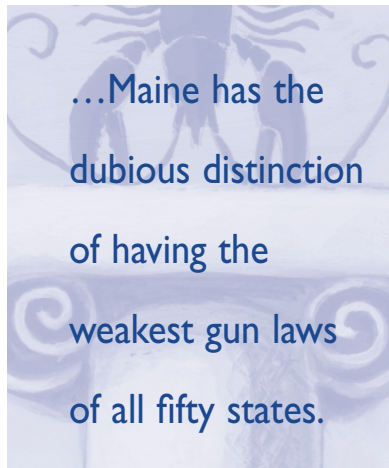
State Regulation

The first significant state regulation of firearms was passed by the State of New York in 1911. Known as the Sullivan Law, the statute was passed in response to the large number of immigrants entering New York. The statute required citizens to obtain a police permit to possess a handgun.¹⁴ Since then, New York and other states have struggled to find the optimal balance between respecting the rights of gun owners and protecting the public health and safety of all citizens.

The regulation of firearms in Maine is not well documented. Although a significant number of laws affecting the use of firearms exist, Maine is not considered to have strict regulation. Most of the laws are limited to hunting or criminal activity involving the use of firearms rather than the ownership or sale of firearms. Although some of the laws regulating hunting are concerned with hunter safety, they focus on a relatively small part of the problem of gun violence. Furthermore, the criminal laws typically just increase the punishment if the criminal activity is committed with a gun. In these statutes, it is the criminal activity that is the primary focus of the law—the use of a

firearm in the commission of a crime is simply considered an aggravating circumstance. Setting aside such hunting and criminal laws, there is relatively little law in Maine directly designed to prevent gun violence.

Not surprisingly, in several recent surveys of state gun laws, Maine's overall gun laws are ranked as being one of the weakest of all fifty states.¹⁵ For example, in



April 2000, the Open Society Institute issued a report comparing the regulation of firearms in all fifty states. The study focused on such areas as registration of firearms, licensing of gun owners, safety training, regulation of firearm sales, and safe storage of firearms. Based upon this study, Maine has the dubious distinction of having the weakest gun

laws of all fifty states. Given the strong opposition to firearm regulation in Maine by the NRA and its ally, the Sportsman's Alliance of Maine (SAM), it is hardly surprising that Maine has not been more willing to adopt tough regulations, much less those that merely complement the existing federal regulations. Nonetheless, the following will briefly summarize some of the state legislative activity in Maine to address gun violence.

Unlawful Possession. Since 1955, Maine has prohibited anyone convicted of a serious crime from owning or possessing a firearm for five years after the sentence is served and thereafter, only with a permit from the commissioner of public safety.¹⁶ In recent years, this has been expanded to include certain juvenile offenders and also those who are subject to domestic violence restraining orders. Given the difficulty of enforcing this type of prohibition in a state with over one million firearms and thousands of convicts and other offenders, it is not clear how much gun violence is eliminated by this provision.

In addition, Maine law prohibits the transfer of firearms to anyone under the age of sixteen. Like the unlawful possession statute above, this does not lend itself to strict enforcement. Furthermore, the age of sixteen is noteworthy because the minimum age under federal law is twenty-one for handguns sold by federally licensed dealers and eighteen for all other sellers and all other types of firearms.

Concealed Weapons Permits. Like many other states, Maine has a concealed weapons permit statute.¹⁷ Since 1981, Maine has required a permit to carry a concealed weapon. The permit is issued by a municipal official, such as the municipal chief of police, to anyone who has demonstrated "good moral character"; is at least eighteen years of age; and is not otherwise disqualified from possessing a firearm. Despite the broad discretion associated with the phrase "good moral character," police chiefs are generally reluctant to use this authority to deny an application for a concealed weapons permit.

Protection from Abuse Orders. Roughly one-half of the approximately twenty-five homicides in Maine each year are the end result of escalating domestic or family violence. Since 1979, Maine has had a system whereby potential victims of domestic violence are allowed to seek a court order (known as a Protection from Abuse Order or PFA Order) requiring the abuser to have limited or no contact with the potential victim.¹⁸ In such cases the judge has discretion to impose specific conditions in the PFA Order, including custody of children and possession of the marital home. In 1997, the PFA statute was amended to give the judge discretion to prohibit the abuser from possessing a firearm during the time the PFA Order is in effect. In 2001, at the urging of the NRA and SAM, a proposal to expand the law to give judges discretion to also include a "no firearm" clause in temporary PFA Orders, which are often issued as an initial interim step in a PFA case, was defeated.

Safety Education. In 1991, the state of Maine enacted two separate statutes designed to warn citizens of the dangers of firearms. First, all federally licensed

dealers must: (1) include a basic firearm safety brochure with every firearm sold; (2) offer to demonstrate to the purchaser the use of a trigger locking device; and (3) post information about local voluntary firearm safety programs.¹⁹ Second, all gun dealers and all “organized gun shows” must conspicuously post a warning that if a firearm is left within easy access of a child, the person doing so may be committing the crime of “endangering the welfare of a child.”²⁰

Unfortunately, the penalties for failing to abide by these requirements are weak. The safety brochure statute contains no specific penalty for violation and actually exempts from civil liability those who produce firearm safety brochures. A violation of the child endangerment statute is only a civil violation, subject to a maximum fine of \$200.

Municipal Preemption. Like the issue of federal preemption of state regulation discussed above, the question has arisen as to whether the state should preempt municipal regulation of firearms.²¹ Specifically, the issue of municipal preemption calls into question the need for one uniform set of regulations within a state versus allowing different regulations for different municipalities within the state. In recent years the NRA has made municipal preemption a high priority in its lobbying at the state level. As of 1988, thirty-four states have passed some form of such legislation.²² Although arguably justified by the need for uniformity, critics of the NRA suggest that the true motive for advancing such legislation is to allow the NRA to concentrate its lobbying efforts in the fifty state capitals and avoid having to fight the issue of gun control in thousands of city and town halls across the country.

In Maine, the state has enacted a strict municipal preemption statute that prohibits Maine municipalities from enacting any regulation of firearms, except regulations governing the discharge of firearms.²³ In 1995, the Maine Supreme Judicial Court gave this prohibition a broad interpretation by ruling that the statute prevented the Portland Housing Authority from including a “no firearms” clause in leases with its tenants.²⁴

In 1999, Maine went even further and joined a growing number of states prohibiting municipalities

from bringing lawsuits against gun manufacturers for damages resulting from gun violence within that municipality.²⁵ This prohibition backed by the NRA attempted to stop possible future litigation against gun manufacturers from following in the footsteps of the litigation against the tobacco industry.

This brief look at the history of United States and Maine firearm regulation offers no clear support for either federal or state regulation. Although Congress in 1934 and 1994 prohibited the sale of certain types of machine guns and assault weapons, it did not try to stop states from expanding the types or categories of firearms that should be prohibited. Similarly, Congress has prohibited the sale of firearms to minors and criminals. However, it did not stop the states from expanding the categories of citizens prohibited from purchasing firearms. Overall, Congress has shied away from taking the step of prohibiting states from going beyond the federal rules. Despite occasional calls for more consistency in our firearm regulations, Congress has never attempted to block states from adopting stricter regulations than those contained in federal law.

Given the political strength of the NRA in Washington, it is puzzling why the NRA has not tried harder to convince Congress to impose a weak but uniform set of regulations on all fifty states. However, the NRA's support draws heavily from the more conservative members of Congress who are generally critical of a large intrusive federal government. Moreover, allowing states to set their own policy on firearm regulations gives members of Congress a justification for not enacting stricter federal regulations.

In Maine, the state has not been aggressive in adopting firearm regulations. Although there are a number of statutes regulating the sales and use of firearms, the laws are not easily enforced and the penalties are fairly weak. In fact, the Maine Legislature has taken steps to protect gun owners and gun manufacturers from both regulation and law suits by municipalities. Overall, neither the federal government nor the state of Maine has shown an inclination to take the lead in regulating firearms.

DEFINING THE ISSUE

Having determined that there is no constitutional limitation on either federal or state action, and that neither has been willing to take the lead, there remains the basic question of whether state or federal regulation is preferable. The following will explore possible factors favoring state or federal regulation.

How the issue of gun violence is framed may be a significant factor in resolving the question of state versus federal regulation. If the issue is framed in such a way that it suggests a need for the federal government to respond, a federal regulation is more likely to be favored. Conversely, if the issue is framed as inviting a state response, state regulation is more likely to be favored. Clearly, gun violence is a part of several much larger social problems: crime prevention, public health, domestic violence, and product safety. Although there is a significant amount of overlap, each category suggests a somewhat different approach to regulating firearms. Specifically, gun control has traditionally been viewed as an issue of crime prevention—how best to deter and punish antisocial behavior involving firearms. More recently, gun violence has been viewed as an issue of public health—how do we prevent firearm-related death and serious injury to approximately 100,000 U.S. citizens each year? The public health perspective is not as concerned with apprehending and punishing those involved in antisocial behavior, as in finding ways to protect our public health from the threat of gun violence, particularly suicide and accidental shootings. In addition to suggesting the most effective type of firearm regulation, deciding whether gun violence is a crime prevention issue or a public health issue may also suggest whether the state or federal government is the more appropriate entity to impose such regulations. The perspective through which one views the issue of gun violence may have a significant effect on whether one favors state or federal regulation.

Crime Prevention

Clearly the traditional view that gun violence is a criminal justice issue remains valid. Much of the gun violence in our society involves antisocial or criminal

behavior. As such, firearm regulation can legitimately be viewed as a necessary part of our criminal laws. For example, certain crimes are often deemed more serious if the person committing the crime possessed a firearm at the time and, in some cases, guns used in crimes are confiscated by the state and destroyed.

It has generally been acknowledged in the United States that the states, as sovereign entities, possess what is known as “the police power.” In essence, because the safety of citizens has traditionally been a matter of local concern, states have taken the lead on issues of law enforcement.²⁶ Although the Federal Bureau of Investigation is a high profile law enforcement agency, it is small compared to the thousands of state and local police officers that form the front line in the fight against crime in our society. Overall, states possess the primary authority for enacting and enforcing the criminal laws. Accordingly, to the extent gun violence is viewed as a criminal matter, state regulation is likely to be preferred over federal regulation.

Public Health

In contrast to the state’s primary role in enforcement of criminal law, public health is generally viewed as the province of the federal government. Whether it be the Food and Drug Administration regulating the introduction of new drugs; the Medicare and Medicaid programs expanding access to health care for the poor and elderly; the surgeon general promoting a campaign to stop smoking; or the Center for Disease Control searching for a cure for cancer or AIDS, the health of the American people has largely been the domain of the federal government. In essence, the federal government has decided that state residency should not determine the quantity or quality of health care available to U.S. citizens. Assuring the health of its citizens has been a priority of the federal government. Accordingly, if one views gun violence as a matter of public health, one is more likely to favor federal regulation.

Domestic Violence

Like criminal law, family law has traditionally been the domain of state government. The states have exercised broad power over marriages, divorce, custody, and other family law matters.²⁷ Closely related to this tradi-

tional state role is the responsibility for responding to domestic violence. Resolving issues of spousal abuse is frequently inseparable from resolving the issues of separation and divorce. Both types of issues are typically the bread and butter of the lower courts of a state's judiciary. Indeed, in Maine, Protection from Abuse (PFA) cases are one of the fastest growing category of cases on the judicial docket. Over the last ten years the number of such cases has almost doubled. Currently, PFA cases represent approximately 15% of all civil cases filed in Maine District Court.

To the extent firearms become involved in domestic violence, gun violence becomes a family law issue. Unfortunately, in approximately 50% of all homicides in Maine, the victim and the shooter are members of the same family or acquaintances. In many of these cases, it is an angry and frustrated husband or boyfriend that has resorted to the use of a gun to finally resolve the issues in his relationship with his wife or girlfriend. For each of these homicide victims, there are numerous other victims of abusive relationships who are seriously wounded by gunshot or live in terror of becoming the next gun violence statistic.

However, domestic violence is certainly not the exclusive domain of state government. Significantly, the issue of domestic violence has become so explosive that Congress recently stepped in. In 1996, Congress enacted the Violence Against Women Act, which restricted access to firearms to those who have been involved in domestic violence.²⁸ However, Congress did not rely on the federal judiciary to solve the problem. Specifically, the Act provides that anyone who is subject to a domestic violence restraining order issued by a *state* judge automatically loses his or her right to possess a firearm. By addressing the problem in this way, Congress indirectly empowered the state judiciary to protect those who may be at risk of domestic violence involving firearms. Despite this federal Act, viewing gun violence as a part of domestic violence is more likely to lead one to favor state regulation.

Product Safety

Finally, viewing gun violence as the foreseeable result of the sale of an inherently dangerous consumer product leads to a mixed verdict of whether states or

the federal government should regulate firearms. To the extent one is considering regulating the manufacture or distribution of firearms as a consumer product, one typically thinks of regulation by a federal agency such as the Consumer Product Safety Commission (CPSC) or the Federal Trade Commission (FTC). This is justified because the output of most factories, including those manufacturing firearms, is typically distributed and sold throughout many different states. To protect manufacturers from having to comply with potentially fifty different, conflicting state laws for each manufactured product, the regulation of consumer products is often undertaken by a federal agency imposing one uniform set of national regulations on the sale of each product.

How the issue of gun violence is framed may be a significant factor in resolving the question of state versus federal regulation.

Surprisingly, although Congress has frequently been presented with proposals to include firearms under the jurisdiction of the CPSC, the NRA and gun owners have lobbied successfully to defeat such proposals. As a result, firearms, as a consumer product, are one of the least regulated products in the United States. Indeed, supporters of stricter gun laws often adopt as a rallying cry the fact that in the United States toy guns are more strictly regulated than real guns. Although the federal Bureau of Alcohol, Tobacco and Firearms (ATF) does have jurisdiction over firearms, it has never been given a directive to regulate firearms as a consumer product. Instead, ATF, as part of the Treasury Department, is primarily focused on the licensing and taxation of firearms dealers.

However, this is only part of government's efforts to protect consumers. Although regulation of consumer products is frequently under a federal agency such as CPSC or the FTC, state courts normally adjudicate claims by consumers for compensation arising out of the sale of defective or dangerous consumer products.

Generally, state law determines whether a company should be held financially responsible for injuries and harm that result from the products they sell. By requiring compensation of victims of defective or dangerous consumer products, the states are providing manufacturers with a financial incentive to minimize the likelihood of future injuries resulting from the use of the particular product. Indeed, a number of civil suits have recently been brought against gun manufacturers and/or dealers, and these cases have been primarily governed by state law. In response, as indicated earlier, the NRA and gun manufacturers have been actively trying to prevent municipalities from suing gun manufacturers by lobbying state legislatures to enact a prohibition on such law suits.

Overall, how the issue is defined does not appear to produce a clear answer to the question at hand. If one views gun violence more as a threat to the public health or the result of an inherently dangerous consumer product, one is likely to look to the federal government to regulate firearms. However, if one views gun violence more as a matter of crime prevention or a threat to family tranquility, one is more likely to look to the states for the appropriate response.

Another potential factor in deciding whether the state or federal government should regulate firearms is which level of government is in the best position to effectively enforce those regulations.

ENFORCEMENT CAPABILITY

Another potential factor in deciding whether the state or federal government should regulate firearms is which level of government is in the best position to effectively enforce those regulations. Although there is increasing cooperation between

state and federal law enforcement, the general rule remains that federal law enforcement agencies enforce federal law, and state and local law enforcement agencies enforce state and local law. Therefore, the level of government that sets the regulations will normally be responsible for enforcing it. Clearly, strict enforcement of firearm regulations is important to successfully reducing gun violence. Indeed, in recent years the NRA has argued against more regulation of firearms by claiming that first the government needs to do a better job of enforcing the existing laws.

The federal agency with primary responsibility for firearm regulation is the Bureau of Alcohol, Tobacco and Firearms (ATF). Despite having been in existence for many years, ATF's powers are mostly limited to the licensing and taxation of firearm dealers. Because of its limited jurisdiction, ATF has a relatively small workforce; less than ten agents are assigned to the state of Maine. With this limited workforce, it is hard to imagine how ATF can effectively regulate the 1.3 million firearms in a state covering an area larger than the other five New England states combined. Although the federal government could expand the ATF workforce and investigatory powers, ATF does not currently have the resources to take on the primary responsibility for regulation of firearms.

The states present a different challenge. Unlike ATF, there are thousands of state and local law enforcement officials and police officers already at work in the states. However, their duties extend well beyond the regulation of firearms. Given their broad jurisdiction, it is not clear that state and local police are well positioned to mount the kind of specialized and focused campaign that may be needed to significantly reduce the level of gun violence. Furthermore, as described above, gun violence is a multifaceted problem, and state and local police may not have the training or resources necessary to carry out a regulatory program aimed at preventing suicides, domestic violence and children's accidents.

In some ways the issue of violence is similar to the issue of drugs. Despite extensive efforts by the federal

government to stop the sale of illegal drugs by incarcerating growers and dealers, many experts have come to the conclusion that this alone will not solve the drug epidemic. Instead, these law enforcement efforts must be complemented by an aggressive program of treating addicts in order to reduce consumer demand for the illegal drugs. Similarly in the case of firearms, we may need to not only stop gun dealers from making guns available to certain at-risk groups but also educate and encourage gun owners to properly secure their guns to protect against unauthorized or inappropriate use. To achieve this goal, it may make sense to create a new agency dedicated specifically to the regulation of firearms rather than rely solely on the existing federal or state agencies.

Overall, the existing state and federal agencies most likely to enforce firearm regulations are not particularly well positioned to mount an aggressive and coordinated response to the issue of gun violence. Therefore, regardless of which level of government is best able to tackle the problem of gun violence, it will likely require significant additional resources and perhaps a new agency. Overall, neither the federal government nor the states have an edge in their present ability to enforce existing or future firearm regulations.

A RECOMMENDATION

Given this relative equilibrium in the advantages of state versus federal regulation, it may be best not to view the problem as one requiring an “either/or” solution. It may not be useful to attempt to determine whether the federal or state government is better positioned to regulate firearms and then give “the winner” sole responsibility for doing so. Instead, gun violence may be better addressed by state and federal governments working together. Because the social problems presented by firearms range from suicide to child safety to domestic violence, it may be preferable to use both federal and state regulation, in a coordinated effort, to reduce the number of victims of gun violence.

Under a coordinated federal-state approach, the federal government would set regulations which would serve as the minimum or floor. Because these federal regulations would apply uniformly throughout the

country, all dealers and gun owners would be required to comply with these federal laws. However, states would be free to impose stricter regulations if they wished to do so. For example, the federal government may prohibit gun dealers from selling to those convicted of a felony. But states could go further and prohibit sales to those convicted of either a felony or a misdemeanor.

In essence, the states could serve as laboratories for experimenting with new regulations while the federal government would take the more conservative approach of only adopting regulations that enjoyed broad public support throughout the country. If state regulations proved successful at reducing gun violence, they would then become candidates for inclusion in the federal regulations. Once enough states—particularly those with large consumer markets—adopted similar regulations, gun dealers and owners would be more willing to accept those regulations being adopted by the federal government and thereby put into effect in all fifty states. Under this scheme the federal government would allow individual states to aggressively address the problem of gun violence but would also provide a firm floor beneath each of the states’ programs.

In addition to the federal government providing the minimum floor and the states experimenting with tougher regulations, the federal government and states would cooperate on another level. Specifically, under a coordinated federal-state approach, the federal government would concentrate on regulating firearm manufacturers and commercial dealers, and the states would concentrate on private ownership and use of firearms. Because of the need for uniformity in setting standards for the manufacturer of firearms, it would be preferable for the federal government to set those standards. Conversely, when adopting regulations for the safe storage of firearms inside the home or transfers of guns between collectors or friends, there is much less need for uniformity and much greater opportunity for regulation to be tailored to reflect the specific values and customs of a particular state.

Finally, the coordinated federal-state approach would include a coordination of enforcement activities by the two levels of government. For example, if the federal government decided for reasons of fiscal prudence not to devote enough resources to properly

enforce federal regulations, the states would step in. If there were not enough ATF agents to inspect the records of the federally licensed gun dealers in a particular state to ensure compliance with federal regulations, the state police or some other state law enforcement agency would begin doing so.

Perhaps the biggest drawback to such a coordinated approach is the risk that the two sets of regulations will not be well coordinated. Rather than complementing each other, there is a risk that significant activity contributing to the level of gun violence may “fall through the cracks” between state and federal regulation and thereby frustrate the combined ability of either level of government to successfully combat the problem. This drawback should be manageable if there is a true spirit of cooperation between state and federal policymakers. Obviously, constant vigilance will be necessary to prevent gaps from developing that frustrate the goal of effectively regulating firearms.

In summary, rather than picking one or the other, both the state and federal government should regulate—but in a well coordinated manner that produces a better regulatory program than either could produce alone. The states should concentrate on individual responsibility of gun owners and serve as the laboratory for experimentation and comparison, while the federal government should concentrate on manufacture and commercial distribution of firearms and provide a strong minimum base of regulations upon which the states can build if they choose. By adopting such a coordinated approach the chances of significantly reducing gun violence in the United States are greatly improved.

Under this approach, what specific types of regulations should the federal government and states consider enacting? Although there are a large number of proposals that could be enacted to reduce gun violence, the following are a few that have received significant attention in recent years. In each case, the proposal is analyzed as a candidate for state or federal regulation under the author’s recommended coordinated state-federal approach.

Assault Weapons Ban

In 1994, Congress completely outlawed private ownership of certain types of firearms. Specifically,

Congress determined that certain kinds of firearms have so much destructive capacity that their use should be limited to military and law enforcement, if such weapons are manufactured at all. As technology advances, gun manufacturers have become increasingly capable of manufacturing guns for a modest cost that have the ability to gun down a large crowd of people, such as a schoolyard full of children, from a considerable distance away. At some point, the destructive capability of such weapons makes them so poorly suited for legitimate recreational uses such as game hunting or target shooting, that the dangers of allowing private ownership of such weapons outweigh the benefits. Furthermore, having decided to ban certain makes and models, the government must be vigilant to be sure that the manufacturers do not simply use technology to slightly modify the banned weapon to produce a new weapon that is equally destructive, but does not fall within the ban.

This type of regulation is clearly better suited to the federal government. There is a need for uniformity so that manufacturers do not have potentially fifty different manufacturing standards with which to comply. Furthermore, smaller states may find it burdensome to develop and enforce very complex and detailed manufacturing standards. Finally, if responsibility for such regulations were left to the states, there is a risk that lax regulation in one state would put citizens of neighboring states at risk of becoming victims of such weapons. For all these reasons, banning private ownership of certain military or assault weapons is a good example of the type of regulation suitable for the federal government.

Background Checks for Purchasers

The federal government requires a Federal Firearms License (FFL) from the Bureau of Alcohol, Tobacco and Firearms (ATF) in order to engage in the commercial sale of firearms. Under the 1994 Brady Act, these licensed dealers are currently required to perform background checks on all purchasers to determine whether the purchaser is qualified to own a firearm or is disqualified because he or she is a convicted felon, mentally incompetent or a domestic abuser. However, those who do not sell firearms commercially do not

need an FFL to do so. This is sometimes referred to as the “gun-show loophole” in recognition of the large number of guns sold each year at gun shows by non-licensed sellers.

In essence, the federal government has only been willing to regulate those who sell guns out of commercial establishments, such as a hunting or sporting goods store. All other gun sellers are unregulated by the federal government. The obvious problem with this is that anyone who is not legally permitted to purchase from an FFL can simply purchase from an unregulated non-FFL. This creates both the need and the opportunity for states to experiment with closing the loophole by regulating the sale of firearms by those not licensed by ATF.²⁹ In the 2000 election, proposals were passed by referendum in Colorado and Oregon to close the gun-show loopholes in those states. In essence, those states now require the equivalent of a Brady background check, similar to that required by the Brady Act of FFLs, for all sales at gun shows. If enough states enact such laws and they appear to be effective in keeping firearms out of the wrong hands, Congress could then close the loophole for the entire country.

It should be pointed out that it is not as important where the line between federal and state requirements for background checks is set, as it is that both the federal government and the states understand and accept the responsibility to require background checks for all sales on their side of that line. It matters less whether Congress or the states close the gun-show loophole. Much more important is that one of them do so. If neither of them act, the existing federal regulation of commercial dealers will be significantly undermined because those who cannot buy from an FFL dealer will simply buy it at an unregulated gun show. In the end, it may make more sense for the federal government to regulate large gun shows and for the states to regulate small gun shows. However, no matter where the line is drawn, someone must close the loophole for the Brady background check to be effective.

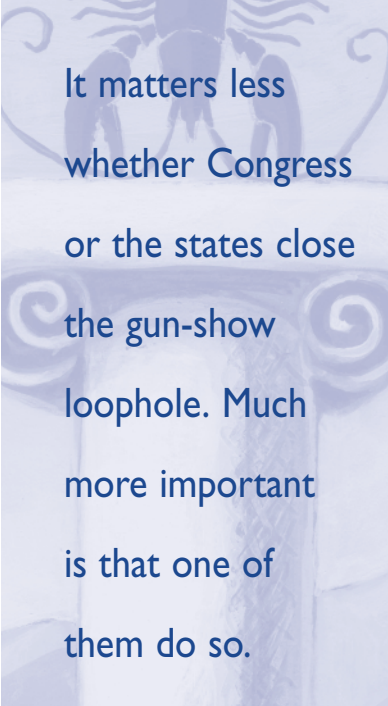
Background checks of buyers are a good example of where the federal government and state governments can work cooperatively to stop the illegal flow of guns to criminals and others. If the ATF continues to require

FFLs to perform Brady background checks, and the states do the same for non-FFLs, the two levels of government can create a seamless web preventing the sale of guns to criminals, mental incompetents and domestic abusers.

Safe Storage

Once a firearm is purchased, one of the most important questions becomes how that owner stores the gun when he or she is not using it and should the government impose regulations mandating safe storage. Although the NRA and gun owners have attempted to use self-defense as a justification for having a loaded gun readily accessible, an unlocked and loaded firearm presents a significant risk of harm to members of the household and visitors. The presence of a gun in the house is four times more likely to be involved in an accidental shooting, seven times more likely to be used in a criminal assault or homicide, and eleven times more likely to be used to commit or attempt suicide, than to be used in self-defense. These statistics are especially troubling when one recognizes that in many states, such as Maine, there is at least one gun in half of all households. Given the risk to the safety of all those who reside or visit homes with guns, it is not surprising that many states have enacted laws requiring firearms to be safely stored in a locked box or with a trigger lock.

For example, in 2000 the state of New Hampshire made gun owners criminally responsible for any injuries or harm resulting from the use of their guns by their children where the gun was left accessible to the children. This is an area of regulation where states can experiment by weighing the competing interests of the rights of gun owners to use their gun in self-defense with the rights of others to be protected from firearms being too accessible to curious children, angry spouses, distraught teenagers, and others.



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Because this involves regulating the owner of a gun inside his or her home, there is less of a compelling need for nationally uniform regulations. Therefore, regulating the safe storage of firearms by individual owners is a good candidate for state regulation.

state they are entering. Overall, concealed weapons laws are another good example of where states can try different approaches to prevent the wrong people from carrying a concealed weapon and thereby threatening public safety.

Applying a cooperative federal-state approach to firearm regulation provides an opportunity for the federal government to act where uniform regulation is desirable, and states to go beyond the federal regulations if they wish to further reduce gun violence in that state.

Concealed Weapons Permit

One of the areas of firearms regulation that has been traditionally left to the states are limitations on the right to carry concealed weapons. In most states, a gun owner is required to obtain a concealed weapons permit from the local police in order to carry a concealed handgun. The state laws vary on the criteria to be applied in issuing such a permit. In some states, there is little or no clearly defined justification for withholding a permit. In others, the local police has been given clear authority to deny an application for a permit. In some states, the law prohibits permit holders from carrying their weapon into certain institutions, such as churches and schools.

Some may argue that this should be subject to federal regulation because gun owners carry concealed guns across state lines and may inadvertently violate a concealed weapons law of which they were unaware. To address this, states can exempt gun owners who temporarily enter their state with a concealed weapons permit from another state. Alternatively, states can educate the public that before they carry a firearm across state lines, they should know the laws of the

Municipal Litigation

In recent years, approximately thirty-two cities and counties have sued firearm manufacturers to recover costs incurred by those cities and counties in responding to gun violence. In response, the NRA has advocated that state legislatures enact laws prohibiting such suits. These prohibitions have themselves generated more litigation to determine whether such prohibitions are an unconstitutional interference by the legislative branch of government in the work of the judicial branch. Having succeeded in passing such immunity laws in approximately one-half of the states, the NRA is now supporting federal legislation to bar such suits.

Clearly, there is considerable disagreement over the extent to which lawyers and judges should assume responsibility for addressing social problems, such as gun violence. However, by leaving those decisions to each state, the state has the option to (1) attempt to stop such suits; (2) do nothing and leave the resolution of such suits to the state judiciary; or (3) join in the suits with the municipalities. In the case of the tobacco litigation, a few states such as Mississippi took an early leadership role that led the way for other states and eventually the federal government to sue tobacco manufacturers. Leaving the litigation against firearm manufacturers up to each state and their political subdivisions allows those states, who believe litigation can help convince gun manufacturers to take steps to reduce gun violence, to bring suit and those states that believe otherwise, to not do so. A uniform national standard on whether such suits should be allowed appears unnecessary.

The specific regulations addressed in this section are only five of the many areas where further gun control may be justified based upon the current level

of gun violence. For each type of regulation, the paradigm of a cooperative federal-state approach has been applied to determine whether it is more appropriate for the state or federal government to do the regulating. In the case of outright bans, we should look to the federal government. In the case of safe storage, concealed weapons permits and municipal litigation, we should look to the states. Finally, in the case of background checks, the federal and state governments should coordinate their activities so that such checks are required on sales by both FFLs and non-FFLs.

CONCLUSION

Overall, there is no clear mandate for state versus federal regulation of firearms. Although constitutional principles of federal preemption and states' rights could in theory decide the issue, they are unlikely to do so. More likely, these constitutional principles will be used to support arguments in the debate over gun control but will not actually determine the outcome of the debate. There simply does not appear to be the political will or constitutional precedent for Congress or the Supreme Court to decide that firearm regulation will be the exclusive province of either the state or the federal government.

Framing the issue as one of crime prevention versus public health or domestic violence versus product safety may suggest a resolution of the federal-state issue, but it is doubtful that a consensus will ever be reached on how to frame the issue. And finally, given the available resources for enforcing existing regulations, it is hard to make a strong case for one level of government over the other. Simply put, there is no clear mandate for giving either the state or the federal government exclusive responsibility for regulation of firearms.

Applying a cooperative federal-state approach to firearm regulation provides an opportunity for the federal government to act where uniform regulation is desirable, and states to go beyond the federal regulations if they wish to further reduce gun violence in that state. In this way, the country has the protection of some federal regulations and the opportunity to compare and contrast each state's additional regula-

tions. Hopefully this will lead to a better understanding of the effectiveness of different approaches in reducing gun violence. By encouraging each state to "experiment" with different regulations, we can better understand the underlying causes of gun violence and, most importantly, how to most effectively reduce the death toll from gun violence. 🐉



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ENDNOTES

1. Davidson, Osha Gray. *Under Fire: The NRA and the Battle for Gun Control*. Iowa City: U of Iowa P. 294.
2. *State v. Brown*, 571 A.2d 816 (Me. 1990).
3. Spitzer, Robert. *The Politics of Gun Control*. Chatham: Chatham House Publishers, 1985. 182.
4. Shields, Pete. *Guns Don't Die—People Do*. New York: Arbor House, 1981. 79-80.
5. U.S. Constitution, Art. I, Section 8.
6. Me. Rev. Statutes Annotated, Title 24-A.
7. U.S. Code Annotated, Title 18, Sections 922(b)(1) and 922(x) and Me. Rev. Statutes Annotated, Title 17-A, Section 554-A.
8. *The Federalist*, No. 45.
9. The NRA's view has recently been adopted by a majority of the Court in *United States v. Emerson*, -F. 3d-(5th Cir. 2001).
10. 18 U.S.C. § 922 (q).
11. *Printz v. U.S.*, 521 U.S. 898 (1997).
12. Davidson, 291.
13. Spitzer, xiii.
14. Davidson, 195.
15. Americans for Gun Safety Foundation: *Broken Promises: How America's Faulty Background Check System Allows Criminals to Get Guns* (January 2002); Handgun Control, Inc.: *Back to School Report Card on Children and Guns* (September 2000); Open Society Institute: *Gun Control in the United States; A Comparative Survey of State Firearm Laws* (April 2000).
16. Me. Rev. Statutes Annotated, Title 15, Section 393.
17. Me. Rev. Statutes Annotated, Title 25, Chapter 252.
18. Me. Rev. Statutes Annotated, Title 19-A, Chapter 101.
19. Me. Rev. Statutes Annotated, Title 25, Section 2012.
20. Me. Rev. Statutes Annotated, Title 15, Section 455-A.
21. Federal preemption of states is generally referred to as federal preemption. However, within the firearm industry, state preemption of municipalities is referred to as municipal preemption rather than state preemption.
22. Spitzer, 183.
23. Me. Rev. Statutes Annotated, Title 25, Section 2011.
24. In 1995, the Maine Supreme Judicial Court, in *Doe v. Portland Housing Authority*, decided that the Portland Housing Authority was a quasi-municipal agency, and was setting gun control policy in violation of the Maine municipal preemption law.
25. Me. Rev. Statutes Annotated, Title 30-A, Section 2005.
26. 16A Am. Jur. 2d Constitutional Law § 230.
27. 16A Am. Jur. 2d Constitutional Law § 230.
28. U.S. Code Annotated, Title 18, § 922 (d)(8).
29. Thomas, George. "The Brady Act, the Tenth Amendment and America's Gun Cult." *UWLA Law Review* 30 (1999): 23, 36.

